



U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF THE ADMINISTRATOR

May 30, 2008

The Honorable John F. Kerry
Chairman
Committee on Small Business and Entrepreneurship
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Thank you for your recent letter to the U.S. Small Business Administration (SBA), regarding AEY, Inc., and SBA's Small Disadvantaged Business (SDB) Program. I am pleased to answer your questions.

1. Please describe the specific oversight activities that the SBA undertakes to ensure the integrity of the SDB Program.

Answer: The SBA certifies as SDBs those businesses that qualify as small under the size standard corresponding to their prime North American Industry Classification System code and are owned and controlled by one or more socially and economically disadvantaged individuals or by an Indian tribe, Alaska Native Corporation, Native Hawaiian Organization, or Community Development Corporation. Each application goes through at least two levels of review at SBA before any firm is certified as an SDB. Once certified, the firm is added to an on-line registry of SBA Certified SDB firms maintained in the Dynamic Small Business Search (DSBS) engine in the Central Contractor Registry. Certified firms remain on the list for 3 years. SBA may initiate a new SDB determination whenever it receives credible information calling into question a firm's eligibility as an SDB. In addition, SBA processes protests and appeals relating to SDB status in connection with specific contracts.

2. What if any benefit in accessing Federal contracts is provided to Small Disadvantaged Businesses? Any answer should include but not be limited to a discussion of the history and relevance of the Price Evaluation Adjustment or any other mechanisms to increase the competitiveness of SDBs.

Answer: The SDB program was initially created for the Department of Defense (DOD) as part of a DOD authorization statute, section 1207(a) of the National Defense Authorization Act for Fiscal Year 1987 (Public Law 99-661). The "Section 1207" program for the first time established a 5 percent (in dollars) goal for all DOD contracts to be awarded to SDBs, authorized DOD to "enter into contracts using less than full and open competition" to "facilitate achievement of the 5 percent goal" (i.e., set-asides for SDBs), and provided a 10 percent price evaluation preference to SDBs in unrestricted competitions.

A Government-wide SDB program was authorized by Section 7102 of the Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355). To facilitate the 5 percent (in dollars) goal for SDBs set forth in section 15(g)(1) of the Small Business Act, 15 U.S. Code section 644(g)(1), FASA authorized both restricted competition (i.e., SDB set-asides) and price evaluation preferences for SDBs acting as prime contractors, and a subcontracting preference whereby a potential prime contractor would receive specified evaluation points for using SDB subcontractors.

The Price Evaluation Adjustment was implemented by Federal Acquisition Circular 97-06, which was published on June 30, 1998, with an effective date of October 1, 1998, creating subpart 19.11 and several related clauses in the Federal Acquisition Regulation (FAR).

In response to the June 1995 Supreme Court decision in *Adarand Constructors, Inc. v. Peña*, the Department of Justice (DOJ) and the Office of Management and Budget suspended the Government-wide SDB set-aside program. In *Adarand*, the Supreme Court applied the doctrine of "strict scrutiny" to Federal affirmative action programs that use racial or ethnic criteria as a basis for decision making. In procurement, this means that any use of race in a program to award contracts is subject to strict scrutiny. Under strict scrutiny, any Federal programs that make race a basis for contract decision making must be narrowly tailored to serve a compelling Government interest.

As a result, DOJ developed a proposed structure to reform affirmative action in Federal procurement designed to ensure compliance with the constitutional standards established by the Supreme Court in *Adarand*. The DOJ proposal was published for public notice and invitation for comments on May 23, 1996. The DOJ model was implemented in several parts of subpart 19.12 of the FAR and the FAR supplements; Small Business Administration (SBA) regulations; and procurement mechanisms and applicable factors (percentages) determined by the Department of Commerce. The SBA published regulations for public comment on August 14, 1997. Requirements related to certification, protests, and appeals and other issues are also addressed in our rules. On May 9, 1997, revisions were proposed to the FAR that were based on the DOJ Model. The price evaluation adjustment for SDB concerns was part of the June 30, 1998 revision to the FAR. In addition, the June 30, 1998 revision also included the evaluation factor or subfactor for SDB participation, incentive subcontracting with SDB concerns, and other SDB coverage that is not directly related to the price evaluation adjustment.

On September 30, 2005, the FAR was revised to rescind the price evaluation adjustment for civilian agencies due to its expiration. This provision, as implemented in FAR subpart 19.11, authorized agencies to apply the price evaluation adjustment to benefit certain small disadvantaged business concerns in competitive acquisitions. As a result of its expiration for civilian agencies (except NASA and Coast Guard), civilian agencies (except NASA and Coast Guard) no longer have statutory authority to apply the small disadvantaged business price evaluation adjustment to their acquisitions.

Today the price evaluation adjustment is applicable only to prime contracting actions issued by DOD, NASA and the Coast Guard. However, Section 801 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Pub. L. 105-261, amended 10 U.S. Code section 2323(e) to prohibit DOD from using the SDB price evaluation preference if the Secretary determines at the beginning of the fiscal year that DOD achieved the SDB 5 percent (in dollars) goal in the most recent fiscal year for which data is available. As a result, DOD has not applied the price evaluation preference to any of its procurements over the past several years.

Status as an SDB is, however, still relevant in Federal contracting. There is still a 5 percent (in dollars) subcontracting goal placed on any large business receiving a Federal contract. In addition, there is also a separate evaluation factor or subfactor used by procuring agencies as one determinant when selecting the successful offeror for a prime Federal contract.

Insofar as we can determine, AEY Inc. received no benefit towards source selection for the Federal contracts mentioned in your letter. SDBs currently receive no benefit in the source selection process, with the possible exception of contracts awarded by NASA and Coast Guard.

3. What training does the agency provide to the contracting offices throughout the Federal Government with respect to small business programs?

Answer: SBA's Government Contracting field staff provides numerous training opportunities to other Federal agencies on small business programs throughout the year. SBA also conducts "train-the-trainer" events to leverage the number of Federal contracting officials receiving this training. For example, during the week of May 14, a Government Contracting field employee gave a presentation to the Department of Housing and Urban Development Contracting and Acquisition staff in Washington D.C. The presentation covered Trends in Small Business Contracting and SBA Procurement Programs. All HUD contracting staff in DC and staff at eight HUD satellite offices throughout the country participated in the presentation.

4. How often does the agency audit SDB Companies?

Answer: SDBs are certified for 3 years, and they may apply for recertification. SBA conducts eligibility reviews of SDB-certified firms in response to protests, appeals, or credible information calling into question a firm's eligibility.

5. Please provide all relevant documents pertaining to AEY Inc.

The SBA does not have any documentation relevant to AEY, Inc., since it has not applied for participation in the 8(a) Business Development Program, Small Disadvantaged Business Certification or participation in the HUBZone Program. Both DSBS and CCR were last updated in July 2007 and do not reflect this firm as being in either program by the SBA.

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Online Representations and Certifications Application (ORCA) does not reflect the firm as being 8(a), SDB, or HUBZone; however, the firm did check the SDB block in ORCA that is for general statistical purposes only. SDB certification is currently relevant only for purposes of statistical goals. There are no Government-wide preferences or set-asides available based on SDB status, except for prime contractor evaluation credits.

If you have any questions, please contact our Office of Congressional and Legislative Affairs at (202) 205-6460.

Sincerely yours,

A handwritten signature in blue ink that reads "Fay E. Ott". The signature is fluid and cursive, with the first name "Fay" being the most prominent.

Fay E. Ott
Associate Administrator
for Government Contracting
and Business Development