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PMP UPDATE
ACTION ALERT

SBA Proposes Contracting Program for Women-Owned Small Businesses

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I. Introduction

On June 15, 2006, the U.S. Small Business Administration ("SBA") issued a proposed rule to implement the Women-Owned Small Business Federal Contract Assistance Program (the "Program") outlined in the Small Business Reauthorization Act of 2000. See 71 F.R. 34550. To increase the proportion of federal prime contracts awarded to firms owned and controlled by women, the Program provides contracting officers new authority to contract with women-owned businesses. In addition, the proposed rules would establish regulations for obtaining certification from the SBA and protesting a certified WOSB's eligibility for contract awards.

We provide below our summary of the proposed rule. Please let us know if we can answer any questions, or if you would like assistance with preparing comments for SBA to consider before taking any final regulatory action. Comments on the proposed rule are due on July 17, 2006, and should be directed by fax, email, mail, or hand delivery to Linda Waters in the SBA Office of Federal Contract Assistance for Women Business Owners at:

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II. Contracting Assistance

The focal point of the Program is that contracting officers would have the authority to set contracts aside for two classes of women-owned firms: Women-Owned Small Businesses ("WOSB") and a sub-set, Economically Disadvantaged WOSBs ("EDWOSB"). However, unlike other set-aside programs, four restrictions on WOSB set-asides apply. The restrictions relate to industry characteristics, contract value, market research, and potential conflicts with the SBA Section 8(a) Business Development Program.

First, set-asides are limited to contracts valued at less than $5 million, for manufacturing contracts, or less than $3 million, for all other contracts. Second, set-asides are only authorized in industries in which firms owned by women do not usually perform government contracts. Contracts in industries where firms owned by women are "underrepresented" could only be set aside for EDWOSBs. However, in an industry where firms owned by women are "substantially underrepresented," all WOSBs would be eligible to receive contracts regardless of economic disadvantage. Third, contracts cannot be set aside under the Program unless the contracting officer expects that two or more certified firms will submit offers and the contract award can be made at a fair market price. Finally, a requirement currently being performed by an 8(a) company, or a requirement that has been accepted for 8(a) procurement, cannot be set aside under the Program without SBA approval. *Id.* § 127.503.

The proposed rule does not define how SBA will determine which industries are "underrepresented" or "substantially underrepresented" by firms owned by women. However, such determinations will be made at least every three years, and posted on the SBA's website. None of a certified firm's WOSB set-aside contracts would be affected if an industry sector is redesignated from underrepresented to well-represented. *Id.* § 127.501.

WOSB and EDWOSB firms may form joint ventures if the firms meet certain requirements. The firm (or firms) that claims eligibility for the Program must be SBA-certified. An SBA-certified firm must manage the joint venture and one of its employees must be the general manager of the joint venture. Two performance of work rules apply: first, the joint venture must comply with the limitations on subcontracting that apply to all small business procurements (13 C.F.R § 125.6); second, the WOSB or EDWOSB venturer must perform a "significant" portion of the contract. Finally, since joint venturers are considered to be affiliates under SBA regulations, the combined revenues or employee headcount of both firms must be less than the applicable size standard. However, if a contract exceeds certain levels, the venturers will not be considered affiliates, so long as each individual firm is small. This exception applies for bundled contracts, as defined by SBA regulations, as well as contracts that either exceed half the dollar value of the applicable size standard for revenue-based size standards, or for procurements that have an employee-based size standard and exceed $10 million.

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WOSBs and EDWOSBs would have certain obligations when bidding and performing set-aside contracts. When submitting an offer for a requirement set aside for the Program, the firm must certify its eligibility. Specifically, a firm must state that the SBA has certified it as a WOSB or EDWOSB, and there has been no change in the company that would affect its eligibility for the Program. In addition, the firm must certify its status as a small business and agree to comply with the limitations on subcontracting that apply to all small business procurements (13 C.F.R § 125.6). *Id.* § 127.506.

III. Eligibility

Both WOSBs and EDWOSBs have some eligibility requirements in common, but additional conditions apply to EDWOSBs. To qualify for SBA certification, or a particular contract award, a firm must be small according to the size standard for the firm's primary NAICS code or the NAICS code assigned to the procurement. Additionally, a firm must be owned and controlled by one or more women who are U.S. citizens. *Id.* § 127.200

Ownership is defined as possession of at least a 51% stake in a company's stock, membership interest, or partnership interest, depending on the corporate form of the business. Ownership must be direct, with the exception of revocable trusts that are made for and by the woman upon whom the firm's certification is based. Further, ownership must be unconditional, so stock or ownership interests cannot be the collateral for a loan or subject to other types of encumbrance. *Id.* § 127.201.

Control consists of conducting both long-term and short-term operations of the business. To satisfy the control requirements, the female owners must satisfy certain requirements related to corporate formalities and actual management. If the firm is a partnership, a woman must serve as general partner; if a limited liability company, a woman must serve as a managing member. If a firm was formed as a corporation, then one or more women must own a portion of stock that exceeds the largest voting requirement and the number of women directors must exceed the number of male directors. *Id*. § 127.202.

To ensure the integrity of the Program, SBA intends to evaluate the management credentials of the woman or women upon whom applications for certification are based. A woman must hold the top office in the firm, and cannot have any outside employment. Moreover, the head of the company must hold qualifications consistent with the firm's line of business. If the firm operates in an industry that typically requires outside credentials, for instance a contractor's license or a professional degree, but the woman does not possess such expertise, the firm must demonstrate that she has "ultimate managerial and supervisory control" of employees who do. *Id.*

Generally, the proposed rule permits men to own a minority interest in WOSB or EDWOSB firms, but two restrictions apply. First, if a man is an equity owner of a woman-owned firm, and the business' line of work requires licenses or technical expertise that the chief

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executive does not possess, the firm might not be eligible as a WOSB or EDWOSB. *Id.* § 127.202 (b). Second, a male who owns stock or an interest in a WOSB or EDWOSB may not exercise actual control, or have the power to control the business. *Id.* § 127.202 (g).

Additional economic disadvantage criteria separate WOSBs from EDWOSBs. SBA defines economic disadvantage as a personal net worth of less than $750,000, not including the personal residence or interest in the firm applying for certification. SBA will also consider two years worth of personal financial information, including income, bonuses, stock options, and the market value of all assets. Moreover, when calculating net worth, the SBA will include the value of any transfers to a family member (or a trust that benefits a family member), but the regulations make an exception for family expenses or gifts on special occasions. *Id.* § 127.203.

IV. Certification and Status Protests

Certification must be obtained from the SBA before a firm can represent itself as a WOSB or EDWOSB for procurement purposes. Applications must be submitted by an electronic application system. While an application is being reviewed – a process expected to usually result in a final decision within thirty days – the SBA is allowed to request additional information. However, SBA will automatically approve applications on behalf of several types of firms, based on their current status in federal and state procurement programs. *Id*. §127.302

SBA will accept all applications from women-owned businesses that are currently certified as 8(a) or Small Disadvantaged Businesses ("SDB"). Women-owned firms that graduated from the 8(a) Program are also eligible for certification as EDWOSB if they meet the eligibility criteria. As proposed, the SBA intends to publish a list of the state Department of Transportation Programs that it will honor for purposes of WOSB and EDWOSB certifications. *Id.* § 127.303.

Certification as a WOSB or EDWOSB would be valid for an initial three-year term, and companies that qualify at the end of the initial term can self-certify for at least one additional three-year period. *Id.* § 127.304. However, the proposed rule does not indicate whether firms can recertify indefinitely, or if they are limited to an overall term of six years. Certification can be terminated before the end of the normal certification period. A WOSB or EDWOSB is required to disclose any change that could affect its eligibility for certification, and failure to do so is punishable by debarment, suspension, and other criminal and civil penalties. *Id.* § 127.305. Moreover, as discussed below, a firm's eligibility as a WOSB or EDWOSB can be protested, and certification will be terminated in the event such a protest is sustained. Finally, the SBA may conduct periodic audits to verify a firm's legibility for the Program. *Id.* §402.

Certain parties may file a protest with the SBA if they believe that an ineligible firm has been awarded a set-aside contract through the Program. The SBA, the awarding agency's contracting officer, or a company that has made an offer on the contract in dispute are the only parties who can protest a contract award. However, other parties may urge the SBA to file a

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status protest. *Id.* § 127.600 The proposed rules distinguish between size protests and Program eligibility protests, which are treated differently. *Id.* § 127.601.

Protests must conform to certain time, format, and content requirements. An interested party must file a protest within five days after either notification by the contracting officer that an offeror is apparently successful (in negotiated procurements) or after bids are open (for sealed-bid procurements). No time limitation applies to protests filed by the SBA or the contracting officer after the five-day limitation has started, but no protest is timely if it is filed beforehand. Protests must contain some credible factual basis, rather than simply a bald accusation. A protest can be filed with the contracting officer or the SBA's Associate Administrator for Government Contracting, and can be transmitted by, facsimile, hand-delivery, or U.S. mail. Protests filed by mail must be postmarked before the end of the five-day limitation. *Id.* § 127.603.

When SBA receives a legally sufficient status protest, it will notify the apparent successful offeror within five days and send a copy of the protest. Unless an extension is granted, the SBA will decide whether to sustain or deny the protest within fifteen business days after receiving the protest. If the decision period expires without extension, however, the contracting officer may proceed with the contract award. *Id.* § 127.604. [Status determinations can be appealed, but only when they are properly filed and demonstrate a procedural error or material factual oversight. *Id.* § 127.605.]

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V. Conclusion

In summary, the SBA proposed rule sets forth a set-aside procurement program that could provide valuable opportunities to woman-owned firms and their teaming partners. However, additional details are needed before the rules are finalized. We encourage you to carefully consider how the Program could affect your business. Please let us know if you have any questions about the regulations or want assistance preparing comments on the proposed rule.

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