Government Contracts Update

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Court Nixes Social Disadvantage Presumption: 8(a) Contractors Should Prepare Social Disadvantage Narratives

On July 19 the U.S. District Court for the Eastern District of Tennessee issued an unprecedented decision with massive implications for the Small Business Administration's (SBA) 8(a) Business Development Program. In *Ultima Servs. Corp. v. U.S. Dep't of Agric.*, the plaintiff challenged the constitutionality of the rebuttable presumption of social disadvantage afforded to individuals who are members of certain racial and ethnic groups.[1] The court ultimately agreed that the presumption is unconstitutional. The effect of this decision on current and future 8(a) Program participants cannot be understated. We believe all business owners participating in the 8(a) Program who were certified based on this rebuttable presumption will soon need to reestablish their status as socially disadvantaged.

Rebuttable Presumption and Social Disadvantage Narratives

One of the primary requirements for participation in the 8(a) Program is that the business must be owned and controlled by a socially and economically disadvantaged individual.[2] SBA defines socially disadvantaged individuals as "those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identity as a member of a group without regard to their individual qualities" and that this disadvantage is a result of "circumstances beyond their control."[3] Under 13 CFR § 124.103(b)(1), members of certain racial and ethnic groups, such as African Americans, Hispanic Americans, Native Americans, Asian Americans, Pacific Islander Americans, and Subcontinent Asian Americans, are deemed to satisfy the socially disadvantaged requirement by use of a rebuttable presumption. Thus, if a business owner is a member of one of those groups, they are not required to submit additional evidence of social disadvantage to successfully apply for the 8(a) Program.

Owners who are not members of these racial and ethnic groups may qualify for the 8(a) Program, but they must satisfy the social disadvantage requirement "by a preponderance of the evidence,"[4] which is generally accomplished by submitting a social disadvantage narrative along with corroborating evidence. The narrative must include information to satisfy the following requirements: (i) at least one objective distinguishing feature contributing to social disadvantage; (ii) the social disadvantage is rooted in treatment experienced in American society; (iii) the social disadvantage is chronic and substantial; and *most importantly* (iv) the social disadvantage negatively impacted the owner's entry into or advancement in the business world.[5] SBA views these narratives quite critically so they must be highly detailed and carefully constructed to ensure admission to the 8(a) Program.

The Case

The plaintiff, Ultima Services Corporation, is a small business owned by a woman who is not a member of the racial and ethnic groups listed in 13 CFR § 124.103(b)(1). In 2017 Ultima was awarded four regional indefinite delivery, indefinite quantity (IDIQ) contracts to provide services to the U.S. Department of Agriculture (USDA). Each IDIQ contract included one base year with an option to renew annually over the four years following the base year. But in

2018 USDA informed Ultima that it was declining to exercise options under the IDIQ contracts and subsequently migrated the services Ultima was providing to contracts that were set aside for 8(a) Program participants. Ultima is not a participant in the 8(a) Program, and thus was ineligible to compete for the award. To prevent this result, it filed a complaint alleging that USDA and SBA engaged in racially discriminatory conduct in violation of its Fifth Amendment rights. Ultima alleged that SBA's use of the 8(a) Program's rebuttable presumption of social disadvantage discriminates on the basis of race.

In analyzing the alleged conduct, the court applied a strict scrutiny standard of review, meaning the use of the rebuttable presumption would be constitutional only if it is narrowly tailored and furthers a compelling governmental interest. The court found that the rebuttable presumption does not serve a compelling government interest and is not narrowly tailored enough to survive the strict scrutiny standard. Consequently, it held that USDA and SBA violated Ultima's Fifth Amendment rights and enjoined SBA from using the rebuttable presumption of social disadvantage in administering the 8(a) Program.

Takeaways

In effect, this decision means that SBA's rebuttable presumption of social disadvantage is unconstitutional and can no longer be used to qualify applicants for the 8(a) Program. And because a business must maintain eligibility throughout its participation in the program, the prohibition on the rebuttal presumption is likely to be given retroactive effect. Barring an appeal by SBA, this will give rise to major changes in the 8(a) Program application and annual review processes. It is also likely to result in protests challenging 8(a) set-aside awards on the basis that the awardee has not affirmatively established its owner's status as socially disadvantaged.

Most importantly, our expectation is that both applicants ***and current 8(a) Program participants*** who satisfied the social disadvantage requirement by using the rebuttable presumption must reestablish that they are socially disadvantaged. They will likely be required to submit social disadvantage narratives satisfying the requirements outlined above. While SBA has yet to comment on the *Ultima* holding, we expect it to do so soon and that its response will be to require all 8(a) Program participants to promptly submit these narratives and other evidence of social disadvantage. Thus, ***we strongly recommend that all 8(a) Program participants prepare a social disadvantage narrative and gather corroborating evidence as soon as possible*.**

Conclusion

The *Ultima* decision undoubtedly has massive implications for the 8(a) Program and its participants. Our Government Contracts practice group assists contractors with 8(a) Program compliance and can help current program participants prepare their social disadvantage narratives.

FOR MORE INFORMATION

For more information, please contact:

Edward T. DeLisle
202.973.2725
Edward.DeLisle@ThompsonHine.com

Andrés M. Vera
202.973.2795
Andres.Vera@ThompsonHine.com

Francis E. (Chip) Purcell, Jr.
202.263.4118
Chip.Purcell@ThompsonHine.com

Joseph R. Berger
202.263.4193
Joseph.Berger@ThompsonHine.com

Jessica V. Haire
202.973.2778
Jessica.Haire@ThompsonHine.com

Kathryn Pettit
Kathryn.Pettit@ThompsonHine.com

Ryan S. Spiegel
202.973.2742
Ryan.Spiegel@ThompsonHine.com

Amaiya Johnson also contributed to this bulletin. She is a former Thompson Hine summer associate; she is not admitted to the practice of law.

[1] *Ultima Servs. Corp. v. United States Dep't of Agric.*, Case No. 2:20-CV-00041-DCLC-CRW, U.S. Dist. LEXIS 124268, at *1-2 (May 2, 2023).
[2] 13 CFR § 124.105.
[3] 13 CFR § 124.103(a).
[4] 13 CFR § 124.103(c)(1).
[5] 13 CFR § 124.103(c)(2).