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Government Contracts Advisory

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SBA Implements Final Rule Authorizing Women-Owned Small Business Set Asides

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On October 7, 2010, the U.S. Small Business Administration ("SBA") issued its Final Rule regarding Women-Owned Small Business ("WOSB") Set Asides. 75 Fed. Reg. 62258. This Final Rule will take effect on February 4, 2011. The long-awaited rule responds to the Small Business Reauthorization Act of 2000 ("the Act"), Public Law 106-554, which authorized federal contracting officers to restrict competition to eligible WOSBs or Economically Disadvantaged Women-Owned Small Businesses ("EDWOSBs"), and endeavored to increase the participation of women-owned firms in federal government contracting. The SBA, under the Bush Administration, proposed an initial rule to implement a WOSB program in December 2007, but the rule was later withdrawn due to criticism that it was too narrow and burdensome to effectively meet the intent of the statute.

This Final Rule remedies many of the perceived shortcomings identified in the 2007 proposed rule, and implements Section 8(m) of the Act. Contracting officers are authorized to set-aside federal procurements worth up to $3 million ($5 million for manufacturing) to eligible WOSBs in industries in which the SBA has determined WOSBs are underrepresented and where the contracting officer reasonably believes that at least two proposals will be received from responsible WOSBs. Unlike some other small business programs, however, a contracting officer is not authorized to award a sole source contract to a WOSB.

The Final Rule sets forth *inter alia*:

- The requirements for qualifying as a WOSB. A WOSB must qualify as a small business according to 13 C.F.R. Part 121. A WOSB must be at least 51 percent unconditionally and directly owned by a U.S. citizen woman (or women). Also, a WOSB must be controlled by a U.S. citizen woman (or women), meaning that a woman controls the management and daily business operations of the business concern, holds the highest officer position, controls the Board of Directors, and otherwise demonstrates that she holds the decision-making power over the entity.

- The requirements for qualifying as an EDWOSB, *i.e.*, in addition to meeting the eligibility requirements of a WOSB, the owners of an EDWOSB must also show an impaired ability to compete due to diminished capital and credit opportunities.

- The formula used to identify industries in which WOSBs are underrepresented. Currently 83 North American Industry Classification (NAICS) codes are eligible for WOSB program contracting based on this formula, and they include a broad range of NAICS codes, *e.g.*, Residential Building Construction (2361), Foundation, Structure, and Building Exterior Contractors (3281), Office Furniture (including Fixtures) Manufacturing (3372), Medical Equipment and Supplies Manufacturing (3391), Legal Services (5411), and Architectural, Engineering, and Related Services (5413). As evidenced by these examples, the qualifying industries are diverse and include the construction, manufacturing and services industries.

- A certification verification process which requires WOSBs to complete Online Representation and Certification Application ("ORCA") certifications. In some instances, a small business concern can rely on a third party certification, *e.g.*, a state designation, that it qualifies as a WOSB, when it makes its ORCA certification, but the third party certifier must be SBA-approved and listed on the SBA's Web site (http://www.sba.gov/aboutsba/sbaprograms/gc/index.html). A WOSB may also self-certify, but the self-certifying WOSB will be required to submit a designated set of eligibility documents to the SBA at the time of its self-certification.

The WOSB certification requirement is a unique requirement compared to other socioeconomic programs administered by the SBA. The other programs typically do not require the affirmative submission of eligibility documents to the SBA, and instead only require the submission of eligibility documents in response to a protest or an SBA inquiry. The SBA is touting the requirement as a means of implementing careful oversight, reducing fraud, and ensuring that only eligible business concerns benefit from the program.

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