

ALERT

FAR Councils Issue Interim Rule Implementing the Women-Owned Small Business Program

April 4, 2011

On April 1, 2011, the Federal Acquisition Regulation (FAR) Councils issued an interim rule amending the FAR, adding subpart 19.15, to address the Small Business Administration's (SBA) regulations regarding the Women-Owned Small Business (WOSB) Program. See 76 Fed. Reg. 18304 (Apr. 1, 2011). The new subpart defines what constitutes a WOSB and an economically disadvantaged women owned small business (EDWOSB), details the requirements for setting aside acquisitions to WOSBs and EDWOSBs, and establishes procedures for protests and self-certification under the program.

The interim rule provides definitions for both WOSB and EDWOSB concerns. To qualify as a WOSB concern under the program, the concern must be a small business, as defined in 13 CFR Part 121 within its primary industry classification, and be at least 51 percent owned by, and the management and daily operations controlled by, one or more women who are citizens of the United States. To qualify as an EDWOSB, the concern must be a small business as defined in 13 CFR Part 121 within its primary industry classification, and be at least 51 percent owned, and the management and daily operations controlled by, one or more women who is economically disadvantaged. A woman is economically disadvantaged if she can demonstrate certain income, asset, and other limitations established in SBA regulations.

Under the new rule, contracting officers will be permitted to set aside acquisitions exceeding the micro-purchase threshold for WOSB or EDWOSB concerns in those NAICS codes in which the SBA has determined that women-owned small business concerns are underrepresented or substantially underrepresented in Federal procurement, as follows:

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- For requirements in NAICS codes designated by the SBA as underrepresented, a contracting officer may restrict competition to EDWOSB concerns if the contracting officer has a reasonable expectation that two or more EDWOSB concerns will submit offers, the anticipated contract price will not exceed \$6.5 million (for manufacturing contracts) or \$4 million (for all other contracts), and the contract award will be made a fair and reasonable price.
- For requirements in NAICS codes designed as substantially underrepresented, a contracting officer may restrict competition to WOSB concerns (including EDWOSBs) if the contracting officer has a reasonable expectation that two or more WOSB concerns (including EDWOSBs) will submit offers, the anticipated contract price will not exceed \$6.5 million (for manufacturing contracts) or \$4 million (for all other contracts), and the contract award will be made a fair and reasonable price.

The rule creates some ambiguity regarding the order of precedence among the WOSB Program and the other small business programs. In a recently issued interim rule, the FAR Councils created a new FAR section 19.203 that, among other things, clarified that there is no order of precedence among the 8(a), HUBZone and Service-Disabled Veteran-Owned Small Business (SDVOSB) Programs. 76 Fed Reg. 14566 (Mar. 16, 2011). The new parity rule also mandates that contracting officers first consider an acquisition for these three programs before using a small business set-aside pursuant to FAR 19.502-2(b). The new rule implementing the WOSB Program revises section 19.203 to clarify that there is no order of precedence among the 8(a), HUBZone, SDVOSB *and* WOSB Programs, but does not identify the WOSB Program as one of the three programs that contracting officers must first consider before setting an acquisition aside for small businesses generally. The WOSB rule therefore creates some uncertainty regarding the circumstances under which a contracting officer may properly set-aside an acquisition for competition among WOSB and/or EDWOSB concerns.

The interim rule allows an offeror, the contracting officer, or the SBA to protest an apparently successful offeror's status as an WOSB or EDWOSB. The protest will be subject to the same procedures as other set-asides, as governed by 31 CFR Subpart 19.3. The interim rule allows women-owned businesses to self-certify as WOSBs or to be certified by third-party certifiers, including government entities and private certification groups. WOSBs that self-certify are required to submit certification documents on the ORCA website and provide documents evidencing status to the WOSB Program Repository maintained by the SBA.

Wiley Rein will continue to evaluate the interim rule and monitor any developments.

*Not admitted to the District of Columbia Bar, supervised by principals of the firm.