



SMALL BUSINESS ADMINISTRATION

13 CFR Part 124

RIN 3245-AH64

Extension of Participation in 8(a) Business Development Program

AGENCY: U.S. Small Business Administration.

ACTION: Interim final rule.

SUMMARY: This interim final rule contains amendments to the regulations governing the 8(a) Business Development (BD) program. The U.S. Small Business Administration (SBA) is revising its regulations to implement a provision in the Consolidated Appropriations Act, 2021 (Appropriations Act), and the National Defense Authorization Act for Fiscal Year 2021 (NDAA 2021), which authorized certain 8(a) Participants to extend their 8(a) BD program term by a period of one year. This interim final rule amends the 8(a) BD program regulations to carry out the changes made by the Act.

DATES: *Effective date:* This interim final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comment date: Comments must be received no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN: 3245-AH64 by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Email: Van Tran, Deputy Associate Administrator, Office of Business Development, Small Business Administration, at 8aQuestions@sba.gov.

SBA will post all comments on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI), as defined in the User Notice at

<http://www.regulations.gov>, please submit the information to Van Tran, Deputy Associate Administrator, Office of Business Development, Small Business Administration at 8aQuestions@sba.gov. Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Van Tran, Deputy Associate Administrator, Office of Business Development, Office of Government Contracting and Business Development, at 8aQuestions@sba.gov, or SBA's 8(a) BD information line at (415) 744-0328.

SUPPLEMENTARY INFORMATION:

I. Background Information

On December 27, 2020, President Trump signed into law the Appropriations Act, Public Law 116-260, Div. N, title III, sec. 330 (Dec. 27, 2020), to, among other things, make appropriations for the 2021 fiscal year and to provide coronavirus emergency response and relief. Section 330 of the Appropriations Act mandates that SBA must ensure that any small business concern participating in the 8(a) BD program on or before September 9, 2020 has the option to extend such participation for a period of one year from the end of its program term, regardless of whether the concern previously elected to voluntarily suspend its program participation in connection with the President's nationwide coronavirus emergency disaster declaration on March 13, 2020. (Presidential Disaster Declaration on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak (March 13, 2020) (<https://www.whitehouse.gov/presidential-actions/proclamation-declaring-national-emergency-concerning-novel-coronavirus-disease-covid-19-outbreak>)).

Section 869 of the National Defense Authorization Act for Fiscal Year 2021, Public Law 116-283, title VIII, sec. 869 (January 1, 2021) (NDAA 2021) also contained the same language authorizing business concerns participating in the 8(a) BD program on or before September 9, 2020 to extend their participation in the program for a period of one year from the end of their program terms. The statutory language of both the Appropriations Act and NDAA 2021 authorizes an extension for firms participating in the program “on or before September 9, 2020.” There is no further clarifying language as to what “before” September 9, 2020 is intended to encompass. It is SBA’s understanding that Congress extended the term of participation in the 8(a) BD program because it believed that the pandemic has adversely affected 8(a) concerns and their ability to participate in and receive the full benefits of the program. Thus, SBA believes it is reasonable to conclude that any firms participating in the program as of the date the national disaster was declared due to the pandemic (i.e., March 13, 2020) should receive the program term extension authorized by Congress.

This extension authority does not extend to business concerns that graduated from or otherwise left the 8(a) BD program prior to March 13, 2020, or to business concerns that were admitted to the 8(a) BD program after September 9, 2020. In addition, this rule clarifies that the extension will not apply to business concerns that were Participants in the 8(a) BD program at any point between March 13, 2020, and September 9, 2020, but were terminated, early graduated or voluntarily withdrew from the program in lieu of being terminated or early graduated. SBA has already determined that such business concerns are no longer eligible to participate in the 8(a) BD program.

In addition, both the Appropriations Act and the NDAA 2021 provide that SBA shall issue regulations implementing the provision not later than 15 days after the date of enactment, and that the regulations shall be issued without regard to the notice

requirements under section 553(b) of title 5, United States Code. As such, this rule is being implemented as an interim final rule with an immediate effective date.

In order to implement the statutory language of section 330 of the Appropriations Act and section 869 of the NDAA 2021, SBA is amending § 124.2 of its regulations to incorporate the optional program term extension for small business concerns participating in the 8(a) BD program on March 13, 2020. Specifically, revised § 124.2 provides that for a firm participating in the 8(a) BD program as of March 13, 2020 and through [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], SBA will extend its program term by one year unless the concern declines such extension. A firm that was participating in the 8(a) BD program as of March 13, 2020, but has since graduated or otherwise left the program before [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] must notify SBA of its intent to be readmitted for a period of one year from the date it completed its program term. Any such notification must be received by SBA no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. In addition, a firm seeking to be readmitted must certify that it continues to meet the applicable eligibility requirements as set forth in §§ 124.101 through 124.111.

SBA is also revising § 124.2 to clarify that any period of extension under the Act will be added to a Participant's transitional stage of participation in the 8(a) BD program. SBA has selected this approach for two reasons. First, in authorizing an extension of 8(a) BD program participation, Congress clearly intended to give certain 8(a) Participants the opportunity to recover and take full advantage of the program's business development assistance, including the additional assistance available to firms in the transitional stage as set forth in § 124.404(c). Second, it would be administratively burdensome and illogical to place a Participant that has already entered the transitional stage (or

completed its program term) back in the development stage during its period of extension.

As part of this revision, SBA is also making conforming amendments to § 124.404 to clarify the respective terms of the developmental and transitional stages of program participation.

Lastly, SBA is revising § 124.509 of its regulations to clarify how an extension of participation under the Act will impact an 8(a) Participant's requirement to attain the targeted dollar levels of non-8(a) revenue in its extended program term. Currently, under SBA's regulations, a Participant in the transitional stage of the 8(a) BD program (i.e., years five through nine) must generally achieve certain targets of revenue derived from sources other than sole source or competitive 8(a) contracts. The purpose of these targets is to ensure that Participants do not develop an unreasonable reliance on 8(a) awards, and to ease their transition into the competitive marketplace after leaving the 8(a) BD program. As such, the targets increase incrementally during the transitional stage of the program. Where a Participant fails to meet its applicable competitive business activity target for the just completed program year and SBA determines that the Participant did not make good faith efforts to obtain the requisite non-8(a) revenue, that Participant will be ineligible for sole source 8(a) contracts in the current program year unless a waiver is granted by SBA.

Currently, a Participant in the ninth year of its program term must derive at least 50 percent of its revenues from sources other than sole source or competitive 8(a) contracts. As noted above, the statutory language contained in section 330 of the Appropriations Act and section 869 of the NDAA 2021 was added because Congress believed that firms participating in the 8(a) BD program may not have been able to experience the full benefits of the program due to complications caused by the pandemic. Thus, it is our view that firms that were in program year nine as of March 13, 2020

should not be subject to a higher business activity target for the time added on to the end of their program terms by section 330 and section 869. As such, the same 50 percent business activity target that applies to program year nine will also apply to the extended program term. In order to receive sole source 8(a) contracts during the extended program term a Participant must meet (or have met) the applicable 50 percent non-8(a) business activity target or have made good faith efforts to obtain the requisite non-8(a) revenue in the ninth program year (or fifth year of the transitional stage). Because the period of extension for firms that were participating as of March 13, 2020 but have since graduated or otherwise left the program may be less than a full year, SBA understands that it may be more difficult to meet the 50 percent non-8(a) business activity target for the extended program term. However, SBA encourages Participants to make good faith efforts to obtain at least 50 percent of their revenue from non-8(a) sources during the extension period in order to ease the transition to the competitive marketplace after graduating from the 8(a) BD program. As a point of clarification, SBA notes that this interim final rule does not revise the schedule of the transitional stage or the corresponding business activity target requirements for current 8(a) Participants in years one through five of the transitional stage of the program. In other words, for purposes of the business activity target requirements any such Participant that elects to extend its participation in the program under the Act will not repeat a year in the transitional stage or revert back to a prior year in the transitional stage as a result of the program extension.

II. Comments and Immediate Effective Date

This interim final rule is effective without advance notice and public comment because section 330(b) of the Appropriations Act and section 869(b) of the NDAA 2021 authorize SBA to issue implementing regulations without regard to notice requirements under 5 U.S.C. 553(b). However, SBA is providing a 60-day comment period for the

public to comment on this Interim Final Rule. SBA's justification for the use of an interim final rule and immediate effective date follow.

III. Justification for Interim Final Rule

In general, SBA publishes a rule for public comment before issuing a final rule, in accordance with the Administrative Procedure Act, 5 U.S.C. 553. The Administrative Procedure Act provides an exception to this standard rulemaking process, however, where an agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Under such circumstances, an agency may publish an interim final rule without soliciting public comment.

SBA has determined that there is good cause for dispensing with advance public notice and comment on the grounds that that it would be contrary to the public interest. Specifically, advance public notice and comment would delay the delivery of critical business development assistance Congress sought to extend to firms that are presently not eligible for the program's assistance because they have already graduated or otherwise left the 8(a) BD program. As explained above, such firms will need to notify SBA that they would like to be readmitted to the program as soon as possible in order to take full advantage of the extension period.

In addition, both the Appropriations Act and the NDAA provisions cited provide specific authority for SBA to proceed with this rule. Section 330(b) of the Appropriation Act provides: "(b). Emergency Rulemaking Authority —Not later than 15 days after the date of enactment of this Act, the Administrator shall issue regulations to carry out this section without regard to the notice requirements under section 553(b) of title 5, United States Code." Similarly, section 869(b) of the NDAA 21 provides: "(b) Emergency Rulemaking Authority.--Not later than 15 days after the date of enactment of this section,

the Administrator shall issue regulations to carry out this section without regard to the notice requirements under section 553(b) of title 5, United States Code.”

Although this interim final rule is effective immediately, comments are solicited from interested members of the public on all aspects of the interim final rule. These comments must be received on or before the close of the comment period noted in the DATES section of this interim final rule. SBA will then consider these comments in making any necessary revisions to these regulations.

IV. Justification for Immediate Effective Date

The APA requires that “publication or service of a substantive rule shall be made not less than 30 days before its effective date, except as—otherwise provided by the agency for good cause found and published with the rule.” 5 U.S.C. 553(d)(3). The purpose of this provision is to provide interested and affected member of the public sufficient time to adjust their behavior before the rule takes effect.

In light of the urgent need to assist 8(a) small business concerns during the pandemic, SBA finds that there is good cause for making this rule effective immediately instead of observing the 30-day period between publication and effective date. While this interim final rule is effective immediately upon publication, SBA is inviting public comment on the rule during a 60-day period and will consider the comments in developing a final rule. SBA has included an applicability date to make clear that the rule is applicable for eligible 8(a) companies to either retain or regain their 8(a) status as quickly as possible.

V. Compliance with Executive Orders 12866, 13771, 12988, 13132, and 13175, the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

The Office of Information and Regulatory Affairs has determined that this interim final rule is not significant for the purposes of Executive Order 12866 and is not considered a major rule under the Congressional Review Act.

This interim final rule is necessary to implement section 330 of the Appropriations act and section 869 of the NDAA 2021 in order to provide relief to 8(a) firms adversely impacted by the March 13, 2020, emergency declaration. SBA anticipates that this rule will substantially benefit such 8(a) firms, their employees, and the communities they serve. The rule will allow 8(a) firms to continue to be eligible to be awarded both competitive and sole source 8(a) contracts for an extended period in the program. In FY 2019, 8(a) firms were awarded 5.15% of federal contract dollars amounting to \$30.39 billion with \$8.62 billion awarded through set asides, \$9.90 billion awarded as sole-source, and \$11.87 billion awarded through open competition or with another preference (e.g., HUBZone) applied.¹ In the past five years (FY 2016-FY 2020) the average total contract awards per 8(a) firm ranged from \$3.15 million in FY 2018 to \$4.45 million in FY 2016.

An addition of one year to the term of 8(a) firms will increase the pool of firms participating in the program by up to 400 to 600 8(a) firms each year for the next ten years, which reflects the amount of firms that have graduated from the 8(a) program annually in the past five years, on average. Approximately 4,150 8(a) firms would be eligible to receive benefits for an additional year in the 8(a) program during the course of the next ten years based on the number of firms within the current 8(a) portfolio and including those firms that graduated since March 13, 2020. While more firms will be eligible to participate in the 8(a) program each year, the impact on 8(a) contract dollars awarded is anticipated to be non-substantive.

¹ Congressional Research Service, SBA's "8(a) Program": Overview, History, and Current Issues, Page 36-37, <https://crsreports.congress.gov/product/pdf/R/R44844>

SBA will also need to account for costs associated with the management of an additional year of eligibility for 8(a) firms, which includes business development assistance and compliance oversight. In FY 2019, with nearly 5,200 8(a) firms in the program, SBA expended approximately \$12,150 per 8(a) Program Participant based on a total program cost of \$63.17 million; this figure includes overhead costs². An additional year of eligibility would likely increase total program costs stemming from program services. However, some of these costs (e.g., overhead) would be redistributed across the 8(a) program and other SBA programs or reduced due to economies of scale. SBA is unable to estimate the marginal costs associated with an additional year at the end of a firm's term in the 8(a) program, but anticipates that it would not exceed SBA's annual costs for an 8(a) Participant.

Executive Order 13771.

This rule is not an EO 13771 regulatory action because this rule is not significant under EO 12866.

Executive Order 12988

This action meets applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. The action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in the Executive Order. As such it does not warrant the preparation of a Federalism Assessment.

² SBA's FY 2021 Congressional Justification and Annual Performance Report, Table 10, Page 16, <https://www.sba.gov/cj>.

Executive Order 13175

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Paperwork Reduction Act

The SBA has determined that this rule does not affect any existing collection of information. The rule does require a concern seeking to be readmitted to the 8(a) BD program to notify SBA of its intent to be readmitted and make a certification that it continues to meet the applicable 8(a) BD program eligibility requirements as set forth in §§ 124.101 through 124.111 of title 13 of the Code of Federal Regulations. SBA is not seeking to collect information through any required form, but rather is anticipating a simple email from the business concern to SBA notifying SBA of its intent to be readmitted to the 8(a) BD program. There are 346 business concerns whose program terms have expired since March 13, 2020. Those are the only business concerns who would be subject to the notification requirement.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), 5 U.S.C. 601, requires administrative agencies to consider the effect of their actions on small entities, small nonprofit enterprises, and small local governments. Pursuant to the RFA, when an agency issues a rulemaking, the agency must prepare a regulatory flexibility analysis which describes the impact of the rule on small entities. However, rules that are exempt from notice and comment are exempt from the RFA requirements when the agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest. Small Business Administration's Office of Advocacy guide: *How to Comply with*

the Regulatory Flexibility Ac. Ch.1. p.9. Accordingly, SBA is not required to conduct a regulatory flexibility analysis.

List of Subjects in 13 CFR Part 124

Administrative practice and procedure, Government procurement, Government property, Small businesses.

Accordingly, for the reasons stated in the preamble, SBA is amending 13 CFR part 124 as follows:

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

1. The authority citation for part 124 is revised to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99-661, Pub. L. 100-656, sec. 1207, Pub. L. 101-37, Pub. L. 101-574, section 8021, Pub. L. 108-87, Pub. L. 116-260, sec. 330, and 42 U.S.C. 9815.

2. Revise § 124.2 to read as follows:

§ 124.2 What length of time may a business participate in the 8(a) BD program?

(a) Except as set forth in paragraph (b) of this section, a Participant receives a program term of nine years from the date of SBA's approval letter certifying the concern's admission to the program. The Participant must maintain its program eligibility during its tenure in the program and must inform SBA of any changes that would adversely affect its program eligibility. The nine-year program term may be shortened only by termination, early graduation (including voluntary early graduation) or voluntary withdrawal as provided for in this subpart.

(b) Pursuant to section 330 of the Consolidated Appropriations Act, 2021, and section 869 of the National Defense Authorization Act for Fiscal Year 2021, a small business concern participating the 8(a) BD program on March 13, 2020, may elect to extend such participation by a period of one year from the end of its program term,

regardless of whether it previously elected to suspend participation in the program under the procedures set forth in § 124.305(h)(1)(iii).

(1) Unless expressly declined in writing, SBA will extend a Participant's program term by one year if the concern was a Participant in the 8(a) BD program on March 13, 2020, and continued its participation through [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]. Declines of such extension must be submitted to: Deputy Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or e-mail to 8aQuestions@sba.gov.

(2) Except as set forth in paragraph (b)(2)(iii) of this section any concern that was a Participant in the 8(a) BD program on March 13, 2020, but graduated or otherwise left the program before [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] may elect to be readmitted to the 8(a) BD program for the period of time equal to one year from the date of the original expiration of the concern's program term. A concern seeking to be readmitted to the 8(a) BD program must notify SBA of its intent to be readmitted no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Example 1 to paragraph (b)(2) introductory text. Business Concern A was a Participant in the 8(a) BD program on September 9, 2020, and its program term expired on November 25, 2020. On January 28, 2021, Business Concern A notified SBA of its election to be readmitted to the 8(a) BD program under the process outlined in this paragraph (b)(2). Business Concern A would be eligible to participate in the 8(a) BD program until November 25, 2021.

(i) All requests for readmittance must be submitted to: Associate Administrator, Office of Business Development, Small Business Administration, 409 Third Street SW, Washington, DC 20416, or e-mail to 8aQuestions@sba.gov.

(ii) As part of a concern's notification to SBA of its intent to be readmitted to the 8(a) BD program, the concern must certify that it continues to meet the applicable 8(a) BD program eligibility requirements as set forth in §§ 124.101 through 124.111. SBA

may, in its discretion, request information or documentation to assess whether the concern meets the eligibility criteria for readmittance.

(iii) Business concerns that were Participants in the 8(a) BD program on March 13, 2020, but were terminated or early graduated by SBA or elected to voluntarily withdraw or early graduate in lieu of termination are not eligible to extend their program terms.

(iv) The readmittance of a business concern owned and controlled by a tribe, ANC, NHO, or CDC to the 8(a) BD program under this paragraph (b)(2) will be disregarded for purposes of the ownership restrictions applicable to Participants owned by a tribe, ANC, NHO, or CDC as set forth in §§ 124.109(c)(3)(ii), 124.110(e), and 124.111(d). The date to commence the two-year waiting period for the tribe, ANC, NHO, or CDC to own another business concern in the 8(a) BD program with the same primary NAICS code as the readmitted concern will not be readjusted with the firm's readmittance.

3. Amend § 124.404 by revising the second sentence of paragraph (a) to read as follows:

§ 124.404 What business development assistance is available to Participants during the two stages of participation in the 8(a) BD program?

(a) * * * The developmental stage will last four years, and the transitional stage will last five years, unless the concern has exited the program by one of the means set forth in § 124.301 prior to the expiration of its program term or has elected to extend its participation pursuant to § 124.2(b).

* * * * *

4. Amend § 124.509 by revising paragraph (b)(2) and adding an example to paragraph (d)(4) to read as follows:

§ 124.509 What are non-8(a) business activity targets?

* * * * *

(b) * * *

(2) *Non-8(a) business activity targets.* -- (i) During their transitional stage of program participation, Participants must meet the following non-8(a) business activity targets each year:

Table 1 to Paragraph (b)(2)(i)

Participant's year in the transitional stage	Non-8(a) business activity targets (required minimum non-8(a) revenue as a percentage of total revenue)
1	15
2	25
3	30
4	40
5	50

(ii) Any Participant that extended its program term pursuant to § 124.2(b) of this chapter must meet the business activity target for year 5 or meet the applicable requirements of paragraph (d) or (e) of this section in order to preserve its eligibility for sole source 8(a) contracts during the extended program period. The applicable business activity target for the extended program period will be the same as that for year 5 of the transitional stage (i.e., 50% non-8(a) revenue).

* * * * *

(d) * * *

(4) * * *

Example 3 to paragraph (d)(4): Firm C elected to extend its participation in the 8(a) BD program as set forth in § 124.2 of this chapter. Firm C had \$10 million in total revenue during year 5 in the transitional stage (year 9 in the program), of which \$8.5 million were 8(a) revenues and \$1.5 million were non-8(a) revenues, and SBA determined that Firm C did not make good faith efforts to meet its non-8(a) business activity target. In order to be eligible for sole source 8(a) contracts during year 6 of the transitional stage (year 10 in the program), Firm C must demonstrate at its first or second quarterly review that it had received at least \$3.5 million in non-8(a) revenue and new non-8(a) awards (the amount by which it failed to meet the 50% non-8(a) business activity target for year 5 in the transitional stage). If, at its first two quarterly reviews during year 6 of the transitional stage (year 10 in the program), Firm C could not

demonstrate that it had received at least \$3.5 million in non-8(a) revenue and new non-8(a) awards, Firm C would not be eligible for sole source 8(a) contracts for the remainder of its program term.

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Jovita Carranza,
Administrator.

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