

August 17, 2012

The Honorable Adam Smith  
U.S. House of Representatives  
Washington, DC 20515

Dear Representative Smith:

Administrator Mills has asked me to respond to your recent inquiry requesting clarification of the U.S. Small Business Administration (SBA) Small Business 8(a) Business Development Program disclosure requirements.

Set-asides of procurements are strictly controlled by statute or regulation. The rules pertaining to federal procurement are set out in regulation through the agency specific title of the Code of Federal Regulations (CFR) and the Federal Acquisition Regulations (FAR). Here, it appears that there was a miscommunication as to the disclosure of award information as it pertains to an 8(a) vendor. By statute, under certain conditions, contracting without providing for full and open competition is authorized. See 41 U.S.C. 253(c) and 10 U.S.C. 2304(c) (Department of Defense, Coast Guard, and National Aeronautics and Space Administration are subject to 10 U.S.C. 2304(c) and other executive agencies are subject to 41 U.S.C. 253(c)). The Small Business Act (“the Act”) establishes various programs that assist qualifying small businesses in obtaining Federal contracts, and sets forth the requirements for those programs. See 15 U.S.C. §§ 631–657. The 8(a) BD Program (named for section 8(a) of the Act, (§ 637(a)(1)(B)), is one of those programs that assists small businesses owned and controlled by socially and economically disadvantaged individuals. Among its requirements, the Act mandates that each Government agency establish annual contracting goals for the various small business programs created by the Act, including the 8(a) BD Program. 15 U.S.C. § 644(g)(1).

The SBA is charged with carrying out the requirements of the Act and issuing such rules and regulations as it deems necessary. The Agency’s regulations are found at Title 13 of the Code of Federal Regulations and the 8(a) BD Program at subpart 124. In addition to 13 CFR, sect. 124 the small business contracting procedures are set out in the FAR. Part 19 of the FAR specifically addresses the procedures for awards to small businesses (small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the Government’s interest). See FAR 19.202-1. Part 15 of the FAR address Contracting through Negotiation and Subpart 15.5 is specific to the award and protest process (Preaward, Award, and Postaward notifications, Protests, and Mistakes).

There is not a policy or rule, whether through full or open or set-asides awards, that requires withholding disclosure of the vendor(s) awarded a Federal government contract. There is a process through which unsuccessful offerors and successful offerors are notified during the procurement process. See FAR 15. Once that process is complete the information pertaining to the award of government contracts is made public through several sources including USAspending.gov and the Federal Procurement Data System – Next Generation ([https://www.fpds.gov/fpdsng\\_cms/](https://www.fpds.gov/fpdsng_cms/)). SBA's website is also a source of information regarding contract awards. See <http://www.sba.gov/category/navigation-structure/contracting/contracting-opportunities>.

Specific to the 8(a) BD Program when a contracting activity determines that a contract is to be set aside for the 8(a) BD Program (competition limited to only those firms certified as 8(a) by SBA including approval of joint venture and mentor-protégé relationships), the activity is required to offer the procurement to the Agency. In turn, SBA accepts the requirement once it determines that the contract is suitable for the 8(a) BD Program. See 13 C.F.R. §§ 501-520. Joint Venture and Mentor-Protégé relationships for 8(a) Participants are permissible and reviewed by SBA. The review includes an evaluation as to whether or not the 8(a) Participant benefits from the relationship. See 13 CFR § 124.513 (joint ventures) and § 124.520(mentor-protégé).

The FAR provisions regarding procedures of small business awards echo SBA's regulations and also provide the specific process for award. In sealed bid acquisitions, upon receipt of offers, the contracting officer will provide the Agency a copy of the solicitation, the estimated fair market price, and a list of offerors ranked in the order of their standing for award (*i.e.*, first low, second low, etc.) with the total evaluated price for each offer, differentiating between basic requirements and any options. The SBA will consider the eligibility of the first low offeror. If the first low offeror is not determined to be eligible, SBA will consider the eligibility of the next low offeror until an eligible offeror is identified. Only SBA will determine the eligibility of the firms and notify the agency making the award. Once eligibility has been established, the successful offeror will be determined by the contracting activity in accordance with normal contracting procedures under the FAR. It is at this time that the awardee is identified. See FAR 19-502(b)(1) and (2). The same rules address challenges or protests of the eligibility of an 8(a) firm for a competitive 8(a) award.<sup>1</sup> FAR 19-502(d).

When making a preaward notice to offers for the small business programs the contracting officers notifies the offerors prior to award, upon completion of negotiations, determinations of responsibility. FAR 15.503(a). Similarly, postaward notices go to those offerors whose proposal was in the competitive range, but was not selected for award. FAR 15.503(b).

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<sup>1</sup> Although the eligibility may not be challenged or protested by another 8(a) firm or any other party as part of a solicitation or proposed contract award, any party with information concerning the eligibility of an 8 (a) firm to continue participation in the 8(a) Program may submit such information to the SBA in accordance with 13 CFR § 124.517.

Agencies may set aside a procurement for either a 8(a) sole source or competitive award. In each case, the agency requests an eligibility determination by SBA. The eligibility determination is made for the apparent successful offerors prior to award of the contract. The SBA does not review the eligibility of those 8(a) certified firms on the basis that a bid was submitted. Additionally, 8(a) contractors are required to abide by the limits on subcontracting and meet the performance of work requirements for the contract they are awarded. Small businesses are encouraged to sub with other small business but 8(a) Participants do not have a subcontracting goal.

In summary, the statute and regulations encourage the use of small business participation in acquisitions. The law permits the set aside of acquisitions to particular types of small businesses. The rules governing these acquisitions are addressed in regulation. The specific procedures for contracting with small businesses and specific to set asides are set out in 13 CFR and FAR 19.

We appreciate your support of the SBA and the Washington small business community. If you and your staff have any questions, please contact the SBA Office of Congressional and Legislative Affairs at (202) 205-6700.

Sincerely,

Darryl K. Hairston  
Associate Administrator  
Office of Business Development