



Fox Rothschild LLP
ATTORNEYS AT LAW

Federal Contractor's Guide to the SBA's October 2020 Final Rule –

Part IV: Changes to the SBA 8(a) Program

Presenters:

Nicholas T. Solosky
Construction Law and Federal
Government Contracts Attorney
202.696.1460
nsolosky@foxrothschild.com

Diana Lyn C. McGraw
Construction Law and Federal
Government Contracts Attorney
202.794.1208
dmcgraw@foxrothschild.com

Today's Agenda

- Changes to the 8(a) Application Process
- Relaxation of Immediate Family Member Restriction
- New Definition for “Follow-on” Requirement or Contract
- Business Activity Targets
- Sole-Source Contracts
- “Bona Fide Place of Business”
- Clarifications to Ownership Rules for Tribally-Owned and ANC-Owned 8(a) Applicants
- Economic Forecasts for FY 2021



Changes to the 8(a) Application Process

- Allows a firm that the SBA rejected to correct its application and **reapply after 90 days** – without seeking reconsideration of the denial.
 - Previously, when denied firms did not seek reconsideration within 45 days, they would have to wait a year to reapply.
- **Limit:** If the SBA denies a firm 3 times within 18 months, the firm must wait 12 months before reapplying.
- Firms must submit a **business plan within 60 days** of 8(a) admission or risk suspension from 8(a) benefits.
 - Previously, firms had to wait for SBA approval of its business plan before being eligible for program benefits.



Relaxation of Immediate Family Member Restriction for Program Eligibility

Applicant is **not eligible** if it has an **immediate family member in the program** (currently or formerly) and one of the following circumstances exist:

1. Applicant and immediate family member share any kind of **common ownership or management**;
2. The concerns have a **contractual relationship** “that was not conducted at an arm’s length”;
3. The concerns **share facilities**; or
4. Both concerns operate under the **same primary NAICS code** but the applicant does not have experience in the primary NAICS code.



New Definition for “Follow-on” Requirement or Contract

Multifactor definition of “follow-on” involves consideration of:

1. Whether the contract **scope** changed;
 2. Whether the requirement’s magnitude/value changed by **at least 25%**; and
 3. Whether **the end user (agency) has changed** – if the end user is the same, the requirement will likely be a follow-on.
- Work is *not* a “follow-on”: Agency must notify SBA of its intent to procure work outside of the 8(a) program as a “new” requirement.
 - Work is a “follow-on”: Agency must make a written request and get SBA approval to re-procure a follow-on outside of the 8(a) program.



Business Activity Targets

- The Final Rule makes business activity targets **less demanding on program participants**.
- Now, firms must only demonstrate “**good faith efforts**” to reach those percentage goals.
 - A concern will not be disqualified from sole-source contract eligibility if it can clearly demonstrate good faith efforts to reach 8(a) goals.
- The Final Rule **lowers the business activity percentage goals** in years 3, 4, and 5 of the transitional stage of the program.
 - Reduces goals by 5% in years 3, 4, and 5 to require **30%, 40%, and 50%** business activity target goals, respectively.



Sole-Source Contracts

- For **sole-source** contracts, a firm must be a current 8(a) program participant **at the time of the contract award**.
 - **Competitive 8(a) contracts** require a firm to be a current participant on the offer submission date.
- For **design-build contracts**, eligibility is determined on the initial submission date for phase one offers.
- Adjusts *how* the SBA will calculate **the \$100M earnings limit** for a concern's continued eligibility to receive sole-source contracts.
 - The SBA will look to **revenues already received** (not projected profit from IDIQ orders, option years, or MACs).
 - The SBA will **not** count contracts **under the Simplified Acquisition Threshold**



“Bona Fide Place of Business”

- **Bona fide place of business:** “the geographic area serviced by the SBA district office, a Metropolitan Statistical Area (MSA), or a contiguous county (whether in the same or different state) where the work will be performed.”
 - **Broadens the geographic area** a contractor may have its business.
- Participants may also have bona fide places of business **in more than one location.**
- The SBA will make determinations within **5 working days** of a site visit **or 15 working days** after a servicing district office’s request.
 - A participant may presume approval if the SBA does not timely respond.



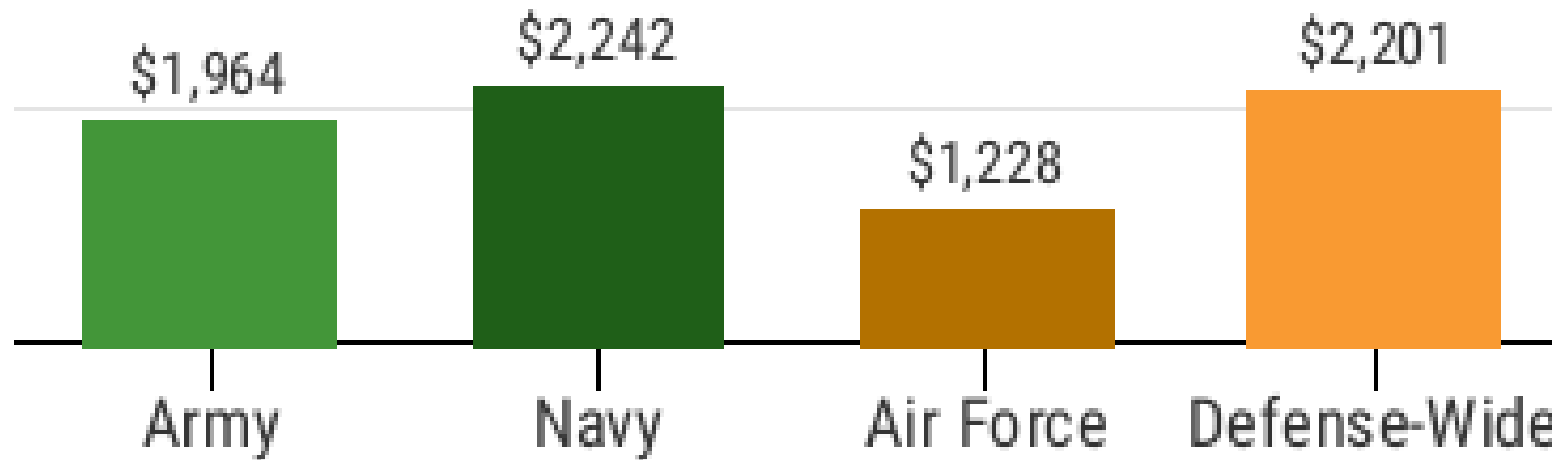
Clarifications to Ownership Rules for Tribally-Owned and ANC-Owned 8(a) Applicants

- A tribally-owned or ANC-owned firm **no longer needs to request a change of ownership** if it reorganizes ownership of the participant business by adding or removing a wholly-owned business entity in the chain of ownership between the tribe/ANC and the business.
 - Must notify the SBA of the change **within 30 days**.
- A **single person** may also control the management/daily operations of **2 tribally-owned concerns** at the same time.
- If a tribally-owned participant **changes its primary NAICS code**, the tribe may qualify **another firm** under the **previous NAICS code**.



Economic Forecast for FY2021

DoD continues to restore, sustain, replace, and build critical facilities, and plans to invest over \$21 billion in Military Construction and Facilities, Sustainment, Restoration, and Modernization, the budget.



Thank You for Joining Us.

Be sure to look out for an upcoming article summarizing all of the SBA rule changes covered in this series.

Additionally, we will be making a few announcements in 2021:

- New Program for Federal Contractors:
Aiming for Success in the Federal Market
- Support Program for SBLO's

Nicholas T. Solosky

202.696.1460

nsolosky@foxrothschild.com

Diana Lyn C. McGraw

202.794.1208

dmcgraw@foxrothschild.com



Fox Rothschild LLP
ATTORNEYS AT LAW