

**“THE ROLE OF THE SBA’S 8(A) PROGRAM IN ENHANCING ECONOMIC  
OPPORTUNITIES.”**

**TESTIMONY OF THE  
NATIONAL ASSOCIATION OF MINORITY CONTRACTORS  
WASHINGTON, D.C.**

**BY  
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**BEFORE THE  
HOUSE COMMITTEE ON SMALL BUSINESS  
HEARING - 11:30 A.M. - RAYBURN HOUSE OFFICE BUILDING  
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Good morning, Madame Chair and ladies and gentlemen of this most important Congressional Committee. The House Committee on Small Business usually represents the first stop in developing legislation that reflects the hopes and aspirations of thousands of small businesses in America -- not only those that are owned and controlled by socially and economically disadvantaged individuals in the 8(a) Program, but all categories of small businesses across the country. Because of that, you are to be commended on focusing your attention on the 8(a) Business Development Program of the Small Business Administration (SBA) at this particular time.

My name is Ralph C. Thomas III, and I am testifying today on behalf of the National Association of Minority Contractors (NAMC). Our headquarters is here in Washington, D.C., and we have chapters and affiliates all over the country. NAMC was founded in 1969, to advocate primarily on behalf of minority –owned construction firms, so we are proudly celebrating our 50<sup>th</sup> anniversary this year. That makes us the oldest minority construction trade association in the United States.

We advocate not just for our members but also for the approximate 100,000 minority contractors across America and for the construction industry as a whole. The inclusion of minority contractors in the overall competitive base of vendors from which the government regularly purchases goods and services ensures that America is operating at the full productive capacity of its citizenry.

I served as Executive Director of NAMC from 1985 to 1992. After that, I was Associate Administrator of NASA's Office of Small and Disadvantaged Business Utilization (OSDBU) from 1992 – 2005. Since 2005, I have represented and advocated on behalf of minority contractors and all other categories of small business as a government contracts attorney. Many of my legal clients have included 8(a) contractors and I have interrelated with the US Small Business Administration (SBA) on numerous occasions in my various roles as an advocate for minority contractors.

I have been familiar with the 8(a) Program almost since it was codified into law more than 40 years ago. So I am happy to be here today representing NAMC and having the benefit of including and sharing some of my personal experiences regarding the 8(a) Program. My testimony will include why NAMC supports the 8(a) Program, a brief history of the Program, successes and challenges of the Program, the SBA Office of Inspector General's (OIG) most recent report regarding the 8(a) Program, and, finally, a few issues that we would like to see this Committee focus on within the Program.

## **I. NAMC SUPPORTS THE 8(A) PROGRAM**

Let me say from the outset that NAMC fully and enthusiastically supports the 8(a) Program. While the Program is not without flaws, it is no doubt one of the best government vehicles that minority contractors can use to enhance their economic opportunities in the federal marketplace. First of all, to be eligible for the Program, one of the requirements is that the business owner has to have already run a successful business in his/her field for at least two years. So there has to be a basis for success from the outset.

As an 8(a) contractor, the minority business has the unique opportunity to build a track record of successfully completed contracts by competing against fellow 8(a) contractors in its field. Even though the entrepreneur is in the Program, it will get no breaks from Federal agencies on demanding the highest quality and the most reasonable cost and prices for an 8(a) contractor's products or services. The 8(a) contractor must deliver its product on time and within budget, even if the contract is a sole source award. Moreover, the 8(a) contractor has a Business Opportunity Specialist (BOS) to assess its progress and to assist the business in obtaining government contracts. A construction 8(a) contractor should have better access to bonding and financing through the SBA's guaranteed programs. Although these SBA services may be available to non-8(a) small businesses as well, a firm might be more familiar with them in the course of being an 8(a) contractor.

If the 8(a) contractor wants to move to the next level and is fortunate enough to find a good mentor company, it can apply to be accepted into SBA's Mentor-Protégé Program where it will receive special training and assistance from a large contractor. Being a part of the Mentor-Protégé Program also means that the 8(a) contractor can joint venture with its large business mentor and still be classified as an 8(a) firm. A contractor can then bid for larger government contracts.

Simply put, a small business could not have this kind of access to government contracts and other contract-related opportunities without the existence of the 8(a) Business Development Program. Nevertheless, the Program is not always administered or implemented as well as it should be. To put the 8(a) Program in its proper context, a brief review of how the 8(a) Program came into existence might be appropriate at this time.

## **II. THE 8(A) PROGRAM – HISTORY AND PURPOSE**

The original authority for SBA assistance to small and disadvantaged businesses has its roots in Section 8(a) of the Small Business Act of 1953. (Pub. L. No. 83-163, 67 Stat. 232 (1953), as amended by Pub. L. N. 85-536, 72 Stat. 384 (1953), and at various times thereafter; currently codified as 15 U.S.C. § 631 et. seq.) At that time Section 8(a) authorized the SBA itself to enter into contracts with government agencies and to arrange for the performance of such contracts by awarding “subcontracts,” by negotiation or otherwise to small business firms or others.

In 1958 the SBA issued its first regulations implementing Section 8(a). (Pub. L. No. 85-536 § 2(8), 72 Stat. 389 (1958)). These regulations indicated that the Section 8(a) power was to be exercised in the event of emergency for the benefit of small businesses as a class and on a publicized, competitive basis. So, the concept of channeling contracts to small businesses through an intermediate federal agency was an emergency measure to insure that small businesses were not bypassed in wartime. However, the SBA never used the Section 8(a) authority for that purpose, and section 8(a) was dormant for the next 10 years or so.

Following the urban riots, President Johnson appointed the Kerner Commission, named after its Chairman, to investigate civil disorders in the American ghettos. (REPORT ON THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 236 (March 1, 1968)). The investigation revealed that in the area of governmental assistance to small businesses, in general, there were truly two societies: one Black and one White . . . separate and unequal.

Consequently, the Commission recommended that the government encourage business ownership by minorities.

In 1970 the SBA regulations were changed to state that a firm must be owned or be destined to be owned by socially or economically disadvantaged persons in order to be eligible for an 8(a) contract. (Act of Aug. 12, 1970, Pub. L. No. 91-375, §6(g), 84 Stat. 776 (current version at 15 U.S.C. 637 (1970)). The regulations were also amended to authorize the award of 8(a) subcontracts on a non-publicized, non-competitive basis. *Id.*

During the 1970's the government sought to encourage the development of minority-owned businesses primarily through expanding government contract procurement opportunities. The administrative program for minority business set-asides developed by the SBA under the general set-side authority of Section 8(a) of the Small Business Act was the primary vehicle used to accomplish that goal.

In 1978 Congress empowered the Small Business Administration (SBA) to “provide small business concerns owned and controlled by socially and economically disadvantaged individuals such management, technical, financial and contract assistance as may be necessary to promote competitive viability within a reasonable amount of time.” (Act of October 24, 1978, Pub. L. No. 95-507, 92 Stat. 1757-73 (1978)). In this law Congress left no doubt as to its intent. The legislation sets forth both congressional findings and purposes. The statute in effect contains a congressional finding that there exists in this country a correlation between ethnicity and social and economic disadvantage. The Congress also found that it was in the national interest to expeditiously ameliorate this situation in order to both obtain social and economic equality and to improve the functioning of the national economy. The promotion of minority

business ownership through the use of federal resources, i.e., contract awards, was one of the means chosen by Congress to effect these goals.

Before the passage of Public Law 95-507, less than one percent of all federal procurement dollars went to minority-owned firms. *Fullilove v. Klutznick*, 488 U.S. 448, 459 (1980). According to the U.S. Supreme Court in *Fullilove* the causes of this disparity were perceived by Congress to be the longstanding existence and maintenance of barriers which impaired access by minority enterprises to public contracting opportunities. Congress found such barriers were attributable to direct discrimination, and not to a lack of capable and qualified minority contractors that were ready and willing to work. *Id.* at 463.

In 1980 Congress passed Pub. L. No. 96-482, which required the SBA to negotiate a fixed period of time for participation and a definite graduation date for all 8(a) firms. Prior to that time, there was no time limit on participation in the Program. In 1982 the SBA implemented regulations which established the fixed program participation term (FPPT) which limited a firm's participation in the Program to an original term of up to five years with a possible extension of two years. (13 C.F.R. § 124.100 (1982)).

In 1988 Congress passed the Business Development Opportunity Reform Act, Pub. L. No. 100-656. Among other things, this law provided for: competition in the 8(a) program; a nine-year participation term; attainment of non-8(a) revenue at certain levels of the program; an 8(a) loan program; transfer of surplus property; employee skills training; and a transition management plan during the first year of the transition stage.

Also, in 1988, a Government-wide study was conducted by the U.S. Senate Committee on Small Business to determine what happens to 8(a) firms after they graduate from the Program.

That Study, which is included in a GAO Report on the subject, showed in part that 21-30 percent of the graduated 8(a) firms had gone out of business, and that 44 percent were either not doing well, or doing just well enough to get by. Fifty-eight percent (58%) of the respondents said that “graduation” had a devastating effect on their businesses. The report concluded that the 8(a) Program was not preparing firms for the post-graduate competitive market. (“Small Business Administration: Status, Operations, and Views on the 8(a) Procurement Program,” General Accounting Office, GAO/RCED0-88-148BR, May, 1988, p. 18).

At the same time the Report indicated that, in general, most 8(a) firms performed satisfactorily. Contracting officers reported that all or most of the delivery dates were met on over 78 percent of the contracts, and for over 88 percent of the contracts, the products or services delivered met or exceeded quality specifications. The study also looked at the performance of 8(a) firms on contracts in comparison with the performance of non-8(a) firms on contracts in the same or similar industries. The contracting officers on over half of the contracts in the surveys had experience with both types of companies and in comparing them reported that the 8(a) firms' performance in meeting delivery dates for about 75 percent of the contracts was equal to or better than non-8(a) firms'. For about 85 percent of the contracts, the 8(a) firms performed the same or better than the non-8(a) firms in terms of the quality of goods or services they delivered.

Since that time, the SBA has issued regulations updating the 8(a) Program as necessary. The above history is not meant to be exhaustive, but only to highlight the most important historical points associated with the Program.



### **III. 8(A) PROGRAM SUCCESSES**

When I began as Executive Director of NAMC in 1985 8(a) firms were primarily used by federal agencies to perform small contracts in construction, administrative contract support and janitorial/maintenance contracts. However, when I served as head of NASA's Small Business Program from 1992 to 2005, I watched 8(a) contractors perform such mission critical activities as developing subsystems for complex spacecraft; assisting in building non-rocket-powered vehicles to fly at hypersonic speed; and, manufacturing hardware for the International Space Station; One 8(a) contract, for example, was valued at \$264 million, and it is my understanding that the contract is still in 8(a) Program, 26 years later.

They were also involved in more complex service-oriented contracts, such as space shuttle-related software development, safety and mission assurance, systems engineering, construction of mission control facilities, and the design of inter-planetary spacecraft.

I also proudly observed the continued success of some of these companies that have graduated from the 8(a) Program, and which are still performing in an outstanding manner. Some of them I knew at NAMC and others at NASA. At NAMC we have a Hall of Fame consisting of about 50 individuals, most of whom were or are construction firm owners. Most of them participated in the 8(a) Program at one time or another. They overcame hardships and became amazingly successful entrepreneurs even after their graduation from the 8(a) Program.

In 1999, at the direction of the NASA Administrator, the OSDBU, in association with NASA's Minority Business Resource Advisory Committee, conducted a study to determine whether high tech firms that were in the 8(a) program when they contracted with NASA were still viable after their graduation from the Program.

Although NASA's Study was limited to high tech contractors, the report closely followed the schematic approach of that of the U.S. Senate Committee on Small Business Report and had much better results. (See "A REPORT TO THE NASA ADMINISTRATOR ON THE STATUS OF NASA HIGH TECH 8(A) GRADUATE CONTRACTORS," submitted by NASA's Minority Business Resource Advisory Committee (July 14, 2000)). The Study showed, for example, that 62 percent of the firms that had completed their first 8(a) contract with NASA were now doing business with other parts of the government, indicating that their experience with the space program made them competitive and able to win contracts from other Federal agencies.

Sixty-eight percent (68%) of the graduates surveyed were currently doing work in the commercial market, while thirty percent (30%) reported that they had contracts in the international market. Indeed seventy percent of the 8(a) graduates surveyed *directly* attributed their success and development to their NASA experience. Another seventeen percent (17%) *indirectly* attributed their current success to NASA.

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Thus, the successes of the 8(a) Program demonstrates the positive potential and promise of the Program to both the Federal government and the nation – if it is properly administered and implemented.

#### **IV. THE SBA OIG REPORT**

NAMC has also reviewed the SBA OIG's Audit Report, dated September 7, 2018, and entitled "Improvements Needed in SBA's Oversight of 8(a) Continuing Eligibility Processes" as well as its "Report on the Most Serious Management and Performance Challenges Facing the Small Business Administration," dated October 11, 2018. While we appreciate the OIG's objective here to make sure that only those 8(a) contractors who are eligible for the Program are in fact in the Program, we do have some concerns.

The OIG is essentially stating that from its independent review of certain documents and records, certain 8(a) contractors, from its viewpoint, are ineligible for the 8(a) Program. As an attorney who has represented 8(a) contractors who have been wrongly marked for termination by the SBA, however, I feel that much caution should be taken in this area. Moreover, I perfectly understand the SBA's partial concurrence to some of the OIG recommendations.

First of all, the SBA is the only entity by law that can determine the true eligibility or ineligibility of an 8(a) contractor. Because of that, only the SBA hears *both* sides to any given claim to an 8(a) contractor's continued eligibility in the Program. In fact, in all of the cases where I represented an 8(a) contractor marked for termination, the SBA had wisely contacted the firm and brought to its attention the charges that were being leveled against it. This was done before the SBA sent a formal Notice of Intent to Terminate to the 8(a) contractor to determine if there was a logical explanation from the 8(a) contractor. If the 8(a) contractor was not successful in informally persuading the SBA that the charges were unwarranted, he/she gets an opportunity to establish a formal record of its position by responding to the SBA's written Notice of Intent to Terminate. Even if the SBA still decides to terminate the firm from the 8(a) Program, the

individual may appeal to the SBA Office of Hearings and Appeals. If the contractor loses there, it can take the case to federal court. As an attorney, I have prevailed in both appeal avenues when the case could not be informally resolved.

The point here is that the SBA is not at liberty to simply terminate firms from the 8(a) Program simply based upon the viewpoints of individuals or even other governmental entities. To wrongly terminate a contractor from the 8(a) Program will adversely affect that contractor for life. Therefore, all of the facts must be heard and considered by the SBA, and then the regulatory process due the 8(a) contractor must be followed. As in other venues of law, factual scenarios are not always what they appear to be at first glance.

Finally, the OIG's Report on the SBA's Most Serious Management and Performance Challenges, indicates that the participants in the 8(a) Program has decreased in recent years. It has gone down from more than 7000 participants in the Program to less than 5000 today. In today's super competitive government contractor environment that dilemma makes no sense.

There are still many (most) participants in the 8(a) Program that never get an 8(a) contract. Hopefully, potential 8(a) Participants are not assuming that because of this fact, it is not worth the time and effort to apply for entry into the Program. This is a topic that causes NAMC great concern, and we hope that the OIG would make the subject of why 8(a) participation is decreasing a future oversight topic. We ask that of this Committee prioritize this issue.

Finally, we would like to see the OIG focus more on whether 8(a) contractors are receiving the training and other resources that they need to succeed in the Program.

## **V. RECOMMENDATIONS FOR IMPROVEMENTS TO THE PROGRAM**

### **A. Left Behind 8(a) Contractors**

Many of our members have complained about having been in the 8(a) Program for years and never getting an 8(a) contract. Some have reported never being awarded an 8(a) contract during their entire nine year tenure. Each 8(a) Participant is assigned a Business Opportunity Specialist (BOS) who is supposed to, in part, assist them in obtaining contracts with the various Federal agencies. While some BOS's are very good at doing that, obviously many are not. NAMC recommends that the SBA develop a process to these BOS's accountable as to how many 8(a) contractors in their client base actually have 8(a) contracts.

Perhaps the fact that most 8(a) contractors in the Program do not have 8(a) contracts may be the reason why participation in the Program is down. Upon hearing from 8(a) contractors currently in the Program that do not have contracts, other eligible small businesses may not see the Program as worth applying to get into

### **B. Status of Graduated 8(a) Firms**

NAMC recommends that the House Committee on Small Business conduct a follow up survey to the 1988 Report by the Senate Committee on Small Business on the current status of graduated 8(a) firms. It is imperative that we understand the current state of affairs with regard to what happens to 8(a) firms after they graduate from the Program. Having this information will serve as guidance to the Members of this Committee as to specific improvements that need to be made to the Program.

### **C. Smaller 8(a) Contractors**

The SBA recently announced that size standards would be increased in the various industry codes for small businesses. NAMC feels that as contracts get larger, smaller 8(a) firms are getting less contract awards. However, we believe that there are still smaller contracts that can be made 8(a) by Federal agencies. The SBA currently negotiates goals with agencies that measure the amount of dollars that are awarded to 8(a) firms. Sometimes these goals can be met with a few super large awards. NAMC recommends that such goal reporting be supplemented to measure the *number* of contracts that are made to 8(a) firms. Such action may increase the number of 8(a) contracts going to smaller firms. Another method to increase the number of contracts going to smaller firms is to require Federal agencies to report contracts awarded to 8(a) contractors by revenue tiers. For example, requesting 8(a) contract dollars that were awarded to firms with less than \$1 million in annual revenues, \$1 million to \$5 million in revenues, and so forth.

### **D. Disparate Treatment of African American and Latino Women Owned Businesses in the 8(a) Program**

The 2017 U.S. Department of Transportation (DOT) Uniform Report on DBE Commitments/Awards and Payments demonstrated a marked disparity of contract awards to African American and Hispanic American Women-Owned Businesses as opposed to other minority firms and non-minority owned women firms. In Tennessee, for example, the Report showed that no awards were made to African-American women owned firms. Yet \$200 million in total contract awards were made.

Although this Report does not involve the 8(a) Program, it would be very informative if the SBA could determine if there was any correlation with the lack of contract awards made to

African American and Hispanic owned women businesses in geographic areas of the DOT Disadvantaged Business Program and awards made to such businesses in these same geographic areas in the 8(a) Program. If further action is warranted, such action should be taken.

#### **E. SBA's Mentor-Protégé Programs/Joint Ventures**

Our members who are or have been in SBA's Mentor Protégé Program are very concerned about the fact that under the 8(a) banner, the large business obtains an 8(a) contract with its 8(a) protégé and then during the performance of the contract, the large firm determines that the 8(a) firm cannot perform its part of the contract and essentially drops the 8(a) firm from the contract.

Because of its commitment to complete the contract if the 8(a) contractor is unable to finish performance of the contract, the large company then gets paid for completing what was supposed to be an 8(a) contract. Our members tell us that this is beginning to happen more and more. We ask this Committee to look further into this issue.

#### **F. Non-Procurement Assistance to 8(a) Contractors**

One of the requirements for a small business to be eligible for the 8(a) Program is its "potential for success." the statute, 15 U.S.C. § 637(a)(7)(A), requires a determination by the SBA as to whether an applicant for the SBA's 8(a) BD Program would have reasonable prospects for success with contract, financial, technical, and management support from the Agency. However, it is not clear what contract, financial, technical and management support that the SBA actually provides the 8(a) Participant. NAMC recommends that this Committee require the SBA to address this issue.

That ends my testimony, distinguished Members of the Committee. Once again, thank you for allowing me to testify today. I am now ready for any questions that you might have.