



## **How Will SBA's Final Rule on Women-Owned Businesses Impact You?**

On Thursday, October 7, 2010, the Small Business Administration (SBA) published a long-awaited final rule laying out the framework for the treatment of women-owned businesses in the Federal marketplace. 75 Fed. Reg. 62,258. The rule will take effect on February 4, 2011. The SBA notice is 35 pages, 22 of which explain the background behind the rules and 13 of which constitute the new regulation. This new program has been 10 years in the making, and it will have a significant impact on the Government contracting community. The purpose of this client alert is to provide a thumbnail sketch of the new rule. The full rule is available online at <http://edocket.access.gpo.gov/2010/pdf/2010-25179.pdf>.

In a nutshell, there soon will be two new kinds of favored entities in Federal contracting: Women-Owned Small Businesses (WOSB) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSB). In the eyes of the contracting officers, WOSBs and EDWOSBs are to receive roughly the same treatment as 8(a), HUBZone and Small Disadvantaged Veteran-Owned Business (SDVOB) concerns. If a procurement falls under one of 83 particular industry classifications, agencies can restrict competition to WOSBs or EDWOSBs. Skeptical competitors will be able to challenge both the size and the eligibility of a firm claiming either status, and the SBA has the ability to conduct "examinations" to confirm the validity of a firm's status. When procurements are set aside for either WOSBs or EDWOSBs, large businesses may still participate as subcontractors or joint venturers, just as they currently do with 8(a), HUBZone or SDVOB prime contractors.

### **I. Contracting Opportunities**

Under the existing regulations, contracting officers already have certain obligations to satisfy in terms of set-aside possibilities, and one option available is to designate certain procurements for 8(a), HUBZone and SDVOB concerns under appropriate circumstances. When the new rule takes effect in February 2011, those obligations will remain in place, but WOSBs and EDWOSBs will be added to the mix, and there will be no order of precedence among the various programs.

In order to set the program aside for WOSB or EDWOSB participation, a contracting officer must first determine that the North American Industry Classification System (NAICS) code that applies to the procurement is one of those that SBA has approved for the program. The 83 NAICS codes are available on the SBA website at [http://www.sba.gov/idc/groups/public/documents/sba\\_program\\_office/gc\\_wosb\\_naics\\_grid\\_s.pdf](http://www.sba.gov/idc/groups/public/documents/sba_program_office/gc_wosb_naics_grid_s.pdf); they are also listed in the Background section accompanying the new rule. Forty-five NAICS codes are listed to indicate industries in which WOSBs are under-represented and 38 NAICS codes represent industries where WOSBs are substantially under-represented. The underlying statute contemplated a program in which contracts in industries where WOSBs have been under-represented would be available for both WOSBs and EDWOSBs, but in

industries where women have been substantially under-represented, only EDWOSBs could be considered. The SBA Administrator has waived this distinction, which means that any eligible WOSB will be able to compete for solicitations in all 83 NAICS codes.

The contracting officer, after conducting market research, must conclude that two or more WOSBs or EDWOSBs, depending on which group is designated, will submit proposals and that contract award will be at a fair and reasonable price. In addition, the anticipated award price of the contract, including options, may not exceed \$5 million for manufacturing NAICS codes and \$3 million for all other codes. A contracting officer may not restrict competition to WOSBs or EDWOSBs if an 8(a) participant is currently performing the requirement under the 8(a) program or if the SBA already has accepted the requirement for that program.

## **II. Eligibility**

For a firm to qualify as a WOSB, it must demonstrate that (a) it is a "small business" under SBA's size standards for its primary industry classification, and (b) it is not less than 51 percent "unconditionally and directly owned and controlled" by one or more women who are U.S. citizens. To qualify as an EDWOSB, an applicant must meet the same two tests, but, in addition, the owners must be "economically disadvantaged." Section 127.201 of the new regulations provides a detailed discussion of the types of factors SBA will consider in order to determine whether ownership is "unconditional." While it is beyond the scope of this alert to discuss those factors, suffice it to say that the SBA is looking for any sign that the applicant is a "front" for otherwise ineligible persons or entities.

In order to be considered "economically disadvantaged," a woman must demonstrate that "her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business." In addition, the woman's personal net worth must be less than \$750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence. This alert will not delve into the details of what SBA will consider in determining economic disadvantage, but Section 127.203 of the new rule clearly is designed to prevent husbands from using their wives as a front. In view of the fact that the SBA Administrator has effectively eliminated the difference between WOSBs and EDWOSBs, some applicants may decide it is more practical to be content with attaining WOSB status.

## **III. Certification as a WOSB or an EDWOSB**

With the exception of the 8(a) program and the HUBZone program, the small business size status program in Federal contracting has traditionally relied on a self-certification process under which the Government took an offeror's certification as valid unless it was challenged by a contracting officer, the SBA or a competitor through a protest. Although protests will still be part of the WOSB and EDWOSB process, the self-certification element will be complemented by a process in which applicants will submit all required information to a "third-party certifier" that will either certify the applicant's status or reject the application. These third-party certifiers will be listed on the SBA's website. In addition, the SBA will honor certifications issued by the SBA under its 8(a) Business Development Program, as well as certifications from third parties used by the Department of Transportation's Disadvantaged Business Enterprise program. The approved third-party certifiers may develop their own procedures for reviewing applications provided that those procedures meet the SBA's expectations.

Once an applicant has obtained a third-party certification, it must file it with the WOSB Program Repository, a secure, Web-based site (yet to be established by the SBA) that will collect, store and disseminate documents to the contracting community and the SBA. This site will be accessible only to the individual concerns, the SBA and to contracting officers, and will serve to verify the eligibility of a concern that is in line for the award of a contract under a WOSB or EDWOSB requirement. For each solicitation under this new program, an applicant will be expected to be registered in the Central Contractor Registration (CCR) system, have a current representation posted on the Online Representations and Certifications of Application (ORCA) that it qualifies as a WOSB or EDWOSB, and have provided the required documents to the WOSB Program Repository. In addition, for each offer it submits under this program, an offeror must furnish the contracting officer its certificate, together with other applicable documents, such as a copy of a joint venture agreement.

In the event that an offeror has not been certified by a third party and simply intends to self-certify, it must provide the required documentation to the WOSB Program Repository, or, if the Repository is unavailable, it must furnish the contracting officer a number of documents that may be used to validate its claims to be eligible for the program. Within 30 days of the Repository becoming available, the concern must furnish the documents to the Repository. At this stage, before things have even started, two things are predictable: First, because the process is burdensome and confusing, it is going to generate headaches for both contractors and the Government. Second, contracting officers are likely to be confused by the new requirements being imposed on them, and contractors will find that every contracting officer handles these requirements differently.

#### **IV. Protests and Examinations**

As has long been the case with procurements involving small business concerns, if a competitor, a contracting officer or the SBA doubts the eligibility of a particular offeror, a protest may be filed. The protest process for WOSBs and EDWOSBs is consistent with the process traditionally used for small businesses. The new rule is careful to point out that an interested party seeking to protest both the size and the WOSB or EDWOSB status of an apparent successful offeror must file two protests. One would be a size protest under Part 121 of the SBA's regulations; the other would be a protest challenging the WOSB or EDWOSB status under Part 127.

In addition to protests, the new rule has introduced a process called an "eligibility examination." This is described as an investigation that verifies the accuracy of any certification made or information provided as part of the certification process, including third-party certifications or in connection with a WOSB or EDWOSB contract. SBA reserves the right to conduct the examination at the concern's offices. SBA also will consider allegations made in a protest, even if the protest was denied or dismissed. Although the rule states that SBA will normally provide five business days' notice before starting an examination, SBA reserves the right to visit a site without prior notification. In conjunction with such an examination, SBA will request copies of documents relating to the concern's eligibility as a WOSB or EDWOSB. If the SBA concludes that the firm is ineligible, it will provide the firm a written notification to that effect, and the firm will have 15 days to respond. After its review of any response, if the SBA determines that the firm is ineligible, it will issue a decision requiring the firm to remove its WOSB or EDWOSB designation from both the CCR and ORCA within five calendar days. If the firm has already certified itself for a pending procurement, the firm must advise the appropriate procurement officials of the adverse determination. Perhaps most significant, if the SBA determines that the firm did

not qualify as a WOSB or an EDWOSB at the time of its certification, the contracting officer may terminate the contract, refrain from exercising any options under the contract, or not award further task or delivery orders under the contract. Once a firm is found ineligible, it may not represent itself as a WOSB or an EDWOSB until it cures the reason for its ineligibility.

## **V. Conclusion and Recommendations**

As exciting as this new rule will be for businesswomen, it is complicated and burdensome, and it is going to be the source of great frustration for all parties involved. Women-owned small businesses that can benefit from the new rule would be wise to begin preparing now for certification as either a WOSB or an EDWOSB, knowing that the applications will be scrutinized carefully and that competitors will be quick to challenge their status. In addition, women-owned businesses need to modify their marketing practices to ensure that they are educating their customers, both primes and the Federal agencies, about the new rule. If the new rule directly applies to you and your company, you should take the time to become intimately familiar with it.

For “other than small” companies, the new categories offer two more opportunities to team so that your company can benefit from contracts that would otherwise be unavailable to you. At the same time, the new rule reflects SBA’s determination to avoid the scandals of the past and to impose severe penalties for those who attempt to abuse the rule. We can expect careful scrutiny of arrangements between WOSBs and large businesses.

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