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New Women-Owned Small Business Regulations: What Do They Mean for Your Federal Contracting Business?

In 1994, Congress passed legislation establishing a goal that 5% of federal procurement dollars be spent on women-owned small businesses ("WOSB"). Six years later, Congress added Section 8(m) to the Small Business Act, authorizing contracting officers to restrict competitions for federal contracts to WOSBs. But only recently has the Small Business Administration ("SBA") issued a final rule implementing the WOSB Program, after a decade of delays and multi-billion dollar annual shortfalls in federal procurement contracts being awarded to WOSBs.

SBA's final rule, which became effective on February 4, 2011, potentially could result in billions more federal procurement dollars being awarded to WOSBs annually as federal agencies get more serious about meeting their annual set-aside goals for WOSBs. An interim rule amending the Federal Acquisition Regulations ("FAR") to reflect changes made to the SBA regulations for the WOSB Program was published on April 1, 2011.

Overview of WOSB Program

Businesses that qualify as WOSBs or Economically Disadvantaged Women-Owned Small Businesses ("EDWOSBs") will be eligible to compete for set-asides under the WOSB Program. In addition to qualifying as a small business, a concern interested in the WOSB Program will have to meet certain ownership and control requirements. Specifically, to qualify as a WOSB, the regulations provide that a concern must not be less than "51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens." 13 C.F.R. § 127.200. And for an EDWOSB, one or more of these women must also be "economically disadvantaged." *Id.*

The SBA regulations are structured to prevent abuses that have recently been exposed on other small business programs. The WOSB and EDWOSB businesses must actually be owned, controlled and managed by women and not be used as a "front" by a large or otherwise ineligible entity. The SBA regulations explain each of the WOSB Program eligibility requirements in detail. For example, the regulations provide that "control" means that the "management and daily business operations of the concern must be controlled by one or more women" and that a woman must also "hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern." 13 C.F.R. § 127.202(a)-(b). Familiarity with SBA's detailed explanations of the eligibility requirements are critical for firms considering self-certification as a WOSB or EDWOSB for the purpose of competing in a WOSB Program restricted competition.

The anticipated contract value for WOSB Program set-asides must not exceed \$5 million dollars for a procurement under a manufacturing North American Industry Classification System ("NAICS") code or \$3 million dollars under all other codes. 13 C.F.R. § 127.503. Additionally, set-asides will be limited to 83 specific NAICS codes that SBA has identified as eligible for restricted competition under the WOSB Program. WOSBs will be eligible to compete for set-asides under 38 of the 83 NAICS codes, while EDWOSBs will be eligible to compete in competitions under all of them.

Practitioner Tips

Small businesses considering their strategic options related to the WOSB Program should consider the following.

- **Carefully review WOSB Program requirements and confirm eligibility.**

SBA has recently become tougher in cracking down on contractors that misrepresent their status in connection with contract awards. Notably, SBA has issued a Compliance Guide for the WOSB Program that clearly warns contractors that misrepresentation of WOSB or EDWOSB status could result in suspension, debarment, civil liability under the False Claims Act, and even criminal penalties. Additionally, Section 1341 of the Small Business Jobs Act of 2010 provides for a "presumption of loss to the United States based on the total amount expended...whenever it is established that a business concern other than a small business concern willfully sought and received the award by misrepresentation." In light of these developments, contractors that knowingly misrepresent their status do so at substantial risk.

- **Encourage government customers to set-aside under the WOSB Program.**

For years WOSBs have been unfairly short-changed by federal agencies failing to meet the 5% procurement goal Congress established in 1994. Eligible WOSBs can play a role in correcting this failure by educating and encouraging their government customers to exercise their discretion

favorably by setting aside procurements under the WOSB Program. This investment would help WOSBs to win more awards in the federal procurement space.

- **Watch for changes to the eligibility caps.**

In 2010, the Fairness in Women-Owned Small Business Contracting Act of 2010 was introduced in the Senate. This bill would have removed the \$3 and \$5 million dollar caps that currently apply to WOSB Program awards. This legislation was not passed, but there is a lobbying effort still underway to eliminate or raise the caps. Such a development would increase the universe of potential contracts eligible for set-aside under the WOSB Program.

For more information about the new women-owned small business regulations and the options for your government contracting business, please contact the authors of this alert or any of the attorneys in the [Government Contracts](#) practice group.

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