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Government Contracts Update

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Disadvantaged Dilemma: SBA Overhauls 8(a) Eligibility, Audits EDWOSB Program

Key Notes:

- Under a new proposed rule, SBA eliminates race-based presumption of social disadvantage and replaces it with a race-neutral, evidence-based test.
- SBA has launched an audit of the EDWOSB program seeking financial and other information to confirm certified companies' eligibility.

Under the Trump administration, the U.S. Small Business Administration (SBA) has been aggressive in overhauling its socioeconomic contracting programs to address concerns related to racial discrimination and DEI and in auditing companies certified under these programs in a search for waste, fraud, and abuse. Earlier this month, SBA took two actions in pursuit of these goals, putting additional pressure on companies certified under the 8(a) and Economically Disadvantaged Women-Owned Small Business (EDWOSB) programs.

First, a proposed rule published June 11 aims to permanently eliminate the race-based rebuttable presumption of social disadvantage for 8(a) eligibility and replace it with a single, evidence-heavy test that applies to all applicants, regardless of race. Second, SBA has launched a sweeping program examination of seemingly all EDWOSB participants, demanding personal and business tax and financial documentation and information under threat of decertification.

The threat is not theoretical. As part of its 8(a) Data Call, SBA suspended over 1,000 8(a) firms and initiated termination proceedings against nearly 800 more, emphasizing that these programs are at serious risk. In fact, SBA hasn't certified a single 8(a) company in nearly a year; rather, it is shrinking these programs fast and overhauling its rules to further undercut their use in federal procurement.

Proposed Rule Revising 8(a) Program "Social Disadvantage" Requirements

The proposed rule eliminates the long-standing rebuttable presumption under 13 CFR 124.103(b) that members of certain racial and ethnic groups – Black, Hispanic, Native American, Asian Pacific, and Subcontinent Asian Americans – are socially disadvantaged. This is nothing new. In 2023, SBA abandoned the presumption of social disadvantage for members of those groups after a court declared it unconstitutional, leaving only a single pathway to establishing social disadvantage: submitting a "social disadvantage narrative" describing how a firm's owner is discriminated against based on an identifiable characteristic in a manner which impedes their advancement in their education, career, or the growth of their business.

The proposed rule eliminates that path to establishing social disadvantage as well. In its place, SBA proposes a single new test requiring an individual applicant to demonstrate that a government entity, university, or corporation discriminated or was biased against a clearly definable group of which the applicant is a member or favored a group of which the applicant is not a member, and that this materially harmed the applicant. SBA goes further, essentially flipping the social disadvantage criteria on its head. The new test expressly allows applicants to cite "illegal or radical DEI policies," affirmative action, race-based quotas, or hiring targets as the discrimination that harmed them. A program created in part to remedy historic discrimination against minorities is being reframed so that individuals claiming harm from DEI can qualify. SBA explicitly states that it will not deny admission because an applicant is white.

SBA has also increased the evidentiary burden on firms applying to the program, shifting from category membership (and even a personal essay) to requiring documentary evidence of discrimination. Applicants will need to identify specific discriminatory actions or policies, build a timeline, assemble corroborating records, and prove material harm tied to a specific government, university, or corporate action. In line with SBA's stated intent to address white males being barred from the program, this standard will be satisfied by establishing a prior attempt to obtain 8(a) certification or even by pointing to an employer's affirmative action program, which until recently were required of many government contractors.

Current 8(a) firms might be tempted to breathe a sigh of relief based on SBA's statement that it "does not currently intend" to apply the new test to current participants at their next annual review. But it also requested comment on "reliance interests that would be implicated by these proposed changes," signaling that it may target current 8(a) firms with the new rules. Given SBA's aggressive enforcement posture (mass suspensions and terminations throughout 2026), current participants should not assume they are safe from the new regulatory regime. However, SBA has made very clear that this rule applies only to individually-owned firms; entity-owned firms (tribes, ANCs, NHOs, CDCs) are entirely unaffected, creating a two-tier program where individually-owned firms now face a far heavier burden.

The proposed rule is open for public comments until July 13, 2026. SBA has not announced a finalization timeline, but for two related policy changes, the agency went straight to a final rule. Contractors should not count on a long runway.

EDWOSB Program Audit

This month, SBA began emailing EDWOSB participants to launch program examinations under 13 CFR § 127.400. Similar to its 8(a) Data Call, SBA is seemingly attempting to verify that women owners remain economically disadvantaged under 13 CFR § 127.203. While SBA has not paired this effort with the press releases that came with the 8(a) Data Call, most believe SBA is targeting all EDWOSB participants. Firms that fail to respond within the required time frame, or that SBA determines no longer meet eligibility, will be proposed for decertification. Critically, SBA may draw an adverse inference from incomplete responses, so silence itself can cost a firm its certification.

This mirrors SBA's recent 8(a) program audit: an intensive data call with compressed deadlines and nearly assured decertification for firms that cannot substantiate eligibility on a tight timeline (deadlines vary for each EDWOSB). The 8(a) program audit produced more than 1,000 suspensions and hundreds of terminations. EDWOSB firms should expect the same aggression from SBA reviewers.

The audit targets economic disadvantage, meaning owners face deeply personal financial scrutiny: personal net worth, adjusted gross income, total assets. Much of this information can be gleaned from business and personal tax returns, which SBA is collecting. But it is also requiring EDWOSB firms to answer a series of questions regarding their financial status through a Survey Monkey questionnaire. Reports indicate that the survey seeks highly sensitive information, such as how much money an owner has in their personal bank accounts.

This is another matter EDWOSB firms should take extremely seriously. Decertification is not merely a lost label, it has cascading consequences, including potential for contract terminations, potential breach of subcontracts or joint venture agreements that require maintaining the certification, and in particularly extreme cases, SBA may refer the matter to the Department of Justice for potential investigation into allegations of fraud.

Program examinations are underway now. A certified EDWOSB firm that hasn't seen the email should check again. If proposed for decertification, a firm has only 20 calendar days to respond in writing and should consider engaging experienced government contracts counsel for that process.

Key Considerations for Contractors

Contractors certified under these programs should not wait until the next shoe drops. SBA has been extremely aggressive in implementing changes to these programs and suspending or terminating program participants for perceived noncompliance. However, there are immediate actions contractors can take to protect their certifications:

- Treat any SBA examination or data-call email as urgent. Calendar every deadline and note the 20-day proposed decertification response window.
- Do not ignore or partially answer SBA requests. Incomplete responses invite an adverse inference and almost certainly will lead to proposed decertification.
- EDWOSB owners should assemble economic-disadvantage proof now (e.g., three years of personal tax returns, net worth/income/asset documentation, etc.).
- Reassess the firm's qualification, consulting counsel before deciding whether to defend, cure, or consider voluntary withdrawal.
- 8(a) applicants (including those with pending applications) should start building a documented, individualized evidentiary file of specific discriminatory actions and the resulting material harm.
- Current 8(a) participants should not assume they are grandfathered in. Monitor annual reviews and the final rule; preserve all documentation supporting continued eligibility.

FOR MORE INFORMATION

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