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July 15, 2019

VIA FEDERAL RULEMAKING PORTAL

Brenda Fernandez
Office of Policy, Planning and Liaison
U.S. Small Business Administration
409 Third Street SW
Washington, DC 20416

Re: RIN 3245-AG75, Proposed Rule
Women-Owned Small Business and Economically Disadvantaged
Women-Owned Small Business Certification

Dear Ms. Fernandez:

We are writing to submit comments on the U.S. Small Business Administration's ("SBA") above-referenced proposed rule on amendments to its regulations to implement a statutory requirement to certify women-owned small business concerns ("WOSB") and economically disadvantaged women-owned small business concerns ("EDWOSB") for participation in the Women-Owned Small Business Program ("WOSB Program"). 84 Fed. Reg. 21,256. Our firm represents small business federal contractors, including WOSBs and EDWOSBs, as well as participants in SBA's 8(a) Business Development Program ("8(a) Program"). We support many of SBA's proposed changes and commend SBA for its thoughtful inquiries. However, as we note below, there are several provisions in the proposed rule that may create confusion and compliance challenges. Our comments to key proposed changes are below.

SBA WOSB/EDWOSB Certification Program

❖ **Certification Bottleneck**

SBA requests comments on solutions to possible delay related to many or all current WOSBs/EDWOSBs seeking certification from SBA once the final rule is implemented. One solution SBA is considering is whether to permit concerns that are waiting for their submitted applications to be approved to submit offers on WOSB and/or EDWOSB set-aside contracts, as applicable, in the event that they have not yet received a negative determination. Firms would be required to notify the procuring agency of their pending certification status. If a firm becomes the apparent successful offeror, then the contracting officer would notify SBA, and SBA would prioritize the firm's application, making a determination within 15 days. SBA requests

comments on this alternative and other possible approaches that would help to ease the transition.

We support this approach and recognize that it has two main benefits. First, it will prioritize concerns that are currently submitting bids and receiving contract awards. Concerns that submit bids and receive awards have a more immediate need to obtain their certification than concerns that are not currently submitting bids. In addition, procuring agencies will benefit from confirmation that they are awarding contracts to WOSBs/EDWOSBs, thus making progress toward their WOSB procurement goals. Second, the approach recognizes that there will undoubtedly be some delay in processing many WOSB/EDWOSB certification applications once the rule is finalized. By permitting a concern to continue to submit bids as a WOSB or EDWOSB while its application is pending, SBA is allowing the concern to maintain its eligibility to bid for WOSB and EDWOSB set-aside work while SBA is dealing with the transition. Without such ability, WOSBs/EDWOSBs would endure significant losses, as their ability to bid would be compromised. In addition, this serves to alleviate an inherent unfairness during the initial application timeframe, as concerns will receive certification determinations from SBA at differing times as their applications are processed.

If this solution is adopted by SBA, SBA should explain how long it will allow this solution to remain in place. We propose that the ability to submit offers on WOSB and EDWOSB set-asides while an application is pending remain in place for at least two years to provide a sufficient transition period from the current self-certification landscape to the required certification process.

- **As an Alternative Solution to the Bottleneck, a Grace Period for Applications and Bidding Should Be Implemented**

We suggest that SBA establish a grace period of at least one year for EDWOSBs/WOSBs to submit applications and for SBA to complete the certification process. This would allow for an evener distribution of applications and thus lower the bottleneck of backlogged applications that SBA anticipates. Additionally, during such time period, all previously self-certified WOSB/EDWOSB concerns should be able to continue to submit offers on WOSB and/or EDWOSB procurements, even if the concern has not yet submitted its certification application. Mandating that WOSBs/EDWOSBs will not be eligible to compete upon rule finalization if they are not yet certified (or do not have a pending application) will unduly harm WOSB and EDWOSB concerns. For example, if SBA's rulemaking is finalized on December 1, but women-owned concerns wish to bid on a WOSB/EDWOSB set-aside with a proposal due date of December 2, a requirement to have their WOSB applications submitted within one day in order to bid is simply unreasonable. A one-year grace period will allow concerns time to submit their applications and will also be beneficial to SBA, so as not to put undue pressure on SBA to review applications at a break-neck speed. After the grace period ends, it would then be appropriate to permit only concerns that have submitted their application and/or received their

certifications to submit bids on WOSB and EDWOSB set-asides. While some concerns may wait until the end of the grace period to submit their applications, the grace period would stagger application submissions, reducing the overall backlog, and permitting more timely evaluations. The grace period also would preserve current WOSB and EDWOSB statuses and provide concerns with more time to compile their application materials, which may result in fewer errors and processing delays.

A grace period of at least one year for WOSBs/EDWOSBs to submit their applications is recommended, as a shorter timeframe could have an adverse effect on otherwise qualified WOSBs/EDWOSBs and run contrary to the mission of the WOSB Program. As the Program seeks to provide greater access to federal contracting opportunities for WOSBs/EDWOSBs, the shorter the grace period and the requirement to be certified, especially in light of the fact that this Program has up until now always offered a self-certification option, the more likely such concerns with limited resources will fail to obtain qualification.

- **As an Alternative Solution to the Bottleneck, Presently Self-Certified WOSBs and EDWOSBs Should Be Afforded a Grandfathering Provision**

A grandfathering provision should apply to all WOSBs/EDWOSBs that are self-certified and registered in the SBA's certify.sba.gov portal as of the regulation's effective date. WOSBs/EDWOSBs that are currently self-certified and otherwise in compliance with the Programs' eligibility criteria should not be required to apply immediately for certification through SBA or a national certifying entity. Instead, such concerns should be subject to the three-year certification requirement proposed under 13 C.F.R. § 127.400. The three-year time period would begin on the regulation's effective date. Concerns self-certified as WOSBs/ EDWOSBs should not be required to recertify (and thus seek formal certification) until the expiration of three these years. To do otherwise would needlessly subject the companies to potential costs and delays caused by the increase in submissions. Implementing such a provision also would serve to streamline the certification process, as the increase in applications submitted following the effective date could cause massive delays in certifications and prevent otherwise eligible concerns from timely obtaining qualification.

- **Application and Appeal Process**

SBA is proposing that WOSB Program applicants who receive a negative determination may request reconsideration. If the application is again denied upon reconsideration, the applicant cannot reapply to the Program for one year. No further appeal mechanism is provided. This proposed WOSB "appellate" process truly takes the "worst of both worlds" from the 8(a) and Historically Underutilized Business Zone ("HUBZone") Programs, as a WOSB concern will neither have the ability to appeal the denial of its application (as an 8(a) applicant might do), nor be able to reapply to the WOSB Program within 90 days after a final denial decision (as a HUBZone applicant might do). Even if the WOSB/EDWOSB applicant has fixed the issues that

otherwise prevented its initial acceptance, it would be forced to wait a period of one year to reapply to the Program.

This is not a fair or equitable process for WOSB concerns. This is especially important for applicants who have been declined by a Third Party Certifier, as these entities are not expert in interpreting issues of ownership and control like SBA. If an applicant is denied admission into the WOSB Program by a Third Party Certifier, it should be allowed to appeal that decision directly to SBA. Additionally, and as SBA is aware, the main eligibility requirements of the WOSB Program are ownership and control of the concern by women. Issues related to ownership and control are not simple "black and white" considerations, such as the employee and principal office numbers that an applicant must hit for HUBZone eligibility. Ownership and control questions often require nuanced reviews of the company's corporate documentation, and sometimes require legal interpretation. For example, the ultimate decision on the question of whether a woman is truly in control over an applicant firm can be a subjective interpretation of the terms of the corporate documents. Such issues are entirely appropriate to raise on appeal before SBA's Office of Hearings and Appeals ("OHA"). Indeed, the other set-aside programs hinging on ownership and control considerations in determining eligibility—the 8(a) and Service-Disabled Veteran-Owned Small Business ("SDVOSB") Programs—allow applicants to appeal application denials to OHA. There is no reason why applicants to the WOSB Program should not be allowed a proper review process as well, especially considering the tricky questions that are raised in ownership and control determinations.

If SBA is intent on denying WOSB applicants access to OHA for appeals of application denials, then applicants should be allowed to reapply to the Program within 90 days of SBA's final determination, not one year as it has proposed. A 90-day reapplication timeframe would be the same as that found in the HUBZone Program, the parallel that SBA draws in the proposed rule's preamble.

- **Three-Year Recertification of Eligibility and Notice of Material Change**

Proposed 13 C.F.R. § 127.400 would require concerns to recertify their eligibility every three years. Such failure to recertify in the time period would result in the concern being decertified. Additionally, proposed 13 C.F.R. § 127.401 would require concerns to notify SBA of any material changes that could affect their eligibility. We take no issue with these requirements. However, the regulation should be revised to provide a timeframe in which the WOSB/EDWOSB must notify SBA of the material change.

- **Acceptance of 8(a), Department of Veterans Affairs and Department of Transportation Certifications**

We appreciate and support SBA's decision to accept 8(a), Veteran-Owned Small Business ("VOSB")/SDVOSB, and Disadvantaged Business Enterprise ("DBE") certifications,

so long as the concerns are owned and controlled by women, for purposes of the WOSB certification requirement. We also understand that SBA may only accept 8(a) certification for purposes of EDWOSB certification. SBA's requirements to establish that a firm is owned and controlled by women closely track the requirements for the 8(a), VOSB/SDVOSB, and DBE Programs. Accepting these certifications will reduce SBA's administrative burden in evaluating certification applications, reduce application backlogs due to faster review, and streamline and simplify the process for firms seeking WOSB or EDWOSB certification. It will also promote consistency across programs, as a firm that is certified under another program would be presumed to similarly qualify as a firm owned and controlled by women for the WOSB and/or EDWOSB Programs, as applicable.

However, the rule is unclear as to how the application process will take place for 8(a), VOSB/SDVOSB, and DBE firms. Will any additional documentation, over and beyond evidence of the certification, be required? Additionally, the rule should clarify what "evidence" should be submitted.

- **WOSB Joint Ventures**

The proposed rule does not discuss WOSB joint ventures. If there is a certification requirement for WOSBs/EDWOSBs, does SBA intend that this also would apply to WOSB joint ventures, similar to the 8(a) Program and SDVOSB set-aside opportunities with the Department of Veterans Affairs ("VA")? And, would the certification need to be in place prior to bid submission (similar to SDVOSB set-aside opportunities with VA) or upon contract award (similar to the 8(a) Program)? Furthermore, would the joint venture need its own account with certify.sba.gov in order to complete the WOSB/EDWOSB certification application, or would this be submitted through the managing venturer? Assuming SBA does intend for the certification requirement to apply to WOSB/EDWOSB joint venture offerors, we posit that the simplest approach would be for the joint venture to have its own account through certify. sba.gov, as the joint venture is already mandated to have its own SAM.gov account. There should be a question in the WOSB/EDWOSB application as to whether or not the applicant is a joint venture.

Furthermore, SBA should not consider allowing Third Party Certifiers to approve joint venture agreements involving EDWOSB and WOSB participants because these business relationships may involve partnerships with an other-than-small business, creating greater potential for a misrepresentation of size and status. To ensure SBA maintains oversight over all aspects of general small business contracting, it should reserve the right to review WOSB and EDWOSB joint venture agreements.

- **Ability for Agencies to Take WOSB Credit Without Certification**

The proposed rule states that WOSBs that do not apply for and participate in the WOSB Program may continue to self-certify their status for contracts that are not set aside for

WOSBs/EDWOSBs. The proposed rule also states that agencies may continue to accept the self-certification and take credit for the WOSB status. We assume this means that for non-WOSB/EDWOSB set-asides, agencies can count awards to non-certified woman-owned companies towards their WOSB goals. If contracting agencies are still able to take credit for entities that self-certify their WOSB status even after the proposed rule becomes effective, this poses a question regarding the fundamental purpose of instituting third-party certification of WOSBs/EDWOSBs. There is either a need for WOSB entities to be certified by a third party, or there is not. The same standard for the Program should be applied across all of federal contracting, not just those procurements set-aside for WOSBs/EDWOSBs. Otherwise, the danger exists that contracting agencies will choose to meet their WOSB goaling requirements through less stringent self-certifications made by contract awardees outside of the WOSB/EDWOSB Program.

❖ **Third-Party Certifications**

While the proposed rule contemplates the utilization of Third Party Certifiers, we believe that SBA is the best choice for the certifying entity to ensure uniformity, fairness, and parity. In a perfect world, SBA would be the only entity certifying WOSBs. Although certification requirements exist in other set-aside programs, these certifications are not performed by non-governmental entities. Rather, SBA and VA (in the case of SDVOSBs and VOSBs) operate the certification processes. Therefore, a basic question facing SBA is whether SBA wants to perpetuate the disparity between its WOSB Program and every other set-aside program available for small business contractors. We submit that the answer to this question should be no. The WOSB Program will only reach success—and the elusive 5% government-wide spending goal—when participants are given the same privileges and obligations as those small businesses participating in other set-aside programs.

That said, if SBA finalizes its proposal to allow Third Party Certifiers, it should ensure that such entities are thoroughly trained in the Program's eligibility requirements. It has been our experience that eligibility determinations performed by Third Party Certifiers can be fairly inconsistent, in both the substance of the eligibility criteria and the timeframes within which the eligibility decisions are made. SBA should hold Third Party Certifiers to the highest standards, starting with training and enforcement.

Moreover, there are certain eligibility issues that Third Party Certifiers should not be allowed to decide without first receiving guidance from SBA. For example, one of the key considerations of whether an applicant meets the WOSB Program eligibility requirements is whether the applicant is a small business under its primary North American Industry Classification System code. This question can potentially raise issues of affiliation, which is a nuanced determination requiring specialization in SBA's affiliation regulations. Because SBA is the <u>only</u> government entity empowered to determine a concern's small business size status, any questions a Third Party Certifier has related to an applicant's size status should automatically be

referred to SBA. Similarly, there are many thorny issues that can arise in determining an applicant's ownership and control by women. We submit that there should be an automatic referral system so that SBA may weigh in on any eligibility questions implicating complicated or non-mainstream eligibility issues.

8(a) Program

- **SBA's Proposed Revision to the Economic Disadvantage Requirements for the 8(a) Program Are Welcome**

SBA's rulemaking also proposes changes to 13 C.F.R. § 124.104(c) to make the economic disadvantage requirements for the 8(a) Program consistent with the disadvantage requirements for EDWOSBs. The proposed change also would eliminate the distinction in the 8(a) Program for initial entry into and continued eligibility for the Program. We support SBA's desire to make the economic disadvantage criteria consistent across the 8(a) and WOSB Programs and encourage adoption of the $750,000 net worth standard.

SBA has specifically requested comments regarding whether the $375,000 net worth standard or the $750,000 net worth standard should be used for both the 8(a) and EDWOSB Programs. We submit that the $750,000 net worth standard should be used for 8(a) initial eligibility, continued eligibility, and EDWOSB purposes. Specifically, there should not be different net worth criteria for admission into and continued eligibility for the 8(a) Program, particularly since under current rules a disadvantaged individual may receive 8(a) certification and then immediately increase his or her net worth substantially after certification. Furthermore, to adopt a $375,000 net worth standard, particularly for the EDWOSB Program, could potentially disqualify an astronomical number of previously qualified EDWOSBs. Reducing the net worth standard by $375,000 would undoubtedly render current EDWOSBs ineligible. This is simply unfair to EDWOSBs.

The $250,000 threshold has existed for decades. It has prevented prime 8(a) candidates, capable of maximizing the benefits associated with the 8(a) Program, from qualifying under outdated eligibility requirements. Simply put, an increase in the net worth threshold is necessary in order for the 8(a) Program's requirements to keep pace with the changing realities of participating in the federal procurement marketplace. Contract values are increasing and contract performance is becoming evermore complicated, requiring even companies that are just starting out (like many 8(a) firms) to be able to draw on significant outside resources. It is no longer prudent to "cap" the net worth of individuals applying for the 8(a) Program at $250,000, as the 8(a) Program would only benefit through the participation of companies owned by individuals capable of marshaling the types of resources necessary to actually perform 8(a) contract awards. Moreover, when considering the appropriate level to establish net worth for the purposes of being economically disadvantaged, SBA should consider the universe of business owners, not the total population. While a $750,000 net worth standard may be substantial for the

general public, it is not a feasible comparison when assessing the potential viability of a company to compete in the federal marketplace. It takes personal resources to establish lines of credit, make payroll, and create the infrastructure required to meet federal contracting compliance requirements. We applaud SBA's efforts to increase the threshold.

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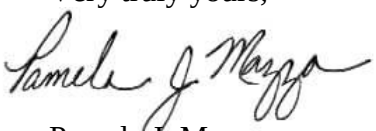
Please do not hesitate to contact the undersigned at (202) 857-1000 if you have any questions about these comments.

Very truly yours,



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