



“Disadvantaged” Small Businesses: Definitions and Designations for Purposes of Federal and Federally Funded Contracting Programs

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Summary

This report discusses what constitutes a "disadvantaged" small business for purposes of federal and federally funded contracting programs and how firms are certified or otherwise designated as such. Three primary categories of disadvantaged small businesses are currently eligible for various contracting programs: (1) small businesses participating in the Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program) (8(a) participants); (2) "small disadvantaged businesses" (SDBs) and (3) "disadvantaged business enterprises" (DBEs).

These firms are characterized as disadvantaged because they are at least 51% owned by one or more socially and economically disadvantaged individuals or groups. However, social and economic disadvantage is defined somewhat differently for each program. Members of certain racial and ethnic groups are presumed to be socially disadvantaged for purposes of the 8(a) and SDB programs, while women are also presumed to be socially disadvantaged for purposes of the DBE program. Similarly, individuals' net worth must be \$250,000 or less for entry into the 8(a) Program, while net worth can be as high as \$750,000 for newly designated SDBs or DBEs.

The programs for the various types of firms also differ in their operation. The 8(a) Program is open only to firms that have been certified by SBA, and firms and individual owners may participate in the 8(a) Program for a maximum of nine years. 8(a) participants are eligible for set-aside or sole-source contracts, as well as other assistance from the SBA. All 8(a) firms qualify as SDBs. Other firms must be certified by procuring agencies, private certifying entities, or state or local governments to qualify for federal programs for SDB prime contractors, although they may self certify for similar programs for SDB subcontractors. SDB certification, when required, lasts three years, but firms may be certified multiple times. There are government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to SDBs. Additionally, certain prime contractors must have "plans" for subcontracting with SDBs as terms of their contracts; agencies may use past performance in subcontracting with SDBs as an evaluation factor in source selection decisions; and agencies may give prime contractors "monetary incentives" for subcontracting with SDBs. DBEs must be certified by the state of the funding recipient. Certifications last at least three years, and firms cannot be required to reapply for certification as a condition of continuing participation in the program unless the factual basis upon which the certification was made changes. There is a national goal that 10% of federal funding for certain transportation-related projects be awarded to DBE contractors and subcontractors. Funding recipients must set similar goals, including on individual contracts.

All programs are based in statute. Section 8(a) of the Small Business Act authorizes the 8(a) Program; Section 8(d) of the Small Business Act, the SDB program; and various transportation statutes, the DBE program. However, many of the specific requirements pertaining to these programs derive from agency regulations.

In part because of small businesses' widely reported role in job creation and concerns that the recent recession disproportionately affected disadvantaged small businesses, Members of the 111th Congress enacted or proposed numerous bills that assisted disadvantaged small businesses in various ways. Members of the 112th Congress may consider similar legislation if concerns about disadvantaged small businesses persist. Members of the 112th Congress may also review agency programs for disadvantaged small businesses, including proposed regulatory changes to the eligibility and certification requirements for 8(a) firms and DBEs.

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Introduction

This report discusses what constitutes a “disadvantaged” small business for purposes of federal and federally funded contracting programs and how firms are certified or otherwise designated as such. Three primary categories of disadvantaged small businesses are currently eligible for various contracting programs: (1) small businesses participating in the Small Business Administration’s (SBA’s) Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program) (8(a) participants); (2) “small disadvantaged businesses” (SDBs) and (3) “disadvantaged business enterprises” (DBEs).¹ These firms are characterized as “disadvantaged” because they are at least 51% unconditionally owned and controlled by socially and economically disadvantaged individuals or groups.² Members of certain racial and ethnic groups are presumed to be disadvantaged, and other individuals can prove personal disadvantage by a preponderance of the evidence. Veterans and persons with disabilities are not presumed to be disadvantaged for purposes of these programs. However, there are separate contracting programs for them.³ Disadvantaged groups include Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations.⁴ In FY2009, the federal government awarded \$33.5 billion in contracts or subcontracts to SDBs,⁵ including \$18 billion in contracts to 8(a) participants.⁶ Comparable data regarding contracting with DBEs are not readily available.

Categories of Disadvantaged Small Businesses

8(a) Participants

Small businesses that are at least 51% unconditionally owned and controlled by “socially and economically disadvantaged individuals” or groups are eligible for the Minority Small Business and Capital Ownership Development Program.⁷ Implemented by the SBA under the authority of

¹ There are other federal programs for SDBs and DBEs, in particular, that are agency-specific and smaller in scale, such as the Environmental Protection Agency’s DBE program. See 33 C.F.R. §§ 33.101-33.503. Such programs are not addressed in this report. Also not addressed in this report are programs for “minority business enterprises” (MBEs), as defined by the Department of Commerce’s Minority Business Development Agency (MBDA). MBEs need not be “small,” and their owners can be either socially *or* economically disadvantaged. 15 C.F.R. § 1400.2(a). MBEs are not certified for purposes of federal programs, and there are no federal or federally funded contracting programs for MBEs that are not also 8(a) participants, SDBs, or DBEs.

² See 13 C.F.R. § 124.105 (8(a) participants); 13 C.F.R. § 124.1002(b)(2) (SDBs); 49 C.F.R. § 26.5 (DBEs).

³ See 15 U.S.C. §§ 657b-657c (programs for veteran-owned small businesses); 15 U.S.C. § 657f (programs for service-disabled veteran-owned small businesses); 41 U.S.C. §§ 46-47 (program to benefit “the blind and severely disabled”). The latter program is commonly known as the Javits-Wagner-O’Day Program (JWOD).

⁴ For more on contracting with Alaska Native Corporations, see CRS Report R40855, *Contracting Programs for Alaska Native Corporations: Historical Development and Legal Authorities*, by Todd Garvey, John R. Luckey, and Kate M. Manuel.

⁵ See Small Business Goaling Report: Fiscal Year 2009, available at https://www.fpdnsng.com/downloads/top_requests/FPDSNG_SB_Goaling_FY_2009.pdf. The report on FY2010 has not yet been compiled.

⁶ Not all contracts awarded to 8(a) firms are awarded through the 8(a) Program. 8(a) firms can also be awarded contracts under the general contracting authorities.

⁷ 13 C.F.R. § 124.101. Eligibility for the 8(a) Program is further limited to firms that demonstrate “potential for success” and whose owners are U.S. citizens and possess “good character.” *Id.* Detailed regulations govern each of (continued...)

Sections 7(j) and 8(a) of the Small Business Act, as amended,⁸ this program is commonly known as the 8(a) Program, and participants in it are often called 8(a) participants or 8(a) firms.

Social Disadvantage

Owners of 8(a) firms must be “socially disadvantaged,” or have experienced “racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities.”⁹ Members of the following racial and ethnic groups are presumed to be socially disadvantaged:

Black Americans; Hispanic Americans; Native Americans (American Indians, Eskimos, Aleuts, or Native Hawaiians); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA.¹⁰

Individuals who are not members of these groups must establish social disadvantage by a preponderance of the evidence, including (1) at least one objective distinguishing feature contributing to social disadvantage, such as race, ethnic origin, gender, or physical handicap; (2) personal experiences of substantial and chronic disadvantage in American society; and (3) negative impact on entry into or advancement in the business world because of this disadvantage.¹¹

Economic Disadvantage

Owners of 8(a) firms must also be “economically disadvantaged” in that their “ability to compete in the free enterprise system has been impaired due to diminished credit and capital opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.”¹² Economic disadvantage is not presumed for any individual owners.¹³ Rather, all

(...continued)

these requirements. *See* 13 C.F.R. § 124.105 (ownership); 13 C.F.R. § 124.106 (control); 13 C.F.R. § 124.107 (potential for success); 13 C.F.R. § 124.108(a) (good character).

⁸ *See* 15 U.S.C. § 636(j); 15 U.S.C. § 637(a).

⁹ 13 C.F.R. § 124.103(a). Such prejudice or bias must also be due to circumstances beyond the individuals’ control. *Id.*

¹⁰ 13 C.F.R. § 124.103(b)(1). This presumption may be overcome by “credible evidence” to the contrary, and SBA may require individuals relying on the presumption to demonstrate that they held themselves out and are currently recognized by others as members of the group. 13 C.F.R. § 124.103(b)(2)-(3). The SBA relies upon a group petition process in recognizing additional groups. *See* 13 C.F.R. § 124.103(d)(1)-(3).

¹¹ 13 C.F.R. § 124.103(c)(2)(i)-(iii). In assessing the third factor, the SBA will consider all relevant evidence produced by the applicant, but must consider the applicant’s education, employment, and business history to see if the totality of the circumstances shows disadvantage. 13 C.F.R. § 124.103(c)(2)(iii).

¹² 13 C.F.R. § 124.104(a).

¹³ Certain group-owners are, however, deemed to be economically disadvantaged. *See* 43 U.S.C. § 1626(e)(1) (Alaska Native Corporations deemed economically disadvantaged); Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 (Community (continued...))

individuals upon whom an 8(a) firm's eligibility is based must describe their economic disadvantage in a narrative statement and submit personal financial information to the SBA.¹⁴ This information must include, among other things, income for the past two years, personal net worth, and the fair market value of all assets.¹⁵ Individuals' net worth, excluding ownership interests in 8(a) firms and equity in primary personal residences, must be less than \$250,000 at the time of application to the 8(a) Program and less than \$750,000 thereafter.¹⁶ The value of retirement accounts is currently not excluded when the net worth of prospective 8(a) participants is calculated, although the SBA has proposed changing its regulations to exclude it.¹⁷ The SBA also compares the financial condition of firms applying to the 8(a) Program to the financial profiles of small businesses in the same primary industry classification¹⁸ or similar line of business that are not owned by socially and economically disadvantaged individuals when determining economic disadvantage.¹⁹

Applications to the 8(a) Program

Firms must apply to participate in the 8(a) Program and may not receive contracting or other federal assistance based upon 8(a) status until the SBA approves their application.²⁰ The application form requires submission of various materials including, but not limited to, financial statements, federal personal and business tax returns, and personal history statements.²¹

Once accepted into the 8(a) Program, firms must inform the SBA in writing of any changes in circumstances that adversely affect their eligibility.²² Each firm must also complete an annual review, which has its own form²³ and requires submission of (1) certifications that the firm meets the eligibility requirements and no changes in circumstances adversely affect its eligibility; (2) personal financial information for each disadvantaged owner; and (3) a financial statement for the firm, among other things.²⁴ Depending upon the firm's gross revenue, its financial statement may need to be audited by an independent public accountant,²⁵ as **Table 1** illustrates.

(...continued)

Development Corporations deemed economically disadvantaged).

¹⁴ 13 C.F.R. § 124.104(b)(1).

¹⁵ 13 C.F.R. § 124.104(c).

¹⁶ 13 C.F.R. § 124.104(c)(2).

¹⁷ Small Business Administration, Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 Fed. Reg. 55694 (Oct. 28, 2009).

¹⁸ Businesses are classified by North American Industry Classification System (NAICS) codes. A firm's primary industry is that in which it earns the majority of its revenue.

¹⁹ 13 C.F.R. § 124.104(c).

²⁰ 13 C.F.R. § 124.2.

²¹ See 13 C.F.R. § 124.203; Small Business Administration, Application for 8(a) Business Development (8(a) BD) and Small Disadvantaged Business (SDB) Certification, *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/forms_trng1010banc.pdf. Despite the title of this form, SBA no longer certifies SDBs. See *infra* note 43 and accompanying text.

²² 13 C.F.R. § 124.112(a).

²³ See Small Business Administration, 8(a) Annual Update, *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/forms_1450.pdf.

²⁴ 13 C.F.R. § 124.112(b)(1)-(8); 13 C.F.R. § 124.603.

²⁵ 13 C.F.R. § 124.602(a)-(c).

Table I. Auditing Requirements Based on Firms’ Gross Revenue

| Amount of Revenue | Auditing Requirements |
|-------------------------------------|--|
| Under \$1 million | Annual financial statement prepared in-house, or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor within 90 days of the fiscal year close |
| Between \$1 million and \$5 million | Reviewed financial statement prepared by a licensed independent public accountant within 90 days of the fiscal year close |
| Over \$5 million | Audited annual financial statement prepared by a licensed independent public accountant within 120 days of the close of the fiscal year |

Source: Congressional Research Service, based on 13 C.F.R. § 124.602(a)-(c).

Maximum Nine-Year Term in the 8(a) Program

Firms may participate in the 8(a) Program one time, for a period of no more than nine years.²⁶ Once a firm has exited the program after participating in it for any period of time, it is generally ineligible for further participation.²⁷ Additionally, socially and economically disadvantaged individuals may confer eligibility for the 8(a) Program upon only one firm over their lives.²⁸ In contrast, disadvantaged groups (i.e., Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations) may confer eligibility upon multiple 8(a) firms, which may participate in the 8(a) Program concurrently (subject to certain limitations on the primary industries in which they operate) or at different times.²⁹

Contracting and Related Assistance for 8(a) Participants

Federal agencies “set aside” certain contracts for 8(a) firms by conducting procurements in which only 8(a) firms may compete.³⁰ They can also award contracts to 8(a) firms on a sole-source basis, sometimes in circumstances in which they could not otherwise make sole-source awards.³¹ Federal agencies reportedly spent \$18 billion on competitive or sole-source contracts or subcontracts with 8(a) participants in FY2009.³² However, 8(a) participants are not guaranteed

²⁶ 13 C.F.R. § 124.2. Firms may be terminated or subjected to early graduation from the 8(a) Program before nine years have passed. 15 U.S.C. § 636(j)(10)(C)(i) (nine-year term); 15 U.S.C. § 637(a)(9) (termination and early graduation); 13 C.F.R. § 124.301 (exiting the 8(a) Program); 13 C.F.R. § 124.302 (early graduation); 13 C.F.R. § 124.303 (termination from the Program).

²⁷ 13 C.F.R. § 124.108(b). When at least 50% of the assets of one firm are the same as those of another firm, the firms are considered identical for purposes of eligibility for the 8(a) Program. 13 C.F.R. § 124.108(b)(4).

²⁸ 15 U.S.C. § 636(j)(11)(B)-(C); 13 C.F.R. § 124.108(b).

²⁹ 15 U.S.C. § 644(o); 13 C.F.R. § 125.6; 48 C.F.R. § 52.219-14.

³⁰ 13 C.F.R. §§ 124.501-124.519.

³¹ See, e.g., 48 C.F.R. 19.805-1(b)(2) (authorizing sole-source awards to 8(a) participants owned by Indian tribes or Alaska Native Corporations (ANCs) even when there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price). However, Section 811 of the National Defense Authorization Act (NDAA) for FY2010 has somewhat limited agencies’ authority to make certain sole-source awards to ANC- or tribally owned firms. See P.L. 111-84, § 811, 123 Stat. 2405-06 (Oct. 28, 2009) (requiring justifications and approvals for sole-source awards in excess of \$20 million made under the authority of Section 8(a) of the Small Business Act).

³² See Small Business Goaling Report, *supra* note 5.

federal contracts, and only 44% percent of 8(a) firms not owned by Alaska Native Corporations reportedly received contracts in FY2008.³³

8(a) firms are also eligible for (1) direct and guaranteed loans from the SBA; (2) transfer of technology and surplus property owned by the United States; and (3) management and technical assistance, including training in financing, management, accounting, bookkeeping, marketing, the operation of small businesses, and the identification and development of new business opportunities.³⁴ Additionally, the SBA sponsors a mentor-protégé program for eligible 8(a) participants.³⁵ Mentors are established firms that provide their 8(a) protégés with “technical and/or management assistance; financial assistance in the form of equity investments and/or loans; subcontracts; and/or assistance in performing prime contracts with the Government in the form of joint venture arrangements.”³⁶ Mentors and protégés can also form joint ventures that may qualify as “small” for purposes of government procurements, including sole-source awards under Section 8(a).³⁷

Small Disadvantaged Businesses

“Small disadvantaged businesses” (SDBs) include 8(a) participants and other small businesses that are at least 51% unconditionally owned and controlled by socially or economically disadvantaged individuals or groups.³⁸ SDBs that are not 8(a) firms need not demonstrate potential for success,³⁹ and individuals owning and controlling non-8(a) SDBs may have net worth of up to \$750,000, excluding ownership interests in 8(a) firms and equity in primary personal residences, when their firms are first designated as SDBs.⁴⁰ Otherwise, however, SDBs must generally meet the same eligibility requirements as 8(a) firms, although they do not apply to the SBA to be designated SDBs in the same way that 8(a) firms do.

³³ Office of the Inspector General, U.S. Small Business Administration, Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations, at 5 (July 10, 2009), *available at* http://www.sba.gov/idc/groups/public/documents/sba_homepage/oig_reptbydate_july9-15.pdf. In contrast, 63% of 8(a) firms owned by Alaska Native Corporations received contracts in FY2008. Similar data regarding FY2009 do not appear to be available.

³⁴ 13 C.F.R. § 124.404(a)-(c); 13 C.F.R. § 124.405; 13 C.F.R. §§ 124.701-704. 8(a) firms are also eligible for certain other assistance from SBA because they are small businesses, not because they are participants in the 8(a) Program. *See, e.g.*, 15 U.S.C. § 694b (surety bond guarantees for small businesses).

³⁵ Eligibility for the mentor-protégé program is generally limited to 8(a) firms that are in the developmental stage of the 8(a) Program; have never received an 8(a) contract; and have a size that is less than half the size standard corresponding to its primary NAICS code. 13 C.F.R. § 124.520(c)(1)(i)-(iii).

³⁶ 13 C.F.R. § 124.520(a).

³⁷ 13 C.F.R. § 124.520(d)(1). For the joint venture to qualify as “small,” the 8(a) firm must qualify as “small” under the size standards for the procurement, and, in the case of sole-source contracts awarded under the authority of Section 8(a), must not have received a combined total of competitive and sole-source awards in excess of \$100 million or other applicable threshold. *See* 13 C.F.R. § 519.

³⁸ 13 C.F.R. § 124.1002. The majority of the firm’s earnings must also accrue to socially and economically disadvantaged individuals or groups for purposes of programs under 10 U.S.C. § 2323, discussed below. *Id.*

³⁹ 13 C.F.R. § 124.1002(e).

⁴⁰ 13 C.F.R. § 124.1002(c).

Certification of SDBs

At one time, SDBs had to be certified by the SBA, or a private certifying entity acting in compliance with SBA regulations, to qualify for certain federal programs as prime contractors.⁴¹ However, most federal programs for SDB prime contractors have been discontinued, with only the government-wide and agency-specific goals for the percentage of federal contract dollars awarded to SDB contractors (and subcontractors) each year remaining.⁴² Because of the discontinuance of these programs, the SBA ceased certifying SDBs in October 2008,⁴³ and no longer issues regulations for private certifiers.⁴⁴ In the few cases where SDB certification is currently required, 8(a) participants are deemed to be certified,⁴⁵ and other firms may be certified by the agency conducting the procurement, private certifying entities, or state and local governments.⁴⁶ Firms not relying on their 8(a) status that have submitted applications for SDB certification to a procuring agency are treated as if they are certified so long as the agency has not rejected their application.⁴⁷ Certification generally lasts for three years,⁴⁸ and the same firm may be certified as an SDB repeatedly, so long as it meets the requirements for certification.

Firms do not need to be certified SDBs to qualify for federal programs for subcontractors. Rather,

A firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.⁴⁹

Prime contractors "acting in good faith" may rely on subcontractors' written representation of their status as an SDB.⁵⁰ Although the Federal Acquisition Regulation (FAR) still contains contract clauses obligating prime contractors to verify firms' SDB status with the SBA,⁵¹ agencies appear to be dropping this requirement in light of the SBA ceasing to certify SDBs.⁵² However, the SBA still retains the authority to review the status of uncertified firms that represent themselves as SDBs for purposes of federal subcontracts when it receives "credible information" that they are not disadvantaged.⁵³

⁴¹ See, e.g., 13 C.F.R. § 124.1004 and § 124.1008 (2007).

⁴² See *infra* notes 54-60 and accompanying text.

⁴³ See Small Business Administration, Small Disadvantaged Business Program, 73 Fed. Reg. 57490 (Oct. 3, 2008) (announcing that SBA would no longer certify SDBs).

⁴⁴ *Id.*

⁴⁵ 13 C.F.R. § 124.1003(a).

⁴⁶ 13 C.F.R. § 124.1003(b)-(c). It is the procuring agency's decision whether to accept certifications from private certifying entities or state or local governments.

⁴⁷ 13 C.F.R. § 124.1001(b)(4).

⁴⁸ 13 C.F.R. § 124.1005(a).

⁴⁹ 13 C.F.R. § 124.1001(c).

⁵⁰ 48 C.F.R. § 19.703(b).

⁵¹ See 48 C.F.R. § 52.219-25.

⁵² See, e.g., Class Deviation to the Federal Acquisition Regulation: Small Disadvantaged Business Certification for Subcontractors, Nov. 19, 2009, at 3, available at <http://www.acq.osd.mil/dpap/policy/policyvault/USA006725-09-DPAP.pdf>.

⁵³ 13 C.F.R. § 124.1006.

Contracting Programs for SDBs

The government promotes contracting and subcontracting with SDBs by setting government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to SDBs each fiscal year. The government-wide goal is that “not less than 5 percent of the total value of all prime contract and subcontract awards” be made to SDBs,⁵⁴ a goal that was met in FY2009, when \$33.5 billion was awarded to SDBs.⁵⁵ Agency specific goals are generally also set at 5% of the total value of prime contracts and subcontracts awarded each fiscal year, although agency achievements range from 1.7% (Department of Energy) to 46.4% (SBA).⁵⁶ In the past, agencies also had authority to “us[e] less than full and open competitive procedures and partial set-asides,” including a 10% price evaluation adjustment,⁵⁷ when evaluating bids or offers involving SDB contractors or subcontractors.⁵⁸ However, such authorities have either expired⁵⁹ or been subject to statutory conditions or judicial decisions precluding their use.⁶⁰

Other federal programs focus specifically on promoting SDBs as subcontractors on federal prime contracts. Agencies must negotiate “subcontracting plans” with the apparently successful bidder or offeror on eligible prime contracts prior to awarding the contract.⁶¹ Subcontracting plans set goals for the percentage of subcontract dollars to be awarded to SDBs, among others, and describe efforts that will be made to ensure that SDBs “have an equitable opportunity to compete for subcontracts.”⁶² Failure to make a good faith effort to comply with the subcontracting plan constitutes a material breach of the contract, potentially allowing the agency to terminate the contract for default⁶³ and subjecting the contractor to liquidated damages.⁶⁴ Federal agencies may

⁵⁴ 15 U.S.C. § 644(g)(1).

⁵⁵ See Small Business Goaling Report, *supra* note 5. This \$33.5 billion represents 7.6% of all federal procurement spending in FY2009. The goal for contracting and subcontracting with SDBs was the only government-wide goal for contracting and subcontracting with small businesses that was met in FY2009. *Id.*

⁵⁶ *Id.*

⁵⁷ A price evaluation adjustment works as follows: when comparing a bid or offer from an SDB with one submitted by another business, the agency can subtract up to 10% of the price from the bid or offer submitted by the SDB in determining which bid or offer has the lowest price or represents the best value. For example, if a business that is not an SDB bids \$100,000 and an SDB bids \$110,000, the SDB would win because it is the lower bidder after its price is reduced by 10% (\$110,000-\$11,000=\$99,000).

⁵⁸ See, e.g., Department of Defense Authorization Act for FY1987, P.L. 99-661, § 1207, 100 Stat. 3973-75 (Nov. 14, 1986) (codified at 10 U.S.C. § 2323) (procurements of defense agencies); Federal Acquisition Streamlining Act, P.L. 103-355, § 7102, 108 Stat. 3368-69 (Oct. 13, 1994) (procurements of civilian agencies).

⁵⁹ See P.L. 103-355, § 7102 (authority expiring at the end of FY2000). This authority was later extended through the end of FY2003, but not renewed thereafter.

⁶⁰ See Strom Thurmond National Defense Authorization Act for FY1999, P.L. 105-261, § 801, 112 Stat. 2080-81 (Oct. 17, 1998) (barring DOD from granting price evaluation adjustments in any fiscal year directly following a fiscal year in which DOD awarded at least 5% of its contract dollars to SDBs); *Rothe Dev. Corp. v. Dep’t of Defense*, 545 F.3d 1023 (Fed. Cir. 2008) (finding 10 U.S.C. § 2323 unconstitutional on its face).

⁶¹ 15 U.S.C. § 637(d)(4) & (5). Eligible contracts are those (1) exceeding \$650,000 (\$1.5 million, in the case of contracts to construct public facilities) and (2) offering subcontracting possibilities. *Id.* Agencies may not find a contractor affirmatively “responsible” for purposes of the award of a federal contract unless it agrees to any required subcontracting plan. For more on responsibility determinations, see CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

⁶² 15 U.S.C. § 637(d)(6).

⁶³ 15 U.S.C. § 637(d)(8).

⁶⁴ 48 C.F.R. § 19.705-7. Liquidated damages are damages whose amount was agreed upon, as compensation for specific breaches, by the parties during the contract’s formation.

also consider the extent of subcontracting with SDBs in determining to whom to award a contract,⁶⁵ or give contractors "monetary incentives" to subcontract with SDBs.⁶⁶ Such incentives reward prime contractors by paying them up to 10% of the amount by which their actual performance in subcontracting with SDBs exceeds their proposed performance.⁶⁷

Disadvantaged Business Enterprises

Like 8(a) participants and SDBs, "disadvantaged business enterprises" (DBEs) are small businesses at least 51% unconditionally owned and controlled by socially and economically disadvantaged individuals.⁶⁸ However, DBEs differ from 8(a) participants and SDBs in that members of the following groups—which include women—are presumed to be both socially *and* economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa; (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race; (iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians; (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, [T]uvalu, Nauru, Federated States of Micronesia, or Hong Kong; (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka; (vi) Women; (vii) [a]ny additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.⁶⁹

⁶⁵ 48 C.F.R. § 19.1202-3 ("In developing an SDB participation evaluation factor or subfactor for the solicitation, agencies may consider—(a) [t]he extent to which SDB concerns are specifically identified; (b) [t]he extent of commitment to use SDB concerns (for example, enforceable commitments are to be weighted more heavily than non-enforceable ones); (c) [t]he complexity and variety of the work SDB concerns are to perform; (d) [t]he realism of the proposal; (e) [p]ast performance of offerors in complying with subcontracting plan goals for SDB concerns and monetary targets for SDB participation; and (f) [t]he extent of participation of SDB concerns in terms of the value of the total acquisition.").

⁶⁶ 48 C.F.R. § 19.1203 ("The contracting officer may encourage increased subcontracting opportunities in the NAICS Industry Subsector as determined by the Department of Commerce for SDB concerns in negotiated acquisitions by providing monetary incentives.... Monetary incentives shall be based on actual achievement as compared to proposed monetary targets for SDB subcontracting.").

⁶⁷ 48 C.F.R. § 52.219-26(b) ("If the Contractor exceeds its total monetary target for subcontracting to small disadvantaged business concerns in the authorized, NAICS Industry Subsectors, it will receive _____ [Contracting Officer to insert the appropriate number between 0 and 10] percent of the dollars in excess of the monetary target, unless the Contracting Officer determines that the excess was not due to the Contractor's efforts (e.g., a subcontractor cost overrun caused the actual subcontract amount to exceed that estimated in the offer, or the excess was caused by the award of subcontracts that had been planned but had not been disclosed in the offer during contract negotiations).").

⁶⁸ 49 C.F.R. § 26.5 (defining "disadvantaged business enterprise"). SBA size standards are used in determining whether DBE firms are "small." 49 C.F.R. § 26.65(a).

⁶⁹ 49 U.S.C. § 26.5. Members of these groups may be required to present evidence of their membership in the group, including showing that they held themselves out as a member of the group over a "long period of time prior to application for certification" and are regarded as a member of the group by the relevant community. 49 C.F.R. § 26.63(a)(1) & (b).

Members of these groups must nonetheless submit a signed, notarized statement regarding their group membership,⁷⁰ as well as information concerning their economic disadvantage.⁷¹ Additionally, their net worth cannot exceed \$750,000,⁷² excluding their ownership interest in the DBE firm and equity in their primary residence.⁷³ Individuals who are not members of designated groups must demonstrate by a preponderance of the evidence that they are socially and economically disadvantaged.⁷⁴

Certification of DBEs

8(a) firms and SDBs are not automatically deemed to be DBEs.⁷⁵ However, their application for 8(a) status or SDB certification generally suffices as their application for DBE certification,⁷⁶ and they must be granted DBE certification unless the certifying entity determines, based on an on-site visit to the firm and related information, that the firm does not meet eligibility requirements.⁷⁷ Firms that are not 8(a) participants or SDBs can only be certified as DBEs after they are found to be eligible based upon (1) an on-site visit with the firm, including interviews with its principal officers; (2) an on-site visit to any job sites operated by the firm; (3) an analysis of the ownership of stock in the firm, as well as its bonding and financial capacity; (4) the firm's work history, including the contracts it has received and the work it has completed; (5) a statement from the firm indicating its preferred type(s) of work and work locations; (6) a list of equipment owned by or available to the firm; and (7) a completed application form.⁷⁸ All certifications must be final before the due date for bids or offers for any contract on which a firm seeks to participate as a DBE.⁷⁹

Once certified, DBEs must provide written notices of any changes in circumstances affecting their eligibility as these changes occur.⁸⁰ They must also produce a sworn affidavit affirming that there have been no changes in circumstances affecting the firm's eligibility each year on the anniversary of their date of certification.⁸¹

Certification lasts for at least three years, and firms cannot be required to reapply for certification as a condition of continuing participation in the program unless the factual basis upon which the certification was made changes.⁸² Assuming firms must be recertified, there is no limit on the

⁷⁰ 49 C.F.R. § 26.65(a).

⁷¹ 49 C.F.R. § 26.61(c); 49 C.F.R. § 26.67(a)(2)(ii).

⁷² 49 C.F.R. § 26.67(a)(2)(i).

⁷³ 49 C.F.R. § 26.67(a)(2)(iii)(A)-(B).

⁷⁴ 49 C.F.R. § 26.61(d).

⁷⁵ 49 C.F.R. § 26.84(c) (requiring the certifying entity to conduct an on-site review before certifying an 8(a) participant or SDB as a DBE).

⁷⁶ 49 C.F.R. § 26.84(a). However, the certifying entity may require 8(a) participants and SDBs to submit information not included in their applications for the 8(a) Program or SDB certification. 49 C.F.R. § 26.84(b).

⁷⁷ 49 C.F.R. § 26.84(d).

⁷⁸ 49 C.F.R. § 26.83(c)(1)-(7). This application form can be found in Appendix F to Part 26 of Title 49 of the *Code of Federal Regulations*.

⁷⁹ 49 C.F.R. § 26.81(c).

⁸⁰ 49 C.F.R. § 26.83(i).

⁸¹ 49 C.F.R. § 26.83(j).

⁸² 49 C.F.R. § 26.83(h) ("Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of Sec. 26.87. You may not require DBEs to (continued...)")

number of times they may be recertified. Certifications are state-specific,⁸³ although states may recognize one another's certifications.⁸⁴

Contracting Programs for DBEs

DBEs are eligible for various contracting programs, most of which are operated by state governments and other entities that receive certain federal highway or transit funds, or airport funds.⁸⁵ The federal government has as a goal that 10% of such funds be awarded to DBEs. However, this is "an aspirational goal at the national level" and "does not authorize or require [funding] recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent."⁸⁶

Funding recipients also set goals for DBE participation overall and on individual contracts that have the possibility of subcontracting.⁸⁷ However, they are barred from using "quotas," or requiring that certain percentages of their contract dollars go to DBEs, and they can "set aside" contracts for DBEs only "in limited and extreme circumstances ... when no other method could be reasonably expected to redress egregious instances of discrimination."⁸⁸ Instead, they must use race-neutral means to meet "the maximum feasible portion" of these goals.⁸⁹ Such means include

- arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate DBE participation (e.g., unbundling contracts; encouraging prime contractors to subcontract work that they would otherwise perform in-house);
- limiting obstacles that DBEs may encounter in obtaining bonding or financing (e.g., simplifying bonding processes; eliminating surety costs from bids);
- providing technical assistance and other services;
- publicizing contract opportunities and providing information about contracting procedures (e.g., providing information in languages other than English);
- assisting DBEs in developing and improving their business management, record keeping, and financial and accounting capabilities;

(...continued)

reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.").

⁸³ See 49 C.F.R. § 26.81(a) & (b)(1) (requiring all recipients of federal funding within a state to participate in a Unified Certification Program (UCP), whose DBE certifications are binding on recipients in that state).

⁸⁴ 49 C.F.R. § 26.81(e)-(f).

⁸⁵ 49 C.F.R. § 26.3(a).

⁸⁶ 49 C.F.R. § 26.41(b)-(c).

⁸⁷ 49 C.F.R. § 26.45(a)(1). These goals are to be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to the availability of other firms ready, willing and able to participate on the contract. 49 C.F.R. § 26.45(b). See also 49 C.F.R. § 26.51(e)(1) (goals only on contracts with subcontracting possibility); 49 C.F.R. § 26.41(f)(3) (requiring funding recipients to project the portions of the overall goal to be met through race-conscious and race-neutral means).

⁸⁸ 49 C.F.R. § 26.43.

⁸⁹ 49 C.F.R. § 26.51(b).

- providing services to help DBEs develop, participate in various kinds of work, and achieve self-sufficiency;
- assisting new start-up firms, particularly in fields where DBE participation has historically been low;
- distributing DBE directories to potential prime contractors; and
- assisting DBEs to develop their capability to utilize emerging technology and conduct business through electronic media.⁹⁰

Funding recipients cannot be penalized for failure to meet their goals unless they did not administer their DBE program in good faith.⁹¹

Recipients may also establish development and mentor-protégé programs for DBEs, although participants in any mentor-protégé programs do not enjoy the same exemption from the SBA size standards when they form joint ventures as 8(a) firms participating in the SBA mentor-protégé program do.⁹²

Tabular Comparison of the Various Types of Disadvantaged Small Businesses

Table 2 provides a comparison of the various types of disadvantaged small businesses for purposes of federal and federally funded contracting programs.

Table 2. Comparison of the Various Types of Disadvantaged Small Businesses

| | 8(a) Participant | SDB | DBE |
|--------------------------------------|---|---|--|
| Social disadvantage | Presumed for designated racial and ethnic groups Not presumed for women | Presumed for designated racial and ethnic groups Not presumed for women | Presumed for designated racial and ethnic groups Presumed for women |
| Economic disadvantage | Not presumed ^a Personal net worth of less than \$250,000 at time of application (\$750,000 thereafter) | Not presumed ^a Personal net worth of less than \$750,000 | Presumed for designated racial and ethnic groups and women Personal net worth of less than \$750,000 |
| Application or certification process | Firms apply to the SBA Firms must be approved before participating Initial application form with supporting materials Mandatory disclosure of changes in circumstances Annual renewal form with | 8(a) participants deemed to be SDBs; other firms certified by procuring agencies, private certifying entities, or state or local governments Firms can participate as prime contractors while certification is pending and as subcontractors with good faith belief in their | 8(a) participants and SDBs not deemed to be DBEs, but their application can be denied only in certain circumstances; other firms must be certified by the Unified Certification Program for the state of the funding recipient Firms must be certified before participating in programs |

⁹⁰ 49 C.F.R. § 26.51(b)(1)-(9).

⁹¹ 49 C.F.R. § 26.47(a).

⁹² See Small Business Size Regulations, 74 Fed. Reg. at 55694.

| | 8(a) Participant | SDB | DBE |
|----------------------------------|---|---|---|
| | supporting materials; may need audited financial statements | eligibility | On-site reviews conducted Mandatory disclosure of changes in circumstances Sworn affidavit annually on anniversary of certification |
| Length of designation | One time eligibility for firms and disadvantaged individuals; no more than nine years in the 8(a) Program | Certification lasts three years; firms may seek and be certified multiple times | Certification lasts at least three years; if necessary, firms may seek and be certified multiple times |
| Contracting and related programs | Set-asides and sole-source contracts | 5% government-wide goal for contracting and subcontracting | 10% national goal for contracting and subcontracting |
| | Direct and guaranteed loans from the SBA | Agency-specific goals for contracting and subcontracting | Recipient-set goals, including on individual contracts |
| | Transfer of federal technology and surplus property | Subcontracting plans | Race-neutral means to meet goals, if possible |
| | Management and technical assistance | Subcontracting an evaluation factor | Development programs |
| | Mentor-protégé program | Monetary incentives for subcontracting | Mentor-protégé programs |

Source: Congressional Research Service, based on 13 C.F.R. §§ 124.1-12.1014 and 49 C.F.R. §§ 26.1-26.109.

a. Individually owned firms only. Group-owned firms are treated somewhat differently.

Constitutionality of Federal Programs for Disadvantaged Small Businesses

All federal programs for disadvantaged small businesses currently define “disadvantage,” in part, based on the presumption that racial and ethnic minorities, or women, are disadvantaged.⁹³ Presumptions based on race have been found to constitute “explicit racial classifications,”⁹⁴ subjecting programs that incorporate them to “strict scrutiny” when such programs are challenged as violations of due process and equal protection under the U.S. Constitution.⁹⁵ For a challenged program to survive strict scrutiny, the government must show that the program is necessary to a compelling government interest.⁹⁶ The U.S. Court of Appeals for the Federal Circuit recently stuck down a Department of Defense program for SDBs because the government could not show a “strong basis in evidence” for concluding that the program was necessary to remedy discrimination in the defense industry.⁹⁷ Presumptions based on sex may also be subjected to

⁹³ See 13 C.F.R. § 124.103(b)(1) (8(a) participants); 13 C.F.R. § 124.1001(a) (SDBs); 49 C.F.R. § 26.5 (DBEs).

⁹⁴ *Rothe Dev. Corp. v. Dep’t of Defense*, 545 F.3d 1023, 1035 (Fed. Cir. 2008).

⁹⁵ Due process under the Fifth Amendment includes equal protection, or the constitutional assurance that the government will apply the law equally to all people and not improperly prefer one class of people over another. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁹⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). See generally CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by Jody Feder.

⁹⁷ *Rothe Dev. Corp.*, 545 F.3d at 1049. In determining whether there was a “strong basis in evidence,” the court examined the empirical studies upon which the government relied in concluding that there was discrimination in the (continued...)

heightened scrutiny if challenged, because courts have required the government to show that other programs classifying individuals on the basis of sex are substantially related to important government objectives.⁹⁸ Something like a “strong basis in evidence” might thus be required for programs incorporating the presumption that women are disadvantaged.⁹⁹

Recently Enacted or Proposed Legislation

In part because of small businesses’ widely recognized role in job creation¹⁰⁰ and concerns that the recent recession has disproportionately affected disadvantaged small businesses,¹⁰¹ the 111th Congress enacted legislation that assisted disadvantaged small businesses in various ways, including by:

- giving SDBs special consideration in the selection of grant recipients under the Broadband Technology Opportunities Program funded by the American Recovery and Reinvestment Act (ARRA);¹⁰²
- providing bonding assistance for DBEs performing transportation contracts funded under ARRA;¹⁰³
- allowing the U.S. Agency for International Development to issue orders under certain multiple-award indefinite-delivery, indefinite quantity (ID/IQ) contracts

(...continued)

defense industry, including their geographical scope, their currency, and whether they were “before” Congress. For more on the *Rothe* decision, see CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by Jody Feder and Kate M. Manuel.

⁹⁸ See, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976). In *United States v. Virginia*, the Court required the State of Virginia to provide an “exceedingly persuasive justification” for its policy of maintaining an all-male military academy. 518 U.S. 515 (1996). It is unclear whether this standard differs from the intermediate scrutiny standard of review.

⁹⁹ During the Bush Administration, the SBA extended the comment period on a proposed rule regarding set-asides for women-owned small businesses in order to “review” the evidence underlying its determinations regarding the industries in which women are underrepresented. See Small Business Administration, *The Women-Owned Small Business Federal Contract Assistance Procedures: Eligible Industries*, 74 Fed. Reg. 1153 (Jan. 12, 2009). Set-asides for women-owned firms are only possible in industries in which the SBA has determined that women-owned firms are underrepresented. See 15 U.S.C. § 637(m)(2)(A)-(F) & (m)(4). However, the Obama Administration has issued final regulations regarding set-asides for women-owned small businesses that are scheduled to take effect on February 4, 2011. See Small Business Administration, *Women-Owned Small Business Federal Contract Program; Final Rule*, 75 Fed. Reg. 62258 (Oct. 7, 2010). Among other things, these regulations identify 83 industries in which women are underrepresented or substantially underrepresented.

¹⁰⁰ See, e.g., Mark Trumbull, *Why Obama Job Creation Plan Focuses on Small Business*, *The Christian Science Monitor*, Dec. 8, 2009, available at <http://features.csmonitor.com/politics/2009/12/08/why-obama-job-creation-plan-focuses-on-small-business> (noting that small businesses are reported to have created 65% of all new jobs in the United States over the past 15 years).

¹⁰¹ See, e.g., John Rosenthal, *Tough Times Often Even Tougher on Minority Biz*, *Chicago Business*, Nov. 30, 2009, available at <http://www.chicagobusiness.com/cgi-bin/mag/article.pl?articleId=32738&seenIt=1>.

¹⁰² P.L. 111-5, § 6001(h)(3), 123 Stat. 515 (Feb. 17, 2009).

¹⁰³ *Id.* at Title XII, 123 Stat. 207. Contractors are often required to post bid, performance, payment and/or patent infringement bonds, the proceeds of which are used to pay the government for any losses it sustains when the contractor fails to perform as required.

funded by the Omnibus Appropriations Act, 2009 to SDBs, among others, without providing other firms a fair opportunity to be considered;¹⁰⁴

- granting the Department of the Interior special authority to contract with SDBs, among others, for forest hazardous fuels reduction, watershed or water quality monitoring or restoration, wildlife or fish population monitoring, or habitat restoration or management;¹⁰⁵ and
- establishing a three-year program to provide grants to states for use in carrying out programs that assist 8(a) firms and other small firms in doing business abroad.¹⁰⁶

Legislation reflecting concerns about disadvantaged small businesses may be reintroduced in the 112th Congress.¹⁰⁷ Members of the 112th Congress may also review agency programs for

¹⁰⁴ P.L. 111-8, § 7034, 123 Stat. 877 (Mar. 11, 2009). The Federal Acquisition Streamlining Act of 1994 generally requires that all contractors holding a multiple-award ID/IQ contract be given a “fair opportunity to be considered” for the issuance of orders under that contract unless certain conditions are met. *See* 10 U.S.C. § 2304c(b)(1)-(4) (procurements of defense agencies) & 41 U.S.C. § 303j(b)(1) (procurements of civilian agencies).

¹⁰⁵ Interior Department and Further Continuing Appropriations, Fiscal Year 2010, P.L. 111-88, § 413, 123 Stat. 2958-59 (Oct. 30, 2009).

¹⁰⁶ Small Business Jobs and Credit Act of 2010, P.L. 111-240, § 1207, 124 Stat. 2532-35 (Sept. 27, 2010).

¹⁰⁷ Examples of legislation that was introduced, but not enacted, in the 111th Congress, include the following: Minority Small Business Enhancement Act of 2009, H.R. 2299, § 2 (increasing the net-worth threshold to \$1.5 million; exempting businesses that have not completed an 8(a) contract from time limits on participation in the 8(a) Program; and raising the government-wide goal for contracting with SDBs to 10%); An Act to Amend the Small Business Act to Change the Net Worth Amount Under the Small Business Program for Socially and Economically Disadvantaged Individuals from \$750,000 to \$978,722, and For Other Purposes, H.R. 4253, § 1; 8(a) Improvements Act, S. 3458, § 4 (requiring periodic adjustment of the net worth thresholds for inflation and extending the maximum term of the 8(a) Program); Promoting Jobs for Veterans Act of 2009, H.R. 4220, § 104 (extending the maximum term of participation in the 8(a) Program for individuals called to “active duty” in the U.S. military for more than 30 days); Expanding Opportunities for Main Street Act of 2010, H.R. 4929, § 101 (increasing agencies’ authority to make sole-source awards to 8(a) firms and requiring that agencies implement set-asides for such firms “to the extent practicable”); Small Business Training in Federal Contracting Certification Act of 2010, S. 3444 (establishing a program to certify acquisition personnel in various things, including use of 8(a) and other set-asides); Homeland Security Science and Technology Authorization Act of 2010, H.R. 4842, § 303 (requiring a report on the role of the venture capital community in funding advanced homeland security technologies, including the possibility of set-asides for 8(a) and other types of small businesses); An Act to Amend the Small Business Act to Establish Mentorship and Assistance Programs Designed to Help Minority, Veteran-Owned, and Women-Owned Small Businesses Operate in the Construction Industry, and For Other Purposes, H.R. 3771, § 2; Transportation Security Administration Authorization Act, H.R. 2200, § 103 (requiring that contractors holding Transportation Security Administration contracts in excess of \$300 million implement their plans for contracting with SDBs and report periodically on this implementation, including the percentages of contract dollars awarded to all tiers of SDB subcontractors); Coast Guard Authorization Act of 2010, H.R. 3619, § 221 (encouraging heads of certain federally funded laboratories at minority-serving institutions to establish partnerships with SDBs for the purpose of increasing R&D capacity, among other things); An Act to Require the Comptroller General of the United States to Carry Out a Study on Procurement under the American Recovery and Reinvestment Act of 2009, S. 3429; An Act to Amend Title 49, United States Code, to Require That Not Less Than 10% of the Amounts Made Available to Certain High-Speed Rail Projects be Expended through Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals, and for Other Purposes, H.R. 5010; Aviation Safety and Investment Act of 2010, H.R. 1586 (increasing the net worth threshold for DBEs and requiring that this threshold be annually adjusted for inflation; excluding retirement income from net worth calculations for DBEs; and prohibiting the imposition of “excessive, unreasonable, or discriminatory bonding requirements” upon DBEs); FAA Air Transportation Modernization and Safety Improvement Act, H.R. 1586, § 715 (requiring that airport concessionaires receive training on certification of DBEs); BUILD Act of 2010, H.R. 5935 (providing additional bonding assistance to DBEs); Hiring Incentives to Restore Employment Act, H.R. 2847, § 451 (requiring that no less than 10% of the funds made available under certain statutes go to DBEs, and that the Secretary of Transportation establish minimum criteria for certifying DBEs).

disadvantaged small businesses, including proposed regulatory changes to the eligibility and certification requirements for 8(a) firms and DBEs, discussed below.

Proposed Changes in Regulations

The Obama Administration has issued two proposed regulations that would make changes to the eligibility and certification requirements for the 8(a) and DBE programs, in particular. On October 28, 2009, the Small Business Administration issued a proposed rule that would exclude certain property when calculating net worth for 8(a) firms and SDBs (e.g., retirement funds, income from S corporations).¹⁰⁸ This rule would also establish a rebuttable presumption that individuals are not economically disadvantaged if their adjusted gross income averaged over the past two years exceeds \$200,000.¹⁰⁹ Later, on May 10, 2010, the Department of Transportation issued a proposed rule that would increase the net worth threshold for DBEs to \$1.3 million; require that the net worth threshold be annually adjusted for inflation; and exclude certain retirement income from net worth determinations.¹¹⁰ This rule would also (1) require funding recipients who fail to meet their goals for contracting with DBEs to report on why they failed and what they will do to correct any identified problems; (2) establish a rebuttable presumption that firms certified in one state are certifiable in another;¹¹¹ (3) make clear that certifications do not need to be renewed, but instead last until a firm is decertified; (4) require funding recipients to concur in terminations or substitutions of DBE subcontractors; (5) prohibit new firms from being denied certification because they lack experience; and (6) allow the use of race-conscious goals in certain circumstances.¹¹² Although the comment periods on both proposed regulations have closed, final regulations had not been issued for either the 8(a) or DBE program as of January 1, 2011.

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¹⁰⁸ 74 Fed. Reg. at 55698-99.

¹⁰⁹ *Id.* at 55699.

¹¹⁰ Dep't of Transportation, Disadvantaged Business Enterprise: Program Improvements, 75 Fed. Reg. 25815 (May 10, 2010); Small Business Administration, Small Business Size Regulations.

¹¹¹ This would mean that the state seeking to deny certification to a firm that is certified in another state would have the burden of proving that the firm should not be certified in the second state.

¹¹² *Id.* at 25818-23.