

Benefits Of The Extended SBA Place Of Business Moratorium

By Meghan Leemon (August 2, 2022, 6:27 PM EDT)

Recently, the U.S. Small Business Administration announced an extension of the moratorium on enforcement of the bona fide place of business requirement, giving small, disadvantaged businesses more time to participate in 8(a) construction projects without the need for an SBA-approved place of business, and Congress more time to amend the outdated requirement.



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As it currently reads and as it relates to prime contracts awarded under the Small Business Administration's 8(a) business development program, the Small Business Act requires that, to the "maximum extent practicable, construction subcontracts awarded by the Administration pursuant to this subsection shall be awarded within the county or State where the work is to be performed."^[1]

This requirement was added to the Small Business Act at Title 15 of the U.S. Code, Section 637(a)(11) over 40 years ago, at a time when there were no other robust socioeconomic programs, such as women-owned, service-disabled veteran-owned, or historically underutilized business zone businesses.^[2] How business was conducted then was, of course, very different from how it is conducted in the world that we live and operate in today.

In order to implement this statutory requirement, the SBA requires 8(a) contractors seeking to perform on 8(a) set-aside construction contracts to have an SBA-approved bona fide place of business, or "location where a Participant regularly maintains an office which employs at least one full-time individual within the appropriate geographical boundary."^[3] Notably, a bona fide place of business does not include a construction trailer or other temporary construction site.^[4]

While this requirement has historically applied to 8(a) competitive procurements, albeit not in every instance, in November 2020 as part of a final rule, the SBA clarified that the bona fide place of business requirement applies to both sole-source and competitive 8(a) procurement.^[5] The clarification led to a significant uptick in enforcement of the bona fide place of business requirement for 8(a) construction contracts, for both competitive and sole-source — i.e., direct-award — contracts.

The clarification came, however, at the height of the COVID-19 pandemic, when many contractors were working from home and closing their office locations. Accordingly, it became increasingly difficult for 8(a) contractors to request a bona fide business determination — and for the SBA to approve their requests.

The SBA's final rule also came as a shock to many 8(a) contractors that had been performing 8(a) construction contracts for years, without an approved bona fide place of business in that geographical area. With the clarification and increased implementation of the requirement, particularly for sole-source awards, companies that had been performing sole-source construction work were frequently no longer eligible, and were left without an avenue to compete or be considered for follow-on work.

Presumably understanding these concerns, former U.S. Rep. Don Young, R-Alaska, who died

in March, introduced a bill in July 2021 to eliminate the bona fide office rule. The bill, H.R. 4697, proposed to eliminate the "requirement relating to award of construction subcontracts within county or state of performance." [6] No further progress has been made on this bill since it was introduced.

Shortly thereafter, at the National 8(a) Association Alaska Regional Conference in August 2021, Bibi Hidalgo, associate administrator for the SBA's Office of Government Contracting and Business Development, announced that the SBA would suspend the bona fide place of business requirement for 8(a) construction contracts, effective immediately.

Given the Small Business Act's statutory requirement, the SBA did not have the authority to remove the requirement from its regulations without direction from Congress. However, in light of the COVID-19 pandemic, it was not practicable to implement the requirement. Accordingly, the SBA suspended the requirement to allow more small, disadvantaged businesses to be eligible for and be awarded 8(a) construction contracts.

The suspension was set to remain in place through September 2022. Notably, the moratorium on the bona fide place of business requirement only applied to contracts that were offered to the 8(a) program between Aug. 25, 2021, and Sept. 30 of this year. This meant that, if the contracting agency had offered the procurement to SBA prior to Aug. 25, 2021, then the bona fide place of business requirement would still be in effect.

On June 21 of this year, at the same conference, SBA Associate General Counsel for Procurement Law John Klein announced suspension of the requirement would continue, given that its implementation continues to be impractical. This moratorium on enforcement of the bona fide place of business requirement is expected to be extended through at least Sept. 30, 2023.

The extension will give more small, disadvantaged businesses an additional year to be eligible for, and to be awarded, 8(a) construction contracts without the need for an SBA-approved bona fide place of business. It also allows Congress more time to consider removing the requirement from the Small Business Act altogether.

The Small Business Act does not explain how the bona fide place of business requirement must be implemented. Perhaps, given differences in how businesses operated in 1998 versus today, which were brought into greater light during the pandemic, we will see changes to the SBA regulations on how this requirement can be met.

The same definition that the SBA introduced in its regulations in 1998 remains in place today. Extension of the moratorium also provides the SBA time to consider revising its regulations to clarify how a firm can demonstrate that it has a bona fide place of business.

It is certainly confusing to contractors why a requirement of this nature applies by definition to small disadvantaged businesses when it does not apply to businesses in any of the other socioeconomic programs, including small businesses.

As the SBA's standard operating procedures explain, the requirement is "intended to promote efficiency and cost-effectiveness in fulfilling construction requirements. Because of the capital intensity of construction projects (i.e., equipment, etc.), costs should be lower, the closer the contractor is to the construction project." [7] However, the cost concern is not entirely accurate, particularly when taking into account that for a set-aside construction contract, including 8(a) set-asides, a prime contractor is permitted to subcontract out up to 85% of the work. [8]

The primary role of a prime contractor for a construction project is to superintend, manage and schedule the work, but the actual construction tasks are often performed by local subcontractors. Accordingly, where the 8(a) prime contractor is located, hardly has any effect on the overall costs of construction contracts.

A prime contractor that is located hundreds of miles away from the job site will incur the same or similar investment costs as a prime contractor that is located one mile away from the job site, in terms of contracting and mobilizing a local subcontractor. While there may be travel costs associated with traveling to the job site to oversee the work, prime contractors often employ local field employees near the locations where the projects are being performed.

So, the work tends to stay local, regardless of where the prime contractor has an office located. And, contractors understandably do not wish to incur the costs of hiring personnel or setting up an office location until awarded a contract.

If and when the moratorium is lifted, and assuming there are no statutory changes, 8(a) construction contractors should be prepared to have at least one bona fide place of business to submit to the SBA for review and approval in their primary location of work. A contractor is permitted to have more than one bona fide place of business, and this is common for construction companies that operate in multiple geographical locations.

For now, 8(a) construction contractors are free to pursue 8(a) set-aside construction contracts without the geographical requirement through Sept. 30, 2023. This allows small, disadvantaged businesses to access contracts that they may not otherwise be able to pursue absent a bona fide place of business.

Ultimately, this moratorium has been well-received by 8(a) contractors and agencies that seek to do work with 8(a) construction contractors. Hopefully this will provide Congress with sufficient time to act, as the SBA is bound by the terms of the Small Business Act.

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[1] 15 U.S.C. § 637(a)(11); Pub L. No. 95-507, 92 Stat. 1757 (1978).

[2] *Id.*

[3] 13 C.F.R. § 124.3.

[4] *Id.*

[5] 85 Fed. Reg. 66146, 66161 (Oct. 16, 2020).

[6] To amend the Small Business Act to eliminate certain requirements relating to the award of construction subcontracts within the county or State of performance, H.R. 4697, 117th

Cong., § 1 (2001).

[7] SOP 80 05 5, Chpt. 4D, § 2(b).

[8] 13 C.F.R. § 125.6(a)(3).