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A PilieroMazza Update for Federal Contractors and Commercial Businesses

Woman-Owned Small Business

NOW'S THE TIME FOR SBA TO EXPAND WOSB-ELIGIBLE INDUSTRIES

By Megan Connor

On May 1, 2015, the U.S. Small Business Administration issued a proposed rule to amend its regulations to implement Section 825 of the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA). Section 825 is most widely known for creating sole source authority for women-owned small businesses (WOSBs) and economically-disadvantaged women-owned small businesses (EDWOSBs), and the purpose of the proposed rule is to implement this authority. However, Section 825 also moves up the deadline for the SBA to conduct a study to determine the industries in which WOSBs are underrepresented, from January 2, 2018 (in the 2013 NDAA) to January 2, 2016 (in the 2015 NDAA). In order to comply with this requirement, SBA proposes revising the definitions of "underrepresentation" and "substantial underrepresentation" in 13 C.F.R. § 127.102 to provide SBA with flexibility to allow it to conduct a reliable and relevant study by the new, sooner deadline imposed by Congress.

Notably, the proposed rule does not describe the study SBA intends to undertake beyond the requirement that it use "reliable and relevant methodology." However, SBA's proposed changes signal a potential distancing from the 2007 Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND) Study. Specifically, SBA proposes eliminating the RAND Study's disparity ratios from the definitions of "substantial underrepresentation" and "underrepresentation" (less than 0.5 for substantial underrepresentation and between 0.5 and 0.8 for underrepresentation). Such a move is warranted as the RAND Study methodologies and data sets have been criticized, and its results too narrowly construed by SBA.

Depending on the methodology selected, the RAND Study showed widespread underrepresentation by women in federal contracting, or no underrepresentation at all. And when originally interpreting the RAND Study and choosing which methodology to follow, the SBA acknowledged that it had selected the more "conservative approach" that could understate the availability of women-owned firms. See *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 62,258, 62,260-61 (Oct. 7, 2010). The SBA's conservative approach to the RAND Study made only 300+ six-digit NAICS codes available to the WOSB Program. As the WOSB Program is the only set-aside program that is not available for all 1,000+ six-digit NAICS codes, the SBA should adopt a more inclusive approach in establishing the "reliable and relevant methodology" it proposes to use.

Fortunately, the SBA has more data available now concerning WOSBs than it did when the RAND Study was published. At that time in 2007, only 3.32% of federal spending went to WOSBs. No doubt thanks in part to other recent changes to the WOSB Program, including the lifting of dollar caps, that percentage increased to 4.68% for fiscal year 2014. Federal agencies, therefore, have more data on hand concerning WOSBs because they are already doing business with them.

Because of this potential wealth of data, the SBA should consider directing each federal agency to perform its own analysis of WOSB representation. The SBA should then use the agency-specific data to develop a list of industries available for WOSB set-asides at each agency. Adjusting the list of available industries on an agency-by-agency basis would maximize each agency's ability to meet their WOSB goal. Under the current system, some agencies will have difficulty ever meeting the WOSB goal because their predominant procurements do not fall within the 300+ available NAICS codes. For example, the Department of

Continued on page 2

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Continued from page 1

Energy (DOE) does a significant amount of spending in the remediation services and environmental remediation services industries under NAICS code 562910, which is not one of the available industries for the WOSB Program. Not surprisingly, in fiscal years 2013 and 2014, DOE fell well short of the WOSB goal. Presumably, a DOE study would find underrepresentation of WOSBs in remediation services. The SBA could then use such a study to make NAICS code 562910 available to DOE for WOSB set-asides.

Importantly, the SBA does not need a legislative fix to involve agencies to determine the industries in which WOSBs are underrepresented. Both the existing law and the implementing regulations permit the SBA to determine underrepresentation of WOSBs based on input from each federal department and agency. See 15 U.S.C. § 637(m)(6) (giving the SBA the ability to request each agency provide "such information as the [SBA] determines to be necessary to carry out the [WOSB Program]"); see also 13 C.F.R. § 127.501(b) ("In determining the extent of disparity of WOSBs, SBA may request that the head of any Federal department or agency provide SBA, data or information necessary to analyze the extent of disparity of WOSBs.").

In light of the fast-approaching January 2, 2016 deadline, the SBA should use its authority under the law to require each agency to perform its own analysis, which the SBA could then use to develop a list of NAICS codes available for WOSBs at each agency. This would best serve the intent of the WOSB Program by increasing the tools each agency can use to maximize WOSB participation in their procurements.

The time is now to open the WOSB Program to more industries and more participants, and the SBA has the means to do so.

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