

SBA Small Biz Program Changes Likely To Limit Participation

By Daniel Wilson

Law360 (August 22, 2023, 8:34 PM EDT) -- The Small Business Administration's changes to its 8(a) small business program after a previously common qualification method was ruled discriminatory are likely to mean some current contractors no longer qualify for the program, and dissuade other potential participants entirely.

The 8(a) program is intended to help improve access to federal contracting for small businesses majority-owned and controlled by the "socially and economically disadvantaged." The SBA provides technical and other assistance to those companies, and about \$30 billion in federal contracts each year are specifically set aside for, or sole-sourced to, 8(a) contractors, according to the agency.

But U.S. District Judge Clifton L. Corker in Tennessee ruled on July 19, in line with a June U.S. Supreme Court ruling **striking down** colleges' use of race-based affirmative action, that the "rebuttable presumption" of social disadvantage used to qualify small businesses with owners from certain ethnic and racial groups for the 8(a) program was discriminatory, violating the Fifth Amendment equal protection rights of plaintiff Ultima Services Corp.

The decision required the SBA to immediately stop using the presumption, upending decades of standard practice for the 8(a) program. After initial confusion about how that ruling would be applied, the agency issued interim guidance on Aug. 18, stating that it would now require a narrative statement to qualify for the program, both for current and potential 8(a) participants — a much more stringent standard that attorneys said a significant number of those companies could struggle to meet.

"I think there is a bit of a misconception out there in some of the 8(a) world that this is just going to be a matter of submitting a document, and it's going to paper the file and we'll be back to business as usual," said Matthew Moriarty, a founding member of Schoonover & Moriarty LLC who frequently represents small business contractors. "I really don't think anybody can afford to think like that. At least most, if not the vast majority of 8(a) [participants] are [in the program] due to the social disadvantage presumption. Many of them have no idea what the social disadvantage narrative entails."

Under the rebuttable presumption standard, Asian Pacific, Black, Hispanic, Subcontinent Asian or Native American small business owners were presumed to be socially disadvantaged as a member of one of those groups, with the narrative requirement previously limited only to small business owners outside those groups trying to prove they

had been disadvantaged.

But companies previously subject to that presumption must now also affirmatively prove their eligibility to continue in the program or be awarded any new 8(a) contracts, which is likely to mean a flood of new narratives will be submitted to the SBA, according to Maynard Nexsen PC shareholder Josh Duvall, who has significant experience representing 8(a) contractors.

"It's safe to say it's in the thousands" of companies that will be affected, "because the categories that are covered under the rebuttable presumption are quite broad under SBA's current regulatory regime," he said.

Although the SBA's separate guidance on those narratives states that they are, in general, "sufficient at a length of three pages," the broader scope of that guidance and the experience of companies that have previously had to submit narratives indicate that they will likely have to be much longer and more detailed than just three pages to fulfill the SBA's requirements, several attorneys said.

The SBA, for example, said it wants at least two specific examples of bias to show the necessary "substantial disadvantage" to qualify for the 8(a) program, such as denial of access to higher education or professional associations, unequal treatment in employment, or restricted access to capital. And it wants further specifics within those examples — the where, when, what and who of the discriminatory conduct, why it was likely discriminatory, and how that discrimination had led to disadvantage in business.

"I think the more specific that the narratives are, the better chance [contractors] have of providing a basis for SBA to grant admission or retain admission into the program," said Holland & Knight LLP government contracts practice co-chair Bob Tompkins. "The SBA regulations that speak to how one might present a narrative demonstrating individual social disadvantage are fairly specific — they make clear that the applicant or the participant must demonstrate that social disadvantage by a 'preponderance of the evidence.'"

That means some contractors previously introduced into the 8(a) program under the rebuttable presumption standard may no longer be able to continue in the program, lacking the necessary documentary proof, or the ability to recall specific enough details of incidents that may be years or even decades old, to meet the narrative standard the SBA requires.

Other contractors may balk at the need to recount painful or traumatic instances of discrimination in their life as part of the narrative requirement, even if they are otherwise able to provide the required details to the SBA.

"The narrative itself may not be traumatic. In some circumstances, it could be cathartic," Moriarty said. "[But] it can still be pretty bad. It's a process — I always feel for people when they're going through it."

The distinction between those who qualify under the narrative requirement and those who don't may ultimately come down to the subjective views of who specifically at the SBA reviews a narrative submission. A narrative, by its nature, can't be judged through strict metrics of what is sufficiently discriminatory to result in disadvantage, said PilieroMazza PLLC managing partner Tony Franco.

"What one person may view as having been an obstacle, someone else may view as, 'That's just the challenges that life presents,'" Franco said. "There's just going to be some folks

who the SBA reviewer, applying their subjective standards, are going to believe ... are giving a narrative that in one situation may pass muster, but this other individual for some other reason doesn't. People are going to have to put some time and effort into telling good, compelling stories."

The narrative requirement not only imposes a potentially significant burden on small businesses that want to stay in the 8(a) program, but also adds another level of uncertainty on top of an already "fairly onerous" application process for companies considering whether to apply for the program, potentially driving them away, according to Tompkins.

"The prospect that one might not be admitted to the program certainly would seem to have a negative effect on parties' willingness to go through the process ... anything that injects a measure of doubt will likely further deter participation by those who are uncertain whether they will gain admission," he said.

The SBA said in its Aug. 18 guidance that it is developing a new narrative process, but gave no indication of how that will differ from the current narrative requirement, or when it expects to complete development.

As such, current 8(a) contractors will likely have to scramble to comply with the current narrative standard to maintain eligibility for the program during the last month of the federal fiscal year in September, a time when the government inks a disproportionately large number of its contracts as it seeks to make use of remaining available funding.

In the meantime, the SBA has said there may be tweaks to its Aug. 18 guidance that could also warrant contractors' attention. Judge Corker has scheduled another hearing in the case for Aug. 31 to discuss "any potential further remedies" after he blocked the SBA from using the rebuttable presumption.

--Editing by Robert Rudinger.