

Tribally Owned Business (Concern)

Frequently Asked Questions (FAQs)

What is an Indian Tribe?

As defined in §124.3, an Indian tribe means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides.

What CFR outlines the requirements for a tribally-owned concern?

13 CFR 124.109 outlines the initial eligibility requirements for Tribes.

How does a tribe establish social disadvantage?

An Indian tribe as defined in §124.3 is considered to be socially disadvantaged.

What special documents are required for a tribe?

A copy of all governing documents such as the tribe's constitution or business charter.

Evidence of its recognition as a tribe eligible for the special programs and services provided by the United States or by its state of residence.

Copies of its Articles of Incorporation, Articles of Incorporation, corporate bylaws, operating agreement, or partnership agreement.

How does a tribe establish economic disadvantage?

In order to be eligible to participate in the 8(a) BD program, the Indian tribe must demonstrate to SBA that the tribe itself is economically disadvantaged. This must involve the consideration of available data showing the tribe's economic condition, including but not limited to, the following information:

- (i) The number of tribal members.
- (ii) The present tribal unemployment rate.
- (iii) The per capita income of tribal members, excluding judgment awards.
- (iv) The percentage of the local Indian population below the poverty level.
- (v) The tribe's access to capital.

(vi) The tribal assets as disclosed in a current tribal financial statement. The statement must list all assets including those which are encumbered or held in trust, but the status of those encumbered or in trust must be clearly delineated.

(vii) A list of all wholly or partially owned tribal enterprises or affiliates and the primary industry classification of each. The list must also specify the members of the tribe who manage or control such enterprises by serving as officers or directors.

The tribe does not need to reestablish its economic disadvantage in order to have other businesses that it owns certified for 8(a) BD program participation. The tribe will need to include a copy of the SBA 8(a) BD approval letter for a firm already certified.

Does the tribally-owned concern have to be a legal business entity organized for profit and susceptible to suit?

The concern must be organized for profit, and the tribe must possess economic development powers in the tribe's governing documents. The applicant or participating concern must be a separate and distinct legal entity organized or chartered by the tribe, or Federal or state authorities. The concern's articles of incorporation, partnership agreement or limited liability company articles of organization must contain express sovereign immunity waiver language, or a "sue and be sued" clause which designates United States Federal Courts to be among the courts of competent jurisdiction for all matters relating to SBA's programs including, but not limited to, 8(a) BD program participation, loans, and contract performance.

What is the unconditional ownership requirement for a tribally-owned concern?

For corporate entities, a Tribe must unconditionally own at least 51 percent of the voting stock and at least 51 percent of the aggregate of all classes of stock. For non-corporate entities, a Tribe must unconditionally own at least a 51 percent interest.

Can the tribally-owned concern be owned by a subsidiary of the tribe?

The Small Business Act permits a tribally-owned concern to be owned through a wholly owned holding company of the tribe.

Can the tribally-owned concern be owned by the tribe through multiple levels of subsidiaries?

The tribe must own at least 51 percent of a tribally owned concern or through a wholly owned business entity of such tribe. However, many tribes conduct their commercial activities through federally-chartered corporations formed under Section 17 of the Indian Reorganization Act (IRA). To form a Section 17 Corporation, a tribe must petition the Secretary of the Interior for issuance of a corporate charter. A Section 17 corporation provides a framework by which a tribe can segregate tribal business assets and liabilities from the assets and liability of tribal governmental assets. It also preserves the integrity of the decision-making process of tribal governmental officials by separating business decisions. A Section 17 corporation, which is an "arm of the tribe," may directly own at least 51% of the firm or by owning 100% of a subsidiary (or holding company), which in turn owns 51% of the firm.

Are there any ownership restrictions governing a tribally-owned concern?

A Tribe may not own 51% or more of another firm which, either at the time of application or within the previous two years, has been operating in the 8(a) program under the same primary NAICS code as the applicant. A Tribe may, however, own a Participant or other applicant that conducts or will conduct secondary business in the 8(a) BD program under the NAICS code which is the primary NAICS code of the applicant concern. In addition, once an applicant is admitted to the 8(a) BD program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe. For purposes of this paragraph, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

The restrictions of §124.105(h) do not apply to tribes; they do, however, apply to non-disadvantaged individuals or other business concerns that are partial owners of a tribally-owned concern.

How does SBA define “same primary NAICS code” for the purposes of the above paragraph discussing ownership restrictions?

For purposes of the paragraph discussing ownership restrictions, the same primary NAICS code means the six digit NAICS code having the same corresponding size standard.

Are companies recently acquired by a tribe eligible for the 8(a) BD program?

The tribe must unconditionally own at least 51% of the company. SBA will assess whether the acquisition was an arm’s length transaction and whether the tribe paid adequate consideration for its ownership interest. The consideration paid should have a reasonable relationship to an objective valuation or appraisal of the company in order to be deemed an arm’s length transaction. SBA will review the purchase/sale agreement, terms of the purchase, derivation of the purchase price, etc.

Can a tribe finance the purchase of a company with a promissory note?

Financing the purchase price with a promissory note may be acceptable if payment is triggered by some independent event not controlled by the holder of the note. A demand note would be unacceptable because the holder may be found to have negative control over the tribe. However, a note with repayment terms based on the tribe’s share of contract revenues may be acceptable. Payment of some cash consideration is always more desirable than executing a note for 100% of the purchase price.

What are the control and management criteria governing a tribally-owned concern?

The management and daily business operations of a Tribally-owned concern must be controlled by the Tribe. The Tribally-owned concern may be controlled by the Tribe through one or more individuals who possess sufficient management experience of an extent and complexity needed to run the concern, or through management as follows:

(A) Management may be provided by committees, teams, or Boards of Directors which are controlled by one or more members of an economically disadvantaged tribe, or

(B) Management may be provided by non-Tribal members if the concern can demonstrate that the Tribe can hire and fire those individuals, that it will retain control of all management decisions common to boards of directors, including strategic planning, budget approval, and the employment and compensation of officers, and that a written management development plan exists which shows how Tribal members will develop managerial skills sufficient to manage the concern or similar Tribally-owned concerns in the future.

(ii) Members of the management team, business committee members, officers, and directors are precluded from engaging in any outside employment or other business interests which conflict with the management of the concern or prevent the concern from achieving the objectives set forth in its business development plan. This is not intended to preclude participation in tribal or other activities which do not interfere with such individual's responsibilities in the operation of the applicant concern.

Does SBA deem an individual involved in the management of the daily business operations to have used his or her eligibility?

SBA does not deem an individual involved in the management or daily business operations of a tribally-owned concern to have used his or her individual eligibility within the meaning of §124.108(b).

What is the potential for success requirement for a tribally-owned concern?

A Tribally-owned applicant concern must possess reasonable prospects for success in competing in the private sector if admitted to the 8(a) BD program. A Tribally-owned applicant may establish potential for success by demonstrating that:

(i) It has been in business for at least two years, as evidenced by income tax returns (individual or consolidated) for each of the two previous tax years showing operating revenues in the primary industry in which the applicant is seeking 8(a) BD certification; or

(ii) The individual(s) who will manage and control the daily business operations of the firm have substantial technical and management experience, the applicant has a record of successful performance on contracts from governmental or nongovernmental sources in its primary industry category, and the applicant has adequate capital to sustain its operations and carry out its business plan as a Participant; or

(iii) The Tribe has made a firm written commitment to support the operations of the applicant concern and it has the financial ability to do so.

(7) Other eligibility criteria. (i) As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless:

(A) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or

Does buy support apply to a tribally-owned concern?

As with other 8(a) applicants, a tribally-owned applicant concern shall not be denied admission into the 8(a) program due solely to a determination that specific contract opportunities are unavailable to assist the development of the concern unless: (a) The Government has not previously procured and is unlikely to procure the types of products or services offered by the concern; or (b) The purchase of such products or services by the Federal Government will not be in quantities sufficient to support the developmental needs of the applicant and other program participants providing the same or similar items or services.

Does SBA's good character requirement apply to a tribally-owned concern and its principals?

The tribally-owned concern and its principals must demonstrate good character, as noted in 124.108(a).

Do the Size Regulations apply to a tribally-owned firm?

A tribally-owned applicant concern must qualify as a small business concern as defined for purposes of Federal Government procurement in part 121 of this title. The particular size standard to be applied is based on the primary industry classification of the applicant concern.

A tribally-owned Participant must certify to SBA that it is a small business pursuant to the provisions of part 121 of this title for the purpose of performing each individual contract which it is awarded.

In determining the size of a small business concern owned by a socially and economically disadvantaged Indian tribe (or a wholly owned business entity of such tribe) for either 8(a) BD program entry or contract award, the firm's size shall be determined independently without regard to its affiliation with the tribe, any entity of the tribal government, or any other business enterprise owned by the tribe, unless the Administrator determines that one or more such tribally-owned business concerns have obtained, or are likely to obtain, a substantial unfair competitive advantage within an industry category.

Can a tribally-owned concern receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract performed by another Participant or former Participant?

Once an applicant is admitted to the 8(a) BD Program, it may not receive an 8(a) sole source contract that is a follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe.

Is the tribally-owned concern required to report benefits to the SBA after entry in the 8(a) BD Program?

As part of the annual review submission each Participant owned by a Tribe must submit to SBA information showing how the Tribe has provided benefits to the Tribal members and/or the Tribal community due to the Tribe's participation in the 8(a) BD program through one or more firms. This data includes information relating to funding cultural programs, employment assistance, jobs, scholarships, internships, subsistence activities, and other services provided by the Tribe to the affected community.