

ADVISORY

April 2010

SBA PROPOSES SOUGHT AFTER SET-ASIDES FOR WOMEN-OWNED SMALL BUSINESSES

Sixteen years ago, Congress decreed that five percent of federal government contracts should go to women-owned small businesses (WOSB). Despite the modest nature of this goal, it has not been met. Since 1999, when the Small Business Administration (SBA) first started tracking the numbers, the figures have hovered near three percent. Recently, the SBA offered a proposed rule that may jump-start this effort. See Women-Owned Small Business Federal Contract Program; 75 Fed. Reg. 10030 (proposed March 4, 2010, to be codified at 13 C.F.R. pts 121, 127, and 134) (Proposed Rule). The SBA has proposed to amend its WOSB regulations to help ensure a level playing field on which WOSBs can compete for federal contracting opportunities. The Proposed Rule is not yet final, and comments are requested by May 3, 2010.

The Proposed Rule has been a long time in coming. The Federal Acquisition Streamlining Act of 1994 set the initial five percent goal. In 2000, Congress passed the "Equity of Contracting Act," which established the WOSB procurement program, and required the SBA Administrator to conduct a study to identify industries in which WOSBs were historically underrepresented with respect to federal contracts. SBA failed to heed the Congressional directive, and in 2004, the US Women's Chamber of Commerce sued the SBA for failing to implement federal law. In 2005, the US District Court found that SBA had sabotaged implementation of a procurement program.

SBA commissioned the RAND Corporation to study the utilization of WOSBs in federal contracting (the RAND Study). That study found that, depending on the methodology used, WOSBs were underrepresented in 87 percent of all industries, or alternatively, in no industries. In response to the study findings, in 2008, SBA issued a proposed rule (the 2008 Rule). Under the 2008 Rule, SBA identified four industries in which WOSBs were underrepresented and thus eligible for set-aside contracts. SBA further required federal agencies to certify that the agency had discriminated against women, before it could set-aside a procurement. Congress included language in the 2009 Omnibus Appropriations Act to stop further action under the proposed rule, apparently with the expectation that a new rule would be promulgated under the Obama Administration.

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After more than a decade of study and debate, on March 4, 2010, SBA issued the current Proposed Rule. For the first time, the Proposed Rule would give federal agencies the ability to set-aside for WOSBs federal competitions in 83 different industry categories, including 45 industries in which WOSBs are underrepresented and 38 in which they are significantly underrepresented. See 75 Fed. Reg. 10030.¹ The 83 newly-identified categories cross a variety of industries, and the Proposed Rule does not require any agency certification regarding previous discrimination.²

The Proposed Rule sets forth six criteria which, if they are met, permit a Contracting Officer to set-aside an acquisition for WOSBs:

- Each eligible concern must be not less than 51 percent owned by one or more women who are “economically disadvantaged.” However, SBA may waive this requirement of economic disadvantage if it determines that the concern is in an industry in which WOSBs are “substantially underrepresented.”
- The contracting officer must have a reasonable expectation that two or more WOSBs will submit offers for the contract.
- The anticipated award price of the contract must not exceed US\$5 million in the case of manufacturing contracts and US \$3 million in the case of other contracts.
- In the estimation of the contracting officer, the contract must be able to be awarded at a fair and reasonable price.
- Each competing concern must be duly certified by a federal agency, a state government, or an SBA-approved entity as a WOSB, or must self-certify to the contracting officer and provide adequate documentation that it is a WOSB. The statute imposes penalties for a

concern’s misrepresentation of its status as a WOSB.

- The contract must be for the procurement of goods or services with respect to an industry in which WOSBs are underrepresented with respect to federal procurement contracting.

See Fed. Reg. 10031.

In addition to expanding the scope of the WOSB Program, the new Proposed Rule also offers several clarifications to existing SBA regulations regarding economic disadvantage. For instance, under the Proposed Rule, certain contracts will be set-aside for WOSBs, while others will be restricted to Economically Disadvantaged Woman-Owned Small Businesses (EDWOSBs). See Fed. Reg. 10048. A woman whose adjusted gross income over the preceding two years exceeds US\$200,000 will be presumed to be “not economically disadvantaged,” and thus not eligible for contracts set aside for EDWOSBs. This presumption can be rebutted, but in all instances, a woman for whom the fair market value of her assets exceeds US\$3 million will be presumed to be not economically disadvantaged, and thus not eligible to compete for EDWOSB contracts. See Fed. Reg. 10038, 10050.

The Proposed Rule would appear to confirm a commitment to assisting women businesses in federal contracting. To further engage women in federal contracting, in April 2009, President Obama appointed Ana Recio Harvey, a former 8(a) small business owner, to serve as SBA’s Assistant Administrator for Women’s Business Ownership. In this role, Ms. Harvey oversees SBA’s efforts to promote the growth of women-owned businesses through programs that provide business training and counseling, access to credit and capital, and multiple business and networking opportunities. While speaking at a Fairfax Chamber of Commerce event, titled “The Power of Women in Contracting,” Ms. Harvey discussed the various challenges that she faced as a woman business owner, and emphasized the importance

¹ As a historical note, women-owned firms lost a chance at sole source awards in a significant reform of the 8(a) and other SBA programs in 1978, a lost status that has never again been addressed.

² Available at: <http://www.census.gov/eos/www/naics/>.

of SBA's WOSB outreach efforts, which are featured on SBA's website.³ In particular, Ms. Harvey highlighted SBA's Women's Business Center (WBC) Program, a national network of WBCs providing business training, counseling and other resources to help women start and grow successful businesses, and invited WOSB firms to take advantage of these SBA resources. Ms. Harvey also highlighted the Proposed Rule and invited individuals to review it and offer their comments to <http://www.regulations.gov> before May 3, 2010, when the public comment period ends.

Whether or not the Proposed Rule accomplishes its goals of improving the percentage of federal procurement dollars directed to women-owned businesses remains to be seen. However, SBA's promulgation of the rule and appointment of an experienced entrepreneur in a position to advance the initiative, demonstrate a commitment to that goal. Companies and individuals who may be impacted by the Proposed Rule should review it and offer timely comments.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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³ <http://www.sba.gov/aboutsba/sbaprograms/onlinewbc/index.html>.