

April 6, 2011

A Potpourri of Small Business Program Changes

Significant new initiatives have recently been launched by the U.S. Small Business Administration ("SBA") in an attempt to meet its small business contracting goals. These initiatives include establishing a women-owned small business set-aside program and also, after ten years of relatively no change to its 8(a) Business Development program, dramatic changes to the rules of that program. These new initiatives will have major implications for contractors for years to come. Some of the major highlights follow.

Women-Owned Small Business Set-Aside Program

On October 7, 2010, the SBA published a final rule expanding federal contracting opportunities for women-owned small businesses ("WOSB"s), which became effective on February 4, 2011 (the "final WOSB Rule").¹ The Final WOSB Rule authorizes contracting officers ("CO"s) to limit competition, or to set aside, contracts in certain industries in order to foster competition solely among WOSBs or economically disadvantaged women-owned small businesses ("EDWOSB"s). The Final WOSB Rule allows agencies to set aside five percent of federal contract dollars for WOSBs in industries where SBA has determined that WOSBs are underrepresented or substantially underrepresented. The program is intended to assist the Federal government in reaching its statutory goal of awarding five percent of federal contracting dollars to women-owned small businesses.²

Participation Requirements

To participate in either the WOSB or EDWOSB set aside program, a contractor must be 51 percent owned and controlled by one or more women, with "the management and daily business operations of the concern . . . [also] controlled by one or more women."³ As with the Service-Disabled Veteran-Owned Small Business ("SDVOSB") set-aside program, women must own the business in a direct, personal capacity (*i.e.* – not through a separate business entity, a trust or employee stock ownership plan). Additionally, the owner(s) must be U.S. citizens.⁴

To qualify for EDWOSB set-asides, in addition to the requirements above, the contractor must be "small" in its "primary industry" and be considered "economically disadvantaged."⁵ The SBA will use a "totality of the circumstances" test to determine whether a WOSB is "economically disadvantaged." Factors

¹ *Women-Owned Small Business Federal Contract Program*, Final Rule, 75 Fed. Reg. 62258, 62285 (Oct. 7, 2010).

² *Id.* Women owned small businesses received 3.2 percent of federal procurement dollars in FY 2005, 3.4 percent in 2006, 3.39 percent in 2008 and 3.68 percent in 2009. See *Federal Procurement System Small Business Goaling Report*, FY 2006; see also SBA 2009 Government-Wide Small Business Procurement Scorecard; found at: http://archive.sba.gov/idc/groups/public/documents/sba_program_office/govt_wide_2009.pdf.

³ *Id.*

⁴ *Id.* at 62, 283.

⁵ *Id.*

considered in determining whether a business is economically disadvantaged include, among other considerations, whether the business owner's personal income is less than \$200,000, the fair market value of assets owned, and whether the business can obtain a line of credit based on the woman's ownership.⁶ However, a WOSB need not be certified as "economically disadvantaged" to compete for set-aside contracts when a CO finds that WOSBs are "substantially under-represented" in that industry. In that event, all WOSBs, regardless of economic status, can compete for the set-aside.

Types of Contracts Eligible to be Set-Aside

To be eligible for a WOSB set-aside, the estimated value of a contract must be less than \$5 million for manufacturing industry codes and less than \$3 million for all other contracts.⁷ The Final WOSB Rule identifies 83 industries⁸ where WOSBs are "under-represented or substantially under-represented." Proposed set-aside contracts are limited to the procurement of goods or services in one of these 83 identified industries.⁹

Certification Requirements

As with certain other set-aside programs, the Final WOSB Rule requires a business to satisfy certification requirements which can be met by self-certification or certification by SBA approved third-party certifiers.¹⁰ There are special requirements for each type of certification, and self-certification requires a more robust submission of company documents to the SBA for review than certification by an approved third-party certifier. In conjunction with the required registration in the Online Representations and Certifications Application ("ORCA") and Central Contractor Registration ("CCR") databases, the WOSB applicant must submit a copy of the WOSB Business Program Certification to the WOSB program repository and update its annual representations.¹¹ Anyone seeking to participate is advised to do so cautiously, however, given that the

⁶ An exhaustive list of the factors is set forth in the Final WOSB Rule.

⁷ *Id.*

⁸ As originally proposed, the rule was to include only four industries. This was changed to 83 based on the large number of comments received by the SBA and the Kauffman-Rand Foundation's study identifying the 83 industries. The Rand Report is available to the public at http://www.Rand.org/pubs/technical_reports/TR442.

⁹ The Final WOSB Rule also removes the requirement set forth in the proposed rule that each agency setting aside contracts for WOSBs must certify that it previously engaged in discrimination against WOSBs. See *Women-Owned Small Business Federal Contract Assistance Procedures*, 72 Fed. Reg. 73285, (Dec. 27, 2007) (proposed rule); *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 62258 (Oct. 7, 2010) (final rule). See SBA News Release, *SBA Releases Final Women-Owned Small Business Rule to Expand Access to Federal Contracting Opportunities*, Release No. 10-55, Oct. 4, 2010.

¹⁰ Final WOSB Rule at 62,285.

¹¹ The WOSB program repository is a device that will be used by the SBA when contractors choose to self-certify eligibility to participate in the set-aside procurements. The repository is part of the SBA's General Login System where self-certifying contractors can upload their certifications and all required supporting documentation. The General Login System can be found at: https://eweb.sba.gov/gls/dsp_addcustomer.cfm.

SBA has announced its intention to engage in substantial auditing to ensure eligibility of participants and to vigorously pursue punitive action against ineligible contractors seeking to take advantage of the program.¹²

Changes to the 8(a) Business Development Program

For the first time in nearly ten years, the SBA has comprehensively revised the regulations governing the 8(a) Business Development program in a final rule issued on February 11, 2011 (the "Final 8(a) Rule").¹³ Except for minor technical changes, the Final 8(a) Rule closely resembles the proposed rule published in October 2009 and, among other things, focuses on changing the mentor-protégé relationship and increasing the transparency of Alaska Native Corporations.

The Final 8(a) Rule went into effect on March 14, 2011 and only applies prospectively. Accordingly, approved mentor-protégé agreements and joint ventures in effect prior to March 14, 2011 will not be affected.

Changes to the Mentor-Protégé Program

Some of the major highlights of the new 8(a) program include:

- Although several agencies currently have mentor-protégé programs, only mentor-protégé agreements approved by SBA or DOD, pursuant to SBA's authorized mentor-protégé program, will avoid triggering affiliation rules. If contractors use other agencies' mentor-protégé agreements, they risk being considered "affiliated" on the basis of such agreements.¹⁴
- The Final 8(a) Rule requires that large businesses and their 8(a) protégés abide by 8(a) mentor-protégé requirements on non-8(a) set-aside contracts. Prior to the Final 8(a) Rule, approved 8(a) mentor-protégé contractor teams could pursue HUBZone, SDVOSB, and other small business set-asides without following the 8(a) restrictions regarding the relationship between the mentor and protégé.
- Mentors may have up to three simultaneous protégés, while protégés may have a second mentor in a secondary and unrelated NAICS code.
- Mentor-protégé agreements must be approved by the SBA before submitting a joint venture offer.
- The Final 8(a) Rule provides new consequences for mentors who fail to provide adequate assistance to their protégés, ranging from stop-work orders to debarment of the mentors.

¹² See SBA News Release, *SBA Releases Final Women-Owned Small Business Rule to Expand Access to Federal Contracting Opportunities*, Release No. 10-55, Oct. 4, 2010.

¹³ *Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations*, 76 Fed. Reg. 8222 (Feb 11, 2011).

¹⁴ *Id.*

Changes to the Joint Venture Program

Major changes to the SBA Joint Venture program include:

- The 8(a) joint-venturer must receive profits "commensurate" with the 8(a) contractor's work. This is a change from the prior requirement that the 8(a) contractor receive at least 51 percent of the profits. SBA's comments, however, indicate that the large business/mentor may claim profit commensurate with the work performed up to as much as 60% of the profit of a joint venture.¹⁵ Accordingly, the Final 8(a) Rule requires the 8(a) joint-venturer participant to perform at least 40 percent of the joint venture's work and to retain at least 40% of the profit.
- The 40% requirement replaces the "significant portion" language under the old rules. Contractors must now document how the 40% work requirements are met on every applicable 8(a) joint venture set-aside contract.
- Importantly, the 40 percent calculation now includes a joint venture's subcontracted work to a non-8(a) joint-venturer, typically a large business. For a populated joint venture,¹⁶ where the employees of the individual joint venture members are no longer distinct, the Final 8(a) Rule recognizes that the requirement that the 8(a) partner perform at least 40% of the work done by the joint-venture as a whole may not always make sense.¹⁷
- Joint ventures are now eligible to receive three contract awards in a two-year period. This is a change from the previous rule allowing joint ventures to submit three proposals in a two-year period.
- The participants in a joint venture may also form other joint ventures and be awarded an additional three contracts in an overlapping two-year period. In the preamble to the Final 8(a) Rule, the SBA highlights issues that may arise if the same entities enter into multiple joint ventures with each other, including potential affiliation and organizational conflicts of interest.
- The non-8(a) joint venture partner is, with certain exceptions, generally prohibited from receiving sub-contracts under a set-aside contract. Exceptions include when the joint venture remains unpopulated and does not actually perform the work, and when the awarding agency determines that other potential contractors are not "available" for any one of several reasons.
- All joint ventures must now be formed through a written document.

¹⁵ *Id.* at 8,243.

¹⁶ A populated joint venture is a legal entity with its own employees and resources to perform the contract. An unpopulated joint venture is a contractual arrangement that is treated as a partnership and has no employees.

¹⁷ In instances where the joint venture company hires the individuals necessary to perform the contract, the work of the joint venture will be done by the joint venture entity itself. The 8(a) joint-venturer, in such a circumstance, must clearly demonstrate the manner in which it will benefit or develop its business. *Id.*

Other Changes to the 8(a) Program

- Agencies seeking to award a sole-source contract under the 8(a) business development program, valued at \$20 million or more,¹⁸ must now provide adequate justification for not utilizing competitive procedures. The justification must be approved by the appropriate agency official prior to award, and the justification must be released to the public after award.¹⁹
- Not every firm completing its nine year term in the 8(a) program will "graduate." Rather, only a contractor that achieves the targets, objectives, and goals contained in its business plan and demonstrates its ability to compete in the marketplace will graduate.²⁰
- In order to help 8(a) concerns compete in the current task and delivery order, multiple-award contracting environment, agencies can receive 8(a) credit for orders placed with 8(a) contractors under contracts not otherwise awarded as set-asides for 8(a) concerns, but only if the order is offered to and accepted for the 8(a) program and competed exclusively among eligible 8(a) concerns. In addition, the limitations on subcontracting provisions apply to the individual order.
- The Final 8(a) Rule adjusts the competitive threshold amounts (the maximum contract amounts that can be set-aside) to \$5,500,000 for contracts using manufacturing industry codes and \$3,500,000 for all other contracts.
- Alaskan Native Corporations ("ANC"s) and Native Hawaiian Organizations ("NHO"s), which are part of the SBA's 8(a) business development program, will now be required to report benefits flowing back to their respective communities. Each firm will be required to submit information relating to their funding of cultural programs, employment assistance, jobs, scholarships, internships and subsistence activities.
- A contractor participating in the 8(a) program must maintain its small size status for its primary industry code during its entire participation in the 8(a) program.
- Although ANCs will still be permitted to own more than one contractor-participant in the 8(a) program, "[a] firm owned by a Tribe or ANC may not receive a sole source 8(a) contract that is a

¹⁸ \$20 million is the total value of the contract, including all option years; or if there is a ceiling value on the contract, the ceiling value itself shall be used in evaluating whether the contract qualifies under the new regulation.

¹⁹ *Federal Acquisition Regulation; Justification and Approval of Sole-Source 8(a) Contracts*, 76 Fed. Reg. 14,559 (Mar. 16, 2011) (interim rule). This change is made by a separate interim rule amending the Federal Acquisition Regulation and took effect March 16, 2011.

²⁰ Final 8(a) Rule, 76 Fed. Reg. 8,222.

follow-on contract to an 8(a) contract that was performed immediately previously by another Participant (or former Participant) owned by the same Tribe."

- The Small Jobs Act of 2010²¹ created parity among the SBA's small business contracting programs when it eliminated language requiring COs to utilize HUBZone businesses first, when available. Section 1347 of the Act now offers COs discretion to treat all of the SBA's programs equally in awarding set-aside contracts.

Changes to the Veterans Affairs Ownership Verification of VOSBs and SDVOSBs

On January 19, 2011, the Department of Veterans Affairs ("DVA") issued a final rule affirming an earlier final rule and request for comments that established procedures for verifying ownership and control of VOSBs and SDVOSBs ("the Final DVA Rule").²² The Final DVA Rule became effective on February 18, 2011 and includes the following:

- Eligible owners are no longer required to work full-time in the company for which they have applied for acceptance in the VOSB or SDVOSB verification program.
- Eligible owners can now have more than one business participating in the verification program at one time, if the veteran can demonstrate the requisite requirements of ownership and control.
- An applicant or a participant "must be controlled by one or more veterans or service-disabled veterans who possess requisite management capabilities. Owners need not work full-time but must show sustained and significant time invested in the business."
- Eligibility requirements for obtaining "verified status" are defined and the procedures for "examination visits" establishing that legitimate parties control VOSBs and SDVOSBs are detailed.

Should you have any questions about the contents of this alert, please feel free to contact [Jim Kearney](#), [Holly Svez](#) or [Steve Cave](#).

²¹ H.R. 5297 (Sept. 27, 2010).

²² *VA Veteran-Owned Small Business Verification Guidelines*, 76 Fed. Reg. 3,017 (Jan. 19 2011).

Womble Carlyle client alerts are intended to provide general information about significant legal developments and should not be construed as legal advice regarding any specific facts and circumstances, nor should they be construed as advertisements for legal services.

IRS CIRCULAR 230 NOTICE: To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. tax advice contained in this communication (or in an attachment) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed in this communication (or in any attachment).