

## The Women-Owned Small Business Federal Contract Program: Ten Years in the Making

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For more than 15 years, the federal government has had a statutory goal of awarding 5 percent of federal contracts to women-owned small businesses (WOSBs). Not once has that goal been met on a government-wide basis.<sup>1</sup> By 2000, nearly five years after enactment of the statutory 5 percent goal, WOSBs were receiving only 2.3 percent of

the \$200 billion in federal contracts awarded annually. The failure to achieve this goal represented a loss to WOSBs of more than \$5 billion in annual contract revenue.

In response to these dismal statistics and other evidence that women-owned businesses did not have an equal opportunity to participate in federal contracting, Congress passed the Women's Equity in Contracting Act.<sup>2</sup> The legislation sought to promote contracting opportunities for women-owned small businesses by first directing the Small Business Administration (SBA) to conduct a study to identify those industries in which women-owned small businesses were underrepresented. It also authorized contracting officers to restrict competition to women-owned small businesses in those industries identified by SBA as underrepresented by WOSBs. President Bill Clinton signed the act into law on December 21, 2000. The following month, however, President George W. Bush took office, and the new administration had a different agenda.

Implementation of the Women's Equity in Contracting Act was put on the slow track at SBA under President Bush and consequently languished. Using its own resources,

SBA conducted a study of women-owned businesses in an attempt to determine the industries in which they were underrepresented. A draft study and proposed procedures were completed in September 2001 but never published. Rather, in 2003, SBA sought an independent review and referred the study to the National Academy of Sciences, where it sat for nearly two years. In 2005, the academy declared the SBA study flawed and recommended that a new study be conducted using revised methodology. After soliciting proposals, SBA contracted with the RAND Corporation in February 2006. The resulting RAND study was published in April 2007.<sup>3</sup>

In the meantime, the US Women's Chamber of Commerce, after a September 2004 meeting with the SBA administrator in which he purportedly stated that "this Administration has no intention of implementing this program," and that "the goals in the Act are meaningless," filed a lawsuit in US District Court in Washington, D.C.<sup>4</sup> The complaint alleged that SBA's delay in completing the congressionally-mandated study and establishing procedures to implement the women-owned business program violated the Administrative Procedure Act, because the delay was unreasonable. In its November 30, 2005, decision denying the government's motion to dismiss, the court found that SBA "had sabotaged, whether intentional[ly] or not, the implementation of the procurement program" and that the "almost five years delay is unreasonable."<sup>5</sup> The court ordered SBA to submit within 45 days a schedule to implement the program.

SBA finally published a proposed rule on December 27, 2007.<sup>6</sup> After waiting for seven years for SBA to implement the law, women's groups and their supporters were not pleased with SBA's proposed rule. They reacted swiftly in condemning the new rule as wholly inadequate and insulting to women business owners. Barbara Kasoff, the national president of Women Impacting Public Policy, called it a "lump of coal,"<sup>7</sup> and stated that the proposed rule "dem-

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onstrates that women business owners are not important to this administration or the political process.”<sup>8</sup>

Although a number of provisions in the proposed rule raised concerns, two provisions in particular drew the most critical scrutiny. First, the proposed rule limited the WOSB program to four industries, finding that women were underrepresented only in (i) national security and international affairs, (ii) coating, engraving, heat treating and allied activities, (iii) household and institutional furniture and kitchen cabinet manufacturing, and (iv) certain motor vehicle dealers. Second, the proposed rule required federal agencies to conduct *additional studies* to determine if the agency itself had engaged in discrimination against women-owned businesses in the past. Only if past discrimination were found to have occurred could the WOSB program be applied to the agency’s contracting activities on a going-forward basis.

Critics stated that this requirement would frustrate congressional intent by requiring a much more stringent standard than the intermediate scrutiny standard that applies to the WOSB program. Others doubted agencies would make findings of discrimination as to their own conduct, because such findings could open the door to discrimination lawsuits.<sup>9</sup> Thus, it appeared as though the requirement for a finding of past discrimination by a federal agency effectively killed the WOSB program before it ever began.

The efforts of the women business owners who had lobbied for years for a women’s contracting program now turned toward preventing final adoption of SBA’s proposed rule. In addition to mobilizing women business owners to submit comments to SBA objecting to the proposed rule, women’s groups threatened to return to court to stop implementation of the proposed rule. They also sought and obtained support from Senator John Kerry, Congresswoman Nydia Velazquez, and other influential members of Congress. Senator Kerry issued a statement calling the proposed rule “a slap in the face to women business owners.”<sup>10</sup> Congresswoman Velazquez, the chairwoman of the House Small Business Committee, called the proposed rule “downright insulting.”<sup>11</sup> In July 2008, the Senate Appropriations Committee voted to block implementation of SBA’s proposed program by including a provision in the 2009 Financial Services and General Government Appropriations Act (S. 3260) that prohibited the expenditure of any funds to implement the WOSB program under the proposed rule. The proposed rule was finally killed in March 2009, when President Obama signed the FY 2009 spending law.

### The Final Rule

On October 7, 2010, nearly 10 years after Congress passed the Women’s Equity in Contracting Act, SBA issued a new final rule to implement the WOSB program.<sup>12</sup> The rule identifies 83 industries in which WOSBs are underrepre-

sented (a disparity ratio between 0.5 and 0.8) or substantially underrepresented (a disparity ratio that is less than 0.5) in federal contracting. The proposed rule relies on the same RAND Corporation study commissioned by SBA in 2006, but employs a combination of both the “share of contracting dollars” and “share of number of contracts awarded” analyses to identify the underrepresented and substantially underrepresented industries, collectively referred to as “eligible industries.”<sup>13</sup> In its initial proposed rule identifying only four eligible industries, SBA had applied only the “share of contracting dollars” analysis.

The rule implementing the WOSB program takes effect on February 4, 2011, and has generally been well received. Women’s groups are especially pleased that the rule identifies 83 eligible industries compared to the four enumerated in the previous proposed rule. The elimination of the requirement found in the earlier proposed rule that an agency must find that it engaged in prior discrimination against women-owned businesses in awarding contracts is also viewed as a critical change.

As a whole, the provisions of the rule represent a leap forward after years of stationary idling and backpedaling, but further steps towards full implementation of the spirit and language of the 2000 Act may yet be needed. Nevertheless, in conjunction with the requirements of the Act, the rule creates opportunities for women—who make up 30 percent of the nation’s business owners—to participate in a small share of federal contracting, in which they now receive less than 3.5 percent of awards.<sup>14</sup> The rule enables the implementation of the 2000 Act, previously rendered inert, through the provisions summarized below.

**Small Business Requirement.** The WOSB program is restricted to small businesses. Accordingly, it is a threshold requirement for a firm to be eligible to participate in the program that it be a *small business* under SBA size standards specified at 13 C.F.R. Part 121.

**US Women-Owned and Controlled Requirement.** A firm participating in the program must be owned and controlled by women who are US citizens. The regulations specifically provide that the firm must be “not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.”<sup>15</sup>

**Ownership.** For partnerships, 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. “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. 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.<sup>16</sup>

**Control.** The requirements for control of the WOSB

provide some of the more unique provisions of the rule. They reflect the legitimate need to guard against firms attempting to qualify for WOSB status when the woman is merely a figurehead for the company. Some commentators, however, believe that SBA has gone too far in defining what women business owners who participate in the program can and cannot do when running their businesses. The rules addressing control are:

- 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.
- 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 concern.
- The woman who holds the highest officer position of the concern must manage it on a full-time basis, must devote herself 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.
- The woman who is a manager need not have the technical expertise or possess the required license to engage in the fundamental activities of the concern. She may still be found to control the concern if she can demonstrate that she has ultimate managerial and supervisory control over those who possess the required licenses or technical experience. However, if a man possesses the required license and has an equity interest in the concern, he may be found to exercise control over it.

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. If the firm is seeking to qualify as an economically disadvantaged WOSB, as discussed below, the firm must be owned and controlled by one or more women who are economically disadvantaged.<sup>17</sup>

**Economically Disadvantaged Status.** A WOSB that seeks status as an economically disadvantaged WOSB, referred to as an EDWOSB, has additional criteria to meet: its woman business owner(s) must satisfy particular requisites to be deemed economically disadvantaged. The rule establishes 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. SBA views the straight line numerical figure as easier to comprehend and implement while avoiding any appearance of unfair treatment as statistics for one tax year are compared to an income level for another tax year. 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. Several

commentators have stated that the \$200,000 maximum in the rule is too low, or that other methodologies can more accurately assess economic status.

In addition to a maximum adjusted gross income, the rule includes two additional 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. In addition, 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. In one of the more controversial aspects of the rule, 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.<sup>18</sup>

**Certification.** Certification is required as of the time of initial offer. 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 plans to post online the process it will follow to approve third-party certifiers, as well as a list of approved certifiers, at a later date.

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 US 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.

SBA is planning to establish a repository to house documents supporting self-certification as well as third-party certificates. The rule provides that, until the repository is available, the business owner, if the apparent successful offeror, must provide a copy of the documents directly to the contracting officer prior to award of the contract.

**Contract Amounts.** Under the Women's Equity in Contracting Act, the contracting officer may restrict competition for any contract to WOSBs if the anticipated contract award price (including options) does not exceed \$5 million for manufacturing contracts and \$3 million for all other

contracts.<sup>19</sup> The rule reflects the statutory provision.

Several commentators<sup>20</sup> have noted that these amounts are too low to result in meaningful contract awards to WOSBs, but they recognize that increasing the amounts would require legislative action. On May 24, 2010, Senators Olympia Snowe and Kristen Gillibrand introduced legislation that would remove the contract award maximums. The bill, S. 3399, is known as the Fairness in Women-Owned Small Business Contracting Act of 2010.<sup>21</sup>

**Eligible Industries.** The rule provides that contracting officers are allowed to restrict competition to WOSBs and EDWOSBs for contract awards in 83 industries. As noted, this provision is based on the findings of the RAND Corporation, in a study commissioned by SBA, that identified 38 industries in which WOSBs are substantially underrepresented and an additional 45 industries in which WOSBs are underrepresented. The eligible industries are identified by their four-digit NAIC code. In the 38 industries identified as substantially underrepresented by WOSB contractors, the contracting officer may restrict competition to two or more WOSBs. There is no requirement that WOSB firms competing for a contract in a substantially underrepresented industry also be economically disadvantaged. In the 45 industries identified as underrepresented by WOSB contractors, however, the contracting officer may only restrict competition to two or more EDWOSBs.

The rule includes a list of the 83 eligible industries. SBA plans to post the list on its website and make it available at SBA local offices and on the General Services Administration's website.<sup>22</sup> The rule does not mandate the updating of the list of industries in which women-owned businesses are found to be underrepresented or substantially underrepresented, and SBA's position is that it post updates as accurate and timely data becomes available. The Fairness in Women-Owned Small Business Contracting Act of 2010 addresses this point by requiring an update every five years.

**Eligibility Examination.** Under the rule, SBA has discretion to perform eligibility examinations to verify a concern's eligibility as a WOSB or an EDWOSB. Eligibility examinations will be used to verify eligibility at any time, including when the concern certifies its status, when it submits an offer, or when it is awarded a contract. SBA also intends to use eligibility examinations as a way to combat fraud and abuse by, among other things, conducting random examinations of WOSBs and EDWOSBs.

**Protests.** As with any socio-economic set-aside, it is important that there be a mechanism for challenging a company's eligibility for contract award under the WOSB program. The availability of a status protest serves as a deterrent to ineligible firms' certifying their status and improves the integrity of the program.

The rule provides that an "interested party" may protest the WOSB or EDWOSB status of the presumptive successful offeror on a contract set aside for WOSBs or EDWOSBs. "Interested party" is defined as: (1) a concern that submits an offer for a specific WOSB or EDWOSB requirement; (2) the contracting activity's contracting officer; or (3) SBA.<sup>23</sup> 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 to SBA with a request that it conduct an examination of the firm's status under SBA regulations, codified at 15 C.F.R. § 127.603(d).<sup>24</sup>

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.<sup>25</sup> In either case, the protests must be in writing and filed no later than five business days after notice of the intended award.<sup>26</sup>

Any WOSB or EDWOSB status protest received by the contracting officer must be forwarded to SBA along with a referral letter setting forth a description of the procurement and copies of relevant documents. Upon receipt of the protest, SBA will decide whether to process the protest or dismiss it. A protest may be dismissed if it 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 will be notified of any protest that is not dismissed by SBA within five business days and will be required to submit relevant documentation to respond to the basis of the protest and verify its eligibility for award. In general, the protest will be decided within 15 business days after it is received. The contracting officer may, however, grant SBA an extension of time. If the SBA receives an extension, the contracting officer may nevertheless 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.

Unlike protests to the Government Accountability Office (GAO), where remedial action in the event of a successful protest is only recommended by GAO to the contracting agency, the rule sets forth definitive action that must be taken by the agency in the event a status protest is sustained. 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 the agency has made a written determination of an immediate need to award the contract.

In addition, if SBA sustains the protest, it will require the concern to remove its EDWOSB or WOSB designation on both the Central Contractor Registration (CCR) and the Online Representations and Certifications Application (ORCA). Concerns that falsely self-certify or otherwise misrepresent their status as an EDWOSB or a WOSB are subject to suspension and debarment as well as penalties under administrative regulations and civil and criminal statutes, including 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.

As these provisions demonstrate, under renewed impetus, SBA has in large measure remediated the narrow application of its previously proposed rule. Although not perfect, the rule will finally allow women-owned small businesses to begin to receive the benefits encapsulated in the Women's Equity in Contracting Act that was signed into law in 2000.

## Conclusion

Women business owners have waited 10 years for the SBA to implement the Women's Equity Contracting Act to address the lack of opportunities for women-owned small businesses to obtain federal government contracts. The SBA's WOSB rule issued on October 7, 2010, finally establishes a program that is a legitimate attempt to implement the act. Moreover, the WOSB program will help open the door to the \$200+ billion federal marketplace for women-owned small businesses. While the current administration remains committed to moving the WOSB program forward, legislative action is required for expansion of the WOSB program by abolishing the contract award ceiling of \$5 million for manufacturing contracts and \$3 million for all other contracts, eliminating the requirement of economic disadvantage for WOSB contract awards in underrepresented industries, and providing for the award of sole-source contracts. In addition, women business owners must recognize that there remains the formidable hurdle of persuading contracting officers—most, if not all, of whom have competing concerns—to exercise their discretion to set aside contracts for restricted competition and award to woman-owned small businesses. **PL**

## Endnotes

1. Sharon G. Hadary, *What's Holding Back Women Entrepreneurs? Women-owned Businesses Are a Lot Smaller than Men-owned Companies*, WALL ST. J., May 17, 2010, at R1.
2. Pub. L. No. 106-554, 114 Stat. 2763A-708 (2000) (codified as amended at 15 U.S.C. § 637(m) (2000)).

3. ELAINE REARDON ET AL., RAND CORP., THE UTILIZATION OF WOMAN-OWNED SMALL BUSINESS IN FEDERAL CONTRACTING (2007), available at [http://www.rand.org/pubs/technical\\_reports/TR442](http://www.rand.org/pubs/technical_reports/TR442).

4. U.S. WOMEN'S CHAMBER OF COMMERCE, REPORT TO CONGRESS: WOMEN BUSINESS OWNERS BLOCKED FROM FAIR ACCESS TO FEDERAL CONTRACTS 6 (2008).

5. 2005 U.S. Dist. LEXIS 32497, at \*65.

6. 72 Fed. Reg. 73,285 (Dec. 27, 2007).

7. Sharon McLoone, *Women's Groups Lambaste SBA Plan*, WASH. POST.COM, Jan. 2, 2008, available at [http://voices.washingtonpost.com/small-business/2008/01/womens\\_groups\\_lambaste\\_sba\\_plan.html](http://voices.washingtonpost.com/small-business/2008/01/womens_groups_lambaste_sba_plan.html).

8. Denise Farris, *SBA Delivers "Lump of Coal" to Women Owned Businesses*, KANSAS CITY SMALL BUSINESS MONTHLY, Jan. 13, 2008, available at <http://www.farrislawfirm.com/Default.aspx?PageID=80> (last visited July 14, 2010).

9. Kent Hoover, *Rule to Give Women More Federal Contracts*, PHOENIX BUS. J., Mar. 12, 2010, available at <http://phoenix.bizjournals.com/phoenix/stories/2010/03/08/daily64.html>.

10. Sharon McLoone, *SBA Upsets Lawmakers with Contracting Plan*, WASH. POST.COM, Dec. 28, 2007, available at [http://voices.washingtonpost.com/small-business/2007/12/sba\\_upsets\\_lawmakers\\_with\\_cont.html](http://voices.washingtonpost.com/small-business/2007/12/sba_upsets_lawmakers_with_cont.html).

11. Angus Loten, *SBA Contracting Plan Draws Fire*, INC. COM, Jan. 2 2008, available at <http://www.inc.com/news/articles/2008/01/contracts.html>.

12. 75 Fed. Reg. 62,258 (Oct. 7, 2010).

13. Matthew Weigelt, *Questions, Answers on SBA's Proposed Rule for Women-owned Small Businesses*, GCN.COM, Mar. 3, 2010, available at <http://gcn.com/blogs/acquisitive-mind/2010/03/women-owned-small-business-rule-faq.aspx>.

14. U.S. WOMEN'S CHAMBER OF COMMERCE, *supra* note 4 at 17.

15. 13 C.F.R. § 127.200.

16. 13 C.F.R. § 127.201.

17. 13 C.F.R. § 127.202.

18. 13 C.F.R. § 127.203.

19. Section 8(m)(2)(D) of the Small Business Act, 15 U.S.C. § 637(m), *supra* note 2.

20. Comments submitted on the March 4, 2010 proposed rule (75 Fed. Reg. 10,029) can be viewed at [www.regulations.gov](http://www.regulations.gov).

21. S. REP. NO. 3399, 111th Cong. (2010).

22. 13 C.F.R. § 127.502.

23. 15 C.F.R. § 127.600.

24. *Id.*

25. 15 C.F.R. § 127.601.

26. 15 C.F.R. § 127.603(c).