

Women-Owned Small Businesses Can Expect An Increase in Federal Contracting Opportunities As The WOSB Program Has Now Been Implemented Under the FAR

On April 1, 2011, DOD, GSA and NASA issued an interim rule designed to implement the Women-Owned Small Business Program (WOSB) under the government-wide Federal Acquisition Regulation (FAR) for all procurements covered under the FAR. 76 Fed. Reg. 18304 (April 1, 2011). This new rule creates FAR Subpart 19.15 which outlines the WOSB program and the procedures that a Contracting Officer (CO) must use for establishing restricted competitions for WOSBs, including Economically Disadvantaged WOSBs (EDWOSBs). The new rule reaffirms that the status of an EDWOSB or WOSB concern is determined in accordance with the SBA qualification requirements set forth under 13 CFR Part 127. Interested parties are invited to submit comments on the new interim rule up to May 31, 2011. However, the rule is effective immediately.

In accordance with the new rule, COs can now restrict competition for certain procurements to WOSBs and/or EDWOSBs. Specifically, for industries where there is underrepresentation of WOSBs, a procurement may be set-aside for EDWOSBs if the CO has a reasonable expectation based on market research that two or more EDWOSBs will submit offers. Furthermore, where there is *substantial* underrepresentation, the procurement may be set-aside for all WOSBs if the CO has a reasonable expectation based on market research that two or more WOSBs will submit offers. The industries where there is underrepresentation or substantial underrepresentation are specified on SBA's web site at <http://www.sba.gov/WOSB>. There are 83 eligible industries. According to the SBA, there are 45 NAICs codes in which WOSBs are underrepresented and 38 NAICs codes in which WOSBs are substantially under-represented. In addition, in order to restrict competition, the CO must reasonably expect that the anticipated award price will not exceed \$4 million dollars including options, except that the price cap is \$6.5 million for a contract assigned a manufacturing NAICs code.

Another change appearing in FAR 19.203(a) under the interim rule clarifies that there is parity (no order or precedence) among WOSBs and the other small business concerns entitled to participate in set-aside procurements, i.e., 8(a), HUBZone, and Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns. This generally means that the CO can decide which program to use in accordance with market research. Earlier this year, the government modified FAR 19.203(c) by requiring contracting officers to consider 8(a), HUBZone and SDVOSB set-asides *before* using a small business set-aside. Presumably, the WOSB program also trumps regular small business set-asides given its parity with the other disadvantaged small business programs, but the regulations are not entirely clear on this point. There is an additional caveat under FAR 19.203(c) which states that if a requirement has been accepted by the SBA under the 8(a) Program, it must remain in the 8(a) Program unless SBA agrees to release it.

If an agency proceeds with a WOSB or EDWOSB set-aside, COs are required to verify that: (i) the offeror is registered in Central Contractor Registration (CCR), (ii) is self-certified in the Online Representation and Certifications Application (ORCA), and (iii) has submitted documents verifying its eligibility at the time of initial offer to the WOSB Program Repository, which is a Web based application that collects, stores and disseminates documents to agencies in order to verify eligibility. The regulations also establish that EDWOSBs and WOSBs can be certified by SBA approved third party certifiers, including SBA itself with respect to SBA certifications under the 8(a) Program.

Eligibility standards are set forth under the SBA rules governing the program. Generally, in order to be eligible under the WOSB program, the concern must be controlled and managed day-to-day by women. In order to qualify as an EDWOSB, the individual(s) in control must additionally meet various requirements set forth in the regulations pertaining to net worth and previous incomes, including having: (i) a personal net worth less than \$750,000.00 (excluding ownership in certain items such as primary personal residence and funds invested in retirement accounts), and (ii) an adjusted gross income average over three years of \$350,000.00 or less.

SUMMARY

Although, WOSB and EDWOSB set-asides are still limited to relatively small procurements in terms of dollar value compared to the size of contracts under other set-aside programs, the new rule represents a major leap forward for the WOSB program which has previously languished in the legislative and executive branches for over 10 years. The government has a goal of awarding 5% of federal procurement funds to WOSBs, a goal which the government has not reached before. Based on the new set-aside rules, the parity of the WOSB program with the other programs, and the government's stated 5% goal, WOSBs can now look forward to more contracting opportunities under the applicable NAICs codes.

If you need any additional information concerning the matters addressed in this Client Alert or other issues relating to government contracting, you can contact **Ken Brody of David, Brody & Dondershine, LLP at 703-264-2220** or **KBrody@dbd-law.com**. Additional information concerning David, Brody & Dondershine, LLP can be found at www.dbd-law.com.

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