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VIA FEDERAL ERULEMAKING PORTAL

Brenda Fernandez
Office of Policy, Planning and Liaison
U.S. Small Business Administration
409 3rd Street, S.W., 8th Floor
Washington, DC 20416

Re: RIN: 3245-AG72, Comments on Proposed Rule Regarding the Women-Owned Small Business Federal Contract Program

Dear Ms. Fernandez:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced proposed rule, issued May 1, 2015, 80 Fed. Reg. 24,846. Our firm represents small businesses, including women-owned and economically-disadvantaged women-owned small businesses ("WOSBs/EDWOSBs"), operating across the government contracting spectrum. Many of the WOSBs/EDWOSBs we represent and have talked to have been eagerly anticipating this rulemaking. The proposed rule places the SBA's WOSB Program on equal footing with other SBA government contracting programs in providing for award of sole source contracts to WOSBs/EDWOSBs. We concur with what SBA is proposing in this rulemaking and commend the agency for its efforts. We urge the SBA to issue the final rule in August 2015, the timetable proposed by the SBA in its Semiannual Regulatory Agenda (80 Fed. Reg. 35,098, 35,102).

Sole Source Authority

We are in favor of SBA's proposal to establish the procedures whereby Federal agencies may award sole source contracts to WOSBs and EDWOSBs and to provide a mechanism to protest such awards. This is welcome news for WOSBs and EDWOSBs, as sole source awards are an additional means by which WOSBs and EDWOSBs may do business with the Federal government. We agree with SBA that the Federal Acquisition Regulation ("FAR") will need to be amended to include this sole source authority so that there is no conflict between the SBA's rules and the FAR.

We note that the proposed rule eliminates, without explanation, the following sentence in 13 C.F.R. § 127.600: "Any other party or individual may submit information to the contracting officer or SBA in an effort to persuade them to initiate a protest or to persuade SBA to conduct

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an examination pursuant to subpart D of this part.” We do not believe SBA means to suggest that firms may not submit information to the contracting officer or SBA in an effort to persuade them to initiate a WOSB/EDWOSB status protest or to persuade SBA to conduct an eligibility examination. SBA should clarify this so that parties are aware they are still free to bring information to the attention of the contracting officer or SBA where a WOSB’s or EDWOSB’s status should be questioned.

Time Period for Study

We appreciate the SBA’s efforts to meet the new, earlier deadline of January 2, 2016 to determine the industries in which WOSBs are underrepresented. We also agree with the SBA’s proposal to revise the definitions of “underrepresentation” and “substantial underrepresentation” in 13 C.F.R. § 127.102. SBA proposes amending these definitions to provide SBA with flexibility to allow it to conduct a reliable and relevant study within the time constraint imposed by Congress.

SBA’s proposed changes eliminate the Kauffman-RAND Institute for Entrepreneurship Public Policy (“RAND”) Study disparity ratios (less than 0.5 for substantial underrepresentation and between 0.5 and 0.8 for underrepresentation), requiring instead that “substantial underrepresentation” and “underrepresentation” be “determined by a study using a reliable and relevant methodology.” However, the proposed rule does not describe the study the SBA intends to undertake beyond the requirement that it use “reliable and relevant methodology.” We agree with the need for a reliable and relevant study as the RAND Study methodology and data sets have been criticized. One issue with the Rand Study was its use of several methodologies and data sets. Depending on the methodology selected, the RAND Study showed widespread underrepresentation by women in federal contracting, or no underrepresentation at all. We believe that SBA should not be hamstrung by the parameters of the RAND Study and hope that by removing references to the RAND Study in 13 C.F.R. § 127.102, SBA is signaling a desire for a more sound and inclusive study resulting in additional North American Industry Classification System (“NAICS”) codes for the WOSB Program.

If SBA were to continue utilizing the RAND Study, SBA should adopt a more inclusive approach to interpreting the existing RAND Study. 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 300+ NAICS codes available to the WOSB Program. However, if the SBA had chosen the other, less conservative methodology, approximately three times as many industries – 948 NAICS codes – would be available to the WOSB Program. See Elaine Reardon, Nancy Nicosia, Nancy Y. Moore, The Utilization of Women-Owned Small Businesses in Federal Contracting, Kauffman-RAND

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Institute for Entrepreneurship Public Policy 22-23 (2007). As the WOSB Program is the only set-aside program that is not available for all 1,000+ NAICS codes, the broader interpretation of the RAND data is warranted.

In addition to expanding its interpretation of the existing data, the SBA should consider directing each federal agency to perform their own analysis of WOSB representation. The SBA should then use the agency-specific data to supplement the RAND Study and 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 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 in supplementing the RAND Study. 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 to 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."). The SBA's early WOSB rulemakings would have required agencies to do their own analysis, but the SBA ultimately decided to use only the RAND Study. See Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285, 73,288 (Dec. 27, 2007); Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,042 (Mar. 4, 2010). The SBA should revisit this now and use its authority under the law to require each agency to supplement the RAND Study with 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.

Certification

We concur with the SBA that proceeding with implementing the certification requirement of Section 825 ("Section 825") of the National Defense Authorization Act for Fiscal Year 2015

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(“2015 NDAA”) through a separate rulemaking while implementing the new WOSB/EDWOSB sole source authority is sensible and fair. It took more than ten years for the SBA rules implementing the WOSB Program to go into effect in 2011 and another three years for Congress to pass legislation providing for sole source awards in the program. By fast-tracking the new sole source authority, the SBA is demonstrating its desire to put the WOSB Program on a “level playing field” with other SBA government contracting programs and to provide an additional, needed tool for agencies to meet the statutorily mandated 5% prime contracting goal for WOSBs.

With this said, we generally oppose the new certification requirement of Section 825. However, we will postpone forming a final opinion until the SBA issues its separate rulemaking implementing the certification requirement, at which time we will consider the SBA’s proposed rule and submit comments.

Please do not hesitate to contact Pamela Mazza, Jon Williams, or Megan Connor at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



Pamela Mazza
Jon Williams
Megan Connor

PilieroMazza PLLC