Diversity: How to Qualify for the Women-Owned Small Business Federal Contracting Program

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The Federal government has a statutory goal of awarding five percent of federal prime and subcontracting dollars to women-owned small businesses ("WOSBs"). In addition, each Federal agency negotiates annual small business goals with the Small Business Administration ("SBA") that present, for that agency, the maximum practicable opportunity for small businesses. In 2000, Congress passed the Women’s Equity in Contracting Act ("Act") as a tool to assist federal contracting agencies in meeting these goals by establishing a program under which contracts could be set-aside for award to women-owned small businesses in certain industries.

This article will discuss the SBA rules implementing the WOSB program including the circumstances under which a contracting officer can limit competition for a contract award to WOSB firms. It will explain how a company can qualify for WOSB status and for status in the subcategory of Economically Disadvantaged Women-Owned Small Business ("EDWOSB"), and what procedures are available for challenging a firm’s WOSB or EDWOSB status. In addition, this article will discuss how non-WOSB small businesses can team with WOSB and EDWOSB firms to compete for Federal government contract awards.

WOSB Program Implemented but Criticized for Providing Too Little Assistance

After implementation of the program was stalled under the Administration of President George W. Bush, on October 7, 2010, the SBA issued a final rule to implement the WOSB program

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effective February 4, 2011. The first contracts under the WOSB program, also known as the SBA 8(m) program, were awarded in April 2011. As the WOSB program nears its second anniversary, however, it is being criticized for providing too little assistance to too few firms. An Atlanta-based construction company, Advantage Building Contractors Inc., was one of the first construction companies to be awarded a WOSB contract in 2011. The company was the successful bidder on a contract to replace the roof on a storage building at the National Center for Agricultural Utilization Research, a USDA research facility in Peoria, Illinois. The contract value, however, was only $50,000. Calendar year 2011 ended with only $21.1 million in contracts being awarded to 150 WOSBs. This compares to $11.9 billion awarded to disadvantaged businesses under the SBA 8(a) program and $3.38 billion to Service Disabled Veteran Owned Small Businesses over the same period.

Some federal agencies had more success than others in meeting the WOSB contracting goal in 2011. The Army Corps of Engineers, for example, established an overall FY 2011 small business contracting goal of 35% with 6% awarded to WOSB and achieved 42.6% overall and 8.0% to WOSBs. Progress was made in 2012 when Osprey Contracting of Florida received a $2.5 million contract for work at Patrick Air Force Base. However, most federal prime contracts for WOSBs have a more modest contract value. In December 2012, for example, the FEDBizOPPS website listed WOSB construction set-aside solicitations for assembly and installation of a new tower and relocation of equipment at Creech AFB Nevada ($208,476), for exhaust and duct cleaning at Eglin AFB Florida ($346,362), and several solicitations for rental of Heavy Equipment.

The Contracting Agency’s Ability to Limit Competition to WOSBs

Under the Act and the SBA rule, an agency contracting officer may restrict competition for a contract award to WOSBs bidders if certain requirements are met. First, the anticipated contract award price (including options) cannot exceed $6.5 million for manufacturing contracts and $4 million for all other contracts including construction contracts. In this regard, the WOSB program is the only SBA set-aside program with a contract dollar cap. The contract dollar cap has been criticized as limiting the effectiveness of the WOSB program. On December 5, 2012, the Senate passed the FY 2013 National Defense Authorization Act (NDAA) which includes a provision that removes the $6.5 million and $4 million award caps placed on WOSB federal contracts. At the time of publication of this Article, the law is still pending in Congress.
Second, the contracting officer must determine that there is reasonable expectation that two or more WOSBs will submit bids and that the contract can be awarded at a fair and reasonable price. Sole source contract awards are not permitted under the WOSB program.

Third, the contract award must be in an industry in which the SBA has found that women-owned businesses are either underrepresented or substantially underrepresented in Federal contracting. The industries eligible for WOSB set-aside contracts are identified by their four-digit NAICS Code and listed on the SBA website.

**Industries Eligible for WOSB Contract Awards**

At present, the SBA has identified 45 industries in which WOSBs are underrepresented in Federal contracting and an additional 38 industries in which WOSBs are substantially underrepresented. Among the 45 industries in which WOSBs are underrepresented are:

- Water, Sewage and Other systems (NAICS 2213);
- Residential Building Construction (NAICS 2361);
- Utility System Construction (NAICS 2371);
- Foundation, Structure, and Building Exterior Contractors (NAICS 2381);
- Building Equipment Contractors (NAICS 2382);
- Building Finishing Contractors (NAICS 2383); and
- Other Specialty Trade Contractors (NAICS 2389).

Also included in the 45 industries in which WOSBs are underrepresented are architectural, engineering, design and related services, transportation services and certain manufacturing industries that provide supplies to construction firms such as electrical equipment manufacturing.

The 38 NAICS codes in which WOSBs are substantially underrepresented do not include industries directly related to construction but may provide tangential services such as office furniture manufacturing, warehouse and storage, commercial and industrial machinery, and equipment rental and leasing.

**Eligibility for WOSB Status**

**Small Business.** The threshold requirement for a firm to be eligible to participate in the WOSB program is that it must be a small business under the SBA size standards specified at 13 C.F.R. Part 121. Also, the regulations specifically provide that the firm must be at least 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens. Companies owned by resident aliens and holders of permanent visas do not qualify for the WOSB program.

**Unconditional Ownership.** Unconditional ownership means that the ownership must not be subject to any conditions, executory
agreements, voting trusts or other arrangements that cause or potentially cause ownership benefits to go to another. Ownership requirements vary according to the corporate status of the business. For a partnership, at least 51 percent of each class of partnership interest must be unconditionally owned by one or more women, and the ownership must be reflected in the firm’s partnership agreement. A corporation must have at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding unconditionally owned by one or more women. A limited liability company must have at least 51 percent of each class of member interest unconditionally owned by one or more women.

**Daily Business Operations Controlled by a Woman.** The requirements for control of the WOSB are somewhat stringent, reflecting the legitimate need to guard against firms attempting to qualify for WOSB status when the woman is merely a figurehead for the company. The management and daily business operations of the concern must be controlled by one or more women. This means that both the long-term decision making and the day-to-day management and administration of the business operations must be conducted by one or more women. Further, a woman must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the company. The woman who holds the highest officer position also must manage it on a full-time basis, must devote full-time to the business concern during normal working hours, and must not engage in outside employment that prevents her from devoting sufficient time and attention to daily business. However, the woman need not have the technical expertise or possess the required license to engage in the fundamental activities of the company. She may still be found to control the firm if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical experience. Nevertheless, if a man possesses the required license and has an equity interest in the firm, he may be found to exercise control over it.

**General Partner Status Required.** The regulations also require one or more women to serve as general partners in a partnership, one or more women to serve as management members in a limited liability company, and one or more women to control the Board of Directors of a corporation.

**Economically Disadvantaged WOSB.** Firms seeking EDWOSB status must be owned and controlled by one or more women who are economically disadvantaged. There is a presumption of economic disadvantage if the adjusted gross yearly income of the woman business owner averaged less than $200,000 for the two most recent tax years preceding WOSB certification. The
presumption may be rebutted by, among other things, a showing that the two-year average income level of more than $200,000 was unusual and not likely to be repeated in the future.

In addition to a maximum adjusted gross income, there are two other requirements for successfully claiming economic disadvantaged status. First, the personal net worth of the woman business owner must be less than $750,000. Excluded from the determination of personal net worth are an equity interest in a primary personal residence, income received from an EDWOSB that is an S corporation, LLC or partnership, and amounts in legitimate retirement accounts. Second, the fair market value of the woman business owner's total assets must be less than $6 million. This includes her primary residence and the value of the business but excludes legitimate retirement accounts. Assets transferred to an immediate family member within two years will be attributed to the woman business owner unless the transfer was made for educational, medical or other form of essential support, or in recognition of a special occasion. The SBA may consider a spouse's financial situation in assessing the woman’s access to capital and credit with respect to the economic disadvantage determination.

**Certification.** Certification of WOSB or EDWOSB status is required as of the time of submission of the initial priced offer in response to a solicitation. The rule provides two alternatives for certification. First, a WOSB can submit a third-party certification from a state government, local government or third-party certifying entity approved by SBA. The representations and self-certifications are effective for one year, and must be updated as necessary, but at least annually. SBA posts online a list of approved third-party certifiers that meet the requirements of the WOSB program.

Alternatively, a firm may self-certify its status as a WOSB or EDWOSB. In order to self-certify, the business owner must submit documents establishing her gender and U.S. Citizenship (e.g., passport, birth certificate) and certain documents related to her business (e.g., articles of incorporation, stock certificates). If the business also claims economically disadvantaged status, the business owner must complete and submit SBA Form 413, Personal Financial Statement. The rule provides that the contracting officer may accept the third-party certification if there has been no protest or other credible information that calls into question the offeror's eligibility as a WOSB or EDWOSB and the entity has submitted all of the required documents.

**Joint Venturing with a WOSB**

Joint ventures with a WOSB are permitted, and joint ventures will be allowed to compete for a WOSB contract award, if certain
requirements are met. First, unless there is an exception to the SBA affiliation rule set forth in 13 C.F.R. § 121.103(h)(3), the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard assigned to the contract. This precludes a joint venture between a WOSB and a large business from competing for a WOSB contract award. Second, the WOSB participant of the joint venture must be registered in the System for Award Management (“SAM”) as a WOSB. Third, there must be a written joint venture agreement that satisfies the SBA requirements including designating the WOSB as the managing venturer of the joint venture and providing that not less than 51% of the net profits earned by the joint venture will be distributed to the WOSB. If the requirements for a joint venture cannot be met, a business should consider a teaming arrangement with a WOSB to strengthen the competitiveness of the team, especially where the prime or general contractor’s small business commitment is an evaluation factor for contract award.

The SBA mentor-protégé program under which large business mentors may joint venture with small business protégés without the small business losing its size status has not yet been extended to the WOSB program. EDWOSBs that are also participants in the SBA 8(a) Business Development program, however, may participate in the SBA 8(a) mentor-protégé program.

In addition, many federal agencies have established their own agency-specific mentor-protégé programs including the Department of Defense and its service branches, the Department of Energy and the Department of Homeland Security. A significant number of these agencies have opened their mentor-protégé programs to women-owned small businesses.

**Challenging WOSB Status**

The SBA rule provides that an “interested party” may protest the WOSB status of the presumptive successful offeror on a contract set aside for WOSBs. “Interested party” is defined as: (1) a concern that submits an offer for a specific WOSB requirement; (2) the contracting activity’s contracting officer; or (3) SBA. Any other party that wishes to challenge another firm’s eligibility must submit the information to the contracting officer in an effort to persuade him or her to initiate a protest. Alternatively, the information may be submitted directly to SBA with a request that it conduct an examination of the firm’s status under SBA regulations.

A protest based on the claim that the firm is not a small business constitutes a size status protest and must be filed and prosecuted under Part 121 of the SBA regulations. Other challenges to
eligibility are considered status protests and are filed and prosecuted under Part 127 of the SBA regulations. In either case, the protests must be in writing and filed no later than five business days after notice of the intended award.

A WOSB status protest received by the contracting officer is forwarded to SBA along with a referral letter setting forth a description of the procurement and copies of relevant documents. A protest may be dismissed by SBA if is found to be premature, untimely, nonspecific or based on nonprotestable allegations. SBA may, however, consider the allegations in a dismissed protest in determining whether to conduct an examination of the protested concern. The protested concern is notified of the by SBA within five (5) business days and is required to submit relevant documentation to respond to the basis of the protest and verify its eligibility for award. In general, a protest will be decided by SBA within 15 business days during which time the award is stayed. If the contracting officer grants SBA an extension of time to decide the protest, the contracting officer may award the contract if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will harm the public interest.

If SBA determines that the firm is not a WOSB or an EDWOSB, the contracting officer may not award the contract to that firm. If the contract was awarded prior to SBA’s determination that the firm is not eligible, then the contracting officer must terminate the award unless a written determination of an immediate need to award had been made.

In addition, if SBA sustains the protest, it will require the firm to remove its EDWOSB or WOSB designation from SAM. A business found to have falsely self-certified or otherwise misrepresented its status as an EDWOSB or a WOSB may be subject to suspension and debarment as well as penalties under the False Claims Act and the Small Business Act. The SBA’s determination on a protest may be appealed to SBA’s Office of Hearing and Appeals in accordance with Part 134 of the SBA regulations.

**WOSB Program is a Great Resource for WOSBs Interested in Federal Projects**

The Women-Owned Small Business Contracting program is the culmination of a decade-long struggle by women-owned businesses to obtain what they perceive to be their [fair share](http://www.americanbar.org/publications/under_construction/2013/january_2013/diversity_how_qualify_wosb.html) of federal government contracting dollars. Women-owned businesses now have a federal program devoted exclusively to ensuring that opportunities are made available to WOSBs and EDWOSBs, and that contracting agencies have the tools necessary to meet their WOSB contracting goals. The SBA promulgates the rules setting the framework for the program,
conducts eligibility examinations, decides protests and works with procuring agencies on establishing and meeting WOSB and EDWOSB goals. The federal agencies, in turn, decide what contracting opportunities should be set-aside for competition exclusively among women-owned contracting firms. While there is still work to be done to ensure that all agencies meet their WOSB and EDWOSB goals and do so on an annual basis, the WOSB program is one of the best resources available for women-owned small businesses that wish to participate in the world of federal government contracting.