



# WOMEN-OWNED SMALL BUSINESS ALERT: SBA PROPOSES NEW RULE TO CHANGE GOVERNMENT CONTRACT ELIGIBILITY

“Although [the federal government] ha[s] made some progress—particularly with respect to Recovery Act contracts—more work can and should be done. I am committed to ensuring that small businesses, including firms owned by women, minorities, socially and economically disadvantaged individuals...have fair access to federal government contracting.... We must expand outreach strategies to alert small firms to federal contracting opportunities.”<sup>1</sup>

On March 4, 2010, in congruence with President Obama’s mission to expand the government contract market share for women-owned small businesses, the Small Business Administration (“SBA”) proposed a rule to make numerous changes to its 8(m) program that will increase the presence of women-owned small businesses (“WOSB”) and economically disadvantaged women-owned small businesses

(“EDWOSB”) in the government contract marketplace.<sup>2</sup> This *Commentary* summarizes the more significant changes in the SBA’s proposed rule.

## PROPOSED CHANGES

**WOSB/EDWOSB Certification Criteria.** The current WOSB and EDWOSB certification standards require that upon bid submission, a concern must: 1) be registered in Central Contractor Registration; 2) have been certified as a small business (owned and operated by at least one woman) by a federal agency, state government, or authorized national certifying entity; and 3) certify, with proper documentation, to the contracting officer that it is owned and operated by a woman.

<sup>1</sup> President Barack Obama. See Jason Miller, Executive Editor, Federal News Radio 1500 AM: “Obama Calls for More Small Business Contracting” (2010), <http://www.federalnewsradio.com/?nid=35&sid=1943643>.

<sup>2</sup> See 13 CFR Parts 121, 127, and 134 – Women-Owned Small Business Federal Contract Program; Proposed Rule, 75 Fed. Reg. 10,029 (proposed March 4, 2010) (to be codified at 13 C.F.R. §§§ 121, 127, and 134), available at <http://edocket.access.gpo.gov/2010/pdf/2010-3887.pdf> (“proposed rules” or “proposed changes”).

The proposed rule would create an efficient alternative to the certification process that would eliminate the continuous resubmission of certification documents. The proposed certification process would provide WOSB/EDWOSBs with several different means for providing requisite documents to contracting officers. This rule would allow concerns to submit multiple bids without having to incur the cost of mailing copies of certification documents to every contracting officer. Under the proposed rule, the concern would have to submit its self-certification documents only twice: first to the Online Representations and Certifications Application (“ORCA”) (the self-certification documents would include documents that confirm that the WOSB is at least 51 percent owned and operated by a woman and meets small-business size standards); and second, the WOSB Repository (repository documents would include articles of incorporation, operating agreements, partnership agreements, evidence of gender and U.S. citizenship, personal financial statements, and joint venture agreements). The documents that would be submitted to the WOSB Repository would be readily available to all contracting officers for review after receipt of the concern’s bid.

**Small-Business Size Regulations.** Currently, to maintain its “small business status,” each small business must meet SBA specified size standards. If someone allegedly exceeds the size allowance, then the SBA will investigate these allegations and deliver a ruling (or, “size determination”). During the investigation, the SBA considers average firm size, market share, start-up costs and entry barriers, distribution of firms by size, etc. If the investigated business would like to contest the ruling, it may appeal the decision to the SBA Office of Hearings and Appeals. The proposed rule would include WOSBs in the list of programs that are subject to general small-business size determination proceedings.

**EDWOSB Classification.** The proposed rule creates objective net worth limitations on the issuance of an economically disadvantaged classification. The general rule would include any woman whose personal net worth is less than \$750,000 (excluding her ownership interest in the business and her

equity interest in her personal residence). In an effort to objectively calculate an applicant’s personal net worth, without unfairly dismissing an applicant because of inaccessible income, a woman’s net worth will not include the following income: 1) community property (if property is equally owned between husband and wife, the SBA will attribute only the wife’s half); 2) IRA/retirement accounts (as long as the funds cannot be withdrawn prior to retirement age without significant penalty); and 3) S Corporation income (as long as the woman can provide documentation that proves that the income was reinvested in the business or utilized solely for tax purposes that were incidental to the normal course of business operations).

Because the top 2 percent of all wage earners receive a gross income of \$200,000 a year, the proposed rule establishes a presumption that any applicant whose average two-year income exceeds \$200,000 is not economically disadvantaged. Similarly, the proposed rule establishes an objective standard that prohibits an economically disadvantaged woman’s total assets from exceeding \$3 million (including the equity of her personal residence and business).

**WOSB Eligible Industries.** The proposed rules would substantially expand the number of WOSB eligible industries from three to 83. See 75 Fed. Reg. at 10,036 for a list of the included industries. Additionally, in the newly enacted HIRE Act, Congress requires that at least 10 percent of federally funded highway and public transportation contracts be awarded to socially (WOSB) and economically disadvantaged (EDWOSB) small businesses.<sup>3</sup>

**Eligibility Examinations/Investigations.** The SBA proposes an amendment to eligibility examinations that would include possible investigations when a concern’s WOSB or EDWOSB status is in question and/or at the time of the contract offer or award. The investigations would require documents that support WOSB or EDWOSB eligibility, copies of the EDWOSB women’s (and spouses’) most recent tax returns, and SBA Form 4506-T.

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<sup>3</sup> See the Hiring Incentives to Restore Employment (HIRE) Act, Pub. L. No. 111-147 (2010). The HIRE Act provides numerous tax credits, grant extensions, tax incentives, and set-asides to small business owners. For example, the IRS is exempting businesses from Social Security and railroad tax on all new employees they hire who can certify that they were unemployed for at least 60 days prior to their current employment.

**Joint-Venture Requirements.** The proposed amendment broadens the joint-venture requirement and allows for WOSB and EDWOSBs to joint venture with any large business as long as 51 percent of the contracted work is performed by the WOSB or EDWOSB. In order to participate in a joint venture, the WOSB or EDWOSB must maintain a written copy of the joint-venture agreement that states the purpose of the joint venture and each party's responsibilities with regard to the contract performance. The WOSB or EDWOSB must be the managing partner of the joint venture (51 percent), and an employee of the WOSB must be the project manager that ensures contract compliance.

**Contract File.** The contracting officer must make a note in the contract file that verifies that the contractor awarded the bid has provided certification documents for review.

## CONCLUSION

The proposed rule will eliminate the need for repeated certification submission to contracting officers, objectively regulate the income standards for economically disadvantaged women, expand the WOSB Program industries from three to 83, and broaden the joint-venture requirements to allow a wider variety of partnerships. The proposed rules embody substantive changes to the SBA WOSB and EDWOSB eligibility and certification criteria and involve additional changes that were not addressed in this brief *Commentary*.<sup>4</sup>

## LAWYER CONTACTS

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<sup>4</sup> For more information, see 13 CFR Parts 121, 127, and 134 – Women-Owned Small Business Federal Contract Program; Proposed Rule, 75 Fed. Reg. 10,029 (proposed March 4, 2010) (to be codified at 13 C.F.R. §§§ 121, 127, and 134), available at <http://edocket.access.gpo.gov/2010/pdf/2010-3887.pdf> ("proposed rules" or "proposed changes").

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