

April 2, 2010

Women-Owned Small Business Set-Asides Finally For Real?

[A Government Contracting Alert from the Office of Jon W. van Horne.]¹

On March 4, 2010, the Small Business Administration proposed new regulations for the Women-Owned Small Business (WOSB) Federal Contract Program. (75 Fed. Reg. 10030-10058) These regulations are authorized by legislation enacted in 2000, and follow a long and convoluted rule making process. The biggest change from previously promulgated regulations is making the the program applicable to 83 NAICS Industry Codes as opposed to the four Industry Codes previously included in the program. The list of these newly selected Industry Codes can be found at 75 Fed. Reg. 10036-10037. The list of Industry Codes won't be included in the regulation, but will be available on the SBA website. This change in selected Industry Codes is based on an extensive rethinking of the process for identifying Industry Codes in which women-owned small businesses are either "underrepresented" or "substantially underrepresented." The details of how these Industry Codes are selected is probably of interest only to those with graduate degrees in statistics and a great deal of patience.

One other interesting change is the elimination of a requirement that an agency must make its own analysis "that would justify a restriction on competition under the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution" and, based on an analysis of the its procurement history "make a determination of whether there is evidence of relevant discrimination in that industry by that agency." (13 CFR 127.501(b))

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I think it's a fair guess that most agencies would be, and probably have been, slow to tackle this burden.

The WOSB Program is probably not the panacea that some might hope since the statute allows WOSB set-asides only for procurements of less than \$5,000,000 for contracts classified under the manufacturing Industry Codes and \$3,000,000 for other contracts. Nevertheless, it's nice to see that the ten-year old legislation might now be given a reasonable chance to have the impact originally intended.