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Women-Owned Small Business Federal Contract Program; Final Rule

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 124, 125, 126, 127, and 134

RIN 3245–AG06

Women-Owned Small Business Federal Contract Program

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is issuing this Final Rule to amend its regulations governing small business contracting procedures. This Final Rule amends part 127, entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," and implements procedures authorized by the Small Business Act (Pub. L. 85–536, as amended) to help ensure a level playing field on which Women-Owned Small Businesses can compete for Federal contracting opportunities.

DATES: This rule is effective February 4, 2011.

FOR FURTHER INFORMATION CONTACT: Dean Koppel, Assistant Director, Office of Policy and Research, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

SUPPLEMENTARY INFORMATION:

I. Background

On December 21, 2000, Congress enacted the Small Business Reauthorization Act of 2000, Public Law 106–554. Section 811 of that Act added a new section 8(m), 15 U.S.C. 637(m), authorizing Federal contracting officers to restrict competition to eligible Women-Owned Small Businesses (WOSBs) or Economically Disadvantaged Women-Owned Small Business (EDWOSBs) for Federal contracts in certain industries. The purpose of this authority, referred to as the WOSB Program, is to enable contracting officers to identify and establish a sheltered market for competition among WOSBs or EDWOSBs for the provision of goods and services to the Federal Government. H.R. Rep. No. 106–879, at 2 (2000) (publicly available at *http://thomas.loc.gov/cgi-bin/cpquery/T?&report=hr879&dbname=106&*).

Section 8(m) of the Small Business Act (Act) sets forth certain criteria for the WOSB Program. Specifically, the Act provides the following requirements in order for a contracting officer to restrict competition for EDWOSBs or WOSBS under this program:

- An eligible concern must be not less than 51 percent owned by one or more women who are "economically disadvantaged" (*i.e.* an EDWOSB). However, SBA may waive this requirement of economic disadvantage for procurements in industries in which WOSBs are "substantially underrepresented."
- A WOSB is a small business concern owned and controlled by women, as defined in section 3(n) of the Act. Section 3(n) of the Act defines a women owned business as one that is at least 51 percent owned by one or more women and the management and daily business operations of the concern is controlled by one or more women. 15 U.S.C. 632(n).
- The contracting officer must have a reasonable expectation that, in industries in which WOSBs are underrepresented, two or more EDWOSBs will submit offers for the contract or, in industries where WOSBs are substantially underrepresented, two or more WOSBs will submit offers for the contract.
- The anticipated award price of the contract must not exceed $5 million in the case of manufacturing contracts and $3 million in the case of all other contracts.
- In the estimation of the contracting officer, the contract can be awarded at a fair and reasonable price.
- Each competing concern must be duly certified by a Federal agency, a State government, or a national certifying entity approved by SBA, as an EDWOSB or WOSB, or must certify to the contracting officer and provide adequate documentation that it is an EDWOSB or WOSB. The statute imposes penalties for a concern's misrepresentation of its status.
- The contract must be for the procurement of goods or services with respect to an industry identified by SBA pursuant to a statutorily mandated study as one in which EDWOSBs are underrepresented or substantially underrepresented or WOSBs are substantially underrepresented with respect to Federal procurement contracting.

The SBA has issued several rulemakings concerning this program. Most recently, SBA issued a proposed rule on March 4, 2010 (75 FR 10029) that proposed amending 13 CFR part 127, which had been promulgated in a Final Rule on October 1, 2008 (entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," RIN 3245–AF40). In particular, the proposed rule: Identified 83 industries by four digit North American Industry Classification System (NAICS) codes in which WOSBs are underrepresented or substantially underrepresented; removed the requirement that each Federal agency must certify that it had engaged in discrimination against WOSBs in order for the program to apply to that agency; allowed WOSBs and EDWOSBs to self-certify their status as long as adequate documents were provided to support the certification; allowed WOSBs or EDWOSBs to be certified by approved third-party certifiers, including Federal agencies; and expanded the eligibility examination process to ensure the eligibility of WOSBs or EDWOSBs for the program. The proposed rule also set forth the eligibility criteria for the program, as well as the protest and appeal process for WOSB and EDWOSB status protests.

In the proposed rule, SBA stated several times that it was seeking comments on any and all aspects of the rule. In particular, though, SBA sought comments on the data used to identify the 83 industries, as well as the proposed new certification procedures. SBA stated that comments were due on May 3, 2010, which provided interested parties 60 days to submit these comments. SBA received a total of 998 comments on the rule. Many of these comments contained the same or similar remarks and virtually all of the comments supported the rule, commended SBA for its efforts, and urged the agency to expeditiously promulgate final regulations since WOSBs have been waiting eleven years for the program.

Many of the comments supported the proposed rule on the grounds that: Women are underrepresented in Federal contracting; the new program will level the playing field for WOSBs; the new program will help businesses to grow; and it will be beneficial to the economy. Few comments did not support the proposed rule on the grounds that the scope was too restrictive in its application to WOSBs, and that they opposed gender based set asides, believed that the program creates an artificial advantage for a certain group, or that the program was merely a token to WOSBs. All comments can be viewed on the Federal rulemaking portal at *http://www.regulations.gov.*

The comments relating to specific sections of the rule are discussed in further detail below.

In addition, the SBA notes that although this is a final rule, it is not effectively immediately. The SBA is in the process of working with the Federal Acquisition Regulatory Council to implement this program in the Federal Acquisition Regulations (FAR). In addition, the SBA is working with the Integrated Acquisition Environment to

make changes to the various Federal procurement data systems, which will be affected by this rule. As a result, the SBA believed it was necessary to publish the rule as final, but to also acknowledge that there are additional measures that need to be taken to fully implement the program.

II. Summary of Comments and Agency Response to Comments

A. Eligible industries

a. General Comments on the Eligible Industries

SBA's proposed rule identified 83 NAICS codes that would be eligible for Federal contract assistance under the WOSB Program. Most comments received on the proposed rule's identification of the 83 NAICS codes were overwhelmingly supportive. In fact, SBA received hundreds of comments which supported the identification of 83 NAICS categories. For example, many comments stated they are "extremely pleased" that all 83 NAICS categories have been selected. Other comments applauded SBA's "efforts to increase women-owned business participation in federal contracting." Additional comments stated that the "rule is a significant improvement over the rule proposed in 2007."

SBA also received dozens of comments that, while supporting the 83 eligible NAICS codes, sought the inclusion of additional NAICS categories. Some of the comments stated that all NAICS categories should be eligible, while other comments identified specific additional NAICS categories for eligibility.

The comments which requested eligibility of all NAICS codes asserted that SBA's other programs are not limited to certain NAICS codes. In addition, some of these comments stated that no court has required a study prior to establishing a program that provided contracting assistance on the basis of gender and SBA's requirement of such a study limits the eligibility of NAICS categories.

The comments which requested the addition of specific NAICS categories based their requests on various viewpoints, including the belief that WOSBs in a NAICS code received few contracts or a small dollar amount of contracts, or that only a few WOSBs participate in a NAICS code, or that WOSBs sought contracts in a NAICS code, but did not receive the contract.

While SBA acknowledges the concerns expressed in these comments relating to the need to increase WOSB participation in Federal contracting, section 8(m) of the Act sets forth certain statutory requirements for this program that specify the manner in which SBA is to identify included NAICS categories. In particular, section 8(m) instructs SBA to conduct a study to identify industries in which WOSBs are underrepresented with respect to Federal procurement contracting. *See* 15 U.S.C. 637(m)(4). Therefore, SBA must identify the program's eligible industries based on a study which analyzes WOSBs' underrepresentation in a specific industry.

Shortly after section 8(m) was enacted, and pursuant to the requirement of paragraph (4) of the law, SBA, using its own internal resources, conducted a study to identify the industries in which WOSBs are underrepresented with respect to Federal procurement contracting. SBA initially completed its study in September 2001, and contracted with the National Academy of Sciences (NAS) to review the study before publication. In March of 2005, the National Research Council, which functions under the auspices of the NAS and other National Academies, issued an independent evaluation concluding that SBA's study was flawed and offering various recommendations for a revised study.

In response to this evaluation, SBA issued a solicitation in October 2005 seeking a contractor to perform a revised study in accordance with the NAS recommendations. In February 2006, SBA awarded a contract to the Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND) to complete a revised study of the underrepresentation of WOSBs in Federal prime contracts by industry code. The resulting study—the RAND Report—was published in April 2007 and is available to the public at *http://www.RAND.org/pubs/technical_reports/TR442.*

As the RAND Report explains more fully, underrepresentation is typically referred to as a disparity ratio. A "disparity ratio" is a measure comparing the utilization of WOSBs in Federal contracting in a particular NAICS code to their availability for such contracts in a particular NAICS code. A disparity ratio of 1.0 suggests that firms of a particular type are awarded contracts in the same proportion as their representation in the industry—that is, there is no disparity. A disparity ratio of less than 1.0 suggests that the firms are underrepresented in Federal contracting, and a ratio greater than 1.0 suggests that they are overrepresented. This disparity ratio provides an estimate of the extent to which WOSBs that are available for Federal contracts in specific industries are actually being utilized to perform such contracts. One of the recommendations made by the NAS Review was to create four disparity ratios of underrepresentation using a combination of different databases and different measures. The four disparity ratios recommended by the NAS Review were the following: (1) Use contract dollars with the Survey of Business Owners (SBO) database; (2) use contract dollars with the Central Contractor Registry (CCR) database; (3) use number of contracts with the SBO database; and (4) use the number of contracts with the CCR database.

The RAND Report, in accordance with the NAS recommendations, created various disparity ratios to identify the NAICS codes which showed underrepresentation based on a disparity ratio. Using the RAND Report, SBA identified a viable and appropriate methodology of identifying industries in which WOSBs are underrepresented or substantially underrepresented. SBA did this in accordance with the statute.

Accordingly, in view of the statute's explicit requirements, SBA cannot simply deem a NAICS code eligible under the WOSB Program based solely on a request set forth in the public comments.

b. Methodology: Dollars and Numbers

In the proposed rule, SBA identified 83 NAICS categories as eligible under the WOSB Program. The RAND Report found these 83 NAICS categories to be underrepresented or substantially underrepresented using the numbers and dollars approaches. That is, the industry was identified as eligible if the industry was underrepresented or substantially underrepresented using either the numbers or the dollars approach. SBA explained in the proposed rule that, for purposes of section 8(m), both the dollars and numbers approaches are viable and appropriate means of identifying industries in which WOSBs are underrepresented or substantially underrepresented. A previous version of the proposed regulations identified only 4 NAICS as eligible because it used only the dollars approach and not the number approach to identify eligible industries.

SBA received hundreds of comments which expressed general support for the identification of 83 NAICS codes, which relied upon the use of both the numbers and dollars approaches. In addition, SBA received hundreds of comments which agreed specifically with the use of both the dollars and numbers approaches identifying the eligible

industries under the WOSB Program. For example, one comment stated that the use of both the numbers and dollars approaches is a better mechanism "to measure underrepresentation and performance of WOSBs."

As explained in the proposed rule, the dollars approach compares the proportion of the dollar value of contracts in a particular NAICS code awarded to WOSBs with the proportion of gross receipts (revenues) in that NAICS code earned by WOSBs. The numbers approach compares the proportion of contracts (calculated in terms of number of contracts) awarded to WOSBs in a particular NAICS code with the number of WOSBs in that particular NAICS code.

SBA determined that both approaches represent legitimate and complementary interpretations of the statutory term "underrepresentation." Specifically, underrepresentation can occur when WOSBs are not being awarded Federal contracting dollars in proportion to their economic representation (measured by their gross receipts) in an industry. But underrepresentation can also occur where there is disparity in the number of contracts being awarded to WOSBs, even if there is no measured disparity in contract dollars, due to a handful of WOSBs winning large-dollar contracts. SBA also stated in the proposed rule that applying the section 8(m) program in these industries would reduce the effects of the discrimination affecting women-owned small businesses, consistent with Congress's goals, and that both numbers and dollars approaches are substantially related to the purpose of the WOSB Program.

Based on the reasons set forth herein and in the proposed rule, as well as the support SBA received from the public comments on this issue, SBA has promulgated the proposed rule as final and will apply both the numbers and dollars approach to identify eligible industries.

c. Methodology: Central Contractor Registry (CCR) and Survey of Business Owners (SBO) Databases

For the availability component of the disparity ratio, RAND used two different databases: The 2002 Survey of Business Owners (SBO) from the five-year Economic Census, and the FY 2006 Central Contractor Registration (CCR) registration database. The proposed rule used the CCR database rather than the SBO database to identify the 83 eligible industries under the WOSB Program. The proposed rule explained that SBA selected the CCR database for various reasons, including the fact that the CCR database, as compared with the SBO database as currently constituted, is more likely to capture those firms ready, willing and able to compete for Federal contracts.

SBA received hundreds of comments which addressed the CCR and SBO databases used in the RAND Report. The overwhelming majority of these comments supported the proposed methodology used to identify eligible industries under the WOSB Program. Specifically, SBA received dozens of comments which supported the use of the CCR database to identify the eligible industries. Several of these comments supported the use of CCR because it is a more comprehensive and complete database.

SBA also received several comments that not only supported the use of the CCR database, but urged SBA to use the SBO database from the RAND Report in addition to the CCR database to identify eligible industries. Specifically, these comments stated that SBA should deem as underrepresented those industries that appear underrepresented in two or more of the four approaches identified in the report issued by the National Academy of Sciences (NAS) recommendations.

Additional comments received by SBA supported the use of only the SBO database (and not the CCR) from the RAND Report to identify the eligible industries. Some of these comments stated that the use of CCR undercuts utilization and perpetuates discrimination because not all WOSBs register in CCR due to their belief that there is no meaningful competition in Federal procurement for women-owned businesses.

As explained in the proposed rule, SBA decided not to use the SBO database used in the RAND Report and concluded that the CCR database used in the RAND report is currently the best available database to use to determine the availability component of the disparity ratios because of certain limitations in the existing SBO dataset. SBA proposed not to use the 2002 SBO database used in the RAND Report for the following reasons:

- The SBO data in the RAND Report do not disaggregate industry groupings beyond the two-digit NAICS level. In the NAS 2005 report examining SBA's 2002 internal study, NAS criticized SBA's use of the two-digit Major Group Standard Industrial Classification (SIC) industry codes as inadequate. The two-digit Major Group SIC designation corresponds to the current three-digit Subsector NAICS designation. Thus, while NAS criticized SBA's use of two-digit SIC information, the SBO two-digit NAICS data are even less precise than the two-digit SIC data. Both the CCR and the FPDS/NG, in contrast, provide the capability to use four-digit NAICS classifications.
- The SBO database in the RAND Report generally considers all firms in the economy, and not simply the number of firms that have explicitly indicated that they are ready, willing, and able to perform Federal contracts. In contrast, because firms are generally required to register on the CCR database prior to bidding on a Federal contract, a firm's presence in the CCR specifically reflects its willingness to bid on a Federal contract. SBA recognized, however, that its reliance on the CCR database could understate the availability of women-owned firms, since a firm's inability to bid on Federal contracts, and therefore its reluctance to register on the CCR could itself result from gender discrimination.
- The SBO database in the RAND Report does not distinguish between WOSBs and women-owned businesses in general, large and small. The CCR, in contrast, contains self-reported information on whether a business is small. And the procedures authorized by section 8(m) are specifically targeted towards only small businesses owned by women.
- The SBO database in the RAND Report is generally not available for two years after the survey is completed. CCR data, in contrast, are updated continuously and made available immediately. Thus, in this instance, the SBO data available to RAND at the time of the study was less recent than the CCR data. SBA recognized, however, that the degree to which data regarding business ownership and economic size change from year to year is unclear, and therefore that it was not clear how much weight this distinction should carry.

As detailed in the proposed rule, SBA notes that the Census Bureau provided SBA with a data set for the availability component of the disparity ratio which came from the 2002 Survey of Business Owners (SBO) collected through the 5-year Economic Census for firms with employees (hereinafter referred to as "Census SBO data"). SBA elected not to use this dataset because that data addresses all firms across the economy as a whole, and does not select for firms which are ready, willing and able to engage in federal procurement contracting. For this reason, SBA is of the view that it is not a viable alternative data set for accurately measuring disparity.

After a review of the comments, for these reasons, SBA continues to support the use of the CCR for the availability component of the disparity ratio to

identify the eligible industries. In so doing, however, SBA does not suggest that use of SBO data would never be appropriate to calculate availability.

While the comments correctly stated that the NAS recommended in their report the designation of an industry as eligible under the WOSB Program if the industry appears underrepresented in two or more of the four approaches, the NAS also recommended estimating disparity ratios at a disaggregated level. In other words, the SBO database used in the RAND Report provides data only at the *two-digit* level. In contrast, both the CCR and the FPDS/NG provide the capability to use *four-digit* NAICS classifications. Thus, SBA had to reconcile these recommendations and, based on the above limitations of the SBO data set from the RAND Report, SBA elected to use the four-digit CCR dataset for the availability component.

In response to the comments which stated that not all WOSBs register in CCR thus resulting in an undercounting of underutilization, SBA notes that courts have looked at the appropriateness of the "availability" component, also known as the "ready, willing, and able" component, in evaluating the accuracy of disparity studies. *See e.g., Eng'g Contractors Ass'n of S. Fla., Inc.* v. *Metro. Dade County,* 122 F.3d 895, 907 (11th Cir. 1997); *Concrete Works of Colorado, Inc.* v. *City and County of Denver,* 321 F.3d 950, 980 (10th Cir. 2003). The CCR and SBO databases are different means of measuring the "availability" component.

Although not all firms or WOSBs have registered in CCR, the firms in the CCR database have at least indicated by registering to submit an offer on Federal prime contracts that they are "willing" to perform work on such contracts and have self-identified as firms that are ready and able to perform such work. Further, the SBO database used in the RAND Report generally considers all firms in the economy so it is possible that it may actually overestimate the number of firms that are ready, willing and able to perform Federal contracts, thus potentially overestimating underrepresentation. SBA recognizes that this is a conservative approach to calculating availability, but believes its use is appropriate in this instance, particularly in light of the other advantages of the CCR database.

Other comments which SBA received supported the SBO database and addressed the fact that the CCR does not allow the disparity ratio to include specific amounts earned by that business in that NAICS code and thus may lead to over counting of earnings.

As stated in the proposed rule, this concern does not render unreliable the disparity ratios calculated using the dollars component of the CCR database. The dollars-based disparity ratios are themselves based on a comparison between two different ratios: The value of the government contracts awarded to WOSBs in a particular industry compared to the value of all government contracts awarded in that industry, on the one hand; and the gross receipts (in the economy at large) of WOSBs registered in the CCR database for that industry compared to the gross receipts for all businesses registered for that industry, on the other hand. The numerator of this ratio-the value of government contracts awarded to WOSBs and to industries in general within a given industry code-is not calculated using the CCR database.

In addition, with respect to the denominator, SBA believes that it is reasonable to assume that WOSBs and non-WOSBs register in the CCR database and identify industries for which they are available in a similar manner. Thus, if a WOSB in a particular kind of business registers in (and effectively restates its total revenues in) three distinct NAICS codes, a non-WOSB in the same kind of business is likely to register in (and restate its total revenues in) each of the same three NAICS codes. And because the denominator of the dollars-based disparity ratio is calculated based on a comparison between gross receipts earned by WOSBs and non-WOSBs, rather than the absolute values of those receipts, the potential duplicative re-reporting of revenue in each NAICS code does not raise serious concerns in SBA's view, about the reliability of the dollars analysis of the RAND study. For these reasons, SBA disagrees with the comments that are concerned with the viability of the CCR data because the CCR does not allow the disparity ratio to include specific amounts earned by a business in a particular NAICS code.

Lastly, SBA received comments which argued that since only 1.8 percent of women-owned businesses have receipts larger than $1 million the fact that SBO doesn't distinguish between large and small WOSBs should not be a determining factor. SBA notes that SBO's failure to distinguish between large and small businesses is only one factor SBA considered in deciding to use the CCR data. In addition, the existence of a few large WOSBs or other businesses would potentially skew the SBO data, resulting in an unreliable disparity ratio using the SBO data. The effect is unknown but outliers on both the large and small ends of the spectrum may affect the reliability of the SBO data used in the RAND Report.

Accordingly, for the reasons stated in the proposed rule, SBA will use the CCR database to identify eligible industries.

d. Methodology: FPDS Database

In the proposed rule, SBA explained that the RAND Report used the Fiscal Year (FY) 2005 Federal Procurement Data System/Next Generation (FPDS/NG) for the utilization component of the disparity ratio that resulted in the identification of 83 eligible NAICS categories.

SBA received hundreds of comments which supported the use of the FPDS database to identify the eligible industries; however, one comment expressed concern with this database, stating that contract revenues in the database (presumably FPDS) may not reflect actual money earned (*e.g.,* multi award contracts) and contract award values do not equate to company revenues.

SBA agrees with the comment that stated a company's revenues do not equal contract award values. In the RAND Report, company revenues are obtained from the CCR database, while contract award values are obtained from the FPDS.

In addition, while SBA understands the concern with the accuracy of the FPDS procurement database, SBA maintains that this database is a viable and appropriate means of identifying eligible industries. In addition, the FPDS is the best source of information on Federal contracts. *See* RAND Report at 7. Lastly, in some instances where relevant data was available, RAND made adjustments to deal with the limitations in the FPDS. *See id.* at 7–9.

For example, RAND considered the fact that, in some cases, individual actions refer to multi-year contracts or are revisions to earlier contracts. RAND stated in the Report that this could lead to errors in summing to the contract level, such as negative dollar amounts or very large contract values. In order to examine the sensitivity of the disparity ratios to these outliers, RAND calculated "trimmed" results. The trimmed results reflect calculations where RAND trimmed the top and bottom 0.5 percent of contract awards after rolling up the data to the contract level. However, RAND found that their "comparisons from FY02 through FY05 also indicate that very large contracts and larger negative values are awarded each year, suggesting that they are not outliers" and "without a compelling reason to delete these contracts, we are inclined to put more weight on the full-sample

results" as opposed to the trimmed results *See id.* at 8.

For the reasons stated above, SBA's Final Rule will use the FPDS database as proposed.

e. The Eligible Industry Codes

For the reasons stated here and in the proposed rule, this Final Rule designates 83 NAICS codes as eligible for Federal contracting under the WOSB Program. There are forty-five NAICS codes in which WOSBs are underrepresented and thirty-eight NAICS codes in which WOSBs are substantially underrepresented.

The forty-five NAICS codes in which WOSBs are underrepresented are:

1. 2213—Water, Sewage and Other systems;
2. 2361—Residential Building Construction;
3. 2371—Utility System Construction;
4. 2381—Foundation, Structure, and Building Exterior Contractors;
5. 2382—Building Equipment Contractors;
6. 2383—Building Finishing Contractors;
7. 2389—Other Specialty Trade Contractors;
8. 3149—Other Textile Product Mills;
9. 3159—Apparel Accessories and Other Apparel Manufacturing;
10. 3219—Other Wood Product Manufacturing;
11. 3222—Converted Paper Product Manufacturing;
12. 3321;—Forging and Stamping;
13. 3323—Architectural and Structural Metals Manufacturing;
14. 3324—Boiler, Tank, and Shipping Container Manufacturing;
15. 3333—Commercial and Service Industry Machinery Manufacturing;
16. 3342—Communications Equipment Manufacturing;
17. 3345—Navigational, Measuring, Electromedical, and Control Instruments Manufacturing;
18. 3346—Manufacturing and Reproducing Magnetic and Optical Media;
19. 3353—Electrical Equipment Manufacturing;
20. 3359—Other Electrical Equipment and Component Manufacturing;
21. 3369—Other Transportation Equipment Manufacturing;
22. 4842—Specialized Freight Trucking;
23. 4881—Support Activities for Air Transportation;
24. 4884—Support Activities for Road Transportation;
25. 4885—Freight Transportation Arrangement;
26. 5121—Motion Picture and Video Industries;
27. 5311—Lessors of Real Estate;
28. 5413—Architectural, Engineering, and Related Services;
29. 5414—Specialized Design Services;
30. 5415—Computer Systems Design and Related Services;
31. 5416—Management, Scientific, and Technical Consulting Services;
32. 5419—Other Professional, Scientific, and Technical Services;
33. 5611—Office Administrative Services;
34. 5612—Facilities Support Services;
35. 5614—Business Support Services;
36. 5616—Investigation and Security Services;
37. 5617—Services to Buildings and Dwellings;
38. 6116—Other Schools and Instruction;
39. 6214—Outpatient Care Centers;
40. 6219—Other Ambulatory Health Care Services;
41. 7115—Independent Artists, Writers, and Performers;
42. 7223—Special Food Services;
43. 8111—Automotive Repair and Maintenance;
44. 8113—Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance; and
45. 8114—Personal and Household Goods Repair and Maintenance.

The thirty-eight NAICS codes in which WOSBs are substantially underrepresented are:

1. 2372—Land Subdivision;
2. 3152—Cut and Sew Apparel Manufacturing;
3. 3231—Printing and Related Support Activities;
4. 3259—Other Chemical Product and Preparation Manufacturing;
5. 3328—Coating, Engraving, Heat Treating, and Allied Activities;
6. 3329—Other Fabricated Metal Product Manufacturing;
7. 3371—Household and Institutional Furniture and Kitchen Cabinet Manufacturing;
8. 3372—Office Furniture (including Fixtures) Manufacturing;
9. 3391—Medical Equipment and Supplies Manufacturing;
10. 4841—General Freight Trucking;
11. 4889—Other Support Activities for Transportation;
12. 4931—Warehousing and Storage;
13. 5111—Newspaper, Periodical, Book, and Directory Publishers;
14. 5112—Software Publishers;
15. 5171—Wired Telecommunications Carriers;
16. 5172—Wireless Telecommunications Carriers (except Satellite);
17. 5179—Other Telecommunications;
18. 5182—Data Processing, Hosting, and Related Services;
19. 5191—Other Information Services;
20. 5312—Offices of Real Estate Agents and Brokers;
21. 5324—Commercial and Industrial Machinery and Equipment Rental and Leasing;
22. 5411—Legal Services;
23. 5412—Accounting, Tax Preparation, Bookkeeping, and Payroll Services;
24. 5417—Scientific Research and Development Services;
25. 5418—Advertising, Public Relations, and Related Services;
26. 5615—Travel Arrangement and Reservation Services;
27. 5619—Other Support Services;
28. 5621—Waste Collection;
29. 5622—Waste Treatment and Disposal;
30. 6114—Business Schools and Computer and Management Training;
31. 6115—Technical and Trade Schools;
32. 6117—Educational Support Services;
33. 6242—Community Food and Housing, and Emergency and Other Relief Services;
34. 6243—Vocational Rehabilitation Services;
35. 7211—Traveler Accommodation;
36. 8112—Electronic and Precision Equipment Repair and Maintenance;
37. 8129—Other Personal Services; and
38. 8139—Business, Professional, Labor, Political, and Similar Organizations.

f. Examples of When Contracting Officers Can Use WOSB Program

SBA received one comment which urged SBA to provide examples of when a contracting officer can apply the WOSB Program to a contract. In response to this request, SBA provides the following examples.

- If the requirement is assigned a six digit NAICS code under NAICS 5313—Activities Related to Real Estate, the contracting officer may not set aside the procurement under the WOSB Program because the contract is not for the procurement of goods or services with respect to an industry as one in which EDWOSBs are underrepresented or substantially underrepresented or WOSBs are substantially underrepresented with respect to Federal procurement contracting.
- If the requirement is assigned a six digit NAICS code under NAICS 8129—Other Personal Services, then, assuming all other requirements are met, the contracting officer may set aside the procurement under the WOSB Program

to all eligible WOSBs because the industry is one in which WOSBs are substantially underrepresented.

• If the requirement is assigned a six digit NAICS code under NAICS 5614—Business Support Services, then, assuming all other requirements are met, the contracting officer may set aside the procurement under the WOSB Program to all eligible EDWOSBs because the industry is one in which WOSBs are underrepresented.

Furthermore, as required by the Small Business Regulatory Enforcement Act (SBREFA) (Pub. L. 110–28, section 212), SBA will publish a small entity compliance guide to assist small businesses with the WOSB Contract Program. The guide will be posted, at the time the rule is published, on the SBA Web site (*http://www.sba.gov*) and distributed to known industry contacts. The guide will be in easily understood language as to what is required to participate in the new program.

g. Updates to the RAND Report

Hundreds of the comments SBA received that supported the identification of the 83 eligible NAICS categories also stated that the RAND Report data is outdated and should be updated. In particular, the comments suggested the creation of a regular timeline for updates to the RAND Report, with some comments specifically recommending updating the RAND Report every five years.

Most of these comments also suggested that SBA find additional data sources for the disparity ratios calculated in the RAND Report and perform additional data analysis to the data. In particular, one comment stated that it "generally supports the methodology but SBA has not sufficiently examined the market where several large companies are dominant and controlling over 95 percent of the market share in NAICS codes 3119, 3121 and 325412." The comments also suggested that SBA gather bid data, all data on WOSBs in Federal contracting, data from state governments and third-party certifiers, as well as any other data sources that allow for a more complete picture of availability.

Another comment suggested that SBA include in its calculation the potential availability of WOSBs had there been no discrimination. The comments also stated that additional data will provide a "'gold standard' by which to judge whether our companies or programs are successful." Another comment suggested that a "special committee" should be appointed to review government purchases on an objective basis, without having knowledge of the demographics of the bidding companies' ownership.

The CCR data used in the RAND Report are from October 2006. One of the cited benefits of the CCR database is that it is updated continuously and made available promptly. Therefore, it provides SBA the flexibility needed to access this data and readily update the eligible industries. The SBO data from the five-year Economic Census is from 2002. The next SBO was taken in 2007, and the results are not yet available.

SBA understands the concerns presented in these comments. The data relied upon in the RAND Report is determinative of the resulting disparity ratios. Obtaining the most accurate and timely data possible is of paramount importance to SBA. SBA is committed to making an on-going effort to obtain accurate and timely data to use in the anticipated updates to the list of eligible industries. In addition, SBA is considering available options in obtaining new and better data sources that are viable and appropriate means of measuring disparity of WOSBs in Federal contracting. Rather than limiting itself to a particular timetable for updating the eligible industries, SBA believes it is more prudent to update the study and list of eligible industries as accurate and timely data become available to SBA for analysis and the analysis is completed.

SBA also received comments which stated that, in examining data about underrepresentation, "fronts" may be skewing calculations, and therefore, SBA should dedicate resources to site visits to ensure accurate calculations.

The SBA believes that its regulations, which permit protests and robust eligibility examinations, will not only aid in preventing fraud, waste and abuse in the WOSB program, but as "fronts" are weeded out of the WOSB Program and denied contract opportunities under the program through the protests and eligibility examinations, the accuracy of the WOSB data in CCR and FPDS will improve. In addition, under SBA's eligibility examinations, SBA reserves the right to conduct a site visit without prior notification to the concern. SBA will conduct such examinations of WOSBs as a way to combat fraud and abuse of the WOSB Program.

h. Appeal Right

SBA received several comments which suggested that businesses should have the right to appeal if their NAICS code was not identified as an eligible industry for Federal contracting under the WOSB Program.

Section 8(m) of the Act sets forth certain criteria for the WOSB Program. Specifically, the Act provides that the contract being set aside must be for the procurement of goods or services with respect to an industry identified by SBA pursuant to a study. Therefore, Congress expressly limited application of the WOSB Program to the industries identified by SBA pursuant to a study.

SBA contracted with RAND to complete a study in order to fulfill this statutory obligation. As explained in the proposed rule, the RAND Report, using various combinations of data sources and methods, identified twenty-eight possible approaches to measuring the underrepresentation and substantial underrepresentation of WOSBs in Federal procurement contracting. SBA had to identify a reasonable means for evaluating, reconciling and applying these methodologies. As detailed in the proposed rule, SBA determined that the methodology using the CCR and FPDS databases, along with both the dollars and numbers approaches, is a viable and appropriate means of identifying industries in which WOSBs are underrepresented or substantially underrepresented.

Because SBA is required to identify the industries pursuant to a study, SBA disagrees with the comments received on this issue and will not implement an appeal process for the NAICS categories found ineligible for Federal contracting under the WOSB Program. However, SBA is committed to reevaluating the list of eligible industries as viable and appropriate data become available to analyze and SBA will provide for the eligibility of additional or fewer industries in accordance with the requirements of the congressional mandate and where indicated by analysis of the viable and appropriate data.

i. Agency-by-Agency Requirement

In the proposed rule, SBA explained it was eliminating the requirement for an agency-by-agency determination of discrimination. SBA received dozens of comments which supported this proposal. SBA did receive a few comments that disagreed with the removal of this requirement because the commentators believed the RAND Report is flawed and therefore the agency-by-agency requirement is necessary.

As stated in the proposed rule, SBA believes the methodology used to identify the 83 eligible industries is a viable and appropriate means of identifying industries in which WOSBs are underrepresented or substantially underrepresented. Based on this assessment, SBA believes that the RAND Report is sufficient to satisfy the

intermediate scrutiny standard that applies to the WOSB Program.

The equal protection requirements of the Fifth Amendment to the United States Constitution establish that programs that use gender as a factor in distributing benefits to individuals must meet the intermediate scrutiny standard. This standard requires the program to further important governmental objectives and employ means that are substantially related to the achievement of those objectives. *See United States* v. *Virginia,* 518 U.S. 515, 533 (1996). In applying this standard to the WOSB Program, the government has a sufficiently important objective: To redress the effects of past discrimination against women in contracting and to ensure that the effects of that discrimination do not serve to limit WOSBs' opportunities to participate in Federal contracting opportunities. *See City of Richmond* v. *Croson Co., 488 U.S. at 492; Califano* v. *Webster,* 430 U.S. 313, 318 (1977). More specifically, the Court has repeatedly upheld as an important government objective the reduction of disparities in condition or treatment between men and women caused by the long history of discrimination against women. *See Califano,* 430 U.S. at 317; *Miss. Univ. for Women* v. *Hogan,* 458 U.S. 718, 728 (1982); *Schlesinger* v. *Ballard,* 419 U.S. 498 (1975); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).

Moreover, the means chosen by Congress to implement the WOSB Program ensure that the Program is substantially related to its goals. Congress expressly limited application of the WOSB Program only to industries in which women are substantially underrepresented or underrepresented in contracting. The RAND Report is a detailed analysis of WOSBs which identifies the disparity ratio of WOSBs in Federal prime contracting by 4-digit NAICS code and is a sufficient basis for implementing the rule. The Supreme Court has rejected the contention that government may adopt a race-conscious contracting program only "to eradicate the effects of its own prior discrimination," and this conclusion also applies to gender-conscious contracting programs. *Croson,* 488 U.S. at 486.

Accordingly, based on the comments that supported the proposed rule and for the reasons set forth in the proposed rule, SBA will not require the procuring agency to make a finding of discrimination prior to setting aside a contract in one of the eligible NAICS categories as currently required in 13 CFR 127.501(b).

B. Ownership and Control

The SBA received several comments which were concerned with the ownership and control of an EDWOSB or WOSB. In the proposed rule, § 127.201 addressed ownership and states that the EDWOSB/WOSB must be unconditionally and directly owned at least 51 percent by women. The ownership could not be subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another. Several comments supported the regulation, and one comment specifically agreed that a WOSB should not be 51 percent owned and controlled by another business entity even if that business entity is owned and controlled by women. However, one comment recommended that SBA increase ownership by women to 67 percent, or at least something higher than 51 percent, because this commenter has witnessed husbands running companies that are 51 percent owned by the wife. SBA notes that the 51 percent ownership and control requirement is statutory and cannot be changed in the regulations. In addition, SBA believes that the regulations set forth sufficient requirements that the woman control the business, and also sufficient checks to ensure that only truly eligible businesses receive the benefits of the WOSB Program.

Another comment agreed that there should be unconditional and direct ownership that is unencumbered by conditions or agreements and believed that if there are instances of a pledge or encumbrance of stock, SBA should ensure such pledges or encumbrances follow normal commercial practices. The final regulation specifically explains that the ownership must be direct (13 CFR 127.201). Further, the final regulation explains that the pledge or encumbrance of stock or other ownership interest as collateral does not affect the unconditional nature of the ownership if the terms of the agreement follow normal commercial practices and the owner retains control absent violations of the terms. SBA believes this Final Rule provides flexibility to the WOSB while at the same time ensuring that the business is owned and controlled by women.

The proposed regulation also addressed unexercised stock options with respect to ownership of a corporation. One comment agreed with the proposed regulation that any unexercised stock options held by a woman will be disregarded while the unexercised stock options held by any other individual or entity will be treated as having been exercised. SBA notes that this final regulation is consistent with SBA's other contracting program regulations addressing the treatment of unexercised stock options.

One comment recommended that SBA establish a minimum amount of time that the business has to be owned by women in order to be eligible for the WOSB Program and another comment questioned why SBA does not require the WOSB to have a minimum amount of experience. SBA does not believe these requirements are necessary in light of the fact they are not required by statute and could be detrimental to start-up companies. In addition, imposing these requirements may only perpetuate discriminatory barriers. Further, there are many industries and contracts in which age and size are irrelevant to ability to perform.

The SBA also received several comments which supported the portion of the proposed rule which addressed control of the EDWOSB/WOSB. Specifically, § 127.202 of the Final Rule explains that the management and daily business operations of the concern must be controlled by one or more women. At least two comments supported the requirement that one or more women must make the long term decisions and have the day-to-day management of the company to ensure that the spouse or another person is not really running the company.

One comment also supported the proposed rule that the women owners cannot have outside employment if it prevents them from devoting sufficient time and attention to the daily operations and management of the company. However, one comment believed that the rule was too stringent concerning the limitation on outside employment. According to this comment, many small business owners have two jobs in the first few years of starting a company and it may take years for the business to grow. The comment stated that this requirement is not consistent with the Service-Disabled Veteran-Owned Small Business, HUBZone or 8(a) Business Development (BD) Programs.

The final regulation states that the woman who holds the highest officer position of the concern must manage it on a full-time basis and devote full-time to the business concern during the normal working hours of business concerns in the same or similar line of business. The final regulation also states that the woman who holds the highest officer position may not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the

concern to control its management and daily business operations. Therefore, the final regulation does not necessarily limit outside employment. It permits outside employment as long as it does not prevent the business owner from managing the EDWOSB or WOSB. Although such limitations may not be expressly set forth in the SDVO or 8(a) BD regulations, the same policy is applied to those programs because essentially, if an individual upon whom eligibility is based is devoting full-time to one business, it is difficult to prove that same individual is devoting full-time to the SDVO or 8(a) business and meeting the eligibility criteria for those programs.

One comment noted that it supported the rule that the women business owners do not necessarily have to have the technical expertise or possess the required license while another comment requested that SBA reconsider this regulation and preclude "nonprofessionals" or unlicensed individuals from owning professional businesses. Another comment believed that SBA should have more stringent rules to ensure WOSBs are actually 51 percent owned by women that are active in the daily management of the business.

The Final Rule provides that although the women manager need not have the technical expertise or license required, she must nonetheless demonstrate that she has the ultimate managerial and supervisory control over those possessing the required licenses or technical expertise. This is consistent with the 8(a) BD regulations concerning control and SBA believes it provides flexibility to the company while still ensuring that the woman controls the company. In addition, SBA will be monitoring EDWOSBs and WOSBs via eligibility examinations and protests and appeals to ensure that the women owners are actively engaged in the daily management of the business.

C. Economic Disadvantage

As discussed above, the statute states that a contracting officer may set aside a requirement for EDWOSBs in industries that are underrepresented or substantially underrepresented. SBA may waive the requirement that the WOSB be economically disadvantaged and permit a contracting officer to set aside a requirement for WOSBs in industries that are substantially underrepresented. The Final Rule implements these statutory provisions and sets forth the criteria for determining economic disadvantage.

One comment specifically supported the waiver of the economic disadvantage requirement if the industry is substantially underrepresented. However, SBA received several comments which opposed any economic disadvantage component to the WOSB Program and one comment specifically opposed any preference provided to EDWOSBs. Some comments noted that there were no similar economic disadvantage requirements for the HUBZone or SDVO Programs and one comment stated that if there are economic disadvantage requirements, then those meeting the requirements should receive the same benefits afforded to 8(a) BD Program Participants. SBA also received some comments which requested the removal of the distinction between substantially underrepresented and underrepresented industries.

Although SBA understands the concerns expressed by these comments, the agency is bound by the requirements set forth in the statute for the WOSB Program. As such, SBA cannot eliminate the economic disadvantage component of the WOSB Program or afford WOSBs or EDWOSBs the same benefits afforded 8(a) BD Program Participants since the statute provides different benefits for each program. For the same reason, it cannot eliminate the distinction between substantially underrepresented and underrepresented industries.

However, upon further review, SBA agrees that there should not be a priority for EDWOSBs for contracts assigned a NAICS code in an industry that has SBA determined is substantially underrepresented. The Small Business Act provides the Administrator authority to waive the economic disadvantage requirement in industries where women are substantially underrepresented. 15 U.S.C. 637(m)(3). With these regulations, the Administrator is waiving this requirement in those industries. Therefore, in industries where WOSBs are substantially underrepresented, as identified in this rule, the contracting officer may set aside the requirement for WOSBs without first determining whether the rule of two for EDWOSBs can be met. The regulation has been amended accordingly. We note that because an EDWOSB is by definition a WOSB, EDWOSBs can obviously submit offers for a procurement set-aside for WOSBs.

The SBA also received over 160 comments addressing the specific economic disadvantage criteria set forth in the proposed rule in § 127.203. One comment believed that the proposed rule was inconsistent with the regulations concerning economic disadvantage in the 8(a) BD Program while another comment expressed concern with using the 8(a) BD criteria because they are two different programs and it is not clear there are sufficient WOSBs in the 8(a) BD Program to support use of the same economic disadvantage criteria.

Along those same lines, one comment supported SBA's efforts to simplify the economic disadvantage analysis while another comment recommended that SBA simplify the economic disadvantage criteria further by simply stating that a woman is economically disadvantaged if the fair market value of all her assets is less than $6 million, excluding her retirement, any loans to her company and any inheritance. Some comments opposed any requirements concerning total assets when determining economic disadvantage.

In the proposed rule, SBA explained that when drafting the WOSB Program rule, it relied on certain interpretations and policies that have been followed by SBA with respect to the 8(a) BD Program that SBA believes should be applied to the WOSB Program as well. This included certain interpretations and policies SBA had set forth in a rule proposing to amend the 8(a) BD regulations, 74 FR 55694 (Oct. 28, 2009), that SBA withdrew on March 4, 2010. SBA believes that the 8(a) BD Program has decades of experience in reviewing cases based on economic disadvantage and has created a body of law and policy that encompasses this experience. SBA believes it would be fair and prudent to use this experience and body of law when determining economic disadvantage for the WOSB Program.

The SBA's experience with the 8(a) BD Program is that it must review income, personal net worth and the fair market value of the total assets of the woman because any other test would not demonstrate economic disadvantage. For example, it could be that a woman with low net worth has a large income or large assets, which should be pertinent to a claim of economic disadvantage. Therefore, SBA has not changed the proposed rule in this respect and continues to follow the policy and regulations for economic disadvantage for the 8(a) BD Program.

One comment stated that failure to get a line of credit should be an indicator of economic disadvantage. SBA agrees and believes that the objective criteria set forth in the rule are indicators of economic disadvantage and demonstrate that a woman's ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of

business. This means that failure to get a line of credit because the business is owned by a woman, while male owned businesses can readily obtain such credit, is encompassed in the objective criteria set forth in the rule.

Numerous comments stated that the overall economic disadvantage figures are too low and should be updated for inflation, adjusted per the Consumer Price Index, or adjusted for geographical reasons. Other comments noted that business owners must have a certain amount of assets to obtain bonding and show stability of the company. For these reasons, the comments stated that it would be difficult to meet the personal net worth or income requirements set forth in the proposed rule.

SBA also received a few comments which stated that it should use specific guidelines based on median regional incomes like Internal Revenue Service Publication 1542 (publicly available at *http://www.irs.gov/formspubs*), which details per diem rates based on local expense averages, peg location and inflation. SBA received numerous comments which argued that it should not use a two year adjusted gross income when determining economic disadvantage because it is unfair to S corporations, sole proprietorships, and partnerships which are corporate structures used by a vast majority of small businesses and it would be more reliable to use the personal net worth guidelines set by the U.S. Department of Transportation, (publicly available at *http://osdbuweb.dot.gov/DBEProgram*), as long as the threshold was increased, and personal residences, retained earnings, and retirement assets are excluded.

Similarly, several comments opposed the $200,000 income cap because it limits a woman's ability to secure financing (line of credit) and bonding. Several comments believed that the salary should vary depending on the type of business and location of the firm. One comment noted that SBA should consider specifically what $200,000 means to other industries and consider other factors. Another comment recommended the income be raised to $400,000.

SBA notes that when determining what dollar thresholds to propose, it sought to create an objective standard by which a woman may or may not qualify as economically disadvantaged and reviewed information available as it relates to the 8(a) BD Program. The SBA believed that a straight line numerical figure would be more understandable, easier to implement, and avoid any appearance of unfair treatment.

When determining the threshold for fair market value of total assets, SBA reviewed SBA Office of Hearings and Appeals (OHA) decisions on the matter. For example, OHA upheld as reasonable a determination that an individual was not economically disadvantaged with total asset levels of $4.1 million and $4.6 million. *See Matter of Pride Technologies,* SBA No. 557 (1996), and *SRS Technologies* v. *U.S.,* 843 F. Supp. 740 (D.D.C. 1994). Alternatively, and again with respect to the 8(a) BD Program, SBA's finding that an individual was not economically disadvantaged with total assets of $1.26 million was overturned. *See Matter of Tower Communications,* SBA No. 587 (1997).

Upon further review, however, SBA agrees that the thresholds for fair market value of the total assets are too low and therefore in the Final Rule, states that an individual will not be considered economically disadvantaged if the fair market value of all her assets (with no reduction for the dollar amount of any liens or mortgages that may exist against such assets) exceeds $6 million. Unlike the net worth analysis, SBA does not exclude the value of the business concern in determining economic disadvantage in the total asset analysis, nor does SBA exclude the fair market value of the primary residence. Therefore, SBA believes it would be reasonable to increase that threshold.

In addition, SBA agrees with the comments and believes that the threshold set forth in the proposed rule for income should be increased. SBA had proposed to provide that it would presume that a woman is not economically disadvantaged if her yearly income averaged over the past three years exceeds $200,000. SBA proposed an income level of $200,000 because that figure closely approximates the income level corresponding to the top two percent of all wage earners, which has been upheld as a reasonable indicator of a lack of economic disadvantage. SBA believed that to some, the $200,000 income would seem unduly high as a benchmark, but noted that exceeding this amount is being used only to presume, without more information, that the woman is not economically disadvantaged.

In all cases, SBA's determination of economic disadvantage is based on the totality of the circumstances, not merely income. Nonetheless, income is a relevant factor, and those whose income is above a certain threshold should not, in most circumstances, be considered to be economically disadvantaged.

Since the time SBA issued the proposed rule, the IRS has issued statistical data on U.S. wage earners that show that the vast majority of individuals have an adjusted gross income of less than $350,000 and that the top 2% of wage earners had an adjusted gross income of $261,000 or more. SBA believes it would be reasonable to raise the threshold to this $350,000 amount to align it with the new IRS statistical data. Further, increasing the personal income threshold to $350,000 will accomplish two important goals. First, it will allow the EDWOSB to attract and retain higher skilled employees, since the woman owners/manager must be the highest compensated individual in the business concern. Second, many EDWOSBs will be actual or potential participants in the SBA's 8(a) Business Development Program as well as Department of Transportation's Disadvantaged Business Entity Program; and SBA will accept the certification of economic disadvantage applicable to all 8(a) program participants as conclusive evidence of economic disadvantage for the WOSB program.

Under this approach, income in excess of $350,000 would generally be used to presume that the individual is not economically disadvantaged. It would not, however, be presumed that those with income below $350,000 are economically disadvantaged. SBA will consider income in connection with other factors (such as overall assets, net worth, changes in income, and other indicia of access to credit and capital) when determining economic disadvantage.

In addition, the Final Rule permits applicants to rebut the presumption of lack of economic disadvantage upon a showing that the income attributed to the individual that is in excess of the threshold amount is not indicative of lack of economic disadvantage. For example, the presumption could be rebutted by a showing that the income was unusual (inheritance) and is unlikely to occur again. At least one comment supported the ability of a business to be able to rebut the presumption of lack of economic disadvantage if the income was unusual or unlikely to occur again. Another comment thought it was confusing as to when inheritance is counted as income and when it is not. Yet another comment believed that if someone inherits over $5 million, that person should not be considered economically disadvantaged even if it is a one-time only event.

The proposed and Final Rule explain that when considering a woman's personal income, a presumption of a lack of economic disadvantage can be

rebutted by a showing that a certain income level was unusual and unlikely to occur again. However, that same money could be counted as part of an individual's total assets. Thus, an inheritance of $6 million, for example, may be atypical income and excluded from SBA's determination of economic disadvantage based on income, but it would not be excluded from SBA's determination of economic disadvantage based on total assets. In such a case, a $6 million inheritance would render the woman not economically disadvantaged based on total assets.

We note that although SBA has raised the thresholds for fair market value of total assets and income, it does not agree that the thresholds for personal net worth should be raised. The Final Rule specifically excludes the following from the personal net worth calculation: (1) The woman's ownership interest in the business concern; (2) equity interest in her primary residence; (3) income received from an S corporation, limited liability company or partnership where the income was reinvested in the business or used to pay taxes arising in the normal course of operations of the business concern; and (4) funds invested in IRAs and retirement accounts that are unavailable until retirement age without a significant penalty for early withdrawal. As a result of these exclusions, SBA believes the personal net worth threshold of $750,000 should remain as proposed.

SBA received numerous comments that supported the proposed regulation to exclude community property interests of the spouse when looking at personal net worth. In the preamble to the proposed rule, SBA explained that it proposed not taking community property laws into account when determining economic disadvantage if the woman has no ownership interest. This means that property that is legally in the name of the one spouse would be considered wholly that spouse's, whether or not the couple lived in a community property state. Since community property laws are usually applied when a couple separates, and since spouses in community property states generally have the freedom to keep their property separate while they are married, SBA proposed to treat property owned solely by one spouse as that spouse's property for economic disadvantage determinations. However, if both spouses own the property, SBA would attribute a half interest in such property to the woman claiming economic disadvantage, unless there is evidence to show that the interest in such property is greater or lesser. SBA believes that this policy results in equal treatment for applicants in community and non-community property states and therefore has not changed the rule as proposed. By statute, community property laws will also not be applied for purposes of determining ownership of an EDWOSB or WOSB.

In addition, and along the same lines, SBA proposed to provide that it may consider a spouse's financial situation in determining an individual's access to capital and credit. One comment stated that it was unclear as to how a spouse's salary and portfolio value would be treated with respect to economic disadvantage. Two comments argued that the spouse's income and access to capital should not be counted if the spouse is not involved in the business.

After careful review, SBA agrees and has determined that a spouse's financial condition should not be attributed to the individual claiming disadvantaged status in every case. Instead, SBA will consider a spouse's financial condition only when the spouse has a role in the business (*e.g.,* an officer, employee or director) or has lent money to, provided credit support to, or guaranteed a loan of the business. In those cases, SBA must consider a spouse's financial situation when determining a woman's access to capital and credit because it is unfair to consider a woman economically disadvantaged when she can rely on her spouse to obtain capital and credit which other women business owners cannot obtain. In addition, the Final Rule explains that SBA may also consider the spouse's financial condition if the spouse's business is in the same or similar line of business as the EDWOSB or WOSB. SBA has seen instances in the past where the spouse and WOSB share similar names, Web sites, or employees. In those instances, it would be reasonable for SBA to look at the spouse's financial condition since it is apparent that the spouse is providing support to the EDWOSB/WOSB.

The proposed rule also explained that SBA would exempt from the calculation of personal net worth and fair market value of total assets funds invested in an Individual Retirement Account (IRA) or other official retirement account that are unavailable until retirement age without a significant penalty. The basis for this proposal stems from SBA's experience with the 8(a) BD Program, where it has found that including IRAs and other retirement accounts in the calculation of an individual's net worth does not serve to disqualify wealthy individuals. Instead, such an exclusion has worked to make individuals ineligible to the extent they have invested prudently in accounts to ensure income at a time in their lives when they are no longer working.

Several comments supported these exemptions; however, two comments opposed the provision that the retirement accounts be included once the woman can withdraw at retirement age because this prevents mature women who still want to work from being eligible for the WOSB Program. These two comments recommended that SBA merely count the withdrawals as income. SBA believes that retirement accounts are held for purposes of ensuring future income when an individual is no longer working and should not count the funds as current assets if they are not currently being enjoyed. However, if the individual has reached retirement age and has access to the retirement account, or has incurred a significant penalty and acquired access to the account, the funds are current assets and must be included as part of the individual's personal net worth, total assets, and income. However, if the individual invests funds from the retirement account into the EDWOSB or WOSB, those funds would be excluded from the net worth analysis as part of the exclusion of business equity. The EDWOSB or WOSB may be required to submit evidence that the funds were invested into the business. SBA has issued the Final Rule as it had proposed.

In addition, the proposed rule explained that in order for SBA to determine whether funds invested in a specific account labeled a "retirement account" may be excluded from a woman's net worth calculation, the woman must provide to SBA information about the terms and conditions of the account. SBA asked for comments on what specific information might be helpful. One comment stated that SBA should use Internal Revenue Service (IRS) Form 5498 to identify yearly contributions to such retirement accounts. SBA has determined that in order for it to determine whether funds invested in a specific account labeled a "retirement account" may be excluded from an individual's net worth calculation, the individual must provide to SBA information about the terms and conditions of the account and certify in writing that the "retirement account" is legitimate. SBA notes that as part of its document collection to verify eligibility, it will obtain income tax information that can also be used to verify whether an account is a retirement account.

SBA has also proposed exempting income from a corporation taxed under Subchapter S of Chapter 1 of the Internal Revenue Code (S corporation)

from the calculation of both income and net worth to the extent such income is reinvested in the firm or used to pay taxes arising from the normal course of operations of an S corporation. Although the income of an S corporation flows through and is taxed to individual shareholders in accordance with their interest in the S corporation for Federal tax purposes, SBA will take such income into account for economic disadvantage purposes only if it is not reinvested in the business or used to pay the taxes. This proposal would result in equal treatment of corporate income for corporations taxed under Subchapter C of Chapter 1 of the Internal Revenue Code (C corporations) and S corporations. In cases where that income is reinvested in the firm or used to pay taxes arising from the normal course of operations of the S corporation and not retained by the woman, SBA believes it should be treated the same as C corporation income for purposes of determining economic disadvantage. In order to be excluded, the owner of the S corporation would be required to clearly demonstrate that the S corporation distribution was used to pay taxes or was reinvested back into the S corporation within 12 months of the distribution of income.

Three comments supported SBA's proposal to exempt income received from an S corporation from the calculation of personal net worth and income and strongly agree that S corporations and C corporations should be treated similarly in this respect. One comment, however, stated that the requirement that the owner demonstrate that money was received and reinvested in the business is burdensome. SBA notes that the small business bears the burden to prove its eligibility for the WOSB Program and therefore, must be able to demonstrate in these cases that the S corporation distribution was used to pay taxes or was reinvested back into the S corporation within 12 months of the distribution of income.

One comment agreed with this provision but recommended that SBA treat limited liability companies the same. SBA agrees and believes limited liability companies and partnerships are taxed similar to S corporations. With all of these entities, the income flows through and is taxed to individual partners, members, or shareholders in accordance with their interest in the company for Federal tax purposes. Therefore, SBA has amended the Final Rule from what it initially proposed.

In addition, SBA has decided it would be best to set forth the clarification contained in the supplementary information—that corporation/partnership/limited liability losses are losses only to the company, and not losses to the individual—specifically in the regulatory text to clear up any confusion on this issue. In addition, the Final Rule has clarified that the treatment of corporation/partnership/limited liability income applies to both determinations of an individual's net worth and personal income.

One comment recommended that SBA eliminate any regulation permitting the transfer of assets to an immediate family member while another comment supported the careful examination of asset transfer to immediate family members within 2 years of the transfer because the women may be transferring the assets to family members for their support. SBA agrees that there are valid reasons for transferring assets to an immediate family member as identified in the rule (*e.g.* medical expenses, education and birthdays) and a woman should not be penalized for this when determining economic disadvantage. As such, SBA has adopted the proposed provision in the Final Rule.

One comment expressed confusion as to when a personal residence would be excluded and questioned if the residence could be excluded if it were used to guarantee a company line of credit. The Final Rule explain that when determining personal net worth, SBA will exclude the woman's equity interest in the primary personal residence. In addition, when determining the fair market value of the assets, SBA will include the value of the primary residence in the calculation (without deduction for any liens on the assets). SBA is not excluding the residence as an asset even if it is used to guarantee the company line of credit because the residence is still an asset to that individual, as evidenced by the fact it can be used to secure a line of credit.

In sum, based upon the comments received, SBA has amended some of the proposed regulations in this Final Rule. Specifically, SBA has increased the dollar thresholds for income and fair market value of assets for purposes of determining economic disadvantage, and has clarified certain issues as they relate to S corporations, limited liability companies and partnerships.

D. Certification

In the proposed rule, SBA proposed permitting EDWOSBs and WOSBs to either self-certify their status or provide evidence of certification from an approved third-party certifier. Of the almost 1,000 comments received overall on the rule, most of them commented on the certification procedures for a total of almost 1,900 specific comments concerning the certification requirements.

We note that many of the comments confused the CCR and Online Representations and Certifications Application (ORCA) databases and believed that ORCA or CCR would serve as the document repository for the WOSB Program or supported the use of the CCR "questionnaire". Some comments stated that WOSBs should be required to register in CCR. A few comments acknowledged some confusion and suggested clarification or a guide on how this process would work. There seems to be some public confusion concerning the different Federal databases and SBA would like to provide some clarification on that as well as the WOSB Program certification process.

CCR is an online government-maintained database of companies wanting to do business with the Federal government available at ccr.gov. The Federal Acquisition Regulation (FAR) at 48 CFR 4.1102(a) requires that most prospective contractors be registered in the CCR database prior to award of a contract or agreement, with certain exceptions. Agencies search the database for prospective vendors. After registering, you may enter your small business profile information on the Dynamic Small Business Search page. Creating a profile in CCR and the Dynamic Small Business Search, and keeping it current, helps provide access to Federal contracting opportunities.

Thus, the EDWOSB or WOSB must register in CCR first. Next, it must provide documents supporting its EDWOSB or WOSB status to an online document repository, called that the WOSB Program Repository, that SBA is planning to establish. The documents submitted would include those verifying that the concern has received a third-party certification. The business concern will be placing these documents in a secure, Web-based environment that would be accessible to the individual WOSBs and EDWOSBs, the contracting officer community and SBA. The contracting officer would be able to access the documents prior to contract award to review the submitted documents. SBA proposed this approach so that the WOSBs and EDWOSBs would not have to submit documents each time they receive a WOSB or EDWOSB contract.

In addition, the WOSB or EDWOSB will have to provide a certification to the repository that will serve as a verification that the concern meets the eligibility requirements and is signed by an authorized officer of the WOSB. In

the proposed rule, SBA had proposed that this certification be part of ORCA. However, upon further reflection, the SBA believes that it would be best if this document were signed and submitted directly to the repository. A copy of the certification is set forth in Tables 1 and 2.

Until the repository is completed, or if the system is otherwise unavailable, then SBA explained that the WOSB or EDWOSBs must submit the documents directly to the contracting officer prior to each WOSB or EDWOSB award. Although one comment thought this was burdensome, SBA notes that the statute requires the submission of supporting documents to the contracting officer and until or unless the repository is established, this appears to be the sole alternative that meets this statutory requirement. The contracting officer must retain these documents in the contract file so that SBA may later review the file for purposes of a status protest or eligibility examination. However, the WOSB or EDWOSB will also be required to post the documents to the WOSB Program Repository within thirty (30) days of the repository becoming available.

Finally, after registering in CCR and submitting the required document to the repository, the EDWOSB or WOSB must represent its status in the ORCA at *https://orca.bpn.gov*. The FAR at 48 CFR 2.101 explains that ORCA is the primary Government repository for contractor-submitted representations and certifications required for the conduct of business with the Government. This database does not collect documents, but collects the representations and certifications required for Federal contracts. As stated above, the SBA had proposed a specific and detailed ORCA representation. That detailed representation will now be a certification, signed by an officer of the company, which will be submitted to the WOSB Program Repository. The representation contained in ORCA, as drafted by the FAR Councils, will be set forth in the FAR.

Of the hundreds of comments received concerning this certification process, several stated that SBA should not accept self-certifications for the WOSB Program. The comments stated that this would increase the risk of fraud. However, other comments stated that self-certification would be reasonable as long as documents were provided to verify eligibility and there were no protests or credible information calling into question the eligibility of a business. At least one comment stated that it was good that SBA recognized the cost of certification and provided alternative compliance requirements, such as the self-certification. Another comment stated that it supported the stringent certification requirements to ensure the credibility of the WOSB Program and its ultimate success. Some comments expressed concern with the burden of the process and additional paperwork and forms required, believing it will discourage WOSBs from using the WOSB Program and required additional costs that are not minimal, while numerous comments supported the innovative approach and believed the repository would minimize paperwork burden and increase oversight and program monitoring capabilities. One comment believed that self-certification would not be fair to those that paid already for a third-party certification.

Many comments also stated that SBA should not have a certification program, similar to 8(a) or HUBZone, but should use its resources instead for enforcement and monitoring. Two comments recommended that SBA create a stringent certification process or program similar to the one it has for 8(a).

The SBA explained in the proposed rule that the Small Business Act sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must: (1) Be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, as a small business concern owned and controlled by women; or, (2) certify to the contracting officer that it is a small business concern owned and controlled by women and provide adequate documentation, in accordance with standards established by SBA, to support such certification. The supporting legislative history stated that there was no intent that SBA create a certification program similar to the one it has for the 8(a) BD Program. As a result of the statutory provision, and the supporting legislative history, the Final Rule permits both self-certification and third-party certification and requires supporting documents to verify eligibility. The supporting documents will be provided to a repository (which is not necessarily part of ORCA) or, if the repository is unavailable, to the contracting officer. In addition, SBA believes that although the certification document and document requirement may seem burdensome to some small businesses, this is required to meet the statutory provisions, reduce fraud in the WOSB Program, and ensure that only eligible concerns receive the benefits of the WOSB Program.

In addition to the comments on self-certification, SBA received over 600 comments which supported the use of third-party certifications, although many of these comments supported the use of both third-party certifications and self-certification. In general, the comments stated the following: SBA should accept all third-party certifiers to ensure a wide range of options for WOSBs; SBA should document the process for approving third-party certifiers; the guidelines for third-party certifiers must comply with the regulations; and the third-party certifications should require yearly recertifications and site visits. In addition, a large number of comments stated that there should be an abridged process or no requirement for the representations for those with a third-party certification because it is counterproductive and redundant and WOSBs that have a third-party certification should not have to submit any additional documents.

The SBA agrees that it should approve all qualified third-party certifiers to ensure a wide range of options for EDWOSBs and WOSBs. However, that does not necessarily mean that every entity interested in being a third-party certifier will meet SBA's requirements. SBA also agrees that it must document the process for approving third-party certifiers. SBA plans to post online to the public the documented process at *http://www.sba.gov/*. In addition, SBA agrees that the guidelines for third-party certifiers must comply with the regulations. The final regulations set forth the eligibility requirements for this Federal program. There cannot be exceptions regarding the eligibility for the WOSB Program to these regulations, and there is no reason to create exceptions for third-party certifications as compared to self-certifications. Because the final regulations do not require site visits in every instance and yearly recertifications, it is not clear at this time that SBA can make those requirements for third-party certifiers, although we agree it would reduce fraud in the WOSB Program.

We understand the concern expressed by the comments that support an abridged process or no requirement for the representations for those with a third-party certification. Many of these individuals believe that because they have undergone a rigorous third-party certification, it would be redundant and burdensome for the EDWOSB or WOSB to submit additional documents or further represent its status.

However, the SBA believes that such a certification is necessary to ensure the integrity of the WOSB Program and that

only those eligible small businesses receive the WOSB Program's benefits. Therefore, all EDWOSBs and WOSBs will be required to complete the certification and submit it to the WOSB Program Repository. In addition, each EDWOSB and WOSB will be required to provide a representation in ORCA. As noted above, ORCA is the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government. Therefore, it will be necessary for the EDWOSB or WOSB, even if they have a third-party certification, to make ORCA representations to the Federal Government.

We also disagree that EDWOSBs or WOSBs that have received a third-party certification should not be required to submit documents to SBA or the contracting to verify eligibility. The Final Rule requires that those businesses with a third-party certification submit only a limited number of documents—specifically, a copy of the third-party certification, the certification, the joint venture agreement if applicable, and in some cases, other documents to verify they meet the requirements of the WOSB Program. If there is a status protest or eligibility examination, then SBA will have to collect all documents necessary to verify eligibility since it is SBA, and not a third-party certifier, which would make this decision concerning eligibility.

The SBA also received several comments which were concerned with identifying specific third-party certifiers. For example, we received comments which stated that all certifications issued by the 50 States should be accepted by SBA, as well as all current other third-party certifications. As discussed above, SBA cannot accept all current third-party certifications, including a certification issued by a State, without first determining whether the third-party certifier's eligibility criteria are the same as those of SBA's for the WOSB program.

The SBA received one comment which recommended that we provide a list of agencies whose certifications will be accepted and two comments stating that we should immediately accept U.S. Department of Transportation (DOT) certifications and not require that agency to enter into a third-party agreement.

Under DOT's Disadvantage Business Enterprise (DBE) Program, recipients, which are state or local entities as defined by DOT regulations at 49 CFR 26.5, perform the certifications for DOT's DBE Program. Recipients are the DOT's DBE Program certifiers. Pursuant to DOT regulations, these certifiers must submit to DOT for approval an agreement establishing a Unified Certification Program (UCP), which identifies a plan for certification as a certifier for the DOT DBE Program. Once the UCP is approved by DOT, the certifier can certify participants for the DBE Program. In other words, the certification for the DOT DBE Program is not done by a central office, but rather various state and local certifiers perform the certifications.

DOT requires every UCP to meet all of the requirements of the DOT DBE Program, but every UCP for the DOT DBE Program is not required to have all of the same requirements. Therefore, without examining the state or local entity's UCP, it is unknown if it will satisfy all the requirements of the WOSB Program regulations. For example, SBA's WOSB Program regulation at 13 CFR 127.201(f) states that in determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. The regulations also states that any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised. DOT DBE regulations do not discuss how unexercised stock options or similar agreements will be treated under the DBE Program. As a result, state and local entities that have an approved UCP for DOT DBE Program certification may or may not be consistent with this requirement. There are additional areas in which it is uncertain whether SBA requirements would be met with a DOT DBE Program certification.

The Final Rule sets forth the eligibility requirements for this Federal program. SBA has determined that there cannot be exceptions regarding the eligibility for the WOSB Program to these regulations, and there is no reason to create exceptions for DOT DBE certifications as compared to self-certifications. Every WOSB or EDWOSB must satisfy the regulatory requirements in 13 CFR part 127, whether through private third party certification, 8(a) certification, DOT DBE certification, or any other certification. As a result and as SBA does with all other third party certifiers, SBA has determined that it will evaluate a DOT DBE certifier on an individual basis. SBA will review the state and local entity's UCP to determine if the WOSB Program requirements can be met with the UCP.

Therefore, the Final Rule will not accept all DOT DBE certifications for the WOSB Program at this time. Once SBA approves a DOT DBE Program certifier, SBA will maintain a list of approved state and local entities from which it will accept DOT DBE certifications on SBA's Internet Web site at *http://www.sba.gov.* Any interested person may also obtain a copy of the list from the local SBA district office or SBA Area Office for Government Contracting.

Several comments recommended that SBA and DOT work together to create a list of businesses indicating the woman owned status of all certified businesses or requiring DOT to provide certifications showing that the business is owned and controlled by women. We agree that the two agencies can continue to work together in furtherance of this program. However, as explained above, SBA must examine a specific UCP prior to accepting the certification from that certifier as a certification of WOSB or EDWOSB status.

One comment stated that third-party certifications sometimes list NAICS codes on the certifications. The comment believed that SBA must therefore make it clear that such a listing does not limit the business' ability to submit an offer for a contract outside that NAICS code. The comment suggested that SBA clarify the regulations or ORCA. SBA does not believe it must clarify the regulations on this point. The Final Rule is clear that a contracting officer must assign a NAICS code to a contract and that a business concern must be small for the size standard corresponding to that NAICS code. In addition, the contracting officer can only reserve the contract opportunity for EDWOSBs if the NAICS code is in an underrepresented industry and for WOSBs if the NAICS code is in a substantially underrepresented industry.

The SBA received a few comments which addressed the specific representations we had set forth in the preamble to the proposed rule, and which will now be a separate certification that must be submitted to the WOSB Program Repository, and the responsibilities of contracting officers. One comment stated that it believed the representations are clearly worded but that the contracting officer needs to know what should be checked for award. Two comments stated that contracting officers need more guidance on what specific documents must be provided. Similarly, SBA received one comment which suggested the agency establish a defined method of signoff by a contracting officer that they have

certified the EDWOSB or WOSB meets the eligibility criteria and provide a contracting guide that would include a checklist for the contracting officer that includes all items to be completed or verified. SBA agrees that this would be helpful to contracting officers and plans to work on a guide for contracting officers that contains a checklist.

In addition, two comments believed that contracting officers may not be in the best position to review the submitted documents and make an accurate determination. In addition, one comment stated that self-certification places an undue burden on contracting officers and opens the door for different levels of application of the rules. We note that the rule does not require the contracting officer to necessarily determine eligibility of the EDWOSB or WOSB. Rather, the contracting officer is to check to ensure that the requisite documents, as set forth in the regulations, are provided and that the ORCA representations have been made. If any of the documents are missing from the repository (including the certification), or if the contracting officer believes the concern is not eligible, he/she must file a status protest with SBA. SBA, not the contracting officer, will make the final determination regarding eligibility.

One comment recommended that SBA eliminate the representation concerning the ability of an EDWOSB to obtain capital and credit because it only complicates the process. The same comment questioned why there should be a representation that "no males or other entity exercise actual control or have the power to control the concern" when there appear to be other questions in the representation that already address this.

The SBA agrees that the representation concerning the ability to obtain capital and credit is not necessary because that issue is addressed with the other questions, especially those concerning the specific objective criteria for economic disadvantage. SBA has deleted this representation from the Final Rule.

However, SBA disagrees with the comment concerning whether males exercise control over the business concern. There is a specific requirement for an EDWOSB or WOSB in the regulations that no male or other entity exercises control or the power to control the concern. Therefore, this representation is required.

The SBA received one comment that recommended having a place in CCR to acknowledge current certifications and transferring this information to ORCA. SBA agrees that CCR should be amended and will work with the appropriate agency to implement these changes to the extent practicable.

One comment recommended that SBA share information common to other certification processes when a person is a member of more than one group. In other words, if a WOSB is also a SDVO SBC, the comment recommended that the processes be streamlined. Unfortunately, this is not possible. The SDVO SBC Program is a self-certification program with different statutory and regulatory requirements than the WOSB Program. When creating the WOSB Program, SBA sought to align this program with others as much as possible. For example, SBA has stated that it will accept 8(a) BD certifications, if the business was certified into the 8(a) BD Program as a women owned business, as evidence that the business is a WOSB.

Some comments recommended that SBA conduct site visits and check financial information on all WOSBs. Two comments supported the use of an outside company to manage the certification and perform site visits. SBA explained in the proposed rule that it does intend to conduct site visits on those certifying as EDWOSBs or WOSBs and believes that its regulations, which permit protests and robust eligibility examinations, will aid in preventing fraud, waste and abuse in the WOSB program.

The SBA has reviewed all of these comments thoroughly and believes that it is not necessary to change the proposed regulations concerning certifications except to amend the ORCA representations to address changes made to the criteria for economic disadvantage. SBA therefore has implemented the proposed rule as final, with respect to the certification requirements. SBA is setting forth a final copy of the certification that each WOSB or EDWOSB must submit to verify status (Table 1, Women-Owned Small Business Program Certification—WOSB; Table 2, Women-Owned Small Business Program Certification—EDWOSB).

Table 1—Women-Owned Small Business Program Certification—WOSB.

(i) It is certified as a WOSB by a certifying entity approved by SBA, the certifying entity has not issued a decision currently in effect finding that the concern does not qualify as a WOSB, and there have been no changes in its circumstances affecting its eligibility since its certification.

☐ Yes ☐ No ☐ N/A

(ii) It is certified by the U.S. Small Business Administration as an 8(a) BD Program Participant and the 51% owner is a woman (or women).

☐ Yes ☐ No ☐ N/A

(iii) If a corporation, the stock ledger and stock certificates evidence that at least 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding is unconditionally and directly owned by one or more women. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

☐ Yes ☐ No ☐ N/A

(v) If a partnership, the partnership agreement evidences that at least 51% of each class of partnership interest is unconditionally and directly owned by one or more women.

☐ Yes ☐ No ☐ N/A

(iv) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments, evidence that at least 51% of each class of member interest is unconditionally and directly owned by one or more women.

☐ Yes ☐ No ☐ N/A

(v) The birth certificates, naturalization papers, or passports for owners who are women show that the business concern is at least 51% owned and controlled by women who are U.S. citizens.

☐ Yes ☐ No

(vi) The ownership by women is not subject to any conditions, executory agreements, voting trusts, or other arrangements that cause or potentially cause ownership benefits to go to another.

☐ Yes ☐ No

(vii) The 51% ownership by women is not through another business entity (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women.

☐ Yes ☐ No

(viii) The 51% ownership by women is held through a trust, the trust is revocable, and the woman is the grantor, a trustee, and the sole current beneficiary of the trust.

☐ Yes ☐ No ☐ N/A

(ix) The management and daily business operations of the concern are

controlled by one or more women. Control means that both the long-term decision making and the day-to-day management and administration of the business operations are conducted by one or more women.

☐ Yes ☐ No

(x) A woman holds the highest officer position in the concern and her resume evidences that she has the managerial experience of the extent and complexity needed to run the concern.

☐ Yes ☐ No

(xi) The woman manager does not have the technical expertise or possess the required license for the business but has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

☐ Yes ☐ No ☐ N/A

(xii) The woman who holds the highest officer position of the concern manages it on a full-time basis and devotes full-time to the business concern during the normal working hours of business concerns in the same or similar line of business.

☐ Yes ☐ No

(xiii) The woman who holds the highest officer position does not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

☐ Yes ☐ No

(xiv) If a corporation, the articles of incorporation and any amendments, articles of conversion, by-laws and amendments, shareholder meeting minutes showing director elections, shareholder meeting minutes showing officer elections, organizational meeting minutes, all issued stock certificates, stock ledger, buy-sell agreements, stock transfer agreements, voting agreements, and documents relating to stock options, including the right to convert non-voting stock or debentures into voting stock evidence that one or more women control the Board of Directors of the concern. Women are considered to control the Board of Directors when either: (1) One or more women own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or (2) women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

☐ Yes ☐ No ☐ N/A

(xv) If a partnership, the partnership agreement evidences that one or more women serve as general partners, with control over all partnership decisions.

☐ Yes ☐ No ☐ N/A

(xvii) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments evidence that one or more women serve as management members, with control over all decisions of the limited liability company.

☐ Yes ☐ No ☐ N/A

(xviii) No males or other entity exercise actual control or have the power to control the concern.

☐ Yes ☐ No

(xix) SBA, in connection with an examination or protest, has not issued a decision currently in effect finding that this business concern does not qualify as a WOSB.

☐ Yes ☐ No

(xx) All required documents verifying eligibility for a WOSB requirement have been submitted to the WOSB Program Repository, including any supplemental documents if there have been changes since the last representation, or will be submitted to the contracting officer if the repository is unavailable and then posted to the WOSB Program Repository within thirty (30) days of the repository becoming available.

☐ Yes ☐ No

☐ All the statements and information provided in this form and any documents submitted are true, accurate and complete. If assistance was obtained in completing this form and the supporting documentation, I have personally reviewed the information and it is true and accurate. I understand that these statements are made for the purpose of determining eligibility for a WOSB Program contract.

☐ I understand that the information submitted may be given to Federal, State and local agencies for determining violations of law and other purposes. The certifications in this document are continuing in nature. Each WOSB prime contract for which the WOSB submits an offer/quote or receives an award constitutes a restatement and reaffirmation of these certifications. I understand that the WOSB may not misrepresent its status as a WOSB to: (1) Obtain a contract under the Small Business Act; or (2) obtain any benefit under a provision of Federal law that references the WOSB Program for a definition of program eligibility.

☐ I am an *officer* of the WOSB authorized to represent it and sign this certification on its behalf.

Table 2—Women-Owned Small Business Program Certification—EDWOSB

(i) It is certified as an EDWOSB by a certifying entity approved by SBA, the certifying entity has not issued a decision currently in effect finding that the concern does not qualify as a EDWOSB, and there have been no changes in its circumstances affecting its eligibility since its certification.

☐ Yes ☐ No ☐ N/A

(ii) It is certified by the U.S. Small Business Administration as an 8(a) BD Program Participant and the 51% owner is an economically disadvantaged woman (or women).

☐ Yes ☐ No ☐ N/A

(iii) If a corporation, the stock ledger and stock certificates evidence that at least 51% of each class of voting stock outstanding and 51% of the aggregate of all stock outstanding is unconditionally and directly owned by one or more women who are economically disadvantaged. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by an economically disadvantaged woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting stock, held by any other individual or entity will be treated as having been exercised.

☐ Yes ☐ No ☐ N/A

(iv) If a partnership, the partnership agreement evidences that at least 51% of each class of partnership interest is unconditionally and directly owned by one or more economically disadvantaged women.

☐ Yes ☐ No ☐ N/A

(v) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments, evidence that at least 51% of each class of member interest is unconditionally and directly owned by one or more economically disadvantaged women.

☐ Yes ☐ No ☐ N/A

(vi) The birth certificates, naturalization papers, or passports show that the business concern is at least 51% owned and controlled by economically disadvantaged women who are U.S. citizens.

☐ Yes ☐ No

(vii) The ownership by economically disadvantaged women is not subject to any conditions, executory agreements, voting trusts, or other arrangements that

cause or potentially cause ownership benefits to go to another.

☐ Yes ☐ No

(viii) The 51% ownership by economically disadvantaged women is not through another business entity (including employee stock ownership plan) that is, in turn, owned and controlled by one or more economically disadvantaged women.

☐ Yes ☐ No

(ix) The 51% ownership by economically disadvantaged women is held through a trust, the trust is revocable, and the economically disadvantaged woman is the grantor, a trustee, and the sole current beneficiary of the trust.

☐ Yes ☐ No ☐ N/A

(x) The management and daily business operations of the concern are controlled by one or more economically disadvantaged women. Control means that both the long-term decision making and the day-to-day management and administration of the business operations are conducted by one or more economically disadvantaged women.

☐ Yes ☐ No

(xi) An economically disadvantaged woman holds the highest officer position in the concern and her resume evidences that she has the managerial experience of the extent and complexity needed to run the concern.

☐ Yes ☐ No

(xi) The economically disadvantaged woman manager does not have the technical expertise or possess the required license for the business but has ultimate managerial and supervisory control over those who possess the required licenses or technical expertise.

☐ Yes ☐ No ☐ N/A

(xiii) The economically disadvantaged woman who holds the highest officer position of the concern manages it on a full-time basis and devotes full-time to the business concern during the normal working hours of business concerns in the same or similar line of business.

☐ Yes ☐ No

(xiv) The economically disadvantaged woman who holds the highest officer position does not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

☐ Yes ☐ No

(xv) If a corporation, the articles of incorporation and any amendments, articles of conversion, by-laws and amendments, shareholder meeting minutes showing director elections, shareholder meeting minutes showing officer elections, organizational meeting minutes, all issued stock certificates, stock ledger, buy-sell agreements, stock transfer agreements, voting agreements, and documents relating to stock options, including the right to convert non-voting stock or debentures into voting stock evidence that one or more economically disadvantaged women control the Board of Directors of the concern. Economically disadvantaged women are considered to control the Board of Directors when either: (1) One or more economically disadvantaged women own at least 51% of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or (2) economically disadvantaged women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

☐ Yes ☐ No ☐ N/A

(xvi) If a partnership, the partnership agreement evidences that one or more economically disadvantaged women serve as general partners, with control over all partnership decisions.

☐ Yes ☐ No ☐ N/A

(xvii) If a limited liability company, the articles of organization and any amendments, and operating agreement and amendments evidence that one or more economically disadvantaged women serve as management members, with control over all decisions of the limited liability company.

☐ Yes ☐ No ☐ N/A

(xviii) No males or other entity exercise actual control or have the power to control the concern.

☐ Yes ☐ No

(xix) The economically disadvantaged woman upon whom eligibility is based has read the SBA's regulations defining economic disadvantage and can demonstrate that her personal net worth is less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence.

☐ Yes ☐ No

(xx) The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past three years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, evidences that she is economically disadvantaged.

☐ Yes ☐ No

(xxi) The adjusted gross income of the woman claiming economic disadvantage averaged over the three years preceding the certification does not exceed $350,000.

☐ Yes ☐ No

(xxii) The adjusted gross income of the woman claiming economic disadvantage averaged over the three years preceding the certification exceeds $350,000; however, the woman can show that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or that the income is not indicative of lack of economic disadvantage.

☐ Yes ☐ No

(xxiii) The fair market value of all the assets (including her primary residence and the value of the business concern but excluding funds invested in an Individual Retirement Account or other official retirement account that are unavailable until retirement age without a significant penalty) of the woman claiming economic disadvantage does not exceed $6 million.

☐ Yes ☐ No

(xxiv) The woman claiming economic disadvantage has not transferred any assets within two years of the date of the certification.

☐ Yes ☐ No

(xxv) The woman claiming economic disadvantage has transferred assets within two years of the date of the certification. However, the transferred assets were: (1) To or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or (2) to an immediate family member in recognition of a special occasion, such as a birthday, graduation, anniversary, or retirement.

☐ Yes ☐ No ☐ N/A

(xxvi) SBA, in connection with an examination or protest, has not issued a decision currently in effect finding that this business concern does not qualify as a EDWOSB.

☐ Yes ☐ No

(xxvii) All required documents verifying eligibility for the EDWOSB requirement have been submitted to the WOSB Program Repository, including any supplemental documents if there have been changes since the last representation, or will be submitted to the contracting officer if the repository is unavailable and then posted to the WOSB Program Repository within thirty (30) days of the repository becoming available.

☐ Yes ☐ No

☐ All the statements and information provided in this form and any documents submitted are true, accurate and complete. If assistance was obtained in completing this form and the supporting documentation, I have personally reviewed the information and it is true and accurate. I understand that these statements are made for the purpose of determining eligibility for a WOSB Program contract.

☐ I understand that the information submitted may be given to Federal, State and local agencies for determining violations of law and other purposes. The certifications in this document are continuing in nature. Each EDWOSB or WOSB prime contract for which the EDWOSB submits an offer/quote or receives an award constitutes a restatement and reaffirmation of these certifications. I understand that the EDWOSB may not misrepresent its status as a EDWOSB or WOSB to: (1) Obtain a contract under the Small Business Act; or (2) obtain any benefit under a provision of Federal law that references the WOSB Program for a definition of program eligibility.

☐ I am an *officer* of the EDWOSB authorized to represent it and sign this certification on its behalf.

E. Contract File

The SBA received one comment which recommended that the contracting officer document the file to include "underrepresented industries." We note that the proposed rule did require the contracting officer to document the contract file with the results of the market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as either underrepresented or substantially underrepresented industry with respect to WOSBs.

In addition, in the proposed rule, we sought comments on whether SBA should add the following additional language to proposed § 127.503(e):

> In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

The SBA received two comments which supported this requirement for contracting officers to document the contract file. SBA has amended the proposed rule to add this requirement.

F. Federal Contract Assistance

Subpart E of the Final Rule addresses the contracting assistance provided to EDWOSBs and WOSBs. For example, this part of the Final Rule states that a contracting officer may restrict competition to EDWOSBs if the contract is an industry that SBA has designated as underrepresented and the contracting officer has a reasonable expectation based on market research that two or more EDWOSBs will submit offers, the anticipated award price (including options) does not exceed $5 million for a contract assigned a NAICS code for manufacturing or $3 million for a contract assigned any other NAICS code, and the contract may be awarded at a fair and reasonable price. The contracting officer may restrict competition for WOSBs in an industry that SBA has designated as substantially underrepresented if the contracting officer has a reasonable expectation based on market research that two or more WOSBs will submit offers, the anticipated award price (including options) does not exceed $5 million for a contract assigned a NAICS code for manufacturing or $3 million for a contract assigned any other NAICS code, and the contract may be awarded at a fair and reasonable price.

The SBA received over 700 comments which stated that the dollar value of the contracts available to this program was too low and a few comments that recommended SBA apply the $5 million contract threshold to contracts with a NAICS code for construction. SBA notes that the contract dollar value threshold is specifically set forth in statute, and therefore, the regulations cannot be changed to reflect different thresholds.

Other comments that addressed the dollar value of the contract available to this program recommended that SBA exclude the cost of construction materials from the contract value since the cost of such materials generally has nothing to do with the work being performed by the WOSB. In addition, two comments recommended that SBA not include option years when determining the cost of the contract. We note that the Small Business Act specifically states the WOSB Program is limited to certain contracts with an "anticipated award price of the contract (including options)" of $5 million in the case of a contract assigned a NAICS code for manufacturing or $3 million for all other contracts. We do not believe, at this time, that the cost of materials from the anticipated award price and SBA does not make this exclusion for any of the contract dollar value limitations for its other procurement programs. In addition, the statute clearly includes options, and therefore, SBA cannot exclude options from the anticipated award price of the contract.

The SBA also received some comments that recommended that the WOSB Program permit sole source awards similar to those available in the 8(a) BD, HUBZone and SDVO SBC Programs. Likewise, SBA received a few comments which questioned why the "rule of two" as explained in the FAR at 48 CFR 19.502–2(b) was set forth in the regulations. In response to these comments, SBA notes that the statutory provision creating the WOSB Program does not authorize sole source awards while the statutory provisions creating the other programs do. In addition, the statutory provisions creating the WOSB Program specifically state that a contracting officer may use this program only if the "rule of two" is met. Therefore, SBA is not amending the regulations as proposed.

The SBA received one comment which recommended that we cap or limit how many awards a particular WOSB can receive in order to ensure that the contracts are going to more than a handful of WOSBs. SBA does not agree with this recommendation primarily because the statute does not provide for such a cap or limitation. In addition, it would not serve the purpose of the WOSB Program to prevent qualified EDWOSBs or WOSBs from receiving further Federal contracts.

The SBA also received several comments which supported the parity of the WOSB Program with the other small business programs. Specifically, in proposed § 127.503 SBA addressed contracting among the various SBA small business programs for acquisitions valued above and below the simplified acquisition threshold. The regulation proposed to provide contracting officers with the discretion to utilize either the 8(a) BD, SDVO SBC, HUBZone, small business or WOSB Programs, depending on the acquisition history, dollar value of the contract, results of the market research, programmatic needs specific to the procuring agency, and the need to meet the agency's goals.

SBA understands that GAO has issued several decisions over the last two years stating that agencies must set aside any acquisition for HUBZone SBCs if the contracting officer has a reasonable expectation that at least two qualified HUBZone SBCs will submit offers and that the award can be made at a fair market price (the "rule of two" for HUBZone small businesses). Thus, under GAO rulings, the contracting officer has no discretion to utilize either the 8(a) BD, SDVO SBC, small business or the WOSB Program if the HUBZone rule of two is met.

However, on July 10, 2009, the Director of the Office of Management and Budget (OMB) issued a memorandum stating that GAO's

decisions are not binding on Federal agencies and are contrary to regulations promulgated by SBA that provide for "parity" among the three small business programs (8(a) BD, HUBZone and SDVO SBC Programs). *See* OMB Memorandum M–09–23, publicly available at *http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-23.pdf.* In addition, on August 21, 2009, the U.S. Department of Justice's Office of Legal Counsel (OLC) concluded its review of the legal basis underlying GAO's decisions. OLC issued an opinion stating that SBA's regulations governing the interplay among the HUBZone, 8(a) BD and SDVO SBC Programs are a permissible construction of the Act and are binding on all Executive Branch agencies. *See* "Permissibility of Small Business Administration Regulations Implementing the Historically Underutilized Business Zone, 8(a) Business Development, and Service-Disabled Veteran-Owned Small Business Concern Programs," April 21, 2009, publicly available at *http://www.usdoj.gov/olc/2009/sba-hubzone-opinion082109.pdf.*

In addition, the Court of Federal Claims issued decisions in *Mission Critical* v. *U.S.,* 91 Fed.Cl. 386 (2010), and *DGR Associates, Inc.* v. *U.S.,* No. 10–396C (Fed. Cl.), stating that HUBZone small business set asides have priority over 8(a) sole source and set aside awards. The U.S. Department of Justice has appealed the *Mission Critical* decision to the Court of Appeals for the Federal Circuit.

Recently, however, the President enacted Public Law 111–240, known as the Small Business Jobs and Credit Act of 2010. In this law, the Small Business Act was amended to delete language stating that a contracting opportunity "shall" be awarded as a HUBZone set-aside if the HUBZone "rule of two" is met. The new statutory language explains that a contracting opportunity "may" be awarded as a HUBZone set-aside if the HUBZone "rule of two" is met. Consequently, the HUBZone provisions do not unambiguously direct contracting officers to reserve every available contract opportunity for HUBZone small businesses whenever the rule of two is met. This statutory change further supports the SBA's position on parity.

As a result of the foregoing, the final regulation explains that there is parity among the 8(a) BD, SDVO, HUBZone, small business and WOSB programs and has implemented the proposed rule as final.

G. Joint Venture Requirements

In the proposed rule, SBA had proposed amending the current joint venture regulation, permitting EDWOSB or WOSB joint ventures for EDWOSB or WOSB contracts. The current rule had provided that the EDWOSB or WOSB must perform a significant portion of the contract and SBA proposed clarifying this requirement.

SBA received one comment which supported the joint venture provisions and five comments suggesting that the language for joint ventures should be strengthened to ensure that women are the primary beneficiaries of the contract. SBA also received one comment which stated that SBA should review all joint ventures to ensure that the percentage of work and the distribution of profits are fair because it is not possible to assign a fixed percentage of profits to the one WOSB joint venturer, such as the stated minimum of 51 percent.

First, SBA believes that the regulation has been strengthened because it requires that not less than 51 percent of the net profits earned by the joint venture must be distributed to the EDWOSB or WOSB while the former regulation only required that the WOSB joint venturer perform a significant portion of the contract, without setting forth a specific and objective percentage of work to be performed. Second, SBA also clarified that the joint venture agreement must be in writing and must set forth the following provisions: The purpose of the joint venture, that an EDWOSB or WOSB must be the managing venturer, that an employee of the managing venturer must be the project manager responsible for the performance of the contract, and the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the EDWOSB or WOSB contract.

In light of these guidelines, SBA does not believe it is necessary to review each joint venture agreement, which can slow down the contracting process. In addition, these same guidelines are in place for the SDVO SBC Program and there have not been any issues concerning the ability of the SDVO SBC joint venture partner to meet the 51 percent net profit requirement.

Therefore, SBA does not believe any changes to the proposed rule or other clarification is necessary and adopts the provision in the Final Rule as proposed.

H. Protests

In the proposed rule, SBA set forth the procedures by which an interested party may protest the status of an EDWOSB or WOSB apparent successful offeror. SBA received a few comments which suggested that the regulations should state that the contracting officer must file a status protest if all the required documents are not received. SBA also received one comment which stated that interested parties should only be permitted to file a protest if it has credible information calling into question the apparent successful offeror's eligibility and one comment recommending that SBA ensure that the protest process is not abused.

The SBA notes that the requirement that a contracting officer file a status protest if all documents are not received, or if the contracting officer has information that calls into question the eligibility of the business, is set forth in § 127.301, titled "When may a contracting officer accept a concern's self-certification?". In addition, this protest process is the same or similar to those for SBA's other contracting programs, such as the HUBZone and SDVO SBC Programs. The process provides that interested parties must file a protest specifying all grounds for the protest and cannot merely assert that the protested concern is ineligible without setting forth specific facts. This protects the protest process from abuse.

The SBA received another comment which stated that anyone should be allowed to file a status protest and not just those businesses competing in the procurement. SBA disagrees with this comment. First, generally only those businesses competing in the acquisition would know who the apparent successful offeror is because they have been notified of this fact by the contracting officer. Second, although a business that is not competing in the requirement cannot file a status protest, the business concern should notify SBA, who can then conduct an eligibility examination. Specifically, § 127.400 explains that SBA may consider information provided to it by a third party that questions the eligibility of an EDWOSB or WOSB that has certified its status in ORCA or CCR in determining whether to conduct an eligibility examination.

The SBA received one comment which stated that it disagrees with the ability of the contracting officer to continue a contract with a business if that business has been found ineligible. The comment suggested that the contract should be terminated as soon as possible. According to § 127.604(f)(2)(i), if a contracting officer receives a protest determination stating that a concern is ineligible after contract award, and there has been no appeal filed with OHA, the contracting officer shall terminate the contract. If an appeal has been filed,

since the appeal process can be lengthy, the rule explains that the contracting officer must consider whether performance can be suspended until an appellate decision has been rendered. If OHA affirms that the concern is not eligible, then the contracting officer must either terminate the contract or not exercise the next option. Therefore, we believe this rule sufficiently limits a contracting officer's ability to continue a contract with a business found ineligible. SBA has implemented the rule as it proposed.

I. Other Comments

Several comments stated that the overall size standards for WOSB/EDWOSBs are too low. SBA notes that this proposed rule did not address the size standards for EDWOSBs or WOSBs and therefore, those comments are beyond the scope of the rulemaking.

The SBA also received several comments which suggested that only those WOSBs certified by third-party certifiers or with completed ORCA certifications should be counted for goaling purposes. SBA also received one comment which suggested that the 5 percent goal should be increased year by year until the percentage of women owned businesses funded are in proportion to the number of women in the population. One comment stated that agencies should not be allowed to multiple count small business programs in meeting their goals because it limits the effectiveness of the small business programs. SBA notes that the proposed rule did not specifically address SBA's goaling program and therefore these comments are outside the scope of the rulemaking, as well.

In addition, at least one comment suggested that the WOSB Program have a Mentor Protégé Program similar to the one in the 8(a) BD Program. As discussed above, the President recently enacted Public Law 111–240, which authorizes a Mentor-Protégé Program for SBA's small business programs. Because the SBA did not propose guidance for such a program in the WOSB proposed rule, and is in the process of reviewing the statutory language and determining guidance on this for its programs, this final rule does not establish a Mentor-Protégé Program for the WOSB Program.

The SBA received one comment which stated that there should be a similar program for non-profits. Because SBA's government contracting programs require that the small business concern be for profit, and SBA did not propose changing this requirement for the WOSB Program, we believe this comment is outside the scope of the rulemaking.

The SBA also received one comment which recommended that SBA audit prime contractors to ensure that they utilize WOSBs for subcontracts. This Final Rule addresses prime contracts only because the WOSB Program is a prime contracting program. However, we note that SBA employs commercial market representatives to assist small businesses in obtaining subcontracts and to help other than small businesses meet their subcontracting goals. In addition, these SBA employees perform compliance reviews on other than small businesses to determine whether such contractors are identifying opportunities for small business as subcontractors and to ensure that the subcontracting plan requirements are met.

Compliance With Executive Orders 12866, 12988, 13132, the Paperwork Reduction Act (44 U.S.C., Chapter 35) and the Regulatory Flexibility Act (5 U.S.C. 601–612)

Executive Order 12866

OMB has determined that this rule is a "significant" regulatory action under Executive Order 12866. In the proposed rule, SBA set forth its initial regulatory impact analysis, which addressed the following: Necessity of the regulation; alternative approaches to the proposed rule; and the potential benefits and costs of the regulation. SBA did not receive any comment which specifically addressed its regulatory impact analysis. However, numerous comments agreed that the rule was necessary to assist WOSB in obtaining Federal contracts. In addition, SBA received numerous comments which supported its proposed approaches, especially concerning the use of self-certification, third-party certifiers, and the document repository. The specific comments on these approaches are discussed above.

At least one comment noted that SBA's proposed certification approach was innovative. Another comment stated that by 2018, small businesses will create 9.7 million new jobs with 5 million being created by WOSBs. This comment stated that substantial new contract opportunities must be found to support this growth in employment and the Federal Government must be one of the accessible markets. Therefore, it appears this comment believed that the rule will potentially benefit not just WOSBs and the Federal Government, but will have a beneficial impact on employment.

For these reasons, and those set forth in the preamble, SBA adopts as final its initial regulatory impact analysis.

Executive Order 12988

This action meets applicable standards set forth in Sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden. This action does not have retroactive or preemptive effect.

Executive Order 13132

This rule does not have federalism implications as defined in the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

Paperwork Reduction Act (PRA)

For purposes of the Paperwork Reduction Act, 44 U.S.C. chapter 35, SBA has determined that the rule imposes new reporting and recordkeeping requirements. The certification process described in Subpart C, §§ 127.300 to 127.302, is an information collection. The certification process requires a concern seeking to benefit from Federal contracting opportunities designated for WOSBs or EDWOSBs to verify its status by submitting a certification to the WOSB Program Repository, submitting other supporting documents to the WOSB Program Repository, and by representing its status in an existing electronic contracting system (*i.e.,* ORCA).

Specifically, the WOSB or EDWOSB will be required to submit certain documents verifying eligibility at the time of certification in ORCA (and every year after). These documents will be submitted to a document repository, or until the repository is established, the contracting office upon notice of a proposed award. Further, the protest and eligibility examination procedures will require the submission of documents from those parties subject to a protest and eligibility examination. To reduce the burden on the WOSBs or EDWOSBs, the same documents submitted at the time of certification will be used for the protests and eligibility examinations, except that for protests and eligibility examinations, SBA will also request copies of proposals submitted in response to a WOSB or EDWOSB solicitation and certain other documents and information to verify the status of an EDWOSB.

Finally, the Final Rule also requires the WOSBs or EDWOSBs to retain copies of the documents submitted for

a period of six (6) years. SBA stated in the proposed rule that it believes that any additional burden imposed by this recordkeeping requirement would be minimal since the firms would maintain the information in their general course of business.

SBA submitted this information collection to OMB for review and it was approved.

Title and Description of Information Collection: Women-Owned Small Business Federal Contract Assistance Program Purpose: The information collected is modeled on two currently approved information collections: SBA Form 1010, OMB Control 3245–0331, SBA's Application for 8(a) Business Development, and SBA Form 413, OMB Control 3245–0188, SBA's Application for Personal Financial Statement, which are used to collect personal and business information on the businesses and owners applying to this program. The information requested for this program includes information verifying the WOSB/EDWOSB status of the business concern, including tax returns, personal statements, and business documents.

OMB Control Number:

Description of and Estimated Number of Respondents: Information will be collected from the small business concerns that are not already certified by an approved third-party certifier and therefore must self-certify and verify their status by submitting certain required documents to a document repository at the time of ORCA certification. This same information must also be collected by the third-party certifier when making its certification determination. In addition, those with third-party certifications will also be required to submit certain documents to the document repository verifying eligibility, such as a copy of the third-party certification and the SBA certification form.

Utilizing the RAND FPDS data set for the total number of WOSBs (identified by Dun and Bradstreet DUNS number) that received obligated funds from awards, contracts, orders and modifications to existing contracts for FY 2005, SBA identified approximately 12,000 WOSBs as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. SBA did not receive specific comments on the estimated number of responses or response times.

Estimated Number of Responses: In FY 2005, there were 12,000 WOSBs that were identified as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. Thus, SBA still believes there could be an estimated 12,000 responses. In addition, SBA will conduct eligibility examinations and protests and appeals. SBA still believes that the total estimated number of responses is 12,200.

Estimated Response Time: 2 hours. Total Estimated Annual Hour Burden: 24,400 hours.

Regulatory Flexibility Act

SBA has determined that this rule establishing a set-aside mechanism for WOSBs may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA set forth an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of the proposed rule in accordance with section 603, title 5, of the United States Code. The IRFA examined the objectives and legal basis for the proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there were any Federal rules that may duplicate, overlap, or conflict with the proposed rule; and whether there were any significant alternatives to the proposed rule. The Agency's final regulatory flexibility analysis (FRFA) is set forth below.

1. What are the reasons for, and objectives of, this final rule?

The Small Business Administration (SBA) is establishing procedures pursuant to the SBA Reauthorization Act, Public Law 106–554, enacted December 21, 2000, codified at Section 8(m) of the Small Business Act, which authorizes the creation and implementation of a new mechanism for Federal contracting with WOSBs. The purpose of the Final Rule is to create a framework and infrastructure for implementing these Procedures, thereby providing a tool for Federal agencies to ensure equal opportunity, and thereby increased Federal procurement opportunities to WOSBs. SBA is finalizing the Final Rule pursuant to section 8(m) of the Small Business Act, 15 U.S.C. 637(m). These Procedures will assist Federal agencies in eliminating barriers to the participation by WOSBs in Federal contracting, thereby achieving the Federal Government's goal of awarding five percent of Federal contract dollars to WOSBs, as provided in the Federal Acquisition Streamlining Act of 1994.

2. Summary of the Significant Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis, a Summary of the Assessment of the Agency of Such Issues, and a Statement of Any Changes Made as a Result of Such Comments

The SBA received a few comments that addressed the IRFA or the subjects discussed in the IRFA. Several comments stated that SBA should consider the costs and burdens of the reporting and recordkeeping requirements for WOSBs because they could inadvertently discourage WOSBs from taking advantage of the program. These reporting and recordkeeping requirements include the representations and the submission of documents relating to WOSB status to the contracting officer if a repository for documents is unavailable.

The SBA notes that WOSBs have the burden of proving eligibility for the program. Although the reporting and recordkeeping requirements may seem onerous, they are necessary to reduce fraud in the program and to ensure that the benefit of the program—an opportunity to obtain a contract through restricted competition—is available to only eligible WOSBs. The SBA's rule adopts methods and processes aimed at meeting these objectives, while also minimizing, as much as possible, the burden on small businesses. Therefore, SBA continues to believe that the initial analysis was accurate.

3. What is SBA's description and estimate of the number of small entities to which the rule will apply?

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. This Final Rule will ultimately establish in the Federal Acquisition Regulation (FAR) a new procurement mechanism to benefit WOSBs. Therefore, WOSBs that compete for eligible Federal contracts are the specific group of small business concerns most directly affected by this rule. More specifically, this rule may affect EDWOSBs that participate in Federal procurement in industries where SBA determines that WOSBs are underrepresented and may affect WOSBs that participate in Federal procurement in industries where SBA determines that WOSBs are substantially underrepresented. In addition, the rule may affect other small businesses, as described below, to the extent that small businesses not owned and controlled by women or non-eligible WOSBs may be excluded from

competing for certain Federal contracting opportunities.

The 2002 Survey of Business Owners published by the U.S. Bureau of the Census reported 6,489,493 women-owned businesses in the United States. More than 900,000 of these businesses have one or more paid employees. Most women-owned businesses, however, do not participate in the Federal contracting market. In addition, the SBO database used in the RAND Report represents all women-owned business (large and small) and only WOSBs are eligible under the regulations. As of January 21, 2007, approximately 93,000 businesses represented themselves as WOSBs in the Federal Government's Central Contractor Registration (CCR) as actual or potential Federal contractors. The study conducted by the RAND Corporation for SBA narrowed the pool of WOSBs in the CCR to approximately 56,000 to more closely approximate the universe of firms who are ready, willing, and able to do business with the Government.[1] However, far fewer than 56,000 WOSBs are likely to be affected by this Final Rule because only those eligible WOSBs competing for contracts in the eligible industries could possibly receive contracts under the program. Utilizing the RAND FPDS data set for the total number of WOSBs (identified by Dun and Bradstreet DUNS number) that received obligated funds from awards, contracts, orders and modifications to existing contracts for FY 2005, SBA identified approximately 12,000 WOSBs as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. Thus, this rule may affect approximately 12,000 WOSBs.

In addition, WOSBs who are not economically disadvantaged could be affected only to the extent that they compete for Federal contracts in industries in which WOSBs are determined to be substantially underrepresented. For industries in which WOSBs are determined to be substantially underrepresented, the potential number of WOSBs that could be direct beneficiaries of these Procedures restricting certain Federal contracts to WOSBs is also likely to be much fewer than the number of WOSBs registered in CCR, since not all WOSBs will satisfy the eligibility requirements for EDWOSB status. The CCR currently lists only approximately 3,800 SDBs owned and controlled by one or more women. This is a useful statistic because the $750,000 net worth requirement is the same for SDBs and for WOSBs. While SBA acknowledges that there may be other WOSBs in existence besides those listed in the CCR as being certified by SBA as SDBs, it is difficult to envision more than 6,000 WOSBs that could meet SBA's eligibility criteria and that are also ready, willing, and able to bid on Government contracts.

Moreover, the anticipated benefits of these Procedures may be less attractive to many WOSBs than a number of other preferences designed to assist small businesses, such as HUBZone, 8(a) BD, and others. Not all areas of Federal procurement are likely to be designated as underrepresented or substantially underrepresented, and opportunities in some of the qualified industries may be limited. Consequently, many otherwise-qualified EDWOSBs and WOSBs may not find it advantageous to pursue contract opportunities under these Procedures.

This Final Rule will also affect non-WOSBs (small businesses not 51 percent owned and controlled by women) seeking Federal contracts for which competition has been restricted to participants in these Procedures. This could affect the number of future contracts for those businesses that derive a significant portion of their business from Federal contracting. As of January 2007, the CCR lists approximately 376,000 small businesses that are not WOSBs. To the extent that contracting officers use these Procedures, non-WOSBs may be excluded from competing for certain Federal contracting opportunities. However, this would occur only in industries in which WOSBs have been found to be underrepresented or substantially underrepresented, thus receiving fewer contracts than would be expected absent discrimination in the marketplace, and where the anticipated dollar value of the procurement does not exceed $3 million or $5 million, in the case of manufacturing contracts. In addition, we note that industries in which WOSBS are underrepresented are ones in which they have gotten less than their fair share of contracts and this suggests, at least implicitly, that non-WOSBs have therefore been getting more than the share they would receive in the absence of discrimination. The number of small businesses that would be excluded from eligibility for competing for contracts designated for the program under these procurements or from future such determinations is not known at this time.

Additional contracting opportunities identified by Federal agencies as candidates to be set aside for WOSBs will come from new contracting requirements and contracts currently performed by small and large businesses. At this time, SBA cannot accurately predict how the existing distribution of contracts by business type may change with this rule. However, SBA does not expect a great many of the contracts awarded through the 8(a), HUBZone, or SDVOSB Programs ($22.6 billion in FY 2006) to be re-competed as WOSB or EDWOSB set-aside contracts because those programs also support other statutory goals that agencies strive to achieve through their contracting activities. It is acknowledged, however, that some redistribution of contracts among the various programs may occur as a result of these Procedures.

4. What are the projected reporting, recordkeeping, Paperwork Reduction Act and other compliance Requirements?

For purposes of the Paperwork Reduction Act, 44 U.S.C. Chapter 35, SBA has determined that the rule imposes new reporting and recordkeeping requirements. The certification process described in Subpart C, §§ 127.300 to 127.302, is an information collection. The certification process requires a concern seeking to benefit from Federal contracting opportunities designated for WOSBs or EDWOSBs to verify its status by providing documents to the WOSB Program Repository, submitting a certification to the WOSB Program Repository, and representing its status in an existing electronic contracting system (*i.e.,* ORCA). The WOSB or EDWOSB will have to represent in ORCA that it meets each eligibility requirement of the program.

Specifically, the WOSB or EDWOSB will be required to submit certain documents verifying eligibility at the time of certification in ORCA (and every year thereafter). These documents will be submitted to a document repository established by SBA, or until the repository is established, the contracting office upon notice of a proposed award. Further, the protest and eligibility examination procedures will require the submission of documents from those parties subject to a protest and eligibility examination. To reduce the burden on the WOSBs or EDWOSBs, the same documents submitted at the time of certification will be used for the protests and eligibility examinations, except that for protests and eligibility examinations, SBA will also request copies of proposals submitted in response to a WOSB or EDWOSB

[1] RAND eliminated firms with less than $1,000 in annual revenue; counted a firm only once if they were registered more than once for multiple locations; eliminated other apparent duplications; and eliminated vendors that were only interested in competing for grants (as opposed to contracts).

solicitation and certain other documents and information to verify the status of an EDWOSB.

Finally, the rule also requires the WOSBs or EDWOSBs to retain copies of the documents submitted for a period of six (6) years. The SBA stated in the proposed rule that it believes that any additional burden imposed by this recordkeeping requirement would be minimal since the firms would maintain the information in their general course of business.

As stated above, SBA submitted this information collection to OMB for review and it was approved.

There will also be some recordkeeping requirements for the Government; but since the Government already tracks procurement awards to WOSBs, the additional reporting requirements will require minimal changes to existing systems. The SBA is working with the Integrated Acquisition Environment, which is managed by GSA, to ensure that CCR, ORCA, and the Federal Procurement Data System–Next Generation (FPDS–NG) contain the fields needed to capture the new socio-economic data. EDWOSB will be a new classification that the Government has not previously used.

5. Description of the Steps the Agency Has Taken To Minimize the Significant Economic Impact on Small Entities Consistent With the Stated Objectives of Applicable Statutes, Including a Statement of the Factual, Policy, and Legal Reasons for Selecting the Alternative Adopted in the Final Rule and Why Each One of the Other Significant Alternatives to the Rule Considered by the Agency Which Affect the Impact on Small Entities Was Rejected

The SBA has minimized the significant economic impact on small entities. Pursuant to section 8(m) of the Small Business Act, a WOSB may be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator; or a WOSB may self-certify to the contracting officer that it is a small business concern owned and controlled by women, along with adequate documentation in accordance with standards established by the Administration. As discussed earlier, SBA will allow EDWOSBs and WOSBs to self-certify their status in the existing CCR and ORCA databases or provide evidence of certification from an approved third-party certifier.

An alternative approach would have been to require EDWOSBs and WOSBs to apply to SBA for formal certification. The SBA has ruled out this approach as unnecessary, not required by statute, and too costly. The SBA believes that eligibility examinations and protest procedures incorporated into the Final Rule will minimize the likelihood of fraud and misrepresentation of WOSB and EDWOSB status. The SBA has decided that allowing self-certification and the option for firms to apply for certification from SBA-approved certifiers, when combined with random eligibility examinations and a formal protest procedure, is a more viable approach than formal certification by SBA and greatly reduces the burden on small entities.

In addition, SBA estimates that implementation of this Final Rule will require no additional proposal costs for WOSBs, as compared to submitting proposals under any other small business set-aside preferences. Moreover, WOSBs currently represent their status for purposes of data collection that is needed to implement 15 U.S.C. 644(g); therefore, the self-certification process of this Final Rule imposes no additional requirement on WOSBs.

Pursuant to Executive Order 13272 dated August 16, 2002, agencies issuing final rules are required to discuss any comments received from SBA's Office of Advocacy in response to the proposed rule. In this case, SBA's Office of Advocacy submitted two formal comments on May 3, 2010. The first comment recommended that SBA address new market opportunities for women-owned small businesses that may not yet be incorporated in the NAICS System. While SBA understands and appreciates the concern expressed by the comment to consider emerging areas for WOSBs, SBA is limited by the data available, particularly the FPDS–NG and CCR databases, to construct the disparity ratios which determine underrepresentation. The FPDS–NG and CCR databases contain data which relate to well-defined NAICS codes in which WOSBs have participated in Federal procurement. To the extent that there are new areas in which WOSBs are participating, SBA is committed to making an on-going effort to obtain accurate and timely data to use in the anticipated updates to the list of eligible industries.

The second comment received from the SBA Office of Advocacy expressed concern with the submission of documents that WOSBs are required to make prior to award. Particularly, the comment was concerned that "until the repository is operational, the women-owned business that decides to self-certify must not only submit documents to the Online Representations and Certifications Application system (ORCA) but must provide each contracting officer with eligibility documents." The SBA Office of Advocacy was concerned with what it viewed as a duplicative submission and sought to have SBA seek a less burdensome alternative.

As stated in the portion of the preamble which discussed the public comments, many of the public comments confused the CCR and ORCA databases. However, neither CCR nor ORCA collects documents; rather CCR is an online government-maintained database on which companies who want to do business with the Federal Government can register and supply limited information relative to their size and type of business, and ORCA collects the representations and certifications required for Federal contracts.

As a requirement for participation in this Program, an EDWOSB or WOSB must register in CCR first. Next, it must provide documents supporting its EDWOSB or WOSB status to an online document repository, called that the WOSB Program Repository, that the SBA is planning to establish. The business concern will be placing these documents in a secure, Web-based environment that would only be accessible to the individual WOSBs and EDWOSBs, Federal contracting officers and SBA. The contracting officer would be required to access the documents prior to contract award to review the submitted documents. The SBA proposed this approach so that the WOSBs and EDWOSBs would not have to submit documents each time they are being considered for the award of a WOSB or EDWOSB contract.

Until the repository is completed, or if the system is otherwise unavailable, then SBA explained that the WOSB or EDWOSBs must submit the documents directly to the contracting officer prior to each WOSB or EDWOSB award. The contracting officer must retain these documents in the contract file so that SBA may later review the file for purposes of a status protest or eligibility examination. However, the WOSB or EDWOSB will also be required to post the documents to the WOSB Program Repository within thirty (30) days of the repository becoming available.

Finally, after registering in CCR and submitting the required document to the repository, the EDWOSB or WOSB must represent its status in ORCA at *https://orca.bpn.gov.*

Thus, the supporting documents will be provided to a repository (which is not necessarily part of ORCA) or, if the repository is unavailable, to the contracting officer. The SBA notes that

the statute requires the submission of supporting documents to the contracting officer and, until or unless the repository is established, this appears to be the sole alternative that meets this statutory requirement. In addition, SBA believes that although the representations and document requirement may seem burdensome to some small businesses, this is required to meet the statutory provisions, reduce fraud in the program, and ensure that only eligible concerns receive the benefits of the program.

List of Subjects

13 CFR Part 121

Administrative practice and procedure, Government procurement, Government property, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 124

Administrative practice and procedure, Government procurement, Hawaiian natives, Indians—business and finance, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Technical assistance.

13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and functions (Government agencies).

■ Accordingly, for the reasons stated in the preamble, SBA amends 13 CFR parts 121, 124, 125, 126, 127 and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

■ 1. The authority citation for 13 CFR part 121 continues to read as follows:

Authority: 15 U.S.C. 632, 634(b)(6), 636(b), 637, 644, 662(5) and 694a; and Pub. L. 105–135, sec. 401 *et seq.,* 111 Stat. 2592.

■ 2. Revise § 121.401 to read as follows:

§ 121.401 What procurement programs are subject to size determinations?

The rules set forth in §§ 121.401 through 121.413 apply to all Federal procurement programs for which status as a small business is required or advantageous, including the small business set-aside program, SBA's Certificate of Competency program, SBA's 8(a) Business Development program, SBA's HUBZone program, the Women Owned Small Business (WOSB) Federal Contract Program, SBA's Service-Disabled Veteran-Owned Small Business program, the Small Business Subcontracting program, and the Federal Small Disadvantaged Business (SDB) program.

■ 3. Amend § 121.1001 by revising paragraph (a)(9) to read as follows:

§ 121.1001 Who may initiate a size protest or request a formal size determination?

(a) * * *

(9) For SBA's WOSB Federal Contracting Program, the following entities may protest:

(i) Any concern that submits an offer for a specific requirement set aside for WOSBs or WOSBs owned by one or more women who are economically disadvantaged (EDWOSB) pursuant to part 127 of this chapter;

(ii) The contracting officer;

(iii) The SBA Government Contracting Area Director; and

(iv) The Director for Government Contracting, or designee.

* * * * *

■ 4. Amend § 121.1008(a) by adding a sentence after the third sentence to read as follows:

§ 121.1008 What occurs after SBA receives a size protest or request for a formal size determination?

(a) * * * If the protest pertains to a requirement set aside for WOSBs or EDWOSBs, the Area Director will also notify SBA's Director for Government Contracting of the protest. * * *

PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS

■ 5. The authority citation for 13 CFR part 124 continues to read as follows:

Authority: 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d) and Pub. L. 99–661, sec. 1207, Pub. L. 100–656, Pub. L. 101–37, Pub. L. 101–574, and 42 U.S.C. 9815.

■ 6. Amend § 124.503 by revising paragraph (j) to read as follows:

§ 124.503 How does SBA accept a procurement for award through the 8(a) BD program?

* * * * *

(j) *Contracting Among Small Business Programs.*

(1) *Acquisitions Valued At or Below $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from setting aside a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

(2) *Acquisitions Valued Above $100,000/Simplified Acquisition Threshold.*

(i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

PART 125—GOVERNMENT CONTRACTING PROGRAMS

■ 7. The authority citation for 13 CFR part 125 continues to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634 (b)(6), 637, 644, and 657f.

■ 8. Add new paragraph (f) to § 125.2 to read as follows:

§ 125.2 Prime contracting assistance.

* * * * *

(f) *Contracting Among Small Business Programs.*

(1) *Acquisitions Valued At or Below $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from setting aside a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

(2) *Acquisitions Valued Above $100,000/Simplified Acquisition Threshold.*

(i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

■ 9. Amend § 125.19 by revising paragraph (b) to read as follows:

§ 125.19 When may a contracting officer set-aside a procurement for SDVO SBCs?

* * * * *

(b) *Contracting Among Small Business Programs.*

(1) *Acquisitions Valued At or Below $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from setting aside a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

(2) *Acquisitions Valued Above $100,000/Simplified Acquisition Threshold.*

(i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

* * * * *

PART 126—HUBZONE PROGRAM

■ 10. The authority citation for part 126 continues to read as follows:

Authority: 15 U.S.C. 632(a), 632(j), 632(p) and 657a.

■ 11. Amend § 126.607 by revising paragraph (b) to read as follows:

§ 126.607 When must a contracting officer set aside a requirement for qualified HUBZone SBCs?

* * * * *

(b) *Contracting Among Small Business Programs.*

(1) *Acquisitions Valued At or Below $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from setting aside a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

(2) *Acquisitions Valued Above $100,000/Simplified Acquisition Threshold.*

(i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

* * * * *

§ 126.609 [Removed and Reserved]

■ 12. Remove and reserve § 126.609.

■ 13. Revise part 127 to read as follows:

PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM

Subpart A—General Provisions

Sec.
127.100 What is the purpose of this part?
127.101 What type of assistance is available under this part?
127.102 What are the definitions of the terms used in this part?

Subpart B—Eligibility Requirements To Qualify as an EDWOSB or WOSB

127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?
127.201 What are the requirements for ownership of an EDWOSB and WOSB?
127.202 What are the requirements for control of an EDWOSB or WOSB?
127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?

Subpart C—Certification of EDWOSB or WOSB Status

127.300 How is a concern certified as an EDWOSB or WOSB?
127.301 When may a contracting officer accept a concern's self-certification?
127.302 What third-party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?
127.303 How will SBA select and identify approved certifiers?
127.304 How does a concern obtain certification from an approved certifier?
127.305 May a concern determined not to qualify as an EDWOSB or WOSB submit a self-certification for a particular EDWOSB or WOSB requirement?

Subpart D—Eligibility Examinations

127.400 What is an eligibility examination?
127.401 What is the difference between an eligibility examination and an EDWOSB or WOSB status protest pursuant to subpart F of this part?
127.402 How will SBA conduct an examination?
127.403 What happens if SBA verifies the concern's eligibility?
127.404 What happens if SBA is unable to verify a concern's eligibility?
127.405 What is the process for requesting an eligibility examination?

Subpart E—Federal Contract Assistance

127.500 In what industries is a contracting officer authorized to restrict competition under this part?
127.501 How will SBA determine the industries that are eligible for EDWOSB or WOSB requirements?
127.502 How will SBA identify and provide notice of the designated industries?
127.503 When is a contracting officer authorized to restrict competition under this part?
127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?
127.505 May a non-manufacturer submit an offer on an EDWOSB or WOSB requirement for supplies?
127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?
127.507 Are there EDWOSB and WOSB contracting opportunities at or below the Simplified Acquisition Threshold?
127.508 May SBA appeal a contracting officer's decision not to reserve a procurement for award as a WOSB Program Contract?
127.509 What is the process for such an appeal?

Subpart F—Protests

127.600 Who may protest the status of a concern as an EDWOSB or WOSB?
127.601 May a protest challenging the size and status of a concern as an EDWOSB or WOSB be filed together?
127.602 What are the grounds for filing an EDWOSB or WOSB status protest?
127.603 What are the requirements for filing an EDWOSB or WOSB protest?
127.604 How will SBA process an EDWOSB or WOSB status protest?
127.605 What are the procedures for appealing an EDWOSB or WOSB status protest decision?

Subpart G—Penalties

127.700 What penalties may be imposed under this part?

Authority: 15 U.S.C. 632, 634(b)(6), 637(m), and 644.

Subpart A—General Provisions

§ 127.100 What is the purpose of this part?

Section 8(m) of the Small Business Act authorizes certain procurement mechanisms to ensure that Women-Owned Small Businesses (WOSBs) have an equal opportunity to participate in Federal contracting. This part implements these mechanisms and ensures that the program created, referred to as the WOSB Program, is substantially related to this important Congressional goal in accordance with applicable law.

§ 127.101 What type of assistance is available under this part?

This part authorizes contracting officers to restrict competition to eligible Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for certain Federal contracts in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented or substantially underrepresented in Federal procurement. It also authorizes contracting officers to restrict competition to eligible WOSBs for certain Federal contracts in industries in which SBA determines that WOSBs are substantially underrepresented in Federal procurement and has waived the economically disadvantaged requirement.

§ 127.102 What are the definitions of the terms used in this part?

For purposes of this part:

8(a) Business Development (8(a) BD) concern means a concern that SBA has certified as an 8(a) BD program participant and whose term has not expired or otherwise left the 8(a) BD program early.

AA/GC&BD means SBA's Associate Administrator for Government Contracting and Business Development.

Central Contractor Registration (CCR) Database means the primary

Government repository for contractor information required for the conduct of business with the Government. It is also a means for conducting searches for small business contractors. In general, prospective Federal contractors must be registered in CCR prior to award of a contract or purchase agreement. CCR is located at *https://www.bpn.gov/ccr/.*

Citizen means a person born or naturalized in the United States. Resident aliens and holders of permanent visas are not considered to be citizens.

Concern means a firm that satisfies the requirements in § 121.105 of this chapter.

Contracting officer has the meaning given to that term in Section 27(f)(5) of the Office of Federal Procurement Policy Act (codified at 41 U.S.C. 423(f)(5)).

D/GC means SBA's Director for Government Contracting.

Economically Disadvantaged WOSB (EDWOSB) means a concern that is small pursuant to part 121 of this chapter and that is at least 51 percent owned and controlled by one or more women who are citizens and who are economically disadvantaged in accordance with §§ 127.200, 127.201, 127.202 and 127.203. An EDWOSB automatically qualifies as a WOSB.

EDWOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to EDWOSBs.

Immediate family member means father, mother, husband, wife, son, daughter, stepchild, brother, sister, grandfather, grandmother, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, and daughter-in-law.

Interested party means any concern that submits an offer for a specific EDWOSB or WOSB requirement, the contracting activity's contracting officer, or SBA.

ORCA (the Online Representations and Certifications Application) means the primary Government repository for contractor submitted representations and certifications required for the conduct of business with the Government. ORCA is located at *https://orca.bpn.gov.*

Primary industry classification means the six-digit North American Industry Classification System (NAICS) code designation that best describes the primary business activity of the concern. The NAICS code designations are described in the NAICS manual available via the Internet at *http://www.census.gov/NAICS.* In determining the primary industry in which a concern is engaged, SBA will consider the factors set forth in § 121.107 of this chapter.

Same or similar line of business means business activities within the same four-digit "Industry Group" of the NAICS Manual as the primary industry classification of the WOSB or EDWOSB.

Substantial underrepresentation means a disparity ratio which is less than 0.5.

Underrepresentation means a disparity ratio between 0.5 and 0.8.

WOSB means a concern that is small pursuant to part 121 of this chapter, and that is at least 51 percent owned and controlled by one or more women who are citizens in accordance with §§ 127.200, 127.201 and 127.202.

WOSB Program Repository means a secure, Web-based application that collects, stores and disseminates documents to the contracting community and SBA, which verify the eligibility of a business concern for a contract to be awarded under a WOSB or EDWOSB requirement.

WOSB requirement means a Federal requirement for services or supplies for which a contracting officer has restricted competition to eligible WOSBs.

Subpart B—Eligibility Requirements To Qualify as an EDWOSB or WOSB

§ 127.200 What are the requirements a concern must meet to qualify as an EDWOSB or WOSB?

(a) *Qualification as an EDWOSB.* To qualify as an EDWOSB, a concern must be:

(1) A small business as defined in part 121 of this chapter for its primary industry classification; and

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens and are economically disadvantaged.

(b) *Qualification as a WOSB.* To qualify as a WOSB, a concern must be:

(1) A small business as defined in part 121 of this chapter; and

(2) Not less than 51 percent unconditionally and directly owned and controlled by one or more women who are United States citizens.

§ 127.201 What are the requirements for ownership of an EDWOSB and WOSB?

(a) *General.* To qualify as an EDWOSB one or more economically disadvantaged women must unconditionally and directly own at least 51 percent of the concern. To qualify as a WOSB, one or more women must unconditionally and directly own at least 51 percent of the concern. Ownership will be determined without regard to community property laws.

(b) *Requirement for unconditional ownership.* To be considered unconditional, 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. The pledge or encumbrance of stock or other ownership interest as collateral, including seller-financed transactions, does not affect the unconditional nature of ownership if the terms follow normal commercial practices and the owner retains control absent violations of the terms.

(c) *Requirement for direct ownership.* To be considered direct, the qualifying women must own 51 percent of the concern directly. The 51 percent ownership may not be through another business entity or a trust (including employee stock ownership plan) that is, in turn, owned and controlled by one or more women or economically disadvantaged women. However, ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by a woman or economically disadvantaged woman where the trust is revocable, and the woman is the grantor, the trustee, and the sole current beneficiary of the trust.

(d) *Ownership of a partnership.* In the case of a concern that is a partnership, at least 51 percent of each class of partnership interest must be unconditionally owned by one or more women or in the case of an EDWOSB, economically disadvantaged women. The ownership must be reflected in the concern's partnership agreement. For purposes of this requirement, general and limited partnership interests are considered different classes of partnership interest.

(e) *Ownership of a limited liability company.* In the case of a concern that is a limited liability company, at least 51 percent of each class of member interest must be unconditionally owned by one or more women or in the case of an EDWOSB, economically disadvantaged women.

(f) *Ownership of a corporation.* In the case of a concern that is a corporation, at least 51 percent of each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding must be unconditionally owned by one or more women, or in the case of an EDWOSB, economically disadvantaged women. In determining unconditional ownership of the concern, any unexercised stock options or similar agreements held by a woman will be disregarded. However, any unexercised stock option or other agreement, including the right to convert non-voting stock or debentures into voting

stock, held by any other individual or entity will be treated as having been exercised.

§ 127.202 What are the requirements for control of an EDWOSB or WOSB?

(a) *General.* To qualify as a WOSB, the management and daily business operations of the concern must be controlled by one or more women. To qualify as an EDWOSB, the management and daily business operations of the concern must be controlled by one or more women who are economically disadvantaged. Control by one or more women or economically disadvantaged women 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 or economically disadvantaged women.

(b) *Managerial position and experience.* A woman, or in the case of an EDWOSB an economically disadvantaged 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 or economically disadvantaged woman manager need not have the technical expertise or possess the required license to 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 expertise. However, if a man possesses the required license and has an equity interest in the concern, he may be found to control the concern.

(c) *Limitation on outside employment.* The woman or economically disadvantaged woman who holds the highest officer position of the concern must manage it on a full-time basis and devote full-time to the business concern during the normal working hours of business concerns in the same or similar line of business. The woman or economically disadvantaged woman who holds the highest officer position may not engage in outside employment that prevents her from devoting sufficient time and attention to the daily affairs of the concern to control its management and daily business operations.

(d) *Control over a partnership.* In the case of a partnership, one or more women, or in the case of an EDWOSB, economically disadvantaged women, must serve as general partners, with control over all partnership decisions.

(e) *Control over a limited liability company.* In the case of a limited liability company, one or more women, or in the case of an EDWOSB, economically disadvantaged women, must serve as management members, with control over all decisions of the limited liability company.

(f) *Control over a corporation.* One or more women, or in the case of an EDWOSB, economically disadvantaged women, must control the Board of Directors of the concern. Women or economically disadvantaged women are considered to control the Board of Directors when either:

(1) One or more women or economically disadvantaged women own at least 51 percent of all voting stock of the concern, are on the Board of Directors and have the percentage of voting stock necessary to overcome any super majority voting requirements; or

(2) Women or economically disadvantaged women comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

(g) *Involvement in the concern by other individuals or entities.* Men or other entities may be involved in the management of the concern and may be stockholders, partners or limited liability members of the concern. However, no males or other entity may exercise actual control or have the power to control the concern.

§ 127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?

(a) *General.* To qualify as an EDWOSB, the concern must be at least 51 percent owned by one or more women who are economically disadvantaged. A woman is economically disadvantaged if she can demonstrate that her ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business. SBA does not take into consideration community property laws when determining economic disadvantage when the woman has no direct, individual or separate ownership interest in the property.

(b) *Limitation on personal net worth.*

(1) In order to be considered economically disadvantaged, the woman's personal net worth must be less than $750,000, excluding her ownership interest in the concern and her equity interest in her primary personal residence.

(2) Income received from an EDWOSB that is an S corporation, LLC or partnership will be excluded from net worth where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the business concern or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern. Losses from the S corporation, LLC or partnership, however, are losses to the EDWOSB only, not losses to the individual, and cannot be used to reduce an individual's net worth.

(3) Funds invested in an Individual Retirement Account (IRA) or other official retirement account that are unavailable until retirement age without a significant penalty will not be considered in determining a woman's net worth. In order to properly assess whether funds invested in a retirement account may be excluded from a woman's net worth, she must provide information about the terms and restrictions of the account to SBA and certify that the retirement account is legitimate.

(c) *Factors to be considered.*

(1) *General.* The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past three years (including bonuses, and the value of company stock given in lieu of cash), her personal net worth and the fair market value of all of her assets, whether encumbered or not, will be considered in determining whether she is economically disadvantaged.

(2) *Spouse's financial situation.* SBA may consider a spouse's financial situation in determining a woman's access to credit and capital. When married, an individual claiming economic disadvantage must submit separate financial information for her spouse, unless the individual and the spouse are legally separated. SBA will consider a spouse's financial situation in determining an individual's access to credit and capital where the spouse has a role in the business (*e.g.,* an officer, employee or director) or has lent money to, provided credit or financial support to, or guaranteed a loan of the business. SBA may also consider the spouse's financial condition if the spouse's business is in the same or similar line of business as the EDWOSB or WOSB and the spouse's business and WOSB share similar names, Web sites, equipment or employees. In addition, all transfers to a spouse within two years of a certification will be attributed to a woman claiming economic disadvantage as set forth in paragraph (d) of this section.

(3) *Income.*

(i) When considering a woman's personal income, if the adjusted gross yearly income averaged over the three years preceding the certification exceeds $350,000, SBA will presume that she is not economically disadvantaged. The

presumption may be rebutted by a showing that this income level was unusual and not likely to occur in the future, that losses commensurate with and directly related to the earnings were suffered, or by evidence that the income is not indicative of lack of economic disadvantage.

(ii) Income received by an EDWOSB that is an S corporation, LLC, or partnership will be excluded from an individual's income where the EDWOSB provides documentary evidence demonstrating that the income was reinvested in the EDWOSB or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern. Losses from the S corporation, LLC or partnership, however, are losses to the EDWOSB only, not losses to the individual, and cannot be used to reduce a woman's personal income.

(4) *Fair market value of all assets.* A woman will generally not be considered economically disadvantaged if the fair market value of all her assets (including her primary residence and the value of the business concern) exceeds $6 million. The only assets excluded from this determination are funds excluded under paragraph (b)(3) of this section as being invested in a qualified IRA account or other official retirement account.

(d) *Transfers within two years.* Assets that a woman claiming economic disadvantage transferred within two years of the date of the concern's certification will be attributed to the woman claiming economic disadvantage if the assets were transferred to an immediate family member, or to a trust that has as a beneficiary an immediate family member. The transferred assets within the two-year period will not be attributed to the woman if the transfer was:

(1) To or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support; or

(2) To an immediate family member in recognition of a special occasion, such as a birthday, graduation, anniversary, or retirement.

Subpart C—Certification of EDWOSB or WOSB Status

§ 127.300 How is a concern certified as an EDWOSB or WOSB?

(a) *General.* At the time a concern submits an offer on a specific contract reserved for competition under this part, it must be registered in the Central Contractor Registration (CCR), have a current representation posted on the Online Representations and Certifications Application (ORCA) that it qualifies as an EDWOSB or WOSB and have provided the required documents to the WOSB Program Repository, or if the repository is unavailable, be prepared to submit the documents to the contracting officer if selected as the apparent successful offeror.

(b) *Form of certification.* In conjunction with its required registration in the CCR database, the concern must submit a copy of the Women-Owned Small Business Program Certification (WOSB or EDWOSB) to the WOSB Program Repository and representations to the electronic annual representations and certifications at *http://orca.bpn.gov,* that it is a qualified EDWOSB or WOSB. The Women-Owned Small Business Program Certification (WOSB or EDWOSB) and representation must state, subject to penalties for misrepresentation, that:

(1) The concern is an EDWOSB or WOSB or is certified as an EDWOSB or WOSB by a certifying entity approved by SBA, and there have been no changes in its circumstances affecting its eligibility since certification;

(2) The concern meets *each* of the applicable individual eligibility requirements described in subpart B of this part, including that:

(i) It is a small business concern under the size standard assigned to the particular procurement;

(ii) It is at least 51 percent owned and controlled by one or more women who are United States citizens, or it is at least 51 percent owned and controlled by one or more women who are United States citizens and are economically disadvantaged; and

(iii) Neither SBA, in connection with an examination or protest, nor an SBA-approved certifier has issued a decision currently in effect finding that it does not qualify as an EDWOSB or WOSB.

(c) *Documents provided to contracting officer.* All of the documents set forth in paragraphs (d) and (e) of this section must be provided to the contracting officer to verify eligibility at the time of initial offer. The documents will be provided via the WOSB Program Repository or, if the repository is unavailable, directly to the contracting officer. The documents must be retained for a minimum of six (6) years.

(d) *Third-Party Certification.*

(1) Prior to certification in ORCA, the WOSB or EDWOSB that has been certified as a WOSB or EDWOSB by a certifying entity approved by SBA, including those certifiers from which SBA will accept certifications from the U.S. Department of Transportation's (DOT) Disadvantaged Business Enterprise (DBE) Program, or by SBA as an 8(a) BD Participant, must provide a copy of the third-party Certification to the WOSB Program Repository. If the WOSB Program Repository is unavailable, then prior to the award of a WOSB or EDWOSB contract, the apparent successful offeror WOSB or EDWOSB that has been certified as a EDWOSB or WOSB by a certifying entity approved by SBA must provide a copy of the third-party Certification to the contracting officer verifying that it was a WOSB or EDWOSB at the time of initial offer.

(2) The EDWOSB or WOSB must also provide a copy of the joint venture agreement, if applicable.

(3) The EDWOSB or WOSB must also provide a signed copy of the Women-Owned Small Business Program Certification (WOSB or EDWOSB).

(4) The EDWOSB or WOSB must also provide any additional documents as requested by SBA in writing that are necessary to satisfy the WOSB Program requirements.

(5) Within thirty (30) days of the WOSB Program Repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository.

(e) *Non-Third Party Certification.* A concern that has not been certified as a WOSB or EDWOSB by a third-party certifier approved by SBA or as a DBE or by SBA as an 8(a) BD Participant must also provide documents to the WOSB Program Repository. If the WOSB Program Repository is unavailable, then prior to award of a WOSB or EDWOSB contract, the apparent successful offeror must provide a copy of the documents to the contracting officer verifying that it was a WOSB or EDWOSB at the time of initial offer. Within thirty (30) days of the WOSB Program Repository becoming available, the WOSB or EDWOSB must provide the same documents to the WOSB Program Repository. These documents must be signed and include the following:

(1) Birth certificates, Naturalization papers, or unexpired passports for owners who are women;

(2) Copy of the joint venture agreement, if applicable;

(3) For limited liability companies:

(i) Articles of organization (also referred to as certificate of organization or articles of formation) and any amendments; and

(ii) Operating agreement, and any amendments;

(4) For corporations:

(i) Articles of incorporation and any amendments;

(ii) By-laws and any amendments;

(iii) All issued stock certificates, including the front and back copies, signed in accord with the by-laws;

(iv) Stock ledger; and

(v) Voting agreements, if any;

(5) For partnerships, the partnership agreement and any amendments;

(6) For sole proprietorships (and corporations, limited liability companies and partnerships if applicable), the assumed/fictitious name certificate(s);

(7) A signed copy of the Women-Owned Small Business Program Certification-WOSBs; and

(8) For EDWOSBs, in addition to the above:

(i) SBA Form 413, Personal Financial Statement, available to the public at *http://www.sba.gov/tools/Forms/index.html,* for each woman claiming economic disadvantage; and

(ii) A signed copy of the Women-Owned Small Business Program Certification–EDWOSBs.

(f) *Update of certification and documents.*

(1) The concern must update its Women-Owned Small Business Program Certification (WOSB or EDWOSB) and EDWOSB and WOSB representations and self-certification on ORCA as necessary, but at least annually, to ensure they are kept current, accurate, and complete. The certification and representations are effective for a period of one year from the date of submission or update.

(2) The WOSB or EDWOSB must update the documents submitted to the contracting officer via the WOSB Program Repository as necessary to ensure they are kept current, accurate and complete. If the WOSB Program Repository is not available, the WOSB or EDWOSB must provide current, accurate and complete documents to the contracting officer for each contract award. Within thirty (30) days of the WOSB Program Repository becoming available, the WOSB or EDWOSB must provide the same documents to the WOSB Program Repository.

§ 127.301 When may a contracting officer accept a concern's self-certification?

(a) *General.*

(1) *Third-Party Certifications.* A contracting officer may accept a concern's self-certification on ORCA as accurate for a specific procurement reserved for award under this Part if the apparent successful offeror WOSB or EDWOSB provided the required documents, which are set forth in § 127.300(d), and there has been no protest or other credible information that calls into question the concern's eligibility as a EDWOSB or WOSB. An example of such credible evidence includes information that the concern was determined by SBA or an SBA-approved certifier not to qualify as an EDWOSB or WOSB.

(2) *Non-Third Party Certification.* A contracting officer may accept a concern's self-certification in ORCA if the apparent successful offeror WOSB or EDWOSB has provided the required documents, which are set forth in § 127.300(e).

(b) *Referral to SBA.* When the contracting officer has information that calls into question the eligibility of a concern as an EDWOSB or WOSB or the concern fails to provide all of the required documents to verify its eligibility, the contracting officer shall refer the concern to SBA for verification of the concern's eligibility by filing an EDWOSB or WOSB status protest pursuant to subpart F of this part. If the apparent successful offeror WOSB or EDWOSB fails to submit any of the required documents, the contracting officer cannot award a WOSB or EDWOSB contract to that business concern.

§ 127.302 What third-party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?

In order for a concern to use a certification by another entity as evidence of its status as a qualified EDWOSB or WOSB in support of its representations in ORCA pursuant to § 127.300(b), the concern must have a current, valid certification from:

(a) SBA as an 8(a) BD Program participant; or

(b) An entity designated as an SBA-approved certifier on SBA's Web site located at *http://www.sba.gov/GC.*

§ 127.303 How will SBA select and identify approved certifiers?

(a) *General.* SBA may enter into written agreements to accept the EDWOSB or WOSB certification of a Federal agency, State government, or national certifying entity if SBA determines that the entity's certification process complies with SBA-approved certification standards and tracks the EDWOSB or WOSB eligibility requirements set forth in subpart B of this part. The written agreement will include a provision authorizing SBA to terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same EDWOSB or WOSB eligibility requirements as set forth in subpart B of this part.

(b) *Required certification standards.* In order for SBA to enter into an agreement to accept the EDWOSB or WOSB certification of a Federal agency, State government, or national certifying entity, the entity must establish the following:

(1) It will render fair and impartial EDWOSB or WOSB eligibility determinations.

(2) It will retain the documents submitted by the approved WOSB or EDWOSB for a period of six (6) years from the date of certification (initial and any recertification) and provide any such documents to SBA in response to a status protest or eligibility examination or agency investigation or audit.

(3) Its certification process will require applicant concerns to pre-register on CCR and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as an EDWOSB or WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under SBA's size standards for its primary industry classification;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(iii) In the case of a concern applying for EDWOSB certification, at least 51 percent owned and controlled by one or more women who are United States citizens and economically disadvantaged.

(4) It will not decline to accept a concern's application for EDWOSB or WOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, or marital or family status.

(c) *List of SBA-approved certifiers.* SBA will maintain a list of approved certifiers, including certifiers from which SBA will accept DOT DBE certifications, on SBA's Internet Web site at *http://www.sba.gov/GC.* Any interested person may also obtain a copy of the list from the local SBA district office or SBA Area Office for Government Contracting.

§ 127.304 How does a concern obtain certification from an approved certifier?

A concern that seeks EDWOSB or WOSB certification from an SBA-approved certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier. Any interested party may obtain such certification information and application by contacting the approved certifier at the address provided on SBA's list of approved certifiers.

§ 127.305 May a concern determined not to qualify as an EDWOSB or WOSB submit a self-certification for a particular EDWOSB or WOSB requirement?

A concern that SBA or an SBA-approved certifier determines does not qualify as an EDWOSB or WOSB may not represent itself to be an EDWOSB or WOSB, as applicable, unless SBA subsequently determines that it is an eligible EDWOSB or WOSB pursuant to the examination procedures under § 127.405, and there have been no material changes in its circumstances affecting its eligibility since SBA's eligibility determination. Any concern determined not to be a qualified EDWOSB or WOSB may request that SBA conduct an examination to determine its EDWOSB or WOSB eligibility at any time once it believes in good faith that it satisfies all of the eligibility requirements to qualify as an EDWOSB or WOSB.

Subpart D—Eligibility Examinations

§ 127.400 What is an eligibility examination?

(a) *Purpose of examination.* Eligibility examinations are investigations that verify the accuracy of any certification made or information provided as part of the certification process (including third-party certifications) or in connection with an EDWOSB or WOSB contract. In addition, eligibility examinations may verify that a concern meets the EDWOSB or WOSB eligibility requirements at the time of the examination. SBA will, in its sole discretion, perform eligibility examinations at any time after a concern self-certifies in CCR or ORCA that it is an EDWOSB or WOSB. SBA may conduct the examination, or parts of the examination, at one or all of the concern's offices.

(b) *Determination on conduct of an examination.* SBA may consider protest allegations set forth in a protest in determining whether to conduct an examination of a concern pursuant to subpart D of this part, notwithstanding a dismissal or denial of a protest pursuant to § 127.604. SBA may also consider information provided to the D/GC by a third-party that questions the eligibility of a WOSB or EDWOSB that has certified its status in ORCA or CCR in determining whether to conduct an eligibility examination.

§ 127.401 What is the difference between an eligibility examination and an EDWOSB or WOSB status protest pursuant to subpart F of this part?

(a) *Eligibility examination.* An eligibility examination is the formal process through which SBA verifies and monitors the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB contract. If SBA is conducting an eligibility examination on a concern that has submitted an offer on a pending EDWOSB or WOSB procurement and SBA has credible information that the concern may not qualify as an EDWOSB or WOSB, then SBA may initiate a protest pursuant to § 127.600 to suspend award of the contract for fifteen (15) business days pending SBA's determination of the concern's eligibility.

(b) *EDWOSB or WOSB protests.* An EDWOSB or WOSB status protest provides a mechanism for challenging or verifying the EDWOSB or WOSB eligibility of a concern in connection with a specific EDWOSB or WOSB requirement. SBA will process EDWOSB or WOSB protests in accordance with the procedures and timeframe set forth in subpart F, and will determine the EDWOSB or WOSB eligibility of the protested concern as of the date the concern represented its EDWOSB or WOSB status as part of its initial offer including price. SBA's protest determination will apply to the specific procurement to which the protest relates and to future procurements.

§ 127.402 How will SBA conduct an examination?

(a) *Notification.* No less than five (5) business days before commencing an examination, SBA will notify the concern in writing that it will conduct an examination to verify the status of the concern as an EDWOSB or WOSB. However, SBA reserves the right to conduct a site visit without prior notification to the concern.

(b) *Request for information.* SBA will request that the concern or contracting officer provide documentation and information related to the concern's EDWOSB or WOSB eligibility. These documents will include those submitted under § 127.300 and any other pertinent documents requested by SBA at the time of eligibility examination to verify eligibility, including but not limited to, documents submitted by a concern in connection with any WOSB or EDWOSB certification. SBA may also request copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation. In addition, EDWOSBs will be required to submit signed copies of SBA Form 413, Personal Financial Statement, the three most recent personal income tax returns (including all schedules and W–2 forms) for the women claiming economic disadvantage and their spouses, unless the individuals and their spouses are legally separated, and SBA Form 4506–T, Request for Tax Transcript Form, available to the public at *http://www.sba.gov/tools/Forms/index.html.* SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information. The WOSB or EDWOSB must retain documentation demonstrating satisfaction of the eligibility requirements for six (6) years from date of self-certification.

§ 127.403 What happens if SBA verifies the concern's eligibility?

If SBA verifies that the concern satisfies the applicable EDWOSB or WOSB eligibility requirements, then the D/GC will send the concern a written decision to that effect and will allow the concern's EDWOSB or WOSB designation in CCR and ORCA to stand and the concern may continue to self-certify its EDWOSB or WOSB status.

§ 127.404 What happens if SBA is unable to verify a concern's eligibility?

(a) *Notice of proposed determination of ineligibility.* If SBA is unable to verify that the concern qualifies as an EDWOSB or WOSB, then the D/GC will send the concern a written notice explaining the reasons SBA believes the concern did not qualify at the time of certification or does not qualify as an EDWOSB or WOSB. The notice will advise the concern that it has fifteen (15) calendar days from the date of the notice to respond.

(b) *SBA determination.* Following the fifteen (15) day response period, the D/GC or designee will consider the reasons of proposed ineligibility and any information the concern submitted in response, and will send the concern a written decision with its findings. The D/GC's decision is effective immediately and remains in full force and effect unless a new examination verifies the concern is an eligible EDWOSB or WOSB or the concern is certified by a third-party certifier.

(1) If SBA determines that the concern does not qualify as an EDWOSB or WOSB, then the D/GC will send the concern a written decision explaining the basis of ineligibility, and will require that the concern remove its EDWOSB or WOSB designation in the CCR and ORCA within five (5) calendar days after the date of the decision.

(2) If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement the concern must immediately inform the officials responsible for the procurement of the adverse determination.

(3) If SBA determines that the concern did not qualify as an EDWOSB or WOSB at the time it submitted its initial offer for an EDWOSB or WOSB requirement, the contracting officer may terminate the contract, not exercise any option, or not award further task or delivery orders.

(4) Whether or not a contracting officer decides to allow or not allow an ineligible concern to fully perform a contract under paragraph (b)(2) of this section, the contracting officer cannot count the award as one to an EDWOSB or WOSB and must update the Federal Procurement Data System–Next Generation (FPDS–NG) and other databases from the date of award accordingly.

(c) A concern that has been found to be ineligible may not represent itself as a WOSB or EDWOSB until it cures the reason for its ineligibility and SBA determines that the concern qualifies as a WOSB or EDWOSB. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in this section.

§ 127.405 What is the process for requesting an eligibility examination?

(a) *General.* A concern may request that SBA conduct an examination to verify its eligibility as an EDWOSB or WOSB at any time after it is determined by SBA not to qualify as an EDWOSB or WOSB, if the concern believes in good faith that it satisfies all of the EDWOSB or WOSB eligibility requirements under subpart B of this part.

(b) *Format.* The request for an examination must be in writing and must specify the particular reasons the concern was determined not to qualify as an EDWOSB or WOSB.

(c) *Submission of request.* The concern must submit its request directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, or by fax to (202) 205–6390, marked "*Attn:* Request for Women-Owned Small Business Eligibility Examination."

(d) *Notice of receipt of request.* SBA will immediately notify the concern in writing once SBA receives its request for an examination. SBA will request that the concern provide documentation and information related to the concern's EDWOSB or WOSB eligibility and may draw an adverse inference if the concern fails to cooperate in providing the requested information.

(e) *Determination of eligibility.* The D/GC will send the concern a written decision finding that it either qualifies or does not qualify as an EDWOSB or WOSB.

(1) If the D/GC determines that the concern does not qualify as an EDWOSB or WOSB, the decision will explain the specific reasons for the adverse determination and advise the concern that it is prohibited from self-certifying as an EDWOSB or WOSB. If the concern self-certifies as an EDWOSB or WOSB notwithstanding SBA's adverse determination, the concern will be subject to the penalties under subpart G of this part.

(2) If the D/GC determines that the concern qualifies as an EDWOSB or WOSB, then the D/GC will send the concern a written decision to that effect and will advise the concern that it may self-certify as an EDWOSB or WOSB, as applicable.

(f) *Effect of decision.* The D/GC's decision is effective immediately and remains in full force and effect unless a new examination verifies the concern is an eligible EDWOSB or WOSB or the concern is certified by a third-party certifier. If the concern has already certified itself as a WOSB or EDWOSB on a pending procurement the concern must immediately inform the officials responsible for the procurement of the adverse determination.

(g) *Determinations of Ineligibility.* A concern that has been found to be ineligible shall not represent itself as a WOSB or EDWOSB until it cures the reason for its ineligibility and SBA determines that the concern qualifies as a WOSB or EDWOSB. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in this section.

Subpart E—Federal Contract Assistance

§ 127.500 In what industries is a contracting officer authorized to restrict competition under this part?

A contracting officer may restrict competition under this part only in those industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented in Federal procurement, as specified in § 127.501.

§ 127.501 How will SBA determine the industries that are eligible for EDWOSB or WOSB requirements?

(a) Based upon its analysis, SBA will designate by NAICS Industry Subsector Code those industries in which WOSBs are underrepresented and substantially underrepresented.

(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.

§ 127.502 How will SBA identify and provide notice of the designated industries?

SBA will post on its Internet Web site at *http://www.sba.gov* a list of NAICS Industry Subsector industries it designates under § 127.501. The list of designated industries also may be obtained from the local SBA district office and may be posted on the General Services Administration Internet Web site.

§ 127.503 When is a contracting officer authorized to restrict competition under this part?

(a) *EDWOSB requirements.* For requirements in industries designated by SBA as underrepresented pursuant to § 127.501, a contracting officer may restrict competition to EDWOSBs if the contracting officer has a reasonable expectation based on market research that:

(1) Two or more EDWOSBs will submit offers for the contract;

(2) The anticipated award price of the contract (including options) does not exceed $5,000,000, in the case of a contract assigned an NAICS code for manufacturing; or $3,000,000, in the case of all other contracts; and

(3) Contract award may be made at a fair and reasonable price.

(b) *WOSB requirements.* For requirements in industries designated by SBA as substantially underrepresented pursuant to § 127.501, a contracting officer may restrict competition to WOSBs if the contracting officer has a reasonable expectation based on market research that:

(1) Two or more WOSBs will submit offers (this includes EDWOSBs, which are also WOSBs);

(2) The anticipated award price of the contract (including options) will not exceed $5,000,000, in the case of a contract assigned an NAICS code for manufacturing, or $3,000,000 in the case of all other contracts; and

(3) Contract award may be made at a fair and reasonable price.

(c) *8(a) BD requirements.* A contracting officer may not restrict competition to eligible EDWOSBs or WOSBs if an 8(a) BD Participant is currently performing the requirement under the 8(a) BD Program or SBA has accepted the requirement for performance under the authority of the 8(a) BD program, unless SBA consented to release the requirement from the 8(a) BD program.

(d) *Contracting Among Small Business Programs.*

(1) *Acquisitions Valued At or Below $100,000/Simplified Acquisition Threshold.* The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $3,000 ($15,000 for acquisitions as described in the Federal Acquisition Regulation (FAR) at 48 CFR 13.201(g)(1)) but valued below $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. This requirement does not preclude a contracting officer from setting aside a contract under the 8(a) BD, HUBZone, Service Disabled Veteran Owned (SDVO), or WOSB programs.

(2) *Acquisitions Valued Above $100,000/Simplified Acquisition Threshold.*

(i) The contracting officer shall set aside any acquisition with an anticipated dollar value exceeding $100,000 ($250,000 for acquisitions described in paragraph (1) of the Simplified Acquisition Threshold definition in the FAR at 48 CFR 2.101) for small business concerns when there is a reasonable expectation that offers will be obtained from at least two small business concerns that are competitive in terms of quality and delivery and award will be made at fair market prices. However, after conducting market research, the contracting officer shall first consider a set-aside or sole source award (if the sole source award is permitted by statute or regulation) under the 8(a) BD, HUBZone, SDVO SBC or WOSB programs before setting aside the requirement as a small business set-aside. There is no order of precedence among the 8(a) BD, HUBZone, SDVO SBC or WOSB programs. The contracting officer must document the contract file with the rationale used to support the specific set-aside, including the type and extent of market research conducted. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's ORCA certifications and associated representations were reviewed.

(ii) SBA believes that Progress in fulfilling the various small business goals, as well as other factors such as the results of market research, programmatic needs specific to the procuring agency, anticipated award price, and the acquisition history, will be considered in making a decision as to which program to use for the acquisition.

(e) *Contract file.* When restricting competition to WOSBs or EDWOSBs in accordance with § 127.503, the contracting officer must document the contract file accordingly, including the type and extent of market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as an underrepresented or, with respect to WOSBs, substantially underrepresented, industry. In addition, the contracting officer must document the contract file showing that the apparent successful offeror's documents and ORCA certifications and associated representations were reviewed.

§ 127.504 What additional requirements must a concern satisfy to submit an offer on an EDWOSB or WOSB requirement?

(a) In order for a concern to submit an offer on a specific EDWOSB or WOSB requirement, the concern must ensure that the appropriate representations and certifications on ORCA are accurate and complete at the time it submits its offer to the contracting officer, including, but not limited to, the fact that:

(1) It is small under the size standard corresponding to the NAICS code assigned to the contract;

(2) It is listed on CCR and ORCA as an EDWOSB or WOSB; and

(3) There has been no material change in any of its circumstances affecting its EDWOSB or WOSB eligibility.

(b) The concern must also meet the applicable percentages of work requirement as set forth in § 125.6 of this chapter (limitations on subcontracting rule).

§ 127.505 May a non-manufacturer submit an offer on an EDWOSB or WOSB requirement for supplies?

An EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b) of this chapter, may submit an offer on an EDWOSB or WOSB contract for supplies, if it meets the requirements under the non-manufacturer rule set forth in § 121.406(b) of this chapter.

§ 127.506 May a joint venture submit an offer on an EDWOSB or WOSB requirement?

A joint venture may submit an offer on an EDWOSB or WOSB contract if the joint venture meets all of the following requirements:

(a) Except as provided in § 121.103(h)(3) of this chapter, the combined annual receipts or employees of the concerns entering into the joint venture must meet the applicable size standard corresponding to the NAICS code assigned to the contract;

(b) The EDWOSB or WOSB participant of the joint venture must be designated on the CCR and the ORCA as an EDWOSB or WOSB;

(c) The parties to the joint venture must enter into a written joint venture agreement. The joint venture agreement must contain a provision:

(1) Setting forth the purpose of the joint venture.

(2) Designating an EDWOSB or WOSB as the managing venturer of the joint venture, and an employee of the managing venturer as the project manager responsible for the performance of the contract;

(3) Stating that not less than 51 percent of the net profits earned by the joint venture will be distributed to the EDWOSB or WOSB;

(4) Specifying the responsibilities of the parties with regard to contract performance, sources of labor, and negotiation of the EDWOSB or WOSB contract; and

(5) Requiring the final original records be retained by the managing venturer upon completion of the EDWOSB or WOSB contract performed by the joint venture.

(d) The joint venture must perform the applicable percentage of work required of the EDWOSB or WOSB offerors in accordance with § 125.6 of this chapter (limitations on subcontracting rule);

(e) The procuring activity will execute the contract in the name of the EDWOSB or WOSB or joint venture.

(f) The WOSB or EDWOSB must provide a copy of the joint venture agreement to the contracting officer.

§ 127.507 Are there EDWOSB and WOSB contracting opportunities at or below the simplified acquisition threshold?

If the requirement is at or below the simplified acquisition threshold, the contracting officer may set-aside the requirement as set forth in § 127.503.

§ 127.508 May SBA appeal a contracting officer's decision not to reserve a procurement for award as a WOSB Program contract?

The Administrator may appeal a contracting officer's decision not to make a particular requirement available for award under the WOSB Program.

§ 127.509 What is the process for such an appeal?

(a) *Notice of appeal.* When the contacting officer rejects a recommendation by SBA's Procurement Center Representative to make a requirement available for the WOSB Program, he or she must notify the Procurement Center Representative as soon as practicable. If the Administrator

intends to appeal the decision, SBA must notify the contracting officer no later than five (5) business days after receiving notice of the contracting officer's decision.

(b) *Suspension of action.* Upon receipt of notice of SBA's intent to appeal, the contracting officer must suspend further action regarding the procurement until the Secretary of the department or head of the agency issues a written decision on the appeal, unless the Secretary of the department or head of the agency makes a written determination that urgent and compelling circumstances which significantly affect the interests of the United States compel award of the contract.

(c) *Deadline for appeal.* Within fifteen (15) business days of SBA's notification to the CO, SBA must file its formal appeal with the Secretary of the department or head of the agency, or the appeal will be deemed withdrawn.

(d) *Decision.* The Secretary of the department or head of the agency must specify in writing the reasons for a denial of an appeal brought under this section.

Subpart F—Protests

§ 127.600 Who may protest the status of a concern as an EDWOSB or WOSB?

An interested party may protest the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB contract. 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 an examination pursuant to subpart D of this part.

§ 127.601 May a protest challenging the size and status of a concern as an EDWOSB or WOSB be filed together?

An interested party seeking to protest both the size and the EDWOSB or WOSB status of an apparent successful offeror on an EDWOSB or WOSB requirement must file two separate protests, one size protest pursuant to part 121 of this chapter and one EDWOSB or WOSB status protest pursuant to this subpart. An interested party seeking to protest only the size of an apparent successful EDWOSB or WOSB offeror must file a size protest to the contracting officer pursuant to part 121 of this chapter.

§ 127.602 What are the grounds for filing an EDWOSB or WOSB status protest?

SBA will consider a protest challenging the status of a concern as an EDWOSB or WOSB if the protest presents sufficient credible evidence to show that the concern may not be owned and controlled by one or more women who are United States citizens and, if the protest is in connection with an EDWOSB contract, that the concern is not at least 51 percent owned and controlled by one or more women who are economically disadvantaged. In addition, SBA will consider a protest challenging the status of a concern as an EDWOSB or WOSB if the contracting officer has protested because the WOSB or EDWOSB apparent successful offeror has failed to provide all of the required documents, as set forth in § 127.300.

§ 127.603 What are the requirements for filing an EDWOSB or WOSB protest?

(a) *Format.* Protests must be in writing and must specify all the grounds upon which the protest is based. A protest merely asserting that the protested concern is not an eligible EDWOSB or WOSB, without setting forth specific facts or allegations, is insufficient.

(b) *Filing.* Protestors may deliver their written protests in person, by facsimile, by express delivery service, e-mail, or by U.S. mail (received by the applicable date) to the following:

(1) To the contracting officer, if the protestor is an offeror for the specific contract; or

(2) To the D/GC, if the protest is initiated by the contracting officer or SBA. IF SBA initiates a protest, the D/GC will notify the contracting officer of such protest.

(c) *Timeliness.*

(1) For negotiated acquisitions, a protest from an interested party must be received by the contracting officer prior to the close of business on the fifth business day after notification by the contracting officer of the apparent successful offeror or notification of award.

(2) For sealed bid acquisitions, a protest from an interested party must be received by close of business on the fifth business day after bid opening.

(3) Any protest received after the time limit is untimely, unless it is from SBA or the contracting officer. A contracting officer or SBA may file an EDWOSB or WOSB protest at any time after bid opening or notification of intended awardee, whichever applies.

(4) Any protest received prior to bid opening or notification of intended awardee, whichever applies, is premature.

(5) A timely filed protest applies to the procurement in question even if filed after award.

(d) *Referral to SBA.* The contracting officer must forward to SBA any protest received, notwithstanding whether he or she believes it is premature, sufficiently specific, or timely. The contracting officer must send all protests, along with a referral letter and documents, directly to the Director for Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416, or by fax to (202) 205–6390, Attn: Women-Owned Small Business Status Protest. The contracting officer's referral letter must include information pertaining to the solicitation that may be necessary for SBA to determine timeliness and standing, including: the solicitation number; the name, address, telephone number and facsimile number of the contracting officer; whether the protestor submitted an offer; whether the protested concern was the apparent successful offeror; when the protested concern submitted its offer; whether the procurement was conducted using sealed bid or negotiated procedures; the bid opening date, if applicable; when the protest was submitted to the contracting officer; when the protestor received notification about the apparent successful offeror, if applicable; and whether a contract has been awarded. In addition, the contracting officer must send copies of any documents provided to the contracting officer pursuant to § 127.300 (if the repository is unavailable). The D/GC or designee will decide the merits of EDWOSB or WOSB status protests.

§ 127.604 How will SBA process an EDWOSB or WOSB status protest?

(a) *Notice of receipt of protest.* Upon receipt of the protest, SBA will notify the contracting officer and the protestor of the date SBA received the protest and whether SBA will process the protest or dismiss it under paragraph (b) of this section. The contracting officer may award the contract after receipt of a protest if the contracting officer determines in writing that an award must be made to prevent significant harm to the public interest.

(b) *Dismissal of protest.* If SBA determines that the protest is premature, untimely, nonspecific, or is based on nonprotestable allegations, SBA will dismiss the protest and will send the contracting officer and the protestor a notice of dismissal, citing the reason(s) for the dismissal. Notwithstanding SBA's dismissal of the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part or submit a protest itself.

(c) *Notice to protested concern.* If SBA determines that the protest is timely, sufficiently specific and is based upon protestable allegations, SBA will:

(1) Notify the protested concern of the protest and request information and documents responding to the protest within five (5) business days from the date of the notice. These documents will include those that verify the eligibility of the concern, respond to the protest allegations, and copies of proposals or bids submitted in response to an EDWOSB or WOSB requirement. In addition, EDWOSBs will be required to submit signed copies of SBA Form 413, Personal Financial Statement, the two most recent personal income tax returns (including all schedules and W–2 forms) for the women claiming economic disadvantage and their spouses, unless the individuals and their spouses are legally separated, and SBA Form 4506–T, Request for Tax Transcript Form. SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information and documents; and

(2) Forward a copy of the protest to the protested concern.

(d) *Time period for determination.* SBA will determine the EDWOSB or WOSB status of the protested concern within fifteen (15) business days after receipt of the protest, or within any extension of that time that the contracting officer may grant SBA. If SBA does not issue its determination within the fifteen (15) day period, the contracting officer must contact SBA to ascertain when SBA estimates that it will issue its decision. After contacting SBA, the contracting officer may 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 it determination will harm the public interest. The determination must be included in the contract file and a written copy sent to the D/GC.

(e) *Notification of determination.* SBA will notify the contracting officer, the protestor, and the protested concern in writing of its determination. If SBA sustains the protest, SBA will issue a decision explaining the basis of its determination and requiring that the concern remove its designation on the CCR and ORCA as an EDWOSB or WOSB, as appropriate. Regardless of a decision not to sustain the protest, SBA may, in its sole discretion, consider the protest allegations in determining whether to conduct an examination of the protested concern pursuant to subpart D of this part.

(f) *Effect of determination.* SBA's determination is effective immediately and is final unless overturned by SBA's Office of Hearings and Appeals (OHA) on appeal pursuant to § 127.605.

(1) A contracting officer may award the contract to a protested concern after the D/GC either has determined that the protested concern is an eligible WOSB or EDWOSB or has dismissed all protests against it. If OHA subsequently overturns the D/GC's determination or dismissal, the contracting officer may apply the OHA decision to the procurement in question.

(2) A contracting officer shall not award the contract to a protested concern that the D/GC has determined is not an EDWOSB or WOSB for the procurement in question.

(i) Where the contracting officer has made a written determination under paragraph (d) of this section that there is an immediate need to award the contract and waiting until SBA makes its determination will harm the public interest, the contracting officer receives the D/GC's determination after contract award finding the business concern does not qualify as EDWOSB or WOSB, and no OHA appeal has been filed, the contracting officer may terminate the award, and shall not exercise any options, or not award further task or delivery orders. If no such written determination by the contracting officer has been made, the contracting officer receives the D/GC's determination after contract award finding the business concern does not qualify as an EDWOSB or WOSB, and no OHA appeal has been filed, the contracting officer shall terminate the award.

(ii) If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered.

(iii) If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders.

(3) The contracting officer must update the Federal Procurement Data System and other procurement reporting databases to reflect the final agency decision (the D/GC's decision if no appeal is filed or OHA's decision).

(4) A concern that has been found to be ineligible may not submit an offer as a WOSB or EDWOSB on another procurement until it cures the reason(s) for its ineligibility and SBA issues a decision to this effect. A concern that believes in good faith that it has cured the reason(s) for its ineligibility may request an examination under the procedures set forth in § 127.405.

§ 127.605 What are the procedures for appealing an EDWOSB or WOSB status protest decision?

The protested concern, the protestor, or the contracting officer may file an appeal of a WOSB or EDWOSB status protest determination with SBA's Office of Hearings and Appeals (OHA) in accordance with part 134 of this chapter.

Subpart G—Penalties

§ 127.700 What penalties may be imposed under this part?

Persons or concerns that falsely self-certify, provide false information to the Government, or otherwise misrepresent a concern's status as an EDWOSB or WOSB for purposes of receiving Federal contract assistance under this part are subject to:

(a) Suspension and Debarment pursuant to the procedures set forth in the Federal Acquisition Regulations, 48 CFR 9.4;

(b) Administrative and civil remedies prescribed by the False Claims Act, 31 U.S.C. 3729–3733 and under the Program Fraud Civil Remedies Act, 31 U.S.C. 3801–3812;

(c) Administrative and criminal remedies as described at Sections 16(a) and (d) of the Small Business Act, 15 U.S.C. 645(a) and (d), as amended;

(d) Criminal penalties under 18 U.S.C. 1001; and

(e) Any other penalties as may be available under law.

PART 134—RULES OF PROCEDURE GOVERNING CASES BEFORE THE OFFICE OF HEARINGS AND APPEALS

■ 14. The authority citation for part 134 continues to read as follows:

Authority: 5 U.S.C. 504, 15 U.S.C. 632, 634(b)(6), 637(a), 637(m), 648(l), 656(i) and 687(c); E.O. 12549, 51 FR 6370, 3 CFR, 1986 Comp., p. 189.

Subpart A—General Rules

■ 15. In § 134.102, paragraph (s) is revised to read as follows:

§ 134.102 Jurisdiction of OHA.

* * * * *

(s) Appeals from Women-Owned Small Business or Economically-Disadvantaged Women-Owned Small Business protest determinations under part 127 of this chapter;

* * * * *

Subpart E—Rules of Practice for Appeals from Service-Disabled Veteran Owned Small Business Concern Protests

■ 16. In § 134.515, paragraph (b) is revised to read as follows:

§ 134.515 What are the effects of the Judge's decision?

* * * * *

(b) The Judge may reconsider an appeal decision within twenty (20) calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

* * * * *

■ 17. Revise Subpart G to read as follows:

Subpart G—Rules of Practice for Appeals from Women-Owned Small Business Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests

Sec.

134.701 What is the scope of the rules in this subpart G?
134.702 Who may appeal?
134.703 When must a person file an appeal from an WOSB or EDWOSB protest determination?
134.704 What are the effects of the appeal on the procurement at issue?
134.705 What are the requirements for an appeal petition?
134.706 What are the service and filing requirements?
134.707 When does the D/GC transmit the protest file and to whom?
134.708 What is the standard of review?
134.709 When will a Judge dismiss an appeal?
134.710 Who can file a response to an appeal petition and when must such a response be filed?
134.711 Will the Judge permit discovery and oral hearings?
134.712 What are the limitations on new evidence?
134.713 When is the record closed?
134.714 When must the Judge issue his or her decision?
134.715 Can a Judge reconsider his decision?

Subpart G—Rules of Practice for Appeals from Women-Owned Small Business Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB) Protests

§ 134.701 What is the scope of the rules in this subpart G?

(a) The rules of practice in this subpart G apply to all appeals to OHA from formal protest determinations made by the Director for Government Contracting (D/GC) in connection with a Women-Owned Small Business Concern (WOSB) or Economically Disadvantaged WOSB Concern (EDWOSB) protest. Appeals under this subpart include issues related to whether the concern is owned and controlled by one or more women who are United States citizens and, if the appeal is in connection with an EDWOSB contract, that the concern is at least 51 percent owned and controlled by one or more women who are economically disadvantaged. This includes appeals from determinations by the D/GC that the protest was premature, untimely, nonspecific, or not based upon protestable allegations.

(b) Except where inconsistent with this subpart, the provisions of subparts A and B of this part apply to appeals listed in paragraph (a) of this section.

(c) Appeals relating to formal size determinations and NAICS Code designations are governed by subpart C of this part.

§ 134.702 Who may appeal?

Appeals from WOSB or EDWOSB protest determinations may be filed with OHA by the protested concern, the protestor, or the contracting officer responsible for the procurement affected by the protest determination.

§ 134.703 When must a person file an appeal from an WOSB or EDWOSB protest determination?

Appeals from a WOSB or EDWOSB protest determination must be commenced by filing and serving an appeal petition within ten (10) business days after the appellant receives the WOSB or EDWOSB protest determination (see § 134.204 for filing and service requirements). An untimely appeal must be dismissed.

§ 134.704 What are the effects of the appeal on the procurement at issue?

Appellate decisions apply to the procurement in question. If a timely OHA appeal has been filed after contract award, the contracting officer must consider whether performance can be suspended until an appellate decision is rendered. If OHA affirms the D/GC's determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract, not exercise the next option or not award further task or delivery orders. If OHA overturns the D/GC's dismissal or determination that the concern is an eligible EDWOSB or WOSB, the contracting officer may apply the OHA decision to the procurement in question.

§ 134.705 What are the requirements for an appeal petition?

(a) *Format.* There is no required format for an appeal petition. However, it must include the following information:

(1) The solicitation or contract number, and the name, address, and telephone number of the contracting officer;

(2) A statement that the petitioner is appealing a WOSB or EDWOSB protest determination issued by the D/GC and the date that the petitioner received it;

(3) A full and specific statement as to why the WOSB or EDWOSB protest determination is alleged to be based on a clear error of fact or law, together with an argument supporting such allegation; and

(4) The name, address, telephone number, facsimile number, and signature of the appellant or its attorney.

(b) *Service of appeal.* The appellant must serve the appeal petition upon each of the following:

(1) The D/GC at U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile (202) 205–6390;

(2) The contracting officer responsible for the procurement affected by a WOSB or EDWOSB determination;

(3) The protested concern (the business concern whose WOSB or EDWOSB status is at issue) or the protester; and

(4) SBA's Office of General Counsel, Associate General Counsel for Procurement Law, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416, facsimile number (202) 205–6873.

(c) *Certificate of Service.* The appellant must attach to the appeal petition a signed certificate of service meeting the requirements of § 134.204(d).

§ 134.706 What are the service and filing requirements?

The provisions of § 134.204 apply to the service and filing of all pleadings and other submissions permitted under this subpart unless otherwise indicated in this subpart.

§ 134.707 When does the D/GC transmit the protest file and to whom?

Upon receipt of an appeal petition, the D/GC will send to OHA a copy of the protest file relating to that determination. The D/GC will certify and authenticate that the protest file, to the best of his or her knowledge, is a true and correct copy of the protest file.

§ 134.708 What is the standard of review?

The standard of review for an appeal of a WOSB or EDWOSB protest determination is whether the D/GC's determination was based on clear error of fact or law.

§ 134.709 When will a Judge dismiss an appeal?

(a) The presiding Judge must dismiss the appeal if the appeal is untimely filed under § 134.703.

(b) The matter has been decided or is the subject of adjudication before a court of competent jurisdiction over such matters. However, once an appeal has been filed, initiation of litigation of the matter in a court of competent jurisdiction will not preclude the Judge from rendering a final decision on the matter.

§ 134.710 Who can file a response to an appeal petition and when must such a response be filed?

Although not required, any person served with an appeal petition may file and serve a response supporting or opposing the appeal if he or she wishes to do so. If a person decides to file a response, the response must be filed within seven (7) business days after service of the appeal petition. The response should present argument.

§ 134.711 Will the Judge permit discovery and oral hearings?

Discovery will not be permitted, and oral hearings will not be held.

§ 134.712 What are the limitations on new evidence?

The Judge may not admit evidence beyond the written protest file nor permit any form of discovery. All appeals under this subpart will be decided solely on a review of the evidence in the written protest file, arguments made in the appeal petition, and response(s) filed thereto.

§ 134.713 When is the record closed?

The record will close when the time to file a response to an appeal petition expires pursuant to § 134.710.

§ 134.714 When must the Judge issue his or her decision?

The Judge shall issue a decision, insofar as practicable, within fifteen (15) business days after close of the record.

§ 134.715 Can a Judge reconsider his decision?

(a) The Judge may reconsider an appeal decision within twenty (20) calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, may request reconsideration by filing with the Judge and serving a petition for reconsideration on all the parties to the appeal within twenty (20) calendar days after service of the written decision. The request for reconsideration must clearly show an error of fact or law material to the decision. The Judge may also reconsider a decision on his or her own initiative.

(b) The Judge may remand a proceeding to the D/GC for a new WOSB or EDWOSB determination if the D/GC fails to address issues of decisional significance sufficiently, does not address all the relevant evidence, or does not identify specifically the evidence upon which it relied. Once remanded, OHA no longer has jurisdiction over the matter, unless a new appeal is filed as a result of the new WOSB or EDWOSB determination.

Dated: October 1, 2010.

Karen Gordon Mills,

Administrator.

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