

SBA Issues New Rules Regarding Women-Owned Small Businesses in Federal Contracting

Last week, the Small Business Administration (SBA) issued a final rule designed to help certain Women-Owned Small Businesses (WOSBs) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) to participate in the federal procurement process. The final rule allows federal contracting officers to limit competition to WOSBs and EDWOSBs for government contracts in 83 industries, including 45 industries in which women are underrepresented and 38 industries in which women are substantially underrepresented. While the final rule marks an important step toward the congressionally-decreed goal of ensuring that five percent of federal government contracts go to WOSBs, it will not become effective until early next year, after the SBA and the Federal Acquisition Regulatory Council (FAR Council) develop additional implementing regulations.

Background

In 2000, Congress established the WOSB Program to allow agencies to limit competition for government contracts to EDWOSBs or WOSBs in industries where women were historically underrepresented or substantially underrepresented with respect to federal contracting. In 2008, after much delay, SBA issued a rule identifying only four industries in which WOSBs were underrepresented and thus eligible for contract set-asides. The controversial 2008 rule further required a federal agency to certify that it had discriminated against women before it could set aside a procurement. Dissatisfied with the proposed rule, Congress inserted language in the 2009 Omnibus Appropriations Act to stop further action under the 2008 rule and force the SBA to issue a new rule.

The Final Rule

In March 2010, SBA proposed the preliminary version of the rule that became final October 7, 2010. The final rule allows contracting officers to limit competition for government contracts in 83 industries to EDWOSBs or WOSBs provided that the following conditions are met:

- An eligible concern must be not less than 51 percent owned by one or more women who are “economically disadvantaged.” SBA may waive the economic disadvantage requirement for procurements in industries in which WOSBs are “substantially underrepresented.”

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- The contracting officer must have a reasonable expectation that, in industries in which WOSBs are underrepresented, two or more EDWOSBs will submit offers for the contract or, in industries where WOSBs are substantially underrepresented, 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 all other contracts.
- The contract can be awarded at a fair and reasonable price.
- A competing concern may self-certify its status, but must provide adequate documentation to prove WOSB or EDWOSB status. Alternatively, concerns may be duly certified by a Federal agency, a State government, or an SBA approved certifying entity (known as third-party certification). As with other self-certifications, there are penalties for a concern's misrepresentation of its status.
- The contract must be for the procurement of goods or services with respect to one of the 85 designated industries in which EDWOSBs are underrepresented or substantially underrepresented, or WOSBs are substantially underrepresented with respect to federal procurement contracting.

The final rule removes the previously proposed requirement that before setting aside a procurement, the agency must certify that it had engaged in discrimination against WOSBs. It also expands the eligibility examination process to ensure the eligibility of WOSBs or EDWOSBs for the program, and requires that concerns provide eligibility documentation for a new WOSB Program Repository. Finally, it sets forth the eligibility criteria for the program, as well as the protest and appeal process for WOSB and EDWOSB status protests.

The final rule also clarifies what qualifies a woman-owned small business as economically disadvantaged. A woman is presumed economically disadvantaged if she has a personal net worth of less than US\$750,000, her adjusted gross yearly income averaged over the three years

preceding the certification does not exceed US\$350,000, and the fair market value of all her assets does not exceed US\$6 million. It is important to note that a woman whose income exceeds US\$350,000 may rebut the presumption that she is "not economically disadvantaged." SBA's new standards for economic disadvantage are more lenient than those imposed for other SBA set-aside programs, including the 8(a) program.

Next on the Horizon?

To further engage women in federal contracting, Senators Olympia Snowe (R-ME) and Kirsten Gillibrand (D-NY) have introduced the Fairness In Women-Owned Small Business Act of 2010 (S. 3399) (Fairness Act). The Fairness Act would amend the Small Business Act to remove the "economically disadvantaged" requirement for women small business owners and remove contract award price limits. Finally, the Fairness Act would require the SBA periodically to conduct a study to identify United States industries in which women are underrepresented. Given the current Congressional recess and the upcoming elections, the prospects for passage of the Fairness Act are uncertain.

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

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