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The “8(a) Program” for Small Businesses Owned and Controlled by the Socially and Economically Disadvantaged: Legal Requirements and Issues

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Summary

Commonly known as the "8(a) Program," the Minority Small Business and Capital Ownership Development Program is one of several federal contracting programs for small businesses. The 8(a) Program provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-asides and sole-source awards. A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition. In FY2014, the federal government spent over \$16 billion on contracts and subcontracts with 8(a) firms. Other programs provide similar assistance to other types of small businesses (e.g., women-owned, HUBZone).

Eligibility for the 8(a) Program is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States" that demonstrate "potential for success." Each of these terms is further defined by the Small Business Act, regulations promulgated by the Small Business Administration (SBA), and judicial and administrative decisions.

A "business" is generally a for-profit entity that has a place of business located in the United States and operates primarily within the United States or makes a significant contribution to the U.S. economy by paying taxes or using American products, materials, or labor. A business is "small" if it is independently owned and operated; is not dominant in its field of operations; and meets any definitions or standards established by the Administrator of Small Business. Ownership is "unconditional" when it is not subject to any conditions precedent or subsequent, executory agreements, or similar limitations. "Control" is not the same as ownership and includes both strategic policy setting and day-to-day administration of business operations.

Members of certain racial and ethnic groups are presumed to be socially disadvantaged, although individuals who do not belong to these groups may prove they are also socially disadvantaged. To be economically disadvantaged, an individual must have a net worth of less than \$250,000 (excluding ownership in the 8(a) firm and equity in one's primary residence) at the time of entry into the program. This amount increases to \$750,000 for continuing eligibility. In determining whether an applicant has good character, SBA looks for criminal conduct, violations of SBA regulations, or debarment or suspension from federal contracting. For a firm to have "potential for success," it generally must have been in business in the field of its primary industry classification for two years immediately prior to applying to the program. However, small businesses owned by Alaska Native Corporations, Community Development Corporations, Indian tribes, and Native Hawaiian Organizations are eligible for the 8(a) Program under somewhat different terms.

The 8(a) Program has periodically been challenged on the grounds that the presumption that members of certain racial and ethnic groups are disadvantaged violates the constitutional guarantee of equal protection. The outcomes in early challenges to the program varied, with some courts finding that the plaintiffs lacked standing because they were not economically disadvantaged. Most recently, two federal district court decisions found that the program is not unconstitutional *on its face* because (1) "breaking down barriers to minority business development created by discrimination and its lingering effects" constitutes a compelling government interest; (2) the government had a strong basis in evidence for concluding that race-based action was necessary to further this interest; and (3) the 8(a) Program is narrowly tailored to "minimize the burden on non-minority firms." However, in one of these cases, the court did find that the program was unconstitutional *as applied* in the military simulation and training industry because the government conceded it had no evidence of discrimination in this industry. The decision in one case was appealed. The litigation in the other has reportedly been settled.

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Commonly known as the "8(a) Program," the Minority Small Business and Capital Ownership Development Program is one of several federal contracting programs for small businesses.¹ The 8(a) Program provides participating small businesses with training, technical assistance, and contracting opportunities in the form of set-asides and sole-source awards. A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition. Eligibility for the 8(a) Program is generally limited to small businesses "unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States" that demonstrate "potential for success."² However, small businesses owned by Alaska Native Corporations (ANCs), Community Development Corporations (CDCs), Indian tribes, and Native Hawaiian Organizations (NHOs) are eligible for the 8(a) Program under somewhat different terms. In FY2014, the federal government spent over \$16 billion on contracts and subcontracts with 8(a) firms.³ Other programs provide similar assistance to other types of small businesses (e.g., women-owned, HUBZone).

The 8(a) and other programs for small businesses are of perennial interest to Congress, given that

It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.⁴

However, recent Congresses have had particular interest in the 8(a) Program because of the recession of 2007-2009,⁵ its effects on minority-owned small businesses,⁶ and small businesses' role in job creation.⁷

This report provides a brief history of the 8(a) Program, summarizes key requirements, and discusses legal challenges alleging that the program's presumption that members of certain racial

¹ See generally CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by (name redacted) and (name redacted) (available upon request). The 8(a) Program takes its name from one of the sections of the Small Business Act that authorizes it. The program is also governed by Section 7(j) of the act.

² 13 C.F.R. §124.101.

³ See Small Business Goaling Report: Fiscal Year 2014, available at https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2014.pdf. The report on FY2015 has not yet been compiled.

⁴ Small Business Act of 1958, P.L. 85-536, §2(a), 72 Stat. 384 (July 18, 1958) (codified at 15 U.S.C. §631(a)).

⁵ See, e.g., Phil Izzo, Recession Over in June 2009, *Wall Street J.*, September 20, 2010, available at <http://blogs.wsj.com/economics/2010/09/20/nber-recession-ended-in-june-2009/> (discussing the recession of 2007-2009).

⁶ See, e.g., Small Bus. Admin., *The Small Business Economy: A Report to the President 3* (2009) (copy on file with the author) ("The credit freeze in the short-term funding market had a devastating effect on the economy and small firms."); John Rosenthal, Tough Times Often Even Tougher on Minority Biz, *Chicago Business*, November 30, 2009, available at <http://www.chicagobusiness.com/article/20091128/ISSUE02/100032738/tough-times-often-even-tougher-on-minority-biz>.

⁷ See, e.g., Mark Trumbull, Why Obama Job Creation Plan Focuses on Small Business, *The Christian Science Monitor*, December 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).

and ethnic groups are socially disadvantaged violates the constitutional guarantee of equal protection.

Historical Development

Origins of the 8(a) Program

The current 8(a) Program resulted from the merger of two distinct types of federal programs: those seeking to assist small businesses in general and those seeking to assist racial and ethnic minorities. This merger first occurred, as a matter of executive branch practice, in 1967 and was given a statutory basis in 1978.

Federal Programs for Small Businesses

Congress first authorized a federal agency to enter into prime contracts with other agencies and subcontract with small businesses for the performance of these contracts in 1942. The agency was the Smaller War Plants Corporation (SWPC), which was created partly for this purpose, and Congress gave it these powers in order to ameliorate small businesses' financial difficulties while also "mobiliz[ing] the productive facilities of small business in the interest of successful prosecution of the war."⁸ The SWPC's subcontracting authority expired along with the SWPC at the end of the World War II. However, in 1951, at the start of the Korean War, Congress created the Small Defense Plants Administration (SDPA), which was generally given the same powers that the SWPC had exercised.⁹ Two years later, in 1953, Congress transferred the SDPA's subcontracting authorities, among others, to the newly created Small Business Administration,¹⁰ with the intent that the SBA would exercise these powers in peacetime, as well as in wartime.¹¹ When the Small Business Act of 1958 transformed the SBA into a permanent independent agency, this subcontracting authority was included in Section 8(a) of the act.¹² At its inception, the SBA's subcontracting authority was not limited to small businesses owned and controlled by the socially and economically disadvantaged. Under the original Section 8(a), the SBA could contract with any "small-business concerns or others,"¹³ but the SBA seldom, if ever, employed this subcontracting authority, focusing instead upon its loan and other programs.¹⁴

⁸ Small Business Mobilization Act, P.L. 77-603, §4(f), 56 Stat. 351 (June 11, 1942).

⁹ Act of July 31, 1951, P.L. 82-96, §110, 65 Stat. 131.

¹⁰ P.L. 83-163, §207(c)-(d), 67 Stat. 230 (July 30, 1953).

¹¹ See, e.g., H.Rept. 494, 83rd Cong., 1st sess., at 2 (1953) (stating that the SBA would "continue many of the functions of the [SDPA] in the present mobilization period and in addition would be given powers and duties to encourage and assist small-business enterprises in peacetime as well as in any future war or mobilization period"); S.Rept. 1714, 85th Cong., 2nd sess., at 9-10 (1958) (stating that the act would "put[] the procurement assistance program on a peacetime basis").

¹² P.L. 85-536, §8(a)(1)-(2), 72 Stat. 384 (July 18, 1958).

¹³ *Id.*

¹⁴ Thomas Jefferson Hasty, III, *Minority Business Enterprise Development and the Small Business Administration's 8(a) Program: Past, Present, and (Is There a) Future?* 145 *Mil. L. Rev.* 1, 8 (1994) ("[B]ecause the SBA believed that the efforts to start and operate an 8(a) program would not be worthwhile in terms of developing small business, the SBA's power to contract with other government agencies essentially went unused. The program actually lay dormant for about fifteen years until the racial atmosphere of the 1960s provided the impetus to wrestle the SBA's 8(a) authority from its dormant state.").

Federal Programs for Racial and Ethnic Minorities

Federal programs for racial and ethnic minorities began developing at approximately the same time as those for small businesses, although there was initially no explicit overlap between them. The earliest programs were created by executive orders, beginning with President Franklin Roosevelt's order on June 25, 1941, requiring that all federal agencies include a clause in defense-related contracts prohibiting contractors from discriminating on the basis of "race, creed, color, or national origin."¹⁵ Subsequent Presidents followed Roosevelt's example, issuing a number of executive orders seeking to improve the employment opportunities of members of various racial and ethnic groups.¹⁶ These executive branch initiatives took on new importance after the Kerner Commission's report on the causes of the urban riots of 1966 concluded that African Americans would need "special encouragement" to enter the economic mainstream.¹⁷

Presidents Lyndon Johnson and Richard Nixon laid the foundations for the present 8(a) Program in the hope of providing such "encouragement." Johnson created the President's Test Cities Program (PTCP), which involved a small-scale use of the SBA's authority under Section 8(a) to award contracts to firms willing to locate in urban areas and hire unemployed individuals, largely African Americans, or sponsor minority-owned businesses by providing capital or management assistance.¹⁸ However, under the PTCP, small businesses did not have to be minority-owned to receive subcontracts under Section 8(a).¹⁹ Nixon's program was larger and focused more specifically on minority-owned small businesses.²⁰ During the Nixon Administration, the SBA promulgated its earliest regulations for the 8(a) Program. In 1970, the first of these regulations articulated the SBA's policy of using Section 8(a) to "assist small concerns owned by disadvantaged persons to become self-sufficient, viable businesses capable of competing effectively in the market place."²¹ A later regulation, promulgated in 1973, defined "disadvantaged persons" as including, but not limited to, "black Americans, Spanish-Americans, oriental Americans, Eskimos, and Aleuts."²² However, the SBA lacked explicit statutory authority for focusing its 8(a) Program on minority-owned businesses until 1978,²³ although courts generally rejected challenges alleging that SBA's implementation of the program was unauthorized because it was "not specifically mentioned in statute."²⁴

¹⁵ Exec. Order No. 8802, 6 *Federal Register* 3,109 (June 25, 1941). Similar requirements were later imposed on non-defense contracts. See Exec. Order No. 9346, 8 *Federal Register* 7,182 (May 29, 1943).

¹⁶ See, e.g., Exec. Order No. 10308, 16 *Federal Register* 12,303 (December 3, 1951) (Truman); Exec. Order No. 10557, 19 *Federal Register* 5,655 (September 3, 1954) (Eisenhower); Exec. Order No. 10925, 26 *Federal Register* 1,977 (March 6, 1961) (Kennedy); Exec. Order No. 11458, 34 *Federal Register* 4,937 (March 7, 1969) (Nixon).

¹⁷ *Report of the National Advisory Commission on Civil Disorders* 21 (1968).

¹⁸ See, e.g., Hasty, *supra* note 14, at 11-12.

¹⁹ See, e.g., Jonathan J. Bean, *BIG GOVERNMENT AND AFFIRMATIVE ACTION: THE SCANDALOUS HISTORY OF THE SMALL BUSINESS ADMINISTRATION* 66 (2001).

²⁰ See Exec. Order No. 1625, 36 *Federal Register* 19,967 (October 13, 1971).

²¹ 13 C.F.R. §124.8-1(b) (1970).

²² 13 C.F.R. §124.8(c) (1973).

²³ S. Rep. No. 95-1070, 95th Cong., 2nd sess., at 14 (1978) ("One of the underlying reasons for the failure of this effort is that the program has no legislative basis."); H.Rept. 95-949, 95th Cong., 2nd sess., at 4 (1978) ("Congress has never extended legislative control over the activities of the 8(a) program, save through indirect appropriations, thereby permitting program operations.... [The] program is not as successful as it could be.")

²⁴ See, e.g., *Ray Billie Trash Hauling, Inc. v. Kleppe*, 477 F.2d 696, 703-04 (5th Cir. 1973). In this case, the court particularly noted that the SBA's program was supported by congressional and presidential mandates issued after enactment of the Small Business Act in 1958. *Id.* at 705.

1978 Amendments to the Small Business Act and Subsequent Regulations

In 1978, Congress amended the Small Business Act to give the SBA statutory authority for its 8(a) Program for minority-owned businesses.²⁵ Under the 1978 amendments, SBA can only subcontract under Section 8(a) with “socially and economically disadvantaged small business concerns,”²⁶ or businesses which are least 51% owned by one or more socially and economically disadvantaged individuals and whose management and daily operations are controlled by such individual(s).²⁷

The 1978 amendments established a basic definition of “socially disadvantaged individuals,” which included those who have been “subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.”²⁸ They also included congressional findings that “Black Americans, Hispanic Americans, Native Americans, and other minorities” are socially disadvantaged.²⁹ Thus, if an individual was a member of one of these groups, he or she was presumed to be socially disadvantaged. Otherwise, the amendments were generally seen to grant the SBA discretion to recognize additional groups or individuals as socially disadvantaged based upon criteria promulgated in regulations.³⁰ Under

²⁵ P.L. 95-507, 92 Stat. 1757 (October 24, 1978).

²⁶ *Id.* at §202.

²⁷ *Id.* (codified at 15 U.S.C. §637(a)(4)(A)-(B)). Firms that are owned and controlled by Indian tribes, ANCs, or NHOs were later included within the definition of a “socially and economically disadvantaged small business concern.” *See infra* notes 36-43 and accompanying text.

²⁸ *Id.* (codified at 15 U.S.C. §637(a)(5)).

²⁹ *Id.* at §201 (codified, as amended, at 15 U.S.C. §631(f)(1)(C)). The meaning of “socially disadvantaged individuals” was the subject of much debate at the time of the 1978 amendments. Some Members of Congress, perhaps focusing on the SBA’s use of its authority under §8(a) in 1968-1970, viewed the 8(a) Program as a program for African Americans and would have defined “social disadvantage” accordingly. *See, e.g.,* Parren J. Mitchell, Federal Affirmative Action for MBE’s: An Historical Analysis, 1 *Nat’l Bar Ass’n Mag.* 46 (1983). (Mitchell was a Member of the U.S. House of Representatives and leader of the Congressional Black Caucus when the 1978 amendments were enacted.) Others favored a somewhat broader view, including both African Americans and Native Americans on the grounds that only those who did not come to the United States seeking the “American dream” should be deemed socially disadvantaged. *See, e.g.,* Testimony Before the House Comm. on Small Bus., Subcomm. on General Oversight & Minority Enter., Task Force on Minority Enter., 96th Cong., at 21 (1979). Yet others suggested that groups that are not racial or ethnic minorities should be able to qualify as “socially disadvantaged,” or that individuals ought to be able to prove they are personally socially disadvantaged even if they are not racial or ethnic minorities. *See, e.g.,* H.Rept. 95-949, 95th Cong., 2nd sess., at 9 (1978) (“[T]he committee intends that the SBA give most serious consideration to, among others, women business owners” when determining which groups are socially disadvantaged.... [T]he bill does recognize that persons falling outside of the racial and ethnic groups presumed to be disadvantaged, may nevertheless be disadvantaged.”). The bill that passed the House defined “socially disadvantaged individuals,” in part, by establishing a rebuttable presumption that African Americans and Hispanic Americans are socially disadvantaged, while the bill that passed the Senate did not reference any racial or ethnic groups in defining “social disadvantage.” *See, e.g.,* H.R. Conf. Rep. No. 95-1714, 95th Cong., 2nd sess., at 20 (1978); S.Rept. 95-1070, 95th Cong., 2nd sess., at 13-16 (1978). The conference committee reconciling the House and Senate versions ultimately arrived at a definition of “socially disadvantaged individuals” that was broader than the definition used in the SBA’s 1973 regulation and included “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group.” P.L. 95-507, at §202. This definition did not incorporate the rebuttable presumption that members of certain groups are socially disadvantaged included in the House bill. However, the conference bill included congressional findings that “Black Americans, Hispanic Americans, Native Americans, and other minorities” are socially disadvantaged, thereby arguably achieving similar effect. *Id.* at §201. Congress subsequently added “Asian Pacific Americans” and “Native Hawaiian Organizations” to the groups whom it finds to be socially disadvantaged. *See* 15 U.S.C. §631(f)(1)(C)).

³⁰ P.L. 95-507, at §201 (stating that the groups Congress finds to be socially disadvantaged “include,” but are “not limited to,” those specified here); *id.* at §202 (authorizing the award of contracts to socially disadvantaged individuals); H.Rept. 95-949, *supra* note 29, at 9 (expressing the view that Sections 201 and 202 of the bill provide “sufficient discretion ... to allow SBA to designate any other additional minority group or persons it believes should be afforded (continued...)”).

these regulations, which include a three-part test for determining whether minority groups not mentioned in the amendment's findings are disadvantaged,³¹ the SBA recognized the racial or ethnic groups listed in **Table 1** as socially disadvantaged for purposes of the 8(a) Program.³² The regulations also established standards of evidence to be met by individuals demonstrating personal disadvantage and procedures for rebutting the presumption of social disadvantage accorded to members of recognized minority groups.³³

Table 1. Groups Presumed to Be Socially Disadvantaged

Group	Countries of Origin Included Within Group
Black Americans	n/a
Hispanic Americans	n/a
Native Americans (including American Indians, Eskimos, Aleuts, Native Hawaiians)	n/a
Asian Pacific Americans	Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia, Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, Nauru
Subcontinent Asian Americans	India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands, Nepal

Source: Congressional Research Service, based on 13 C.F.R. §124.103(b).

The 1978 amendments also defined “economically disadvantaged individuals,” for purposes of the 8(a) Program, as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.”³⁴ Later, the SBA established by regulation that personal net worth of less than \$250,000 at the time of entry into the 8(a) Program (\$750,000 for continuing eligibility) constitutes economic disadvantage.³⁵

(...continued)

the presumption of social ... disadvantage”).

³¹ See 13 C.F.R. §124.103(d)(2)(i)-(iii)(1980).

³² 13 C.F.R. §124.103(b). Different groups are sometimes recognized as socially disadvantaged for purposes of other programs, such as those of the Department of Commerce’s Minority Business Development Agency (MBDA). See 15 C.F.R. §1400.1(b). The SBA has rejected petitions from certain groups, including Hasidic Jews, women, disabled veterans, and Iranian-Americans. See, e.g., George R. La Noue & John C. Sullivan, Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences, 41 *Santa Clara L. Rev.* 103, 127-29 (2000). However, Hasidic Jews are eligible to receive assistance from the MBDA, while women are deemed to be disadvantaged for purposes of the Department of Transportation’s Disadvantaged Business Enterprise (DBE) program. See 49 U.S.C. §47113(a)(2) (DBE program); 15 C.F.R. §1400.1(c) (MBDA program).

³³ 13 C.F.R. §124.103(c)(2) (standards of evidence for showing personal disadvantage); 13 C.F.R. §124.103(b)(3) (mechanisms for overcoming the presumption of social disadvantage).

³⁴ P.L. 95-507, §202.

³⁵ See Small Bus. Admin., Minority Small Business and Capital Ownership Development Program: Final Rule, 54 *Federal Register* 34,692 (August 21, 1989) (codified, as amended, at 13 C.F.R. §124.104(c)). Some commentators have estimated that 80 to 90% of Americans are economically disadvantaged under the SBA’s net-worth requirements. See, (continued...)

Expansion of the 8(a) Program to Include "Disadvantaged" Groups

Although the 8(a) Program was originally established for the benefit of disadvantaged *individuals*, in the 1980s, Congress expanded the program to include small businesses owned by four "disadvantaged" *groups*.

The first owner-group to be included was Community Development Corporations (CDCs). A CDC is

a nonprofit organization responsible to residents of the area it serves which is receiving financial assistance under part A of this subchapter [42 U.S.C. §§9805 *et seq.*] and any organization more than 50 percent of which is owned by such an organization, or otherwise controlled by such an organization, or designated by such an organization for the purpose of this subchapter [42 U.S.C. §§9801 *et seq.*].³⁶

Congress created CDCs with the Community Development Act of 1981³⁷ and instructed the SBA to issue regulations ensuring that CDCs could participate in the 8(a) Program.³⁸

In 1986, two additional owner-groups—Indian tribes and Alaska Native Corporations (ANCs)—became eligible for the 8(a) Program when Congress passed legislation providing that firms owned by Indian tribes—which include ANCs³⁹—were to be deemed "socially disadvantaged" for purposes of the 8(a) Program.⁴⁰ In 1992, ANCs were further deemed to be "economically disadvantaged."⁴¹

The final owner-group, that of Native Hawaiian Organizations (NHOs), was recognized in 1988.⁴² An NHO is defined as

any community service organization serving Native Hawaiians in the State of Hawaii which (A) is a nonprofit corporation that has filed articles of incorporation with the director (or the designee thereof) of the Hawaii Department of Commerce and Consumer

(...continued)

e.g., La Noue & Sullivan, *supra* note 32, at 108.

³⁶ 42 U.S.C. §9802.

³⁷ P.L. 97-35, Ch. 8, Subch. A, 95 Stat. 489 (1981) (codified at 42 U.S.C. §§9801 *et seq.*).

³⁸ *Id.* at §626, 95 Stat. 496 (codified at 42 U.S.C. §9815(a)(2)) ("Not later than 90 days after August 13, 1981, the Administrator of the Small Business Administration, after consultation with the Secretary, shall promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under §637(a) of title 15.")

³⁹ P.L. 99-272, §18015, 100 Stat. 370 (1986) (codified at 15 U.S.C. §637(a)(13)) (defining "Indian tribe" to include "any Indian tribe, band, nation, or other organized group or community of Indians, including any Alaska Native village or regional or village corporation (within the meaning of the Alaska Native Claims Settlement Act (43 U.S.C. §1606)) which (A) is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or (B) is recognized as such by the State in which such tribe, band, nation, group, or community resides."). An Alaska Native Corporation is "any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act." 13 C.F.R. §124.3. An Alaska Native is any "citizen of the United States who is a person of one-fourth degree or more Alaskan Indian . . . , Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native." 13 C.F.R. §124.3.

⁴⁰ P.L. 99-272, §18015, 100 Stat. 370 (codified at 15 U.S.C. §637(a)(4)).

⁴¹ P.L. 102-415, §10, 106 Stat. 2115 (1992) (codified at 43 U.S.C. §1626(e)).

⁴² P.L. 100-656, §207, 102 Stat. 3861 (1988) (codified at 15 U.S.C. §637(a)(4)).

Affairs, or any successor agency, (B) is controlled by Native Hawaiians, and (C) whose business activities will principally benefit such Native Hawaiians.⁴³

Current Requirements

Under the current 8(a) Program, participating firms are eligible for set-asides or sole-source awards of federal contracts, as well as training and technical assistance from SBA. Detailed statutory and regulatory requirements govern eligibility for the Program; set-asides and sole-source awards to 8(a) firms; and related issues. These requirements are generally the same for all participants in the 8(a) Program, although there are instances where there are "special rules" for 8(a) firms owned by groups.⁴⁴ An **Appendix** to this report compares the requirements applicable to individual owners of 8(a) firms to those applicable to groups owning 8(a) firms (i.e., ANCs, CDCs, NHOs, and Indian tribes).⁴⁵

Requirements In General

Eligibility for the 8(a) Program

Eligibility for the 8(a) Program is limited to "small business[es] which [are] unconditionally owned and controlled by one or more socially and economically disadvantaged individuals who are of good character and citizens of and residing in the United States, and which demonstrate[] potential for success."⁴⁶ Each of these terms is further defined by the Small Business Act; regulations that the SBA has promulgated to implement Section 8(a); and judicial and administrative decisions.⁴⁷ The eligibility requirements are the same at the time of entry into the 8(a) Program and throughout the Program unless otherwise noted.⁴⁸

"Business"

Except for small agricultural cooperatives, a "business" is a for-profit entity that has a place of business located in the United States and operates primarily within the United States or makes a significant contribution to the U.S. economy by paying taxes or using American products, materials, or labor.⁴⁹ For purposes of the 8(a) Program, businesses may take the form of

⁴³ *Id.* (codified at 15 U.S.C. §637(a)(15)). A "Native Hawaiian" is "any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii." 13 C.F.R. §124.3.

⁴⁴ *See, e.g.*, 13 C.F.R. §124.109(a) ("*Special rules for ANCs.* Small business concerns owned and controlled by ANCs are eligible for participation in the 8(a) program and must meet the eligibility criteria set forth in §124.112 to the extent the criteria are not inconsistent with this section.") (emphasis in original).

⁴⁵ *See also* archived CRS Report R40855, *Contracting Programs for Alaska Native Corporations: Historical Development and Legal Authorities*, by (name redacted) and (name redacted) (discussing contracting with ANC-owned firms through the 8(a) Program and other programs).

⁴⁶ 13 C.F.R. §124.101. The Office of Legal Counsel at the Department of Justice has opined that SBA regulations limiting eligibility for the 8(a) Program to citizens do not deprive resident aliens of due process in violation of the Fifth Amendment to the U.S. Constitution. *See* U.S. Dep't of Justice, Office of Legal Counsel, *Constitutionality of 13 C.F.R. §124.103 Establishing Citizenship Requirement for Participation in 8(a) Program*, 20 Op. O.L.C. 85 (1996).

⁴⁷ The SBA's Office of Hearings and Appeals has, for example, developed a seven-part test for determining whether a small business is "unusually reliant" on a contractor that is used in determining affiliation. *See* Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996).

⁴⁸ *See* 13 C.F.R. §124.112(a) ("In order for a concern ... to remain eligible for 8(a) ... program participation, it must continue to meet all eligibility criteria contained in [Section] 124.101 through [Section] 124.108.").

⁴⁹ 13 C.F.R. §121.105(a)(1). "Business" is separately defined for small agricultural cooperatives. *See* 13 C.F.R. (continued...)

individual proprietorships, partnerships, limited liability companies, corporations, joint ventures, associations, trusts, or cooperatives.⁵⁰

"Small"

A business is "small" if it is independently owned and operated; is not dominant in its field of operations; and meets any definitions or standards established by the Administrator of the SBA.⁵¹ These standards focus primarily upon the size of the business as measured by the number of employees or its gross income, but they also take into account the size of other businesses within the same industry.⁵² For example, businesses in the field of "scheduled passenger air transportation" are "small" if they have fewer than 1,500 employees, while those in the data processing field are "small" if they have a gross income of less than \$32.5 million.⁵³

Affiliations between businesses, or relationships allowing one party control or the power of control over another,⁵⁴ generally count in size determinations, with the SBA considering "the receipts, employees, or other measure of size of the concern whose size is at issue and all of its domestic and foreign affiliates, regardless of whether the affiliates are organized for profit."⁵⁵ Businesses can thus be determined to be other than small because of their involvement in joint ventures,⁵⁶ subcontracting arrangements,⁵⁷ or franchise or license agreements,⁵⁸ among other things, provided that their income or personnel numbers, plus those of their affiliate(s), are over the pertinent size threshold.

"Unconditionally owned and controlled"

Participants in the 8(a) Program must be "at least 51% unconditionally and directly owned by one or more socially and economically disadvantaged individuals who are citizens of the United States" unless they are owned by an ANC, CDC, NHO, or Indian tribe.⁵⁹ Ownership is "unconditional" when it is not subject to any conditions precedent or subsequent, executory

(...continued)

§121.105(a)(2).

⁵⁰ 13 C.F.R. §121.105(b).

⁵¹ 15 U.S.C. §632(a)(1)-(2)(A).

⁵² 13 C.F.R. §§121.101-121.109. The number of employees is the average number in each pay period for the preceding 12 calendar months. Where possible, gross income is based on the average for the last three completed fiscal years. It includes all revenues, not just those from the firm's primary industry. *See* IMDT, Inc., SBA-4121 (1995).

⁵³ 13 C.F.R. §121.201.

⁵⁴ 13 C.F.R. §121.103(a)(1). Control, or the power of control, need only exist. It need not be exercised for affiliation to be found.

⁵⁵ 13 C.F.R. §121.103(a)(6).

⁵⁶ 13 C.F.R. §121.103(h) ("[A] specific joint venture entity generally may not be awarded more than three contracts over a two year period, starting from the date of the award of the first contract, without the partners to the joint venture being deemed affiliated for all purposes.").

⁵⁷ 13 C.F.R. §121.103(h)(4) ("A contractor and its ostensible subcontractor are treated as joint venturers, and therefore affiliates, for size determination purposes. An ostensible subcontractor is a subcontractor that performs primary and vital requirements of a contract, or of an order under a multiple award schedule contract, or a subcontractor upon which the prime contractor is unusually reliant.").

⁵⁸ 13 C.F.R. §121.103(i) ("Affiliation may arise ... through ... common ownership, common management or excessive restrictions on the sale of the franchise interest.").

⁵⁹ 13 C.F.R. §124.105 (defining "unconditional ownership"). *See also* 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring at least 51% unconditional ownership).

agreements, voting trusts, restrictions on or assignments of voting rights, or other arrangements that could cause the benefits of ownership to go to another entity.⁶⁰ Ownership is "direct" when the disadvantaged individuals own the business in their own right and not through an intermediary (e.g., ownership by another business entity or by a trust that is owned and controlled by one or more disadvantaged individuals).⁶¹ Non-disadvantaged individuals and non-participant businesses that own at least 10% of an 8(a) business may generally own no more than 10 to 20% of any other 8(a) firm.⁶² Non-participant businesses that earn the majority of their revenue in the same or similar line of business are likewise barred from owning more than 10% (increasing to 20%-30% in certain circumstances) of another 8(a) firm.⁶³

Participants must also be controlled by one or more disadvantaged individuals.⁶⁴ "Control is not the same as ownership" and includes both strategic policy setting and day-to-day management and administration of business operations.⁶⁵ Management and daily business operations must also be conducted by one or more disadvantaged individuals unless the 8(a) business is owned by an ANC, CDC, NHO, or Indian tribe.⁶⁶ These individuals must have managerial experience "of the extent and complexity needed to run the concern" and generally must devote themselves full-time to the business "during the normal working hours of firms in the same or similar line of business."⁶⁷ A disadvantaged individual must hold the highest officer position within the business.⁶⁸ Non-disadvantaged individuals may otherwise be involved in the management of an 8(a) business, or may be stockholders, partners, limited liability members, officers, or directors of an 8(a) business.⁶⁹ However, they may not exercise actual control or have the power to control the firm or its disadvantaged owner(s), or receive compensation greater than that of the highest-paid officer (usually the CEO or President) without SBA approval.⁷⁰

"Socially disadvantaged individual"

Socially disadvantaged individuals are "those who have been subjected to 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."⁷¹ Members of designated groups, listed in **Table 1**, are entitled to a rebuttable presumption of social disadvantage for purposes of the 8(a) Program,⁷² although this presumption can be overcome with "credible evidence to the contrary."⁷³

⁶⁰ 13 C.F.R. §124.3.

⁶¹ 13 C.F.R. §124.105(a).

⁶² 13 C.F.R. §124.105(h)(1). Ownership is limited to 10% when the 8(a) firm is in the "developmental stage" of the 8(a) Program and 20% when it is in the "transitional stage." *Id.* For more on the developmental and transitional stages, see *infra* notes 110-112 and accompanying text.

⁶³ 13 C.F.R. §124.105(h)(2).

⁶⁴ 15 U.S.C. §637(a)(4)(A)(i)-(ii) (requiring control of management and business operations); 13 C.F.R. §124.106.

⁶⁵ 13 C.F.R. §124.106.

⁶⁶ *Id.*

⁶⁷ 13 C.F.R. §124.106 & §124.106(a)(3).

⁶⁸ 13 C.F.R. §124.106(a)(2). The individual must also be physically located in the United States. *Id.*

⁶⁹ 13 C.F.R. §124.106(e).

⁷⁰ 13 C.F.R. §124.106(e)(1) & (3).

⁷¹ 13 C.F.R. §124.103(a). *See also* 15 U.S.C. §637(a)(5).

⁷² 13 C.F.R. §124.103(b)(1). If required by the SBA, individuals claiming membership in these groups must demonstrate that they held themselves out and are recognized by others as members of the designated group(s). 13 C.F.R. §124.103(b)(2).

⁷³ 13 C.F.R. §124.103(b)(3).

Individuals who are not members of designated groups must prove they are socially disadvantaged by a preponderance of the evidence.⁷⁴ Such individuals must show (1) at least one objective distinguishing feature that has contributed to social disadvantage (e.g., race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from mainstream American society); (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world.⁷⁵ 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.⁷⁶ Groups not included in **Table 1** may obtain listing by demonstrating disadvantage by a preponderance of the evidence.⁷⁷

"Economically disadvantaged individual"

Economically disadvantaged individuals are "socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."⁷⁸ Individuals claiming economic disadvantage must describe it in a personal statement and submit financial documentation.⁷⁹ The SBA will examine their personal income for the past three years, their personal net worth, and the fair market value of the assets they own.⁸⁰ However, principal ownership in a prospective or current 8(a) business is generally excluded when calculating net worth, as is equity in individuals' primary residence.⁸¹ For initial eligibility, applicants to the 8(a) Program must have a net worth of less than \$250,000.⁸² For continued eligibility, net worth must be less than \$750,000.⁸³

"Good character"

In determining whether an applicant to, or participant in, the 8(a) Program possesses "good character," the SBA looks for criminal conduct; violations of SBA regulations; current debarment or suspension from government contracting; managers or key employees who lack business integrity; and the knowing submission of false information to the SBA.⁸⁴

"Demonstrated potential for success"

For a firm to have demonstrated potential for success, it generally must have been in business in the field of its primary industry classification for at least two full years immediately prior to the

⁷⁴ 13 C.F.R. §124.103(c)(1).

⁷⁵ 13 C.F.R. §124.103(c)(2)(i)-(iii).

⁷⁶ 13 C.F.R. §124.103(c)(2)(iii).

⁷⁷ 13 C.F.R. §124.103(d)(4). Groups petitioning for recognition as socially disadvantaged do not always obtain it. Over the years, the SBA has rejected petitions from Hasidic Jews, women, disabled veterans, and Iranian-Americans. *See supra* note 32.

⁷⁸ 13 C.F.R. §124.104(a). *See also* 15 U.S.C. §637(a)(6)(A).

⁷⁹ 13 C.F.R. §124.104(b)(1).

⁸⁰ 13 C.F.R. §124.104(c). *See also* 15 U.S.C. §637(a)(6)(E)(i)-(ii).

⁸¹ 13 C.F.R. §124.104(c)(2).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ 13 C.F.R. §124.108(a)(1)-(5). For more on debarment and suspension, see CRS Report RL34753, *Procurement Debarment and Suspension of Government Contractors: Legal Overview*, by (name redacted).

date of its application to the 8(a) Program.⁸⁵ However, the SBA may grant a waiver allowing firms that have been in business for less than two years to enter the 8(a) Program when (1) the disadvantaged individuals upon whom eligibility is based have substantial business management experience; (2) the business has demonstrated the technical experience necessary to carry out its business plan with a substantial likelihood of success; (3) the firm has adequate capital to sustain its operations and carry out its business plan; (4) the firm has a record of successful performance on contracts in its primary field of operations; and (5) the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).⁸⁶

Set-Asides and Sole-Source Awards Under Section 8(a)

Section 8(a) of the Small Business Act authorizes agencies to award contracts for goods or services, or to perform construction work, to the SBA for subcontracting to small businesses participating in the 8(a) Program.⁸⁷ A "set-aside" is an acquisition in which only certain contractors may compete, while a sole-source award is a contract awarded, or proposed for award, without competition.⁸⁸ Although the Competition in Contracting Act (CICA) generally requires that agencies obtain "full and open competition through the use of competitive procedures" when procuring goods or services, set-asides and sole-source awards are both permissible under CICA. In fact, an 8(a) set-aside is a recognized competitive procedure.⁸⁹ Agencies are effectively encouraged to subcontract through the 8(a) Program because there are government-wide and agency-specific goals regarding the percentage of procurement dollars awarded to "small disadvantaged businesses," among others.⁹⁰ Awards made via set-asides or on a sole-source basis count toward these goals,⁹¹ and businesses participating in the 8(a) Program are considered small disadvantaged businesses.⁹²

⁸⁵ 13 C.F.R. §124.107. Specifically, "[i]ncome tax returns for each of the two previous tax years must show operating revenues in the primary industry in which the applicant is seeking 8(a) ... certification." 13 C.F.R. §124.107(a).

⁸⁶ 15 U.S.C. §637(a)(7)(A) ("reasonable prospects for success"); 13 C.F.R. §124.107(b)(1)(i)-(v).

⁸⁷ SBA may delegate the function of executing contracts to the procuring agencies and often does so. *See* 13 C.F.R. §124.501(a); Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Defense, January 7, 2013, *available at* <http://www.sba.gov/sites/default/files/files/Department%20of%20Defense.pdf>.

⁸⁸ Set-asides may be total or partial. *See* 48 C.F.R. §19.501(a).

⁸⁹ 10 U.S.C. §2304(b)(2), 41 U.S.C. §3303(b) (CICA provisions authorizing set-asides for small businesses); 48 C.F.R. §§6.203-6.207 (set-asides for small business generally, 8(a) small businesses, Historically Underutilized Business Zone (HUBZone) small businesses, service-disabled veteran-owned small businesses, and women-owned small businesses). CICA authorizes competitions excluding all sources other than small businesses when such competitions assure that a "fair proportion of the total purchases and contracts for property and services for the Federal Government shall be placed with small business concerns." 41 U.S.C. §3104. CICA also permits sole-source awards when such awards are made pursuant to a procedure expressly authorized by statute, or when special circumstances exist (e.g., urgent and compelling circumstances). *See* 10 U.S.C. §2304(c)(1) (defense agency procurements) & 41 U.S.C. §§3301 & 3304(a) (civilian agency procurements). For more on competition in federal contracting, see CRS Report R40516, *Competition in Federal Contracting: Legal Overview*, by (name redacted).

⁹⁰ 15 U.S.C. §644(g)(1)-(2). Currently, the government-wide goal is that 5% of all federal contract and subcontract dollars be spent with small disadvantaged businesses, including 8(a) businesses. Most agencies also have a 5% goal. *See* Small Business Goaling Report, *supra* note 3. The government-wide goal was met in FY2014, the most recent year for which information is available, when 9.4% of all federal procurement dollars was spent with small disadvantaged businesses. *Id.* Performance by the large procuring agencies varies, from 2.3% (Department of Energy) to 47.8% (SBA). *Id.*

⁹¹ They also count toward a separate goal for the percentage of federal procurement dollars awarded to small businesses generally. This latter goal is currently 23%.

⁹² *See* 13 C.F.R. §124.1002 (defining "small disadvantaged business").

Discretion to Subcontract Through the 8(a) Program

There are few limits on agency discretion to subcontract through the 8(a) Program.⁹³ However, the SBA is prohibited by regulation from accepting procurements for award under Section 8(a) when

1. the procuring agency issued a solicitation for or otherwise expressed publicly a clear intent to reserve the procurement as a set-aside for small businesses not participating in the 8(a) Program prior to offering the requirement to SBA for award as an 8(a) contract;⁹⁴
2. the procuring agency competed the requirement among 8(a) firms prior to offering the requirement to SBA and receiving SBA's acceptance of it;⁹⁵ or
3. the SBA makes a written determination that "acceptance of the procurement for 8(a) award would have an adverse impact on an individual small business, a group of small businesses located in a specific geographical location, or other small business programs."⁹⁶

Additionally, SBA is barred from awarding an 8(a) contract, either via a set-aside or on a sole-source basis, "if the price of the contract results in a cost to the contracting agency which exceeds a fair market price."⁹⁷

Otherwise, agency officials may offer contracts to the SBA "in [their] discretion," and the SBA may accept requirements for the 8(a) Program "whenever it determines such action is necessary or appropriate."⁹⁸ The courts and the Government Accountability Office (GAO) will generally not

⁹³ See, e.g., AHNTECH, Inc., B-401092 (April 22, 2009) ("The [Small Business] Act affords the SBA and contracting agencies broad discretion in selecting procurements for the 8(a) program.")

⁹⁴ Even in this situation, SBA may accept the requirement under "extraordinary circumstances." 13 C.F.R. §124.504(a); Madison Servs., Inc., B-400615 (December 11, 2008) (finding that extraordinary circumstances existed when the agency's initial small business set-aside was erroneous and did not reflect its intentions).

⁹⁵ However, offers of requirements below the simplified acquisition threshold (generally \$150,000) are assumed to have been accepted if SBA does not reply within two days. 13 C.F.R. §124.503(a)(4)(i). See also Eagle Collaborative Computing Servs., Inc., B-401043.3 (January 28, 2011) (finding that an agency properly awarded a sole-source contract valued below the simplified acquisition threshold even though SBA never formally accepted the requirements).

⁹⁶ 13 C.F.R. §124.504(a)-(c). The third provision applies only to preexisting requirements. It generally does not apply to new contracts, follow-on or renewal contracts, or procurements conducted using simplified acquisition procedures. *Id.* Also, under its regulations, SBA must presume an adverse impact when:

- (A) The small business concern has performed the specific requirement for at least 24 months;
- (B) The small business is performing the requirement at the time it is offered to the 8(a) ... program, or its performance of the requirement ended within 30 days of the procuring activity's offer of the requirement to the 8(a) ... program; and
- (C) The dollar value of the requirement that the small business is or was performing is 25 percent or more of its most recent annual gross sales (including those of its affiliates).

13 C.F.R. §124.504(c)(1)(i)(A)-(C).

⁹⁷ 15 U.S.C. §637(a)(1)(A); 48 C.F.R. §19.806(b). Fair market price is estimated by looking at recent prices for similar items or work, in the case of repeat purchases, or by considering commercial prices for similar products or services, available in-house cost estimates, cost or pricing data submitted by the contractor, or data from other government agencies, in the case of new purchases. 15 U.S.C. §637(a)(3)(B)(i)-(iii); 48 C.F.R. §19.807(b) & (c).

⁹⁸ 15 U.S.C. §637(a)(1)(A). See also *Totolo v. United States*, 87 Fed. Cl. 680, 695 (2009) ("The manner in which [an agency] assesses its needs is a business judgment and lies within its own discretionary domain."); *JT Constr. Co., B-254257* (December 6, 1993) (stating that it is a business judgment, within the contracting officer's discretion, to decide not to set aside a competition for small businesses). For a time in 2008-2010, the federal courts and the Government (continued...)

hear protests of agencies' determinations regarding whether to procure specific requirements through the 8(a) Program unless it can be shown that government officials acted in bad faith or contrary to federal law.⁹⁹

Monetary Thresholds and Subcontracting Mechanism Under 8(a)

Once the SBA has accepted a contract for the 8(a) Program, the contract is awarded either through a set-aside or on a sole-source basis, with the amount of the contract generally determining the acquisition method used. When the anticipated total value of the contract, including any options, is less than \$4 million (\$7 million for manufacturing contracts), the contract is normally awarded without competition.¹⁰⁰ In contrast, when the anticipated value of the contract exceeds \$4 million (\$7 million for manufacturing contracts), the contract generally must be awarded via a set-aside with competition limited to 8(a) firms so long as there is a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.¹⁰¹ Sole-source awards of contracts valued at \$4 million (\$7 million or more for manufacturing contracts) may only be made when (1) there is not a reasonable expectation that at least two eligible and responsible 8(a) firms will submit offers at a fair market price, or (2) the SBA accepts the requirement on behalf of an 8(a) firm owned by an Indian tribe, an ANC or, in the case of Department of Defense contracts, an NHO.¹⁰² Requirements valued at more than \$4 million (\$7 million for manufacturing contracts) cannot be divided into several acquisitions at lesser amounts in order to make sole-source awards.¹⁰³

Other Requirements

Other key requirements of the 8(a) Program include the following:

- ***Inability to protest an 8(a) firm's eligibility for an award:*** When the SBA makes or proposes an award to an 8(a) firm, that firm's eligibility for the award cannot

(...continued)

Accountability Office (GAO) found that set-asides for Historically Underutilized Business Zone (HUBZone) small businesses had "precedence" over set-asides for 8(a) firms. *See generally* archived CRS Report R40591, *Set-Asides for Small Businesses: Recent Developments in the Law Regarding Precedence Among the Set-Aside Programs and Set-Asides Under Indefinite-Delivery/Indefinite-Quantity Contracts*, by (name redacted). However, the Small Business Act was amended on September 27, 2010, to remove the language that formed the basis for these decisions. Small Business Jobs Act of 2010, P.L. 111-240, §1347,124 Stat. 2546-47 (September 27, 2010).

⁹⁹ *See, e.g.*, Rothe Computer Solutions, LLC, B-299452 (May 9, 2007).

¹⁰⁰ 15 U.S.C. §637(a)(16)(A). A noncompetitive award may be made under this authority so long as (1) the firm is determined to be a responsible contractor for performance of the contract; (2) the award of the contract would be consistent with the firm's business plan; and (3) award of the contract would not result in the firm exceeding the percentage of revenue from 8(a) sources forecast in its annual business plan. 15 U.S.C. §637(a)(16)(A)(i)-(iii).

¹⁰¹ 15 U.S.C. §637(a)(1)(D)(ii); 48 C.F.R. §19.805-1(a). However, competitive awards for contracts whose anticipated value is less than \$4 million (\$7 million for manufacturing contracts) can be made with the approval of the SBA's Associate Administrator for 8(a) Business Development. 15 U.S.C. §637(a)(1)(D)(i)(I)-(II); 48 C.F.R. §19.805-1(d).

¹⁰² 48 C.F.R. §19.805-1(b)(1)-(2) (sole-source awards to tribally or ANC-owned firms); 48 C.F.R. §219.805-1(b)(2)(A)-(B) (sole-source awards to NHO-owned firms). Prior to enactment of the National Defense Authorization Act (NDAA) for FY2010, contracting officers making sole-source awards in reliance on the second exception did not have to justify such awards or obtain approval of them from higher-level agency officials. The NDAA changed this by requiring justifications, approvals, and notices for sole-source contracts in excess of \$20 million awarded under the authority of §8(a) analogous to those required for sole-source contracts awarded under the general contracting authorities. *Compare* P.L. 111-84, §811, 123 Stat. 2405-06 (October 28, 2009) *with* 10 U.S.C. §2304(c) & (f) (procurements of defense agencies); 41 U.S.C. §3304(a) & (e) (procurements of civilian agencies).

¹⁰³ 48 C.F.R. §19.805-1(c).

be challenged or protested as part of the solicitation or proposed contract award. Instead, information concerning a firm's eligibility for the 8(a) Program must be submitted to SBA in accordance with separate requirements contained in Section 124.517 of Title 13 of the *Code of Federal Regulations*.¹⁰⁴

- **Maximum of nine years in the 8(a) Program:** Firms may participate in the 8(a) Program for no more than nine years from the date of their admission into the Program, although they may be terminated or graduate from the program before nine years have passed.¹⁰⁵
- **One-time eligibility for the 8(a) Program:** Once a firm or a disadvantaged individual upon whom a firm's eligibility was based has exited the 8(a) Program after participating in it for any length of time, neither the firm nor the individual is generally eligible to participate in the 8(a) Program again.¹⁰⁶ 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.¹⁰⁷
- **Limits on ownership of 8(a) firms by family members of current or former 8(a) firm owners:** Individuals generally may not use their disadvantaged status to qualify a firm for the 8(a) Program if the individual has an immediate family member who is using, or has used, his or her disadvantaged status to qualify a firm for the 8(a) Program.¹⁰⁸
- **Limits on the amount of 8(a) contracts that a firm may receive:** 8(a) firms may generally not receive additional sole-source awards once they have received a combined total of competitive and sole-source awards in excess of \$100 million, in the case of firms whose size is based on their number of employees, or in excess of an amount equivalent to the lesser of (1) \$100 million or (2) five times the size standard for the industry, in the case of firms whose size is based on their revenues.¹⁰⁹ Additionally, 8(a) firms in the "transitional stage," or the last five years of participation, must achieve annual targets for the amount of revenues they receive from non-8(a) sources.¹¹⁰ These targets increase over time, with firms required to attain 15% of their revenue from non-8(a) sources in the fifth year; 25% in the sixth year; 35% in the seventh year; 45% in the eighth year; and 55% in the ninth year.¹¹¹ Firms that do not display the relevant percentages of

¹⁰⁴ 48 C.F.R. §19.805-2(d).

¹⁰⁵ 15 U.S.C. §636(j)(15) (nine-year term); 15 U.S.C. §637(a)(9) (termination and early graduation); 13 C.F.R. §124.301 (exiting the program); 13 C.F.R. §124.302 (early graduation); 13 C.F.R. §124.303 (termination).

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

¹⁰⁷ 13 C.F.R. §124.108(b)(4).

¹⁰⁸ 13 C.F.R. §124.105(g)(1). SBA may waive this prohibition if the firms have no connections in terms of ownership, control, or contractual relationships and certain other conditions are met. *Id.*

¹⁰⁹ 13 C.F.R. §124.519(a)(1)-(2). Contracts less than \$100,000 are not counted in determining whether a firm has reached the applicable limit. 13 C.F.R. §124.519(a)(3). The Administrator of the SBA may waive this requirement if the head of the procuring agency determines that a sole-source award to a firm is necessary "to achieve significant interests of the Government." 13 C.F.R. §124.519(e). Even after they have received a combined total of competitive and sole-source awards in excess of \$100 million, or other applicable amount, firms may still receive competitive contracts under the 8(a) Program. 13 C.F.R. §124.519(b).

¹¹⁰ 15 U.S.C. §636(j)(10)(I)(i)-(iii); 13 C.F.R. §124.509(b)(1).

¹¹¹ 13 C.F.R. §124.509(b)(2).

- revenue from non-8(a) sources are ineligible for sole-source 8(a) contracts "unless and until" they correct the situation.¹¹²
- **Limitations on subcontracting:** Although not only under the authority of Section 8(a) of the Small Business Act or applicable only to 8(a) businesses, limitations on subcontracting require that small businesses receiving contracts under a set-aside perform an amount of work that equals certain minimum percentages of the amount paid under the contract.¹¹³ Specifically, small businesses must generally perform at least 50% of the costs of the contract incurred for personnel with its own employees, in the case of service contracts; and at least 50% of the cost of manufacturing supplies or products (excluding the cost of materials), in the case of manufacturing contracts.¹¹⁴

Requirements for Tribally, ANC-, NHO-, and CDC-Owned Firms

Tribes, ANCs, NHOs or CDCs themselves generally do not participate in the 8(a) Program. Rather, businesses that are at least 51% owned by such entities participate in the 8(a) Program,¹¹⁵ although the rules governing their participation are somewhat different from those for the 8(a) Program generally.¹¹⁶

Eligibility for the 8(a) Program

"Small"

Firms owned by Indian tribes, ANCs, NHOs, and CDCs must be "small" under the SBA's size standards.¹¹⁷ However, certain affiliations with the owning entity or other business enterprises of that entity are excluded in size determinations *unless* the Administrator of Small Business determines that a small business owned by an ANC, CDC, NHO, or Indian tribe "[has] obtained, or [is] likely to obtain, a substantial unfair competitive advantage within an industry category" because of such exclusions.¹¹⁸ Other affiliations of small businesses owned by ANCs, CDCs, NHOs, and Indian tribes can count in size determinations, and ANC-owned firms, in particular, have been subjected to early graduation from the 8(a) Program because they exceeded the size standards.¹¹⁹

¹¹² 13 C.F.R. §124.509(d)(1). This prohibition may be waived when the Director of the Office of Business Development finds that denial of a sole-source contract would cause severe economic hardship for the firm, potentially jeopardizing its survival, or when extenuating circumstances beyond the firm's control caused it to miss its target. 13 C.F.R. §125.509(e).

¹¹³ 15 U.S.C. §637(a)(14)(A)-(B); 15 U.S.C. §644(o); 13 C.F.R. §125.6; 48 C.F.R. §52.219-14.

¹¹⁴ 15 U.S.C. §657s(a)(1)&(2); 13 C.F.R. §125.6(a)(1)-(2). There are separate provisions regarding the percentage of work to be performed under construction contracts. *See generally* 13 C.F.R. §125.6(a)(3)-(4).

¹¹⁵ 13 C.F.R. §124.109(c)(3)(i) (tribally and ANC-owned firms); 13 C.F.R. §124.110 (b) (NHO-owned firms); 13 C.F.R. §124.111(c) (CDC-owned firms).

¹¹⁶ 13 C.F.R. §§124.109-124.111.

¹¹⁷ 13 C.F.R. §124.109(c)(2) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); 13 C.F.R. §124.111(c) (CDC-owned firms).

¹¹⁸ 13 C.F.R. §124.109(c)(2)(iii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(b) (NHO-owned firms); 13 C.F.R. §124.111(c) (CDC-owned firms).

¹¹⁹ *See, e.g.,* Valenzuela Eng'g, Inc. & Curry Contracting Co., Inc., SBA-4151 (1996) (rejecting a challenge to the size of an ANC-owned firm because its subcontractor performed less than 25% of the work on the contract and was not its affiliate); Gov't Accountability Office, Increased Used of Alaska Native Corporations' Special 8(a) Provisions Calls (continued...)

"Business"

Firms owned by ANCs, CDCs, NHOs, and Indian tribes must be "businesses" under the SBA's definition.¹²⁰ Although ANCs themselves may be for-profit or nonprofit, ANC-owned businesses must be for-profit to participate in the 8(a) Program.¹²¹

"Unconditionally owned and controlled"

Firms owned by ANCs, CDCs, NHOs, or Indian tribes must be unconditionally owned and substantially controlled by the ANC, CDC, NHO, or Indian tribe, respectively.¹²² However, under SBA regulations, tribally or ANC-owned firms may be managed by individuals who are not members of the tribe or Alaska Natives if the firm can demonstrate:

that the Tribe [or ANC] can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.¹²³

NHO-owned firms must demonstrate that the NHO controls the board of directors.¹²⁴ However, the individual who is responsible for the NHO-owned firm's day-to-day management need not establish personal social and economic disadvantage.¹²⁵ CDCs are to be managed and have their daily operations conducted by individuals with "managerial experience of an extent and complexity needed to run the [firm]."¹²⁶

"Socially disadvantaged"

As owners of prospective or current 8(a) firms, Indian tribes, ANCs, NHOs, and CDCs are all presumed to be socially disadvantaged.¹²⁷

(...continued)

for Tailored Oversight, GAO-06-399, at 29 (April 2006) (describing "early graduation" of ANC-owned 8(a) firms).

¹²⁰ 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹²¹ 13 C.F.R. §124.109(a)(3).

¹²² 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with the special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹²³ 13 C.F.R. §124.109(c)(4)(B).

¹²⁴ 13 C.F.R. §124.110(d).

¹²⁵ *Id.*

¹²⁶ 13 C.F.R. §124.111(b).

¹²⁷ 13 C.F.R. §124.109(b)(1) (tribally and ANC-owned firms); 15 U.S.C. §637(a)(4)(A)(i)(II) (NHO-owned firms); 13 C.F.R. §124.110(a) (same); 13 C.F.R. §124.111(a) (CDC-owned firms); Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 ("A Community Development Corporation (CDC) is considered to be a socially and economically disadvantaged entity if the parent CDC is a nonprofit organization responsible to residents of the area it serves which has received financial assistance under 42 U.S.C. 9805, et seq."). SBA's authority to designate CDCs as socially and economically disadvantaged derives from Section 9815(a)(2) of Title 42 of the *United States Code*, which required SBA to (continued...)

"Economically disadvantaged"

By statute, ANCs are deemed to be economically disadvantaged,¹²⁸ and CDCs are similarly treated as economically disadvantaged.¹²⁹ Indian tribes and NHOs, in contrast, must establish economic disadvantage at least once. Indian tribes must present data on, among other things, the number of tribe members; the tribal unemployment rate; the per capita income of tribe members; the percentage of the local Indian population above the poverty level; the tribe's access to capital; the tribe's assets as disclosed in current financial statements; and all businesses wholly or partially owned by tribal enterprises or affiliates, as well as their primary industry classification.¹³⁰ However, once a tribe has established that it is economically disadvantaged for purposes of one 8(a) business, it need not reestablish economic disadvantage in order to have other businesses certified for the 8(a) Program *unless* the Director of the Office of Business Development requires it to do so.¹³¹

When determining whether an NHO is economically disadvantaged, SBA will consider "the individual economic status of NHO's members," the majority of whom "must qualify as economically disadvantaged" under the same standards as individual applicants to the 8(a) Program.¹³² Specifically:

For the first 8(a) applicant owned by a particular NHO, individual NHO members must meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants. For any additional 8(a) applicant owned by the NHO, individual NHO members must meet the economic disadvantage thresholds for continued 8(a) eligibility.¹³³

"Good character"

When an organization owns an actual or prospective 8(a) firm, all members, officers, or employees of that organization are generally not required to show good character. The regulations governing tribally and ANC-owned firms explicitly address the issue, stating that the "good character" requirement applies only to officers or directors of the firm, or shareholders owning more than a 20% interest.¹³⁴ NHO-owned firms may be subject to the same requirements in practice.¹³⁵ With CDC-owned firms, the firm itself and "all of its principals" must have good character.¹³⁶

(...continued)

"promulgate regulations to ensure the availability to community development corporations of such programs as shall further the purposes of this subchapter, including programs under §637(a) of title 15."

¹²⁸ 43 U.S.C. §1626(e)(1) ("For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors."); 13 C.F.R. §124.109(a)(2) (similar).

¹²⁹ See Small Disadvantaged Business Certification Application, *supra* note 129. See also 13 C.F.R. §124.111(a).

¹³⁰ 15 U.S.C. §637(a)(6)(A); 13 C.F.R. §124.109(b)(2)(i)-(vii).

¹³¹ 13 C.F.R. §124.109(b).

¹³² 13 C.F.R. §124.110(c)(1).

¹³³ *Id.* If the NHO has no members, then a majority of the members of the board of directors must qualify as economically disadvantaged.

¹³⁴ 13 C.F.R. §124.109(c)(7)(ii).

¹³⁵ The regulations as to NHOs do not appear to address "good character." However, in practice, when this has (continued...)

"Demonstrated potential for success"

Firms owned by ANCs, CDCs, NHOs, and Indian tribes may provide evidence of "potential for success" in several ways, including by demonstrating that

1. the firm has been in business for at least two years, as shown by individual or consolidated income tax returns for each of the two previous tax years showing operating revenues in the primary industry in which the firm seeks certification;
2. the individuals who will manage and control the daily operations of the firm have substantial technical and management experience; the firm has a record of successful performance on government or other contracts in its primary industry category; and the firm has adequate capital to sustain its operations and carry out its business plan; or
3. the owner-group has made a firm written commitment to support the operations of the firm and has the financial ability to do so.¹³⁷

The first of these ways for demonstrating potential for success is the same for individually owned firms,¹³⁸ and the second arguably corresponds to the circumstances in which SBA may waive the requirement that individually owned firms have been in business for at least two years.¹³⁹ There is no equivalent to the third way for individually owned firms, and some commentators have suggested that this provision could "benefit ANCs [and other owner groups] by allowing more expeditious and effortless access to 8(a) contracts for new concerns without having to staff new subsidiaries with experienced management."¹⁴⁰

Report of Benefits for Firms Owned By ANCs, Indian Tribes, NHOs, and CDCs

Although implementation of this requirement has been delayed,¹⁴¹ 8(a) firms owned by ANCs, CDCs, NHOs, and Indian tribes must submit information annually to the SBA showing

how the Tribe, ANC, NHO or CDC has provided benefits to the Tribal or native members and/or the Tribal, native or other community due to the Tribe's/ANC's/NHO's/CDC's participation in the 8(a) ... program through one or more firms. This data includes

(...continued)

happened in the past, NHO-owned firms have often been treated the same as firms owned by Indian tribes.

¹³⁶ 13 C.F.R. §124.111(g).

¹³⁷ 13 C.F.R. §124.109(c)(6)(i)-(iii) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(g)(1)-(3) (NHO-owned firms); 13 C.F.R. §124.111(f)(1)-(3) (CDC-owned firms).

¹³⁸ See *supra* note 85 and accompanying text.

¹³⁹ See *supra* note 86 and accompanying text.

¹⁴⁰ Daniel K. Oakes, *Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences*, 40 *Pub. Cont. L.J.* 777 (2011).

¹⁴¹ Regulations promulgated by SBA in February 2011 provided that this reporting requirement would be effective "as of September 9, 2011, unless SBA further delays implementation through a Notice in the Federal Register." Small Bus. Admin., *Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations: Final Rule*, 76 *Federal Register* 8,222 (February 11, 2011). SBA appears to have delayed reporting through four such notices, two announcing tribal consultations about the reporting requirements, and two seeking comments on the reporting requirements pursuant to the Paperwork Reduction Act of 1995. See Small Bus. Admin., *Notice: Extension of Comment Period for New 8(a) Business Development Program Reporting Requirements*, 78 *Federal Register* 9,447 (February 8, 2013); Small Bus. Admin., *60 Day Notice and Request for Comments*, 76 *Federal Register* 63,983 (October 14, 2011); Small Bus. Admin., *Notice of Tribal Consultations*, 76 *Federal Register* 27,859 (May 13, 2011); Small Bus. Admin., *Notice of Tribal Consultations*, 76 *Federal Register* 12,273 (March 7, 2011).

information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe, ANC, NHO or CDC to the affected community.¹⁴²

Set-Asides and Sole-Source Awards

Like other participants in the 8(a) Program, firms owned by ANCs, CDCs, NHOs, and Indian tribes are eligible for 8(a) set-asides and may receive sole-source awards valued at less than \$4 million (\$7 million for manufacturing contracts). However, firms owned by ANCs and Indian tribes can also receive sole-source awards in excess of \$4 million (\$7 million for manufacturing contracts) even when contracting officers reasonably expect that at least two eligible and responsible 8(a) firms will submit offers and the award can be made at fair market price.¹⁴³ NHO-owned firms may receive sole-source awards from the Department of Defense under the same conditions.¹⁴⁴

Other Requirements

Firms owned by ANCs, CDCs, NHOs, and Indian tribes are governed by the same regulations as other 8(a) firms where certain of the "other requirements" are involved, including (1) inability to protest an 8(a) firm's eligibility for an award;¹⁴⁵ (2) maximum of nine years in the 8(a) Program (for individual firms);¹⁴⁶ and (3) limits on subcontracting.¹⁴⁷ However, the requirements for such firms differ somewhat from those for other 8(a) firms where one-time eligibility for the 8(a) Program; limits on majority ownership of 8(a) firms; and limits on the amount of 8(a) contracts that a firm may receive are involved. Firms owned by ANCs, CDCs, NHOs, and Indian tribes may participate in the 8(a) Program only one time.¹⁴⁸ However, unlike the disadvantaged individuals upon whom other firms' eligibility for the 8(a) Program is based, ANCs, CDCs, NHOs, and Indian tribes may confer eligibility for the 8(a) Program upon firms on multiple occasions and for an indefinite period.¹⁴⁹ Additionally, although ANCs, CDCs, NHOs, and Indian tribes may not own 51% or more of a firm obtaining the majority of its revenues from the same

¹⁴² 13 C.F.R. §124.604.

¹⁴³ An Act To Amend the Small Business Act To Reform the Capital Ownership Development Program, and for Other Purposes; P.L. 100-656, §602(a), 102 Stat. 3887-88 (November 15, 1988) (codified at 15 U.S.C. §637 note); 48 C.F.R. §19.805-1(b)(2).

¹⁴⁴ The authority for DOD to make sole-source awards to NHO-owned firms of contracts valued at more than \$4 million (\$7 million for manufacturing contracts) even if contracting officers reasonably expect that offers will be received from at least two responsible small businesses existed on a temporary basis in 2004-2006 and became permanent in 2006. *See* Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act of 2006, P.L. 109-148, §8020, 119 Stat. 2702-03 (December 30, 2005) ("[Provided] [t]hat, during the current fiscal year and hereafter, businesses certified as 8(a) by the Small Business Administration pursuant to section 8(a)(15) of Public Law 85-536, as amended, shall have the same status as other program participants under section 602 of P.L. 100-656 ... for purposes of contracting with agencies of the Department of Defense."); 48 C.F.R. §219.805-1(b)(2)(A)-(B).

¹⁴⁵ 48 C.F.R. §19.805-2(d).

¹⁴⁶ 13 C.F.R. §124.109(a) & (b) (requiring tribally and ANC-owned firms to comply with the general eligibility requirements where they are not contrary to or inconsistent with special requirements for these entities); 13 C.F.R. §124.110(a) (similar provision for NHO-owned firms); 13 C.F.R. §124.111(a) (similar provision for CDC-owned firms).

¹⁴⁷ 15 U.S.C. §644(o); 15 U.S.C. §657s; 13 C.F.R. §125.6; 48 C.F.R. §52.219-14.

¹⁴⁸ 13 C.F.R. §124.109(a) & (b) (ANC- and tribally-owned firms); 13 C.F.R. §124.110(a) (NHO-owned firms); 13 C.F.R. §124.111(a) (CDC-owned firms).

¹⁴⁹ *Id.*; 15 U.S.C. §636(j)(11)(B)-(C).

“primary” industry in which another firm they own or owned currently operates or has operated within the past two years, there are no limits on the number of firms they may own that operate in other primary industries.¹⁵⁰ Moreover, ANCs, CDCs, NHOs, and Indian tribes may own multiple firms that earn less than 50% of their revenue in the same “secondary” industries.¹⁵¹ Finally, firms owned by ANCs, CDCs, NHOs, and Indian tribes may continue to receive additional sole-source awards even after they have received a combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in Section 124.519 of Title 13 of the *Code of Federal Regulations*, while individually owned firms may not.¹⁵² However, firms owned by any of these four types of entities are subject to the same requirements regarding the percentages of revenue received from non-8(a) sources at various stages of their participation in the 8(a) Program as other 8(a) firms.¹⁵³

Constitutionality of the 8(a) Program

The 8(a) Program has periodically been challenged on the grounds that the presumption that members of certain racial and ethnic groups are disadvantaged violates the constitutional guarantee of equal protection. The outcomes in early challenges to the program varied, with some courts finding that the plaintiffs lacked standing to bring such challenges because they were not economically disadvantaged, or were otherwise ineligible for the program;¹⁵⁴ and other courts finding that the program was unconstitutional as applied in specific cases.¹⁵⁵ More recently, in its 2012 decision in *DynaLantic Corporation v. U.S. Department of Defense*, the U.S. District Court for the District of Columbia found that the 8(a) Program was not unconstitutional on its face because (1) “breaking down barriers to minority business development created by discrimination

¹⁵⁰ 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); 13 C.F.R. §124.111(d) (CDC-owned firms). These regulations also provide that an 8(a) firm owned by an ANC, CDC, NHO, or Indian tribe may not, within its first two years in the 8(a) Program, receive a sole-source contract that is a follow-on to an 8(a) contract currently performed by an 8(a) firm owned by that entity, or previously performed by an 8(a) firm owned by that entity that left the program within the past two years. *Id.* In addition, there are restrictions on the percentage of work that may be performed by any non-8(a) venturer(s) in joint ventures involving 8(a) firms. *See generally* 13 C.F.R. §124.513.

¹⁵¹ 13 C.F.R. §124.109(c)(3)(ii) (tribally and ANC-owned firms); 13 C.F.R. §124.110(e) (NHO-owned firms); 13 C.F.R. §124.111(d) (CDC-owned firms).

¹⁵² 13 C.F.R. §124.519(a). *See supra* note 109.

¹⁵³ 13 C.F.R. §124.509.

¹⁵⁴ *See, e.g., Ray Baillie Trash Hauling*, 477 F.3d at 710 (“The plaintiffs never applied for participation in the section 8(a) program. Furthermore, they do not even contend that they are socially or economically disadvantaged and therefore eligible for participation in the program.”); *SRS Techs., Inc. v. U.S. Dep’t of Defense*, No. 96-1484, 1997 U.S. App. LEXIS 10143 (4th Cir., May 6, 1997) (“SBA’s requirement of economic disadvantage for entry into the 8(a) Program is a race-neutral criterion. It was by virtue of this race-neutral criterion that plaintiff failed to qualify for a contract award, and its standing to challenge the race-conscious criteria is therefore lacking.”). *But see* *C.S. McCrossan Constr. Co., Inc. v. Cook*, No. 95-1345-HB, 1996 U.S. Dist. LEXIS 14721 (D.N.M., April 2, 1996) (“Although Defendants attempt to characterize this set-aside program as one based on size and economic status of the owner, the fact remains that ‘economic disadvantage’ requires a showing of ‘social disadvantage’ which then implicates the race-based challenge. ... Plaintiff is not seeking admission into the 8(a) program. It is challenging the government’s preferential treatment towards 8(a) program participants in the bidding of the job order contract.”).

¹⁵⁵ *See, e.g., Cortez III Service Corp. v. Nat’l Aeronautics & Space Admin.*, 950 F. Supp. 357, 361 (D.D.C. 1996) (finding that the 8(a) Program is facially constitutional, but that “agencies have a responsibility to decide whether there has been a history of discrimination in the particular industry at issue” prior to procuring requirements through the 8(a) Program); *Fordice Constr. Co. v. Marsh*, 773 F. Supp. 867 (S.D. Miss. 1990) (“The court ... finds that the United States Army Corps of Engineers failed to give consideration to the impact of a 100% set-aside upon non-§8(a) eligible contractors in the Vicksburg area.”).

and its lingering effects” constitutes a compelling government interest; (2) the government had a strong basis in evidence for concluding that race-based action was necessary to further this interest; and (3) the 8(a) Program is narrowly tailored to “minimize the burden on non-minority firms.”¹⁵⁶ However, the court found that the program was unconstitutional as applied in the military simulation and training industry because the Department of Defense (DOD) conceded it had “no evidence of discrimination, either in the public or private sector, in the simulation and training industry.”¹⁵⁷

Particularly in its rejection of the facial challenge to the 8(a) Program, the court emphasized certain aspects of the program’s history and requirements when finding that the government had articulated a compelling interest for the program and had a strong basis in evidence for its actions. Specifically, the court rejected the plaintiff’s assertion that the 8(a) Program was “not truly remedial,” but rather favored “virtually all minority groups ... over the larger pool of citizens,” because non-minority individuals may qualify for the program, and all 8(a) applicants must demonstrate economic disadvantage.¹⁵⁸ The court also noted that the history of the 8(a) program prior to 1978 (when Congress expressly authorized set-asides for disadvantaged small businesses) had evidenced that race-neutral methods were insufficient to promote contracting with minority-owned small businesses.¹⁵⁹ The court further noted that the 8(a) Program was intended to be a business development program, not a means to “channel contracts” to minority firms;¹⁶⁰ that Section 8(a) of the Small Business Act expressly provides that awards may be made through the 8(a) Program only when SBA determines that “such action is necessary and appropriate”;¹⁶¹ and that the act requires the President and SBA to report annually to Congress on the program, thereby ensuring that Congress has evidence as to whether there is a “continuing compelling need for the program.”¹⁶² Similarly, in finding that the program was narrowly tailored to meet the government’s interests, the court noted (1) that goals for contracting with small disadvantaged businesses are purely aspirational, and there are no penalties for failing to meet them;¹⁶³ (2) the

¹⁵⁶ 885 F. Supp. 2d 237, 251, 271 (D.D.C. 2012).

¹⁵⁷ *Id.* at 265-66. However, the court did suggest that, with the requisite evidence, the government could use the 8(a) Program to make awards in the military simulation and training industry. *Id.* at 292. The court further characterized this industry as a “highly skilled” one, which arguably differentiates it from certain other industries in which DOD and other federal agencies seek to award 8(a) contracts. *Id.* at 281. Questions about the availability of qualified minority contractors may be less likely in industries that are not seen as highly skilled. *See, e.g.,* Danielle Ivory, *Minority Vendors Say Awards Program at Risk on U.S. Court Ruling, Bloomberg Gov’t*, September 13, 2012 (quoting Alan Chvotkin, counsel and executive vice president of the Professional Services Council, as saying that the *DynaLantic* ruling may “open the door to more lawsuits,” and “[t]he implications across the government could be significant”).

¹⁵⁸ 885 F. Supp. 2d at 252. The court also rejected *DynaLantic*’s argument that the government may only seek to remedy discrimination by a government entity, or by private individuals directly using government funds to discriminate. The court viewed these arguments as foreclosed by prior decisions holding that, under the Fourteenth Amendment, the government may implement race-conscious programs “to prevent itself from acting as a ‘passive participant’ in private discrimination in the relevant industries or markets.” *Id.* (quoting *City of Richmond v. J.A. Croson*, 488 U.S. 469, 492 (1989)).

¹⁵⁹ *Id.* at 255 (“Reports prepared by the GAO and investigations conducted by both the executive and legislative branches prior to the 1978 codification showed that the Section 8(a) program had fallen far short of its goal to develop businesses owned by disadvantaged individuals, and that one reason for this failure was that the program had no legislative basis.”).

¹⁶⁰ *Id.* at 256 (quoting H.Rept. 1714, 95th Cong., 2nd sess., at 22-23 (1978)).

¹⁶¹ *Id.* at 252-53.

¹⁶² *Id.* at 258. *DynaLantic* had asserted that post-enactment evidence of discrimination should not be considered. However, the court concluded that it was proper to consider such evidence, particularly where the “statute is over thirty years old and the evidence used to justify Section 8(a) [at the time of its enactment] is stale for purposes of determining a compelling interest in the present.” *Id.*

nine-year limits on program participation for individual owners and firms;¹⁶⁴ and (3) that SBA may not accept a requirement for the 8(a) Program if it determines that doing so will have a adverse effect on another small business or group of small businesses.¹⁶⁵ The court emphasized that the last two factors, in particular, helped ensure that race-conscious remedies do not “last longer than the discriminatory effects [they are] designed to eliminate,”¹⁶⁶ and “work the least harm possible to other innocent persons competing for the benefit.”¹⁶⁷

A 2015 decision by the U.S. District Court for the District of Columbia in *Rothe Development, Inc. v. Department of Defense* subsequently adopted the reasoning of the *DynaLantic* court in finding that the 8(a) Program is not unconstitutional on its face.¹⁶⁸ In so doing, the court noted the same attributes of the 8(a) Program that the *DynaLantic* court had emphasized. In particular, in its brief discussion, the court noted the following six factors:

1. alternative, race-neutral remedies had proved unsuccessful in addressing the discrimination targeted here;
2. the 8(a) Program is “appropriately flexible” because it imposes no quotas and prescribes no consequences for failure to meet the aspirational goals as to the percentage of federal contract dollars awarded to small disadvantaged businesses;
3. the program is neither under- nor over-inclusive, since it “does not provide that every member of a minority group is disadvantaged”;
4. the program imposes temporal limits on individuals’ participation in the program, and SBA continuously monitors participants’ eligibility;
5. the aspirational goals for contracting with small disadvantaged businesses are “numerically proportionate” to the evidence regarding the availability of minority firms that are ready, able, and willing to perform government contracts; and
6. various aspects of the 8(a) Program minimize the program’s burden on non-minority firms (e.g., SBA cannot accept a contract for award through the 8(a) Program if it determines that doing so would have an “adverse impact” on other small businesses).¹⁶⁹

The decision in *Rothe* has been appealed to the U.S. Court of Appeals for the District of Columbia Circuit.¹⁷⁰ The litigation in *DynaLantic*, however, was reportedly settled by the parties while their appeals to the D.C. Circuit were pending.¹⁷¹

(...continued)

¹⁶³ *Id.* at 282-86.

¹⁶⁴ *Id.* at 287-88.

¹⁶⁵ *Id.* at 289-91.

¹⁶⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 238 (1995).

¹⁶⁷ *Grutter v. Bollinger*, 539 U.S. 306, 341 (2003).

¹⁶⁸ No. 12-cv-0744 (KBJ), 2015 U.S. Dist. LEXIS 72925, at *60-*61 (D.D.C., June 5, 2015) (“[T]his Court concurs with the *DynaLantic* court’s conclusion that the strict scrutiny standard has been met, and that the Section 8(a) program is facially constitutional despite its reliance on race-conscious criteria. In so holding, this Court incorporates by reference the reasoning in Parts III.A through III.D.1.(c) and Part III.E of the *DynaLantic* memorandum opinion, and adopts it as its own.”) (internal citations omitted). The *Rothe* court also rejected the plaintiffs allegation that the 8(a) Program violates the non-delegation doctrine because Congress did not articulate “any intelligible principle to limit the Executive’s discretion in deciding whether racial, ethnic or cultural bias occurred or even what constitutes a racial, ethnic, or cultural group.” *See id.* at *22, *65-*69.

¹⁶⁹ *Id.* at *59-*60.

¹⁷⁰ *See, e.g., Jon M. DeVore and Melinda L. Meade Meyers, Rothe Development, Inc. v. Department of Defense*: D.C. (continued...)

(...continued)

District Court Upholds Constitutionality of 8(a) Program, Appeal Underway, *available at* [http://birchhorton.com/presentations/Victory_in_D_C_District_Court_in_Rothe_Case_re_Constitutionality_of_8\(a\)_Program.pdf](http://birchhorton.com/presentations/Victory_in_D_C_District_Court_in_Rothe_Case_re_Constitutionality_of_8(a)_Program.pdf).

¹⁷¹ *See, e.g.*, Center for Individual Rights, *DynaLantic Corp. v. Dep't of Defense: Feds End 19-Year Battle with DynaLantic*, January 31, 2014, *available at* <https://www.cir-usa.org/cases/dynalantic-corp-v-department-of-defense/> (reporting that the district court had approved an agreement between the parties that, among other things, bars the federal government from awarding any contracts in DynaLantic's industry for two years). After that time, the government reportedly must notify the court if it plans to begin making awards through the 8(a) Program in DynaLantic's industry and demonstrate that it has a strong basis in evidence for reinstating the program. *Id.*

Appendix. Comparison of the Requirements Pertaining to Different Types of 8(a) Firms

Category	8(a) Firms Generally	Tribally Owned 8(a) Firms	ANC-Owned 8(a) Firms	NHO-Owned 8(a) Firms	CDC-Owned 8(a) Firms
"Small"	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) All affiliations count (13 C.F.R. §121.103)	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the tribe or tribal ownership, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the ANC or ownership by the ANC, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.109(c)(2))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the NHO or ownership by the NHO, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.110(c))	Independently owned and operated; not dominant in field of operation; meets size standards (15 U.S.C. §631(a)) Affiliations based on the CDC or ownership by the CDC, among others, do not count (15 U.S.C. §636(j)(10)(j)(ii); 13 C.F.R. §124.111(c))
"Business"	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1)) Although ANC may be nonprofit, ANC-owned firms must be for-profit to be eligible for 8(a) Program (13 C.F.R. §124.109(a)(3))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))	For-profit entity with its place of business in the United States; operates primarily within the United States or makes a significant contribution to the U.S. economy (13 C.F.R. §121.105(a)(1))
"Unconditionally owned and controlled"	At least 51% unconditionally and directly owned by one or more	At least 51% tribally owned (13 C.F.R. §124.109(b)) Management may	At least 51% ANC-owned (13 C.F.R. §124.109(a)(3)) Management	At least 51% NHO-owned (13 C.F.R. §124.110(a)) NHO must	At least 51% CDC-owned (13 C.F.R. §124.111(a)) Management and daily business

Category	8(a) Firms Generally	Tribally Owned 8(a) Firms	ANC-Owned 8(a) Firms	NHO-Owned 8(a) Firms	CDC-Owned 8(a) Firms
	disadvantaged individuals who are U.S. citizens (13 C.F.R. §124.105) Management and daily business operations must be conducted by one or more disadvantaged individuals (13 C.F.R. §124.106)	be conducted by individuals who are not members of the tribe provided that the SBA determines that such management is necessary to assist the business's development, among other things (13 C.F.R. §124.109(c)(4)(B))	may be conducted by individuals who are not Alaska Natives provided that the SBA determines that such management is necessary to assist the business's development, among other things (13 C.F.R. §124.109(c)(4)(B))	control the board of directors, but individual who is responsible for day-to-day management need not establish personal social and economic disadvantage (13 C.F.R. §124.110(d))	operations to be conducted by individuals having managerial experience of an extent and complexity needed to run the firm (13 C.F.R. §124.111(b))
"Socially disadvantaged individual"	Members of designated groups presumed to be socially disadvantaged; other individuals may prove personal disadvantage by a preponderance of the evidence (13 C.F.R. §124.103)	Indian tribes presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	ANCs presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	NHOs presumed to be socially disadvantaged (43 U.S.C. §1626(e); 15 U.S.C. §637(a)(4)(A)-(B); 13 C.F.R. §124.109(b)(1))	CDCs presumed to be socially disadvantaged (42 U.S.C. §9815(a)(2))
"Economically disadvantaged individual"	Financial information (e.g., personal income, personal net worth, fair market value of assets) must show diminished financial capital and credit opportunities (13 C.F.R. §124.104)	Tribe must prove economic disadvantage the first time a tribally owned firm applies to the 8(a) Program; thereafter, a tribe need only prove economic disadvantage at the request of the SBA (13 C.F.R. §124.109(b)(2))	Deemed to be economically disadvantaged (43 U.S.C. §1626(e); 13 C.F.R. §124.109(a)(2))	For first applicant to 8(a) Program, NHO members must meet the same initial eligibility economic disadvantage thresholds as individually-owned 8(a) applicants; for later applicants, NHO members must meet the economic disadvantage thresholds for continued 8(a) eligibility (13 C.F.R. §124.109(a)(2))	CDCs presumed to be economically disadvantaged (42 U.S.C. §9815(a)(2))

Category	8(a) Firms Generally	Tribally Owned 8(a) Firms	ANC-Owned 8(a) Firms	NHO-Owned 8(a) Firms	CDC-Owned 8(a) Firms
				§124.110(c)(1)	
"Good character"	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all members of the tribe (13 C.F.R. §124.109(c)(7)(B)(ii))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirement applies only to officers, directors, and shareholders owning more than a 20% interest in the business, not to all ANC shareholders (13 C.F.R. §124.109(c)(7)(B)(ii))	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Regulations do not address to whom requirements apply ^a	No criminal conduct or violations of SBA regulations; cannot be debarred or suspended from government contracting (13 C.F.R. §124.108(a)) Requirements apply to the firm and "all its principals" (13 C.F.R. §124.111(g))
"Demonstrated potential for success"	Firm must generally have been in business in primary industry for at least two full years prior to date of application to 8(a) Program unless SBA grants a waiver; waiver based on 5 conditions ^b (13 C.F.R. §124.107)	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or Tribe must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.109(c)(6)(i)-(iii))	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or ANC must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.109(c)(6)(i)-(iii))	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or NHO must have made written commitment to support the firm and have the financial	Firm must have been in business in primary industry for at least two full years prior to date of application to 8(a) Program; individuals who will manage firm must have substantial experience, and firm must have had successful performance and adequate capital; or CDC must have made written commitment to support the firm and have the financial ability to do so (13 C.F.R. §124.111(f)(1)-(3))

Category	8(a) Firms Generally	Tribally Owned 8(a) Firms	ANC-Owned 8(a) Firms	NHO-Owned 8(a) Firms	CDC-Owned 8(a) Firms
Sole-source awards	With contracts valued at over \$4 million (\$7 million for manufacturing contracts), sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))	Can be made with contracts valued at over \$4 million (\$7 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (15 U.S.C. §637(a)(1)(D)(i)-(ii); 48 C.F.R. §19.805-1(b)(1)-(2))	Can be made with contracts valued at over \$4 million (\$7 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (15 U.S.C. §637(a)(1)(D)(i)-(ii); 48 C.F.R. §19.805-1(b)(1)-(2))	ability to do so (13 C.F.R. §124.110 (g)(1)-(3)) Can be made with Department of Defense contracts valued at over \$4 million (\$7 million for manufacturing contracts) even if there is a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §219.805-1(b)(2)(A)-(B)). Otherwise cannot be made unless there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))	With contracts valued at over \$4 million (\$7 million for manufacturing contracts), sole-source awards permissible only if there is not a reasonable expectation that at least two eligible 8(a) firms will submit offers and the award can be made at fair market price (48 C.F.R. §19.805-1(b)(1)-(2))
Inability to protest eligibility for award	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract	Firm's eligibility for award cannot be challenged or protested as part of the solicitation or proposed contract award (48 C.F.R. §19.805-2(d))

Category	8(a) Firms Generally	Tribally Owned 8(a) Firms	ANC-Owned 8(a) Firms	NHO-Owned 8(a) Firms	CDC-Owned 8(a) Firms
Maximum of nine years in the 8(a) Program	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	(48 C.F.R. §19.805-2(d)) Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	award (48 C.F.R. §19.805-2(d)) Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)	Firm receives "a program term of nine years" but could be terminated or graduated early (13 C.F.R. §124.2)
One-time eligibility for 8(a) Program	Applies to both disadvantaged owners and firms (13 C.F.R. §124.108(b))	Applies only to tribally owned firms, not tribes (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to ANC-owned firms, not ANCs (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to NHO-owned firms, not NHOs (15 U.S.C. §636(j)(11)(B)-(C))	Applies only to CDC-owned firms, not CDCs (15 U.S.C. §636(j)(11)(B)-(C))
Limits on the amount of 8(a) contracts that a firm may receive	No source awards possible once the firm has received combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has received combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Can make sole-source awards even when a firm has combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 (13 C.F.R. §124.519(a)) Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))	Combined total of competitive and sole-source 8(a) contracts in excess of the dollar amount set forth in 13 C.F.R. §124.519 not explicitly addressed in regulation Firms must receive an increasing percentage of revenue from non-8(a) sources throughout their participation in the 8(a) Program (13 C.F.R. §124.509(b))

Source: Congressional Research Service.

- a. The rules governing NHO- and/or CDC-owned firms do not address this issue, and although the general rules apply where no "special rules" exist, it seems unlikely that NHO- and/or CDC-owned firms are treated differently than tribally or ANC-owned firms in this regard.
- b. These criteria include (1) the management experience of the disadvantaged individual(s) upon whom eligibility is based; (2) the business's technical experience; (3) the firm's capital; (4) the firm's performance record on prior federal or other contracts in its primary field of operations; and (5) whether the firm presently has, or can demonstrate its ability to timely obtain, the personnel, facilities, equipment, and other resources necessary to perform contracts under Section 8(a).

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