

**SMALL BUSINESS ADMINISTRATION****13 CFR Parts 121, 127, and 134**

RIN 3245-AG06

**Women-Owned Small Business Federal Contract Program****AGENCY:** Small Business Administration.**ACTION:** Notice of proposed rulemaking; withdrawal of proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA) proposes to amend its regulations governing small business contracting procedures. This Proposed Rule would amend part 127, that was promulgated in a Final Rule on October 1, 2008, and entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," RIN 3245-AF40. This Proposed Rule would implement procedures authorized by the Small Business Act (Act) (Pub. L. 85-536, as amended) to help ensure a level playing field on which Women-Owned Small Businesses (WOSBs) can compete for Federal contracting opportunities. SBA proposes changes to part 127 that include eliminating the requirement for an agency-by-agency determination of discrimination, adopting both "numbers" and "dollars" measures of underrepresentation, and using the Fiscal Year 2006 Central Contractor Registration (CCR) database as the data source for determining eligible industries under the WOSB Program. This Proposed Rule thus identifies the eligible industries under the Program as those industries in which WOSBs are underrepresented or substantially underrepresented using either the numbers or the dollars approach. This Proposed Rule seeks to retain, for the most part, parts 121 and 134 of the Final Rule published on October 1, 2008, titled "The Women-Owned Small Business Federal Contract Assistance Procedures," RIN 3245-AF40; these portions of the rule govern various implementation procedures of the Program, as more fully discussed below.

In addition, SBA is withdrawing its proposed rule entitled "The Women-Owned Small Business Federal Contract Assistance Procedures," which was published on October 1, 2008, in the **Federal Register** together with a request for comments on two data sets used to determine the eligible industries under the WOSB Program.

**DATES:**

*Date of Withdrawal:* The proposed rule published on October 1, 2008, in the **Federal Register** at 73 FR 57014 is withdrawn as of March 4, 2010.

*Comment Date:* Submit comments on or before May 3, 2010.

**ADDRESSES:** You may submit comments, identified by 3245-AG06, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* 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.

All comments will be posted on <http://www.regulations.gov>. If you wish to submit confidential business information (CBI) as defined in the User Notice at <http://www.regulations.gov>, please submit the comments to Dean Koppel and highlight the information that you consider to be CBI and explain why you believe this information should be held confidential. SBA will make a final determination as to whether the comments will be published or not.

**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 addressed the difficulties women-owned businesses have endured in competing for Federal procurement contracts by adding 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) for Federal contracts in certain industries. The law responds to decades of sex discrimination that have inhibited the ability of women to form firms and then to compete equally for contracts. By providing small, women-owned businesses an opportunity to gain a critical foothold in the Federal procurement market, the statute helps WOSBs overcome the economic barriers they have faced and helps ensure that the Federal government does not perpetuate the effects of economic sex discrimination.

In enacting this statute, Congress acted against a backdrop of discrimination against women that has been examined in Congressional hearings over many years and which persists to this day, as well as a history

of largely unsuccessful Federal attempts to remedy that discrimination and provide a level playing field for WOSBs to compete for Federal contracts. Women-owned firms have been persistently underrepresented in Federal procurement contracting. For example, in 1979, when Executive Order 12138

charged Federal agencies with responsibility for providing procurement assistance to women-owned businesses, WOSBs received only 0.2% of all Federal procurements.

LaLa Wu and Kate Collier, *The National Plan of Action: Then and Now*, Bella Abzug Leadership Institute, Nov. 2007 (hereinafter referred to as *National Plan of Action*), publicly available at [http://www.abzuginstitute.org/NationalPlanofAction\\_ThenandNow-Final.pdf](http://www.abzuginstitute.org/NationalPlanofAction_ThenandNow-Final.pdf).<sup>1</sup> In the nine succeeding years (through 1989), the percentage of WOSB Federal procurements grew to 1 percent. *See id.* In later years,

[a]lthough the growth rate in the number of women-owned small businesses (WOSBs) was almost twice that of all firms between 1997 and 2002, WOSBs [did] not experience[] a proportional increase in their share of Federal contracting dollars.

*See id.*

Evidence presented to Congress shows that women-owned firms continue to be significantly underrepresented in Federal contracting.<sup>2</sup> In 2002, for example, there

<sup>1</sup> In 1988, the Women's Business Ownership Act, Public Law 100-588 (Oct. 25, 1988), "was enacted to assist women in starting, managing and growing small businesses." *Ibid.* The National Plan of Action reported that "while this program has assisted thousands of women in obtaining business financing and information, it has had less success" at increasing the percentage of the total value of all prime contract and subcontract awards going to WOSBs or increasing the WOSB share in the economy because WOSBs have not experienced a proportional increase in their share of Federal contracting dollars. Subsequently, in 1994, section 7106 of the Federal Acquisition Streamlining Act (FASA), Public Law 103-355, "amended the Small Business Act by establishing a target that was aimed at increasing opportunities for women to compete for Federal contracts." *Id.* "FASA, among other things, established a government-wide goal for participation by WOSBs in procurement contracts of not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year." *Ibid.* That goal has not been reached to date.

<sup>2</sup> This underrepresentation is mirrored by disparities that women-owned firms face in the marketplace more generally. *See, e.g.*, Opportunities and Challenges for Women Entrepreneurs on the 20th Anniversary of the Women's Business Ownership Act: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 3 (2008) (available at <http://www.access.gpo.gov/congress/Senate/Senate17ch110.html>); Expanding Opportunities for Women Entrepreneurs: The Future of Women's Small Business Programs: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 2 (2007) (statement of the Hon. John F. Kerry, Chairman and Sen. from

were 6.5 million women-owned firms in the United States, which accounted for 28.2 percent of all non-farm businesses in the United States. See SBA Office of Advocacy, *Women in Business: A Demographic Review of Women's Business Ownership, 2007* (available at <http://www.sba.gov/advo/research/rs280tot.pdf>). Despite this presence, however, the share of women-owned small business prime contract awards (in dollar terms) was 2.9 percent in FY 2002 and 3.39 percent in FY 2008. See Federal Procurement Data System/Next Generation (available at [http://www.fpds.gov/fpdsng\\_cms/](http://www.fpds.gov/fpdsng_cms/)).<sup>3</sup>

Substantial academic literature and evidence presented to Congress demonstrates that women face discrimination both in the ability to form and grow their businesses and in the treatment they receive in contracting markets.<sup>4</sup>

Massachusetts) (stating that "women owned small businesses still continue to have markedly lower revenue and fewer employees than firms, even comparable ones, owned by men") (available at <http://sbc.senate.gov/hearings/20070920.cfm>); *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 8 (2008)* (available at <http://sbc.senate.gov/hearings/20080319.cfm>).

<sup>3</sup> See also Small Business Administration, FY 2008 Official Goaling Report; Small Business Administration (available at <http://www.sba.gov/aboutsba/sbaprograms/goals/index.html> (last visited February 12, 2010)).

<sup>4</sup> See, e.g., *Women in Business: Leveling the Playing Field: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 8 (2008)* (discussing challenges facing women business owners) (available at <http://sbc.senate.gov/hearings/20080319.cfm>); The Department of Transportation's Disadvantaged Business Enterprises Program: Hearing Before the H. Comm. on Transp. and Infrastructure, 111th Cong. 299 (2009) (statement of Joann Payne, President, Women First National Legislative Committee) (describing sex discrimination in business lending) (available at <http://transportation.house.gov/hearings/hearingdetail.aspx?NewsID=859>); *Opportunities and Challenges for Women Entrepreneurs: Roundtable Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. 25 (2008)* (detailing, among other things, sex discrimination in lending, and women's exclusion from informal business networks that are a crucial source of business opportunities) (available at <http://sbc.senate.gov/hearings/20080909.cfm>); National Economic Research Associates, Inc., *Race, Sex and Business Enterprise: Evidence from Memphis, Tennessee 100 (2008)* (explaining that discrimination in the labor force reduces the future availability of women-owned businesses by limiting women's ability to obtain the kinds of employment experiences that are most likely to lead to entrepreneurial opportunities) (The Minority Business Development Agency: *Enhancing the Prospects for Success: Hearing Before the H. Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 111th Cong. (2009)* available at [http://energycommerce.house.gov/index.php?option=com\\_content&view=article&id=1772:the-minority-business-development-agency-enhancing-the-prospects-for-success&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70](http://energycommerce.house.gov/index.php?option=com_content&view=article&id=1772:the-minority-business-development-agency-enhancing-the-prospects-for-success&catid=129:subcommittee-on-commerce-trade-and-consumer-protection&Itemid=70)).

The following sections explain the operation of the Program.

## II. Section 8(m): The WOSB Program Legislation

Congress established the WOSB Program as a tool to enable contracting officers to identify and establish a sheltered market for competition among WOSBs 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&>). Consistent with these goals, section 8(m) of the Act authorizes contracting officers to restrict competition for "any contract for the procurement of goods or services by the Federal Government" to WOSBs under certain enumerated circumstances. 15 U.S.C. 637(m)(2). To be deemed a WOSB for purposes of section 8(m), a firm must be a "small business concern owned and controlled by women." As defined in section 3(n) of the Act, this means that at least 51 percent of the concern must be owned by one or more women, and that the management and daily business operations of the concern must be controlled by one or more women. 15 U.S.C. 632(n).

Section 8(m) establishes six criteria that must be satisfied in order for a contracting officer to reserve an acquisition for WOSBs:

- First, each eligible concern must be not less than 51 percent owned by one or more women who are "economically disadvantaged." However, SBA may waive this requirement of economic disadvantage if it determines that the concern is in an industry in which WOSBs are "substantially underrepresented."
- Second, the contracting officer must have a reasonable expectation that two or more WOSBs will submit offers for the contract.
- Third, 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 other contracts.
- Fourth, in the estimation of the contracting officer, the contract must be able to be awarded at a fair and reasonable price.
- Fifth, each competing concern must be duly certified by a Federal agency, a State government, or an SBA-approved entity as a WOSB, or must certify to the contracting officer and provide adequate documentation that it is a WOSB. The statute imposes penalties for a concern's misrepresentation of its status as a WOSB.

• Sixth, paragraph (2)(C) of the Act provides that the contract for which competition is restricted must be for the procurement of goods or services with respect to an industry identified by SBA "pursuant to paragraph (3)." However, the reference to paragraph (3) of the Act appears to be a drafting error that resulted from a floor amendment, and the intent of the provision appears to be to identify eligible contracts as those concerning an industry identified pursuant to paragraph (4).<sup>5</sup> Thus, accounting for the apparent drafting error, the sixth condition for the restriction of Federal procurement contracts to WOSBs is that the contract be for the procurement of goods or

<sup>5</sup> Paragraph (3) as enacted permits SBA to waive the "economically disadvantaged" requirement for industries in which SBA has determined that WOSBs are substantially underrepresented. However, at the time that the WOSB bill was reported out of the House Committee on Small Business, then-paragraph (3) (eventually enacted as paragraph (4)) required the Administrator to conduct a study to identify industries in which WOSBs are underrepresented with respect to Federal procurement contracting. Thus, the House Committee viewed paragraph (2)(C) as requiring that contracts eligible for the 8(m) program be contracts "for the procurement of goods and services in an industry identified by the Administrator of the Small Business Administration as one in which small business concerns owned and controlled by women are historically underrepresented." H.R. Rep. No. 106-879, at 4 (2000). There is nothing in the legislative history that indicates that Congress intended a different result.

In accord with the legislative history, and to give effect to each provision of the statute, SBA has concluded that paragraph (2)(C)'s reference to paragraph (3) is better understood as a reference to paragraph (4). Paragraph (2)(C) authorizes restricted competition with respect to industries "identified" by SBA pursuant to the referenced paragraph. Paragraph (4) uses the term "identify," calling for SBA to conduct a study to "identify" industries in which WOSBs are underrepresented with respect to Federal procurement contracting. Paragraph (3), in contrast, does not use the term "identify."

Understanding the reference to paragraph (3) as a reference to paragraph (4) also preserves the independent effect of each paragraph in section 8(m), including paragraphs (2)(A) and (3). If, by contrast, paragraph (2)(C) were applied literally, it would generate several anomalies. For example, it would undercut paragraph (2)(A)'s requirement of economic disadvantage (the first condition discussed above), because restricted competition would apply only to industries for which SBA had waived the economic disadvantage requirement. Further, a literal reading of paragraph (2)(C) would turn paragraph (3), which is clearly phrased as a waiver provision, into an affirmative condition for restricted competition, authorizing restricted competition *only* in industries in which WOSBs are "substantially underrepresented." In addition, the literal application of paragraph (2)(C) would undercut paragraph (4), which requires SBA to conduct a study to identify industries in which WOSBs are "underrepresented" with respect to Federal procurement contracting. If restricted competition were permitted only in industries in which SBA had determined WOSBs to be "substantially underrepresented," there would be no need for SBA to conduct a study to determine underrepresentation (as opposed to substantial underrepresentation).

services with respect to an industry identified by SBA pursuant to the study mandated by paragraph (4) as one in which WOSBs are underrepresented with respect to Federal procurement contracting.

Based on its understanding of the meaning and intent of section 8(m) read as a whole, SBA interprets the statute to authorize restricted competition for industries in which it has determined WOSBs to be underrepresented or substantially underrepresented in Federal procurements, provided the other conditions of section 8(m) are met. This Proposed Rule is drafted accordingly.

### III. The RAND Report

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](http://www.RAND.org/pubs/technical_reports/TR442).

As the RAND Report explains more fully, RAND measured WOSB representation in each industry code through a “disparity ratio,” which is a measure comparing the utilization of WOSBs in Federal contracting in a particular code to their availability for such contracts. The disparity ratio itself is defined as utilization divided by availability. Utilization and availability, in turn, are themselves ratios. The disparity ratio is therefore a ratio of ratios. 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.

Consistent with the NAS's recommendation, RAND measured utilization and availability in two ways: in terms of dollars and numbers. When using dollars as the measure, RAND calculated utilization as the ratio of Federal contract dollars awarded to WOSBs in a given industry code to total Federal contract dollars awarded in that industry code. It calculated availability as the ratio of the gross receipts (revenues) of WOSBs in a particular industry code to the gross receipts (revenues) of all firms in that code.<sup>6</sup> When using numbers as the measure, RAND calculated utilization as the ratio of the number of Federal contracts awarded to WOSBs in a particular industry code to the number of Federal contracts awarded overall in that code, and availability as the ratio of the number of WOSBs in a particular industry code to the total number of firms in that code.

According to the RAND Report, if the disparity ratio in an industry code is equal to 1.0 when measuring in terms of dollars, that indicates that WOSBs have been awarded contract dollars in the same proportion as their economic representation in the industry; that is, they are awarded contracting dollars in proportion to their share of total business in that industry, and are therefore neither over- nor underrepresented. Similarly, if the disparity ratio in an industry code is equal to 1.0 when measuring in terms of numbers, this indicates that WOSBs are awarded contracts (of whatever dollar value) in the same proportion as their numerical representation in the industry. A ratio of less than 1.0 (lower utilization than availability) suggests some degree of underrepresentation with respect to that particular means of measuring disparity (dollars or numbers); a ratio of greater than 1.0 (greater utilization than availability) suggests some measure of overrepresentation with respect to a given metric. Following the NAS report's recommendations, RAND classified an industry as “underrepresented” if its disparity ratio was between 0.5 and 0.8 using either the numbers or dollars approach, and “substantially underrepresented” if its ratio was less than 0.5. It is important to note that RAND states

disparity ratios are not in and of themselves measures of discrimination, although they

<sup>6</sup>This is a fairly conservative method of determining availability and may underestimate the availability of WOSBs because discrimination may limit the revenues of WOSBs that nonetheless are ready, willing, and able to perform work on Federal contracts.

have been used in numerous court cases to infer discrimination. Nonetheless they are a starting point, a way to identify whether there are any differences in outcomes between different types of firms. (RAND Report at 30; see also discussion at 4 and 5).

RAND calculated these ratios using a variety of different data sets. For the utilization component of the disparity ratio, RAND used the data from the FY 2005 Federal Procurement Data System/Next Generation (FPDS/NG) procurement database. This was the only data source identified by RAND with respect to the utilization component of the disparity ratio. However, RAND did adjust the FPDS to account for possible miscoding of business size. Specifically, RAND linked the FPDS data to 2004 Dun and Bradstreet (D&B) data using the Data Universal Numbering System (DUNS) to identify the parent companies of local establishments, and then used the DUNS to assess whether a firm was small. However, because the data file was also prone to error, RAND presented results both with and without the DUNS cross-reference.

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. Using the SBO database, RAND presented results only at the two-digit industry code level, a comparatively generalized level of industry disaggregation. Using the CCR, in contrast, RAND presented results at the two-, three-, and four-digit industry code levels. RAND also presented full sample results and trimmed sample results (eliminating the top and bottom 0.5 percent of the data) for each disparity ratio. RAND did this in order to examine the sensitivity of the disparity ratio to extreme values, such as very large contracts or negative dollar amounts resulting from contract actions based on multi-year contracts or modifications to such contracts to earlier contracts.

Using these different data sources and various adjustments, the RAND Report identified twenty-eight different possible approaches to determining the degree of underrepresentation of WOSBs in Federal procurement contracting. The parameters and results of each approach are summarized in the RAND Report at Table 4.6.

### IV. Regulatory History

On June 15, 2006, SBA published in the **Federal Register**, at 71 FR 34550, a Proposed Rule (RIN 3245-AE65), with

request for comments, that proposed to amend its regulations in accordance with section 8(m). The Proposed Rule contained the infrastructure rules necessary for the WOSB Program implementation, but did not identify the eligible industries for the WOSB Program because the RAND Report had not been published at the time of the issuance of that Proposed Rule. The RAND Report was subsequently published on April 27, 2007. Based on SBA's evaluation of the public and inter-agency comments received on the June 15, 2006 Proposed Rule, as well as discussions with the U.S. Department of Justice (DOJ) and the Office of Federal Procurement Policy (OFPP), and further examination of section 8(m), it was determined that the June 15, 2006 Proposed Rule required significant changes that warranted further public comment and consideration. In addition, SBA had the results of the RAND study.

Therefore, on December 27, 2007, SBA published a new Proposed Rule, titled Women-Owned Small Business Federal Contract Assistance Procedures, RIN 3245-AF40, at 72 FR 73285, that consolidated the infrastructure rules necessary for the WOSB Program implementation with the RAND study findings, which were used to determine the industries in which WOSBs would be eligible for Federal contracting under the WOSB Program.

In determining the eligible industries, the December 2007 Proposed Rule employed the full-sample 4-digit NAICS code dollars approach (using the dollar value of contract awards and the receipts of businesses) to identify the eligible industries under the WOSB Program. This approach identified four industries in which WOSBs were either underrepresented or substantially underrepresented. The comment period for the December 2007 Proposed Rule closed on March 31, 2008. SBA received approximately 1,720 comments on the proposed rule. Of the 1,720 comments received, 1,689 requested withdrawal of the Proposed Rule and/or stated opposition to some portion of the Proposed Rule. Subsequently, on October 1, 2008, SBA published a Final Rule in the **Federal Register** at 73 FR 56940, RIN 3245-AF40. This Final Rule implemented the infrastructure regulations for the WOSB Program, but did not identify the eligible industries for the WOSB Program.

The reason for the approach was that after identifying eligible industries under the program in December 2007, SBA discovered certain limitations in the data RAND used. Therefore, SBA published a Proposed Rule; Request for

Comment on October 1, 2008, at 73 FR 57014, which provided for a 30-day public comment period and requested comments on two data sets that SBA could use to determine the eligible industries for the WOSB Program. SBA elected to publish the October 1, 2008, Proposed Rule, rather than a Final Rule, on the identification of the eligible industries to engage in a further review and examination of the RAND study and potential measures of disparity. As a result of this further examination, SBA stated in the Proposed Rule; Request for Comments that it had identified a limitation inherent in the CCR data set when the dollars approach was used. Specifically, SBA explained that vendors input information into CCR relating to the firm's revenues and NAICS codes, which are a method for classifying business establishments. Vendors must supply at least one NAICS code for registration into CCR to be complete, but can supply more than one. Vendors do not input the business's revenues for each NAICS code listed or for each NAICS code in which it does business; rather, vendors input total revenues for the firm. Thus, CCR does not provide information concerning the revenue of a firm in each of the NAICS codes, or industries, it sets forth in its CCR registration. Therefore, when RAND computed the disparity ratio using the CCR dollars approach to determine underrepresentation, each firm's total revenue was counted in every NAICS code associated with the firm.

Upon discovering the CCR data set limitation, SBA contacted the United States Census Bureau (Census Bureau) to determine the availability of an alternative data set. The Census Bureau provided SBA with a data set for the availability component of the disparity ratio that consists of data 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"). Although this data set was not used in the RAND report results, it was mentioned in the RAND report as restricted data which would be available to SBA at a more disaggregated NAICS code level than the public SBO data. The Census Bureau report and associated data are available at [http://www.sba.gov/idc/groups/public/documents/sba\\_homepage/census\\_bureau.pdf](http://www.sba.gov/idc/groups/public/documents/sba_homepage/census_bureau.pdf).

In its October 1, 2008 Proposed Rule; Request for Comment, SBA sought input from the public on this CCR data limitation as well as the Census SBO data set alternative. SBA received 38 comments on that Proposed Rule. The

majority of these comments generally opposed the use of the Census SBO data because the disaggregated data set was not available publicly without undergoing a screening process due to statutory restrictions to protect the confidentiality of the data. No comments addressed the substantive findings of the Census data or challenged its accuracy.

SBA has reviewed the October 1, 2008 Final Rule and the Proposed Rule, as well as the public comments, and determined that changes to both rules are necessary. After careful review of the comments, SBA has decided to withdraw the October 1, 2008 Proposed Rule for the reasons identified in the currently proposed rule. Consequently, SBA has set forth below a new Proposed Rule for the WOSB Program which includes both the infrastructure regulations and the identification of the eligible industries. SBA has set forth the entire Proposed Rule below, rather than only the portions of part 127 that SBA has decided to amend, in order to afford the public an opportunity to comment on all aspects of the program. SBA has determined that setting forth the entire infrastructure and industries in a Proposed Rule will best serve the public's ability to address any concerns or opinions regarding this WOSB Program. For ease of reference, following is a discussion of the substantive changes that the rule proposes to make to the Final Rule and Proposed Rule published on October 1, 2008 at 73 FR 56940 and 73 FR 57014, respectively.

## V. Identification of the Eligible Industries

### 1. Choice of Data sets

As stated earlier, 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. Twenty of these approaches compare FY 2006 CCR registration data to FY 2005 FPDS/NG procurement data, while eight of the approaches compare the 2002 SBO data from the five-year Economic Census to FYs 2002/2003 FPDS/NG procurement data.

SBA proposes not to use the eight approaches that rely on a comparison of the 2002 SBO data to FYs 2002/2003 FPDS/NG procurement data for the following reasons:

- The SBO data set generally considers all firms in the economy, and not simply the number of firms that 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 reflects its willingness to bid on a Federal contract. However, it is possible that 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 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 is generally not available for two years after the survey is completed. CCR data, in contrast, are updated continuously and made available immediately. It is not clear, however, the degree to which data regarding business ownership and size economic size change from year to year, and therefore not clear how much weight this distinction should carry.

In addition, 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 is 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.

SBA solicits comment on its decision, in light of the foregoing considerations, not to use any of RAND's approaches that utilize the SBO data and to focus instead on only those approaches that use the CCR data. A further discussion on the appropriateness of the use of the CCR data is set forth below.

Because the NAS criticized SBA's use of the two-digit SIC code and recommended that SBA use industry detail as disaggregated as the data will support, SBA also proposes to eliminate the sixteen approaches that used CCR and FPDS/NG FY 2005 procurement data at the two and three-digit NAICS code level.

Of the remaining four approaches, two are based on full sample results, while the other two are based on trimmed sample results (eliminating the top and bottom 0.5 percent of the data).

The RAND Report found little benefit to trimming the sample, and placed more weight on the full sample results. Based on RAND's finding, SBA proposes to eliminate the two approaches based on the trimmed-sample results.

This leaves two possible approaches, both of which use 2004 CCR and 2005 FPDS/NG procurement data at the four-digit NAICS code level.

## 2. Numbers and Dollars Approaches

After careful analysis of the comments on SBA's 2007 and 2008 Proposed Rules and reconsidering the data and analysis in the RAND Report, SBA has determined that both of the remaining approaches, using numbers and dollars, are viable and appropriate means of identifying industries in which WOSBs are underrepresented or substantially underrepresented for purposes of section 8(m). Both approaches represent legitimate and complementary interpretations of the statutory term "underrepresentation." SBA likewise believes 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 Program. As a result, as is explained in more detail below, the Proposed Rule would amend the definitions of underrepresentation and substantial underrepresentation and identify the eligible industries under this Program as those industries in which WOSBs are underrepresented or substantially underrepresented using either the numbers or the dollars approach. SBA recognizes that this approach may enable competition restricted to WOSBs in industries where using only one or the other of the disparity measurement methodologies in the RAND study might not show underrepresentation of WOSBs in that industry. SBA therefore seeks comment on this proposed approach.

Section 8(m) instructs SBA to conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.

15 U.S.C. 637(m)(4). The statute does not specify how underrepresentation should be identified, or state that only a single disparity measure can be used to identify underrepresentation. SBA must therefore determine the appropriate methods for identifying WOSB underrepresentation, recognizing that it is not bound to any one disparity measure to achieve that goal. As

discussed above, 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.

After reviewing comments and conducting further analysis, SBA concludes that both approaches provide sound and complementary analytical bases for determining the industries in which WOSBs are underrepresented and substantially underrepresented.

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. This might occur if, for example, WOSBs were awarded contracts in numbers proportional to their numerical representation in an industry, but received much less in Federal contracting dollars than their non-WOSB counterparts. 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. Indeed, as the RAND Report results show, during FY 2005, the top WOSB firm was awarded \$673 million dollars in contracts, or 6 percent of the value of all Federal prime contracts awarded to WOSBs (\$10.5 billion dollars). In addition, the top 10 WOSBs garnered \$1.6 billion, or 15 percent of Federal prime contracts going to WOSBs, and the top 25 WOSBs were awarded \$2.1 billion, or 20 percent of Federal prime contracts going to WOSBs. Accordingly, the number of contracts, regardless of size, is a valid alternative measure of whether WOSBs have been offered equality of opportunity.

It is true that the statutory goal for WOSB participation in government contracting is expressed in terms of dollars. However, upon further analysis, SBA does not believe that this fact counsels against use of a numbers approach for purposes of identifying the industries in which the WOSB Program should operate. The 5 percent participation goal—which appears in a different section of the statute from section 8(m)—is a measure of the total volume of Government-awarded prime contracts and subcontracts that, ideally, will be awarded to WOSBs each year.

The goal includes both contracts awarded under the section 8(m) program and contracts awarded in industries deemed ineligible for that program. Section 8(m)'s "underrepresent[ation]" requirement, in contrast, concerns the identification of industries in which the statutorily prescribed contracting assistance to WOSBs should be permitted. There is no basis in the statutory language for determining that "underrepresentation" for purposes of authorizing specific contracting assistance to WOSBs must be measured by the same metric as the total volume of Federal contracts awarded to WOSBs for purposes of an overall participation goal. As discussed above, the numbers approach identifies a valid and important meaning of "underrepresentation" that may exist even in situations where the dollars approach does not identify underrepresentation.

SBA recognizes that these different means of measuring and evaluating underrepresentation are tools to identify those industries in which competition restricted to WOSBs will be authorized. Where different analytical methodologies yield different outcomes on the issue of WOSB underrepresentation in a particular industry, SBA must identify a reasonable means for evaluating, reconciling and applying these methodologies in order to serve the statutory goal of improving WOSBs equal access to Federal contracting in those industries where WOSBs are underrepresented. SBA therefore seeks comment on its proposed approaches to identifying underrepresentation.

### 3. Appropriateness of Using the CCR Database

Comments on the prior Proposed Rules raised concerns about the RAND study's use of revenue data from the CCR database, concerns SBA noted in its withdrawn 2008 Final Rule. One concern centered on the way vendors, *i.e.*, businesses registering for Federal contracts, input data into the CCR. As described above, the CCR database reflects each firm's total revenue in every NAICS code associated with the firm, rather than the amount of revenue associated with the particular NAICS code at issue. SBA noted in its 2007 Proposed Rule that this feature of the CCR data might result in overstating firms' revenues in some or all NAICS codes.

At least one commenter, in response to a prior version of the rule, asserted that the CCR data only takes into consideration current Federal contractors, whereas the SBO data could

include all WOSB that are ready, willing and able to perform Federal work. A further potential viewpoint is that when using the SBO data set, the RAND Study found underrepresentation in a smaller number of industries, which could imply that women-owned firms were "over-represented" in numerous other industries in terms of the dollars of Federal procurement relative to their size in the economy. Consequently, it might be asserted that using the CCR data will allow set-asides in industries where other credible data (SBO data) show women-owned small businesses are not underrepresented in terms of Federal procurement.

Based on further analysis, SBA has concluded that the CCR data set is the best available data to use to determine the availability component of the disparity ratios. First, the fact that the CCR database reflects each firm's total revenue in every NAICS code associated with the firm, rather than the amount of revenue associated with the particular NAICS code at issue, does not render unreliable the disparity ratios calculated using the dollars component of the CCR database.<sup>7</sup> As previously discussed, 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. 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 overstates its revenues in) three NAICS codes, a non-WOSB in the same kind of business is likely to register in (and overstate its revenues in) 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 over-reporting of revenue in each NAICS code does not raise serious concerns about the reliability of the dollars analysis of the RAND study.

SBA has also concluded the CCR database appropriately captures those firms ready, willing and able to compete for Federal contracts. The firms in the CCR database have 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. RAND's review of the data identified no additional means of determining which firms are ready and able to work on these contracts.<sup>8</sup> However, RAND ensured that the firms each had at least one employee as a "proxy for 'able.'" RAND Study at 30. Further, because the SBO data generally considers all firms in the economy, 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.

Although the CCR data account for a firm's willingness to submit an offer and receive a Federal contract without also expressly accounting for firm qualifications or abilities, SBA believes that the CCR data is nevertheless an appropriate measure of firm availability. Although some contracting assistance programs may rely on actual bidder lists as the utilized measure of ready, willing, and able firms, see, *e.g.*, *Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County*, 122 F.3d 895, 912 (11th Cir. 1997), some programs do not, and courts have upheld such programs against challenges. See *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 983 (10th Cir. 2003) (rejecting argument that underutilization must be measured by examining "only those firms *actually* bidding on City construction projects"). In *Concrete Works*, the court noted that even those firms that did submit bids might be unqualified, so that the city would always have to make some assumption about qualifications, and further observed that bidder lists might not capture all firms that are qualified. *Id.* The court concluded that disparity studies may make assumptions about qualifications "as long as the same

<sup>7</sup> This feature of the CCR database has no effect on disparity ratios calculated according to the numbers method, since that method does not make reference to firms' gross receipts.

<sup>8</sup> For instance, although size may be relevant to the ability to perform certain work, RAND found that small firms successfully competed for Federal contracts, and that it was not possible to identify a natural break point in contract size beyond which small businesses generally could not compete.

assumptions can be made for all firms.” Id.; cf. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1173 (2000) (noting that there was no evidence in the record that “those minority subcontractors who *have* been utilized have performed inadequately or otherwise demonstrated a lack of necessary qualifications”). The court also noted that a firm’s ability to perform contracts is not static: firms can generally perform services by hiring additional employees or using subcontractors. *Concrete Works*, 321 F.3d at 981. Of course, to the extent that the age and size of a firm may themselves be effectively limited by barriers tied to historical discrimination, using these factors to assess capacity and availability may in some instances extend the effects of past discrimination into this statistical assessment.

For the reasons stated above, this Proposed Rule proposes to evaluate underrepresentation and substantial underrepresentation by using the CCR database and applying both the numbers and dollars approaches to identify eligible industries. Using this methodology, the RAND study found one hundred and nine (109) year-2002 NAICS codes in which WOSBs were either underrepresented or substantially underrepresented.

Because SBA has received comments on this issue in the past, and there is a more detailed data set available (SBO data), it is interested in hearing from the public about this proposal to utilize the CCR data set, and specifically requests comments on whether the WOSB Program should operate, or whether its operation should require special justification, in sectors where women-owned businesses appear not be underrepresented based on other data.

#### 4. The Eligible Industry Codes

NAICS codes are revised every five years (in the years ending in ‘2’ and ‘7’). RAND used the 2002 NAICS codes in its study. All but three of the 109 2002 NAICS codes identified by RAND correspond with the current 2007 NAICS codes. The three 2002 NAICS codes which do not correspond are: 5161—Internet Publishing and Broadcasting; 5173—Telecommunications Resellers; and 5181—Internet Service Providers and Web Search Portals. However, these three 2002 NAICS codes were made part of other NAICS codes in 2007 that were also designated by RAND as substantially underrepresented—2002 NAICS code 5161 is now part of 2007 NAICS code 5191; 2002 NAICS code 5173 is now a part of 2007 NAICS code 5179; and 2002 NAICS code 5181 is

now split between 2007 NAICS codes 5171 and 5179. Because the RAND study found NAICS codes 5191, 5179 and 5171 also to be substantially underrepresented, the change in NAICS code affects only the designation of industries to the extent that there are 106 2007 NAICS codes instead of 109 2002 NAICS codes but does not affect the types of WOSBs eligible under the WOSB Program.

However, the WOSB Program will not operate in three of the 106 2007 NAICS codes in sector 92 (2002 and 2007) because those NAICS codes do not apply to the private sector. These NAICS codes are: 9211—Executive, Legislative, and other General Government Support; 9231—Administration of Human Resource Programs; and 9281—National Security and International Affairs. Firms in these NAICS codes are:

Federal, state, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments, see 13 CFR 121.201 n. 19, and contracts are not classified with this NAICS code. See 13 CFR 121.402(b).

In addition, twenty of the 106 NAICS codes in sectors 42, 44, and 45 (2002 and 2007) are not available for contracting assistance under the Program. These industries codes are: 4231—Motor Vehicle and Motor Vehicle Parts and Supplies Merchant Wholesalers; 4232—Furniture and Home Furnishing Merchant Wholesalers; 4233—Lumber and Other Construction Materials Merchant Wholesalers; 4234—Professional and Commercial Equipment and Supplies Merchant Wholesalers; 4236—Electrical and Electronic Goods Merchant Wholesalers; 4239—Miscellaneous Durable Goods Merchant Wholesalers; 4241—Paper and Paper Product Merchant Wholesalers; 4243—Apparel, Piece Goods, and Notions Merchant Wholesalers; 4246—Chemical and Allied Products Merchant Wholesalers; 4248—Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers; 4249—Miscellaneous Nondurable Goods Merchant Wholesalers; 4412—Other Motor Vehicle Dealers; 4421—Furniture Stores; 4422—Home Furnishings Stores; 4431—Electronics and Appliance Stores; 4461—Health and Personal Care Stores; 4511—Sporting Goods, Hobby, and Musical Instrument Stores; 4532—Office Supplies, Stationery, and Gift Stores; 4541—Electronic Shopping and Mail-Order Houses; and 4543—Direct Selling Establishments.

These twenty NAICS codes fall under the 2-digit NAICS code sectors 42, 44 and 45, which cover wholesalers and retailers. Contracts are not classified with these NAICS codes. See 13 CFR 121.402(b). SBA regulations specifically state that sectors 42, 44 and 45 are “not applicable to Government procurement of supplies.” 13 CFR 121.201. These NAICS codes are not available for set-asides because contracting officers must classify any contract for the procurement of supplies under the applicable manufacturing NAICS code (and then the nonmanufacturer rule would apply to any offerors that are nonmanufacturers of the supply). 13 CFR 121.402.

As a result of the above, this Proposed Rule treats eighty-three 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: 2213—Water, Sewage and Other systems; 2361—Residential Building Construction; 2371—Utility System Construction; 2381—Foundation, Structure, and Building Exterior Contractors; 2382—Building Equipment Contractors; 2383—Building Finishing Contractors; 2389—Other Specialty Trade Contractors; 3149—Other Textile Product Mills; 3159—Apparel Accessories and Other Apparel Manufacturing; 3219—Other Wood Product Manufacturing; 3222—Converted Paper Product Manufacturing; 3321—Forging and Stamping; 3323—Architectural and Structural Metals Manufacturing; 3324—Boiler, Tank, and Shipping Container Manufacturing; 3333—Commercial and Service Industry Machinery Manufacturing; 3342—Communications Equipment Manufacturing; 3345—Navigational, Measuring, Electromedical, and Control Instruments Manufacturing; 3346—Manufacturing and Reproducing Magnetic and Optical Media; 3353—Electrical Equipment Manufacturing; 3359—Other Electrical Equipment and Component Manufacturing; 3369—Other Transportation Equipment Manufacturing; 4842—Specialized Freight Trucking; 4881—Support Activities for Air Transportation; 4884—Support Activities for Road Transportation; 4885—Freight Transportation Arrangement; 5121—Motion Picture and Video Industries; 5311—Lessors of Real Estate; 5413—Architectural, Engineering, and Related Services; 5414—Specialized Design

Services; 5415—Computer Systems Design and Related Services; 5416—Management, Scientific, and Technical Consulting Services; 5419—Other Professional, Scientific, and Technical Services; 5611—Office Administrative Services; 5612—Facilities Support Services; 5614—Business Support Services; 5616—Investigation and Security Services; 5617—Services to Buildings and Dwellings; 6116—Other Schools and Instruction; 6214—Outpatient Care Centers; 6219—Other Ambulatory Health Care Services; 7115—Independent Artists, Writers, and Performers; 7223—Special Food Services; 8111—Automotive Repair and Maintenance; 8113—Commercial and Industrial Machinery and Equipment (except Automotive and Electronic) Repair and Maintenance; and 8114—Personal and Household Goods Repair and Maintenance.

The thirty-eight NAICS codes in which WOSBs are substantially underrepresented are: 2372—Land Subdivision; 3152—Cut and Sew Apparel Manufacturing; 3231—Printing and Related Support Activities; 3259—Other Chemical Product and Preparation Manufacturing; 3328—Coating, Engraving, Heat Treating, and Allied Activities; 3329—Other Fabricated Metal Product Manufacturing; 3371—Household and Institutional Furniture and Kitchen Cabinet Manufacturing; 3372—Office Furniture (including Fixtures) Manufacturing; 3391—Medical Equipment and Supplies Manufacturing; 4841—General Freight Trucking; 4889—Other Support Activities for Transportation; 4931—Warehousing and Storage; 5111—Newspaper, Periodical, Book, and Directory Publishers; 5112—Software Publishers; 5171—Wired Telecommunications Carriers; 5172—Wireless Telecommunications Carriers (except Satellite); 5179—Other Telecommunications; 5182—Data Processing, Hosting, and Related Services; 5191—Other Information Services; 5312—Offices of Real Estate Agents and Brokers; 5324—Commercial and Industrial Machinery and Equipment Rental and Leasing; 5411—Legal Services; 5412—Accounting, Tax Preparation, Bookkeeping, and Payroll Services; 5417—Scientific Research and Development Services; 5418—Advertising, Public Relations, and Related Services; 5615—Travel Arrangement and Reservation Services; 5619—Other Support Services; 5621—Waste Collection; 5622—Waste Treatment and Disposal; 6114—Business Schools and Computer and

Management Training; 6115—Technical and Trade Schools; 6117—Educational Support Services; 6242—Community Food and Housing, and Emergency and Other Relief Services; 6243—Vocational Rehabilitation Services; 7211—Traveler Accommodation; 8112—Electronic and Precision Equipment Repair and Maintenance; 8129—Other Personal Services; and 8139—Business, Professional, Labor, Political, and Similar Organizations.

#### VI. Economic Disadvantage

SBA proposes to clarify current § 127.203 concerning economically disadvantaged women-owned small businesses (EDWOSBs) to address certain interpretations and policies that have been followed informally by SBA with respect to the 8(a) Business Development (BD) Program and that SBA believes would apply to the WOSB Program as well. This includes certain interpretations and policies SBA recently set forth in a rule proposing to amend the 8(a) BD regulations. *See* 74 FR 55694 (Oct. 28, 2009). For example, this Proposed Rule specifically states that SBA does not take 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 husband would be considered wholly the husband'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 proposes 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.

This policy also results in equal treatment for applicants in community and non-community property states. In addition, and along the same lines, SBA proposes to provide that it may consider a spouse's financial situation in determining an individual's access to capital and credit.

SBA has also proposed exempting funds in Individual Retirement Accounts (IRAs) and other official retirement accounts from the calculation of net worth, provided that the funds cannot currently be withdrawn from the account prior to retirement age without a significant penalty. While such funds

can be useful to an applicant seeking credit, SBA believes that retirement accounts are not assets to be currently enjoyed; rather, they are held for purposes of ensuring future income when an individual is no longer working. SBA believes it is unfair to count those assets as current assets. 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 middle and lower income 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.

SBA is cognizant of the potential for abuse of this proposed provision, with individuals attempting to hide current assets in funds labeled "retirement accounts." SBA does not believe such attempts to remove certain assets from an individual's economic disadvantage determination would be appropriate. Therefore, this Proposed Rule states that in order for funds not to be counted in an economic disadvantage determination, the funds cannot be currently withdrawn from the account without a significant penalty. A significant penalty would be one equal or similar to the additional income tax on early distributions under section 72(t) of the Internal Revenue Code. 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 is interested in hearing from the public about this proposal, and specifically requests comments on how best to exclude legitimate retirement accounts without affording others a mechanism to circumvent the economic disadvantage criterion.

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. Conversely, the woman owner of an S corporation could not subtract S corporation losses from the income paid by the S corporation to her or from her total income from whatever source. S corporation losses, like C corporation losses, are losses incurred by the company, not by the individual, and based upon the legal structure of the corporation and the protections afforded the principals through this structure, the individual is not personally liable for the debts representing any of those liabilities. Thus, it is inappropriate to consider these personal losses and women should not be able to use them to reduce their personal incomes for purposes of the economic disadvantage.

SBA also proposes to provide that it would presume that a woman is not economically disadvantaged if her yearly income averaged over the past two years exceeds \$200,000. SBA considered incorporating into the regulation the present policy for the 8(a) BD Program that a woman is not economically disadvantaged if her adjusted gross income exceeds that for the top two percent of all wage earners according to IRS statistics. Under that approach for the 8(a) BD Program, SBA compares the income of the individual claiming disadvantage to the most currently available, final IRS income tax statistics. In some cases, SBA may be comparing IRS statistics relating to one tax year to an individual's income from a succeeding tax year because final IRS statistics are not available for that succeeding tax year.

Although that policy has been upheld by SBA's Office of Hearings and Appeals (OHA) and the Federal courts (see *SRS Technologies v. United States*, 894 F. Supp. 8 (D.D.C. 1995); *Matter of Pride Technologies, Inc.*, SBA No. 557 (1996) SBA No. MSB-557) for the 8(a)

BD Program, SBA believes that a straight line numerical figure is more understandable, easier to implement, and avoids any appearance of unfair treatment when statistics for one tax year are compared to an income level for another tax year. Therefore, SBA is proposing for the WOSB Program 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. Although a \$200,000 income may seem unduly high as a benchmark, we note that this amount is being used only to presume, without more information, that the woman is not economically disadvantaged. SBA may consider incomes lower than \$200,000 as indicative of lack of economic disadvantage. However, it would not presume lack of economic disadvantage in that case. It may also consider income in connection with other factors when determining a woman's access to capital. SBA specifically requests comments on both the straight line approach proposed and the current comparison of income levels to the IRS statistics.

This proposed regulation would permit applicants to rebut the presumption of lack of economic disadvantage upon a showing that the income 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. The presumption could also be rebutted, for example, by showing that the earnings were winnings that are offset by related losses as in the case of winnings and losses from gambling resulting in a net gain far less than the actual gambling income received. SBA may still consider any unusual earnings or windfalls as part of its review of total assets. Thus, although an inheritance of \$5 million, for example, may be unusual income and excluded from SBA's determination of economic disadvantage based on income, it would not be excluded from SBA's determination of economic disadvantage based on total assets. In such a case, a \$5 million inheritance would render the woman not economically disadvantaged based on total assets.

This rule also proposes to establish an objective standard by which a woman may not qualify as economically disadvantaged based on her total assets. With respect to the 8(a) BD Program, SBA's findings that an individual was not economically disadvantaged with total asset levels of \$4.1 million and

\$4.6 million have been upheld as reasonable. 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). This rule proposes to eliminate any confusion as to what level of total assets qualifies as economic disadvantage for EDWOSB purposes as has occurred in the 8(a) BD Program. Under this Proposed Rule, a woman generally would not be considered economically disadvantaged if the fair market value of all her assets exceeds \$3 million. While this Proposed Rule would exclude retirement accounts from a woman's net worth in determining economic disadvantage, it would not exclude such amounts from her total assets in determining economic disadvantage on that basis.

## VII. Certification

The 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 legislative history for this statutory provision explains that certification by a Federal agency, State government or national certifying entity should be acceptable if it tracks the statutory and regulatory definition of WOSB and EDWOSB. H.R. Rep. No. 106-879, at 4 (2000). Consequently, to identify approved third-party certifiers, SBA will review those entities that certify WOSBs and designate those with certification criteria meeting the requirements of this program at a later date.

In addition, the legislative history explains that

the Committee expects the contracting officers will accept self-certification so long as the documentation provided along with the response to the solicitation enables the contracting officer to determine that the WOSB or EDWOSB meets the requirements of the program. Id. As a result of the statutory provision, and the

supporting legislative history, SBA has proposed a rule that will require WOSBs and EDWOSBs to first certify their status in the Online Representations and Certifications Application (ORCA) at <https://orca.bpn.gov>, and then provide the contracting officer with certain documents verifying their status.

SBA believes that the statute and supporting legislative history permit several means for providing the requisite documents to the contracting officer. Therefore, SBA is proposing to establish a repository (WOSB Program Repository) for the documents where WOSBs and EDWOSBs that certify in ORCA would submit the documents. The documents would be stored in a secure, web-based environment that would be accessible to WOSB and EDWOSB applicants, contracting community and SBA.

This idea is analogous to a system already utilized in the government. CCR

is a web-enabled government-wide application that collects, validates, stores, and disseminates business information about the Federal government's trading partners in support of the contract award, grants, and the electronic payment processes.

See Federal Agency Registration FAQs, publicly available at <https://www.bpn.gov/FAR/docs/FAQ.pdf>.

Although CCR is used to electronically share secure and encrypted data with the Federal agencies' finance offices to facilitate paperless payments through electronic funds transfer, and does not necessarily serve as a repository for documents, the concept would be similar.

WOSBs and EDWOSBs that certify in ORCA would be required to submit documents verifying their status to the repository at the time of initial self-certification in ORCA and then every year thereafter, and in addition if there is a change in such information that would necessitate the submission of supplemental or new information. The contracting officer would be able to access the documents prior to contract award to review the submitted documents. This proposal would mean that WOSBs and EDWOSBs would not have to submit documents each time they receive a WOSB or EDWOSB contract.

SBA also proposes that WOSBs or EDWOSBs will submit certain documents at the time of self certification in ORCA and then must submit additional documents in the event of a protest or program examination. SBA intends for those additional documents to be placed into the document repository, as well.

With respect to the specific documents that must be submitted at

the time of initial certification (and updated anytime after) the Proposed Regulation sets forth several documents that will assist in verifying ownership and control. For those WOSBs and EDWOSBs that have not received an approved third-party certification, SBA reviewed the requirements and standards established for a similar program, the 8(a) BD Program, in determining which documents must be provided. In the 8(a) BD Program, the applicant must complete a standard form and provide SBA with appropriate documents to support and verify the statements made in the application.

Using the 8(a) BD Program application process as a guide, and in accordance with the proposed eligibility criteria for the WOSB Program, SBA has proposed that a WOSB or EDWOSB, which has not received a third-party certification from an approved certifier, provide the following documents to the repository:

- WOSBs or EDWOSBs that are corporations would need to submit their articles of incorporation, stock certificates (both sides), stock ledger, shareholders' agreements, by-laws and amendments.
- WOSBs or EDWOSBs that are LLCs must submit their articles of organization (also referred to as the certificate of organization or articles of formation) and any amendments and operating agreement with any amendments.
- WOSBs or EDWOSBs that are partnerships must submit an original and amended partnership agreement.

In addition, all WOSBs and EDWOSBs must submit evidence of gender and U.S. citizenship for women (women) owners(s), such as a copy of a birth certificate, naturalization papers or passport. EDWOSBs would also need to submit a Form 413, Personal Financial Statement, for at least each woman claiming economic disadvantage. Further, all EDWOSBs or WOSBs must also provide a copy of the joint venture agreement, if applicable.

SBA anticipates that the repository will also house copies of the third party certifications. With respect to those WOSBs or EDWOSBs that have received an approved third-party certification, this Proposed Rule requires that the WOSB or EDWOSB must provide a copy of the certification to the repository at the time of certification in ORCA. If the WOSB or EDWOSB has a third-party certification as a DOT Disadvantaged Business Enterprise (DBE), it must submit a copy of the DBE certification at the time of certification in ORCA showing that it received such certification because it is owned and controlled by women. In addition, the

WOSB or EDWOSB must provide a statement identifying the woman or women upon whom eligibility was based and documents, such as birth certificates or passports, evidencing that the woman or women are citizens of the United States as defined by 13 CFR 127.102.

SBA believes that it is not necessary for these concerns to submit any other documents to verify eligibility, at that time, since such documents have already been submitted to and reviewed by a third party.

SBA intends that the WOSB Program Repository preclude modification or retrieval of any document submitted; however, documents can be supplemented in a separate submission. This would allow the system to be a historical site for each change in documentation. This historical data may be useful in determining whether, over a period of time, the data is consistent rather than contradictory.

Until SBA is able to establish a repository, or if the system is otherwise unavailable, then SBA is proposing that the WOSB or EDWOSBs 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.

The Proposed Rule also explains the consequences for failure to provide the required documents and the contracting officer's duties in those situations. If the apparent successful WOSB or EDWOSB fails to provide any of the required documents, the contracting officer cannot make a WOSB or EDWOSB award to that concern and must file a protest with SBA. In addition, if the contracting officer believes that the apparent successful offeror does not meet the requirements of the program, the contracting officer must file a protest with SBA concerning the status of the concern.

In addition to the documents, SBA proposes that the WOSB or EDWOSB represent that it meets all of the eligibility of the program. Therefore, SBA is proposing that the WOSB represent the information in Table 1, Proposed WOSB Representations in ORCA, to ORCA.

**Proposed WOSB Representations in ORCA**

(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 as a U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) because it is owned and controlled by one or more women who are citizens of the United States, as defined in 13 CFR § 127.102.

Yes  No  N/A

(iii) It is certified by the U.S. Small Business Administration as an 8(a) BD Program Participant due to the owner(s) status as an economically disadvantaged woman (or women).

Yes  No  N/A

(iv) If a corporation, the stock ledger and stock certificates evidence that at least 51 percent of each class of voting stock outstanding and 51 percent 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 percent of each class of partnership interest is unconditionally and directly owned by one or more women.

Yes  No  N/A

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

Yes  No  N/A

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

Yes  No

(viii) 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

(ix) The 51 percent 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

(x) The 51 percent 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

(xi) 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

(xii) 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

(xiii) 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

(xiv) 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

(xv) 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

(xvi) 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 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 comprise the majority of voting directors through actual numbers or, where permitted by state law, through weighted voting.

Yes  No  N/A

(xvii) 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

(xviii) 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

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

Yes  No

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

Yes  No

(xxi) 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.

Yes  No

In addition, the EDWOSB must represent the information in Table 2, Proposed EDWOSB Representations in ORCA, to ORCA.

**Proposed EDWOSB Representations in ORCA**

(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 as a U.S. Department of Transportation (DOT) Disadvantaged Business Enterprise (DBE) because it is owned and controlled by one or more women who are citizens of the United States, as defined in 13 CFR § 127.102.

Yes  No  N/A

(iii) It is certified by the U.S. Small Business Administration as an 8(a) BD Program Participant due to the owner(s) status as an economically disadvantaged woman (or women).

Yes  No  N/A

(iv) If a corporation, the stock ledger and stock certificates evidence that at least 51 percent of each class of voting stock outstanding and 51 percent 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

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

Yes  No  N/A

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

Yes  No  N/A

(vii) The birth certificates, naturalization papers, or passports show

that the company is at least 51% owned and controlled by economically disadvantaged women who are U.S. citizens.

Yes  No

(viii) 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

(ix) The 51 percent 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

(x) The 51 percent 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

(xi) 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

(xii) 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

(xiii) 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

(xiv) 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

(xv) 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

(xvi) 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 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) 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

(xvii) 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

(xviii) 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

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

Yes  No

(xx) The economically disadvantaged woman or women upon whom eligibility is based can demonstrate that their 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 (not considering community property laws when determining economic disadvantage when the woman has no ownership interest in the property).

Yes  No

(xxi) 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

(xxii) The personal financial condition of the woman claiming economic disadvantage, including her personal income for the past two 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

(xxiii) The adjusted gross income of the woman claiming economic disadvantage averaged over the two years preceding the certification does not exceed \$200,000.

Yes  No

(xxiv) The adjusted gross income of the woman claiming economic disadvantage averaged over the two years preceding the certification exceeds \$200,000; 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  N/A

(xxv) 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 \$3 million.

Yes  No

(xxvi) The woman claiming economic disadvantage has not transferred any

assets within two years of the date of the certification.

Yes  No

(xxvii) 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

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

Yes  No

(xxix) 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.

Yes  No

SBA is specifically requesting comments on all of these approaches to certification, or other alternatives that would meet the statutory requirements and ensure that only eligible small businesses receive WOSB or EDWOSB contracts.

### VIII. Eligibility Examinations

SBA also proposes amending current § 127.400 concerning eligibility examinations. The rule currently states that SBA will conduct an examination to determine eligibility at the time of the examination. However, the Act states that the Administrator shall establish procedures for verification of the accuracy of any certifications and those procedures may provide for program examinations, including random examinations. 15 U.S.C. 637(m)(5). It is clear that the examinations are to serve as a mechanism against fraud, waste and abuse in the program. Thus, SBA believes that the purpose of such examinations is broader, and that examinations should be used to verify eligibility at any time, including when an EDWOSB or WOSB certifies it is such a concern in ORCA, CCR, or at the time of offer or award of a contract. Therefore, SBA has amended this rule to explain that eligibility examinations will be used to verify eligibility at those times, as well.

In addition, this Proposed Rule states that SBA will conduct such examinations, as a way to combat fraud and abuse of the program. Further, as permitted by statute, SBA may adopt one or more various approaches from time to time and as appropriate by the circumstances when determining which WOSBs or EDWOSBs to examine. This may include the utilization of robust random sampling, as well as higher levels of random examinations of WOSBs or EDWOSBs that have received the most contracts or most contract dollars during any applicable period. Further, SBA may decide to conduct examinations when it has received credible information that certain WOSBs or EDWOSBs do not meet the eligibility criteria of the WOSB Program.

As part of these examinations, the WOSB or EDWOSB must submit documents to verify its eligibility. Specifically, this Proposed Rule requires WOSBs and EDWOSBs to submit documents to verify eligibility, including those submitted under proposed § 127.300(c), as well as copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation. In addition, EDWOSBs will be required to submit the two most recent personal income tax returns (including all schedules and W-2 forms) for the women claiming economic disadvantage and their spouses and SBA Form 4506-T, Request for Tax Transcript Form. In some cases, SBA may be able to obtain those documents from the third-party certifier or the contracting officer's contract file.

However, because the examination may look at eligibility at the time of certification in ORCA, this Proposed Rule requires that WOSBs or EDWOSBs retain documents demonstrating satisfaction of the eligibility requirements for six (6) years from date of self-certification. SBA believes that WOSBs and EDWOSBs already retain this information in the ordinary course of business and that it does not impose a burden on these businesses.

### IX. Agency-by-Agency Determination

This Proposed Rule seeks to strike from the 2008 Final Rule the requirement at § 127.501 for an agency-by-agency determination of discrimination. Specifically, in response to SBA's June 15, 2006 Proposed Rule, commenters voiced concerns over the requirement in proposed § 127.501(b) that the procuring agency conduct its own additional analysis of its procurement history and make a determination whether the agency itself had discriminated against WOSBs in the relevant industry. The comments state

that this requirement would frustrate Congressional intent by applying an erroneous and overly restrictive standard of constitutional scrutiny. The comments also state that the disparity study analysis conducted by RAND is sufficient to satisfy the intermediate scrutiny standard that applies to the WOSB Program and that the agency determination of discrimination requirement exceeds what would be required even under the strict scrutiny standard applicable to classifications based on race and national origin. The comments further state that the requirement would inappropriately limit the industries in which WOSBs were recognized as underrepresented or substantially underrepresented. Lastly, the comments state that this requirement would substantially burden the procuring agencies and that the procuring agencies would avoid fulfilling the goals of the program to avoid self-incrimination and litigation.

Based on these comments and further analysis, SBA agrees that an agency-by-agency analysis is not required.

First, the equal protection requirements of the Fifth Amendment establish that programs that use gender as a factor in distributing benefits to individuals must 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 an 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, "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.")

This objective—to overcome the effects of past sex discrimination and to ensure that the effects of such discrimination are not extended into its own procurement activity—is sufficiently "important" to sustain the WOSB Program. See *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 benefits provided through the WOSB program are not a result of "archaic and overbroad generalizations" about women, *Schlesinger*, 219 U.S. at 508, or of "the role-typing society has long imposed" upon women, *Stanton v. Stanton*, 421 U.S. 7, 15 (1975). Instead, they are a targeted means to redress the discrimination to which women have long been subjected and which has prevented them from competing equally for Federal contracts.

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, as is more fully explained above, is a detailed analysis of WOSBs which identifies the disparity ratio of WOSBs in Federal prime contracting by 4-digit NAICS code.

This Proposed Rule is limited to the eligible industries identified in the RAND study, and SBA in the future may conduct new studies or update existing studies as appropriate.

In addition, SBA agrees with commenters that an agency-by-agency determination is not required for the WOSB Program to be substantially related to an important government objective or to be properly implemented. 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, this Proposed Rule seeks to strike from the Final Rule at § 127.501 the requirement for an agency-by-agency determination of discrimination.

#### X. Contract File

This Proposed Rule requires contracting officers to document the contract file with results of market research and the fact that the NAICS code assigned to the contract is for an industry that SBA has designated as a substantially underrepresented industry with respect to WOSBs. SBA is considering adding the following additional language to § 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.

SBA is requesting comments on this proposal.

#### XI. Joint Venture Requirements

SBA has also proposed amendments to the current joint venture regulation, permitting EDWOSB or WOSB joint ventures for EDWOSB or WOSB contracts. The rule currently provides that the EDWOSB or WOSB must perform a significant portion of the contract. SBA has proposed clarifying this requirement by requiring that not less than 51 percent of the net profits earned by the joint venture must be distributed to the EDWOSB or WOSB. SBA also proposes clarifying that the joint venture agreement must be in writing and 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.

#### XII. Request for Comments

SBA seeks comments on all aspects of this Proposed Rule. This includes comments relating to the eligible industries, and especially the use of the CCR data set and SBA's concerns with the use of the SBO data set. This also includes comments relating to the certification procedures, including the certification requirements, representations in ORCA, and submission of documents to the document repository.

*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. The Regulatory Impact Analysis is set forth below.

#### Regulatory Impact Analysis

##### 1. Necessity of Regulation

This regulatory action implements section 8(m) of the Act, which was enacted as part of section 811 of the Small Business Reauthorization Act of 2000, Public Law 106–554. Section 8(m) authorizes the creation of the contracting assistance mechanism described in this regulation. Under this regulation, contracting officers will be

allowed to restrict competition to EDWOSBs in industries in which SBA has determined that WOSBs are underrepresented or substantially underrepresented and to WOSBs in industries in which SBA has determined that WOSBs are substantially underrepresented and waived the economically disadvantaged requirement. This Proposed Rule will establish the requirements and procedures necessary to administer these restricted competitions.

## 2. Alternative Approaches to Proposed Rule

In developing this Proposed Rule, SBA considered the costs and benefits of alternatives for certification of small business concerns that claim EDWOSB or WOSB status, particularly the alternatives provided by section 8(m) of the Act. Specifically, section 8(m)(2)(F) provides that in order to qualify as a WOSB or EDWOSB, a concern must either be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, or, alternatively, must certify to the contracting officer that it is a small business concern owned and controlled by women and provide supporting documents. In light of this provision, SBA considered performing the certifications by requiring each concern to submit a formal application to SBA for a determination of its status. That approach, however, is not required or intended by the statute or legislative history.

In addition, SBA considered utilizing third-party certifiers. For the reasons set forth in the preamble, SBA has decided to propose the use of such third-party certifiers. SBA believes that the proposed process would be the most beneficial and cost-effective approach for the small business concerns because they will not have to submit formal applications to SBA to become eligible for restricted competition for WOSB and EDWOSB procurements.

In this Proposed Rule, SBA has proposed the use of an ORCA certification and document submission process, which is similar to the one that is used in other existing SBA set-aside programs. For example, SBA's program for small businesses permits those concerns to self-represent their size when submitting offers on Federal contracts. The set-aside program for small businesses has worked well for decades. SBA believes that the certification process proposed in this rule is credible because it supported by robust protest procedures as well as eligibility examinations. In addition, the

business concern must provide documents verifying its eligibility.

SBA did consider another option with respect to the submission of documents to the contracting officer. As discussed in the preamble above, the Act states that a WOSB or EDWOSB can certify to the contracting officer that it is such an entity and must provide supporting documents to the contracting officer verifying its eligibility. This Proposed Rule requires the WOSB or EDWOSB to submit certain documents to the contracting officer via an electronic repository at the time of initial certification in ORCA and then every year after that. In addition, WOSBs and EDWOSBs must also provide updated documents anytime there is a change that necessitates supplementing the original document submission. In the alternative, if the repository is not available, the WOSB or EDWOSB must submit those documents directly to the contracting officer prior to the award of a WOSB or EDWOSB contract. SBA did consider having the EDWOSB or WOSB provide all necessary documents to the contracting officer at the time of award in order to verify eligibility of the awardee (e.g., tax returns, resumes). However, SBA believes this may be a burden on both the small business and contracting community and therefore did not propose this alternative. SBA is still exploring the feasibility of all of these approaches and has requested comments from the public on all of them and any other the public may have.

SBA also considered alternative data sets and measures of disparity. SBA proposes to use the CCR database and both numbers and dollars approaches for the reasons set forth in the preamble but solicits comments on this approach.

## 3. What Are the Potential Benefits and Costs of This Regulatory Action?

This rule directs benefits to EDWOSBs and WOSBs at a cost to concerns ineligible for the program. In addition, this rule may result in new administrative costs of managing a Federal contracting assistance program. However, SBA believes that these costs are significantly outweighed by the benefits to be gained by reducing the inefficiencies caused by discriminatory barriers that currently impede WOSBs' full participation in the Federal contracting market.

Any concern about an increase in product or service cost is balanced by the requirement in the statute and Proposed Rule that any contract award under the WOSB Program be made at a fair and reasonable price. Further, there will not be any additional cost

associated with the length of the procurement since the process will not be any longer, and could in some instances be shorter, than would be the case in the absence of the WOSB program. Finally, the creation and development of WOSBs could well, over time, result in enhanced bidding for Federal contracts, ultimately resulting in lower costs of contracts for the Federal government.

This rule aims to aid EDWOSBs and WOSBs by enabling contracting officers to restrict competition to EDWOSBs in industries in which SBA has determined that WOSBs are underrepresented and substantially underrepresented and to WOSBs in industries in which SBA has determined that WOSBs are substantially underrepresented where certain threshold determinations are made by an agency. It is difficult to estimate the total number of potential beneficiaries that will be eligible for Federal small business assistance as a result of this Proposed Rule. Utilizing the RAND FPDS/NG 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, approximately 12,000 WOSBs were identified as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. It is expected that the number of awards to EDWOSBs and WOSBs will increase within these NAICS codes should an agency restrict competition to those groups in accordance with the procedures in this Proposed Rule.

To the extent that additional firms become active in government programs, additional administrative costs to the Federal government may arise due to additional bidders for Federal small business procurement programs, additional firms seeking SBA guaranteed lending programs, and additional firms eligible for enrollment in SBA's Dynamic Small Business Search data base. Among businesses in this group seeking SBA assistance, there will be some additional costs associated with compliance and verification associated with certification of small business status and protests of small business status. However, these activities are likely to generate minimal incremental costs since mechanisms are currently in place to handle these administrative requirements.

In addition, as more EDWOSBs and WOSBs enter into the Federal arena, competition will likely increase, lowering the cost of the program and ultimately, we hope, eliminating

underrepresentation within the industries covered by this Proposed Rule and the industry's participation in the program. In the long run, small business opportunities—and the amount of competition in the Federal procurement market as a whole—will be enhanced by the experience WOSBs gain in Federal contracting through participation in this Program. While WOSBs gain this experience, moreover, this Rule ensures that any contract award to them will be based on a fair and reasonable price to the government. Indeed, the current barriers that inhibit WOSBs' ability to compete equally for contracts and subcontracts impose upon the government increased costs due to lessened competition; these costs are likely to be reduced as more WOSBs become economically successful and competition for contracts and subcontracts therefore increases.

This regulatory action promotes the government's objectives. One of SBA's goals is to help individual small businesses succeed through fair and equitable access to capital and credit, government contracts, and management and technical assistance. Implementation of this Proposed Rule ensures that the intended beneficiaries have access to small business programs designed to assist them. This Proposed Rule does not interfere with State, local, and tribal governments in the exercise of their government functions. In a few instances, in fact, State and local governments have voluntarily adopted SBA's regulations for their programs; those state and local governments that do so here will save resources that otherwise would be consumed by the need to establish their own administrative standards and processes.

This regulatory action will also enable the Federal government to avoid extending the effects of discrimination against women through the government's own contracting processes. As explained in Section I, Background, of the preamble, the Federal government has an obligation to ensure that it is not implementing contracting procedures that permit the effects of sex discrimination to continue to impede the ability of WOSBs to participate in Federal contracting. As stated in *Croson*, these remedial programs not only help businesses overcome the effects of discrimination, but ensure that the public's tax dollars are not spent in a discriminatory manner. This program, by creating a sheltered market for a very small percentage of Federal contracts, thus advances the Federal government's commitment to ensuring equal opportunity in its contracting processes.

#### 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 this Proposed Rule imposes new reporting and recordkeeping requirements. The certification process described in Subpart C, §§ 127.300 to 127.302, is an information collection. The proposed self-certification process requires a concern seeking to benefit from Federal contracting opportunities designated for WOSBs or EDWOSBs to verify its status by using the 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. In addition, the WOSB or EDWOSB will be required to submit certain documents verifying eligibility at the time of certification in ORCA (and every year after). SBA proposes that these documents 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 this proposed rule also requires the WOSBs or EDWOSBs to retain copies of the documents submitted for a period of six (6) years. SBA believes, however, that any

additional burden imposed by this recordkeeping requirement would be de minimus since the firms would maintain the information in their general course of business.

SBA has submitted this information collection to OMB for review.

*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:* New collection.

*Description of and Estimated Number of Respondents:* This 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. As noted above, 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, approximately 12,000 WOSBs were identified as recipients of Federal contracts in the 83 NAICS codes that would be eligible under the WOSB Program. 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 estimates that there will be 12,000 responses. In addition, SBA intends to conduct eligibility examinations and protests and appeals. The total estimated number of responses is 12,200.

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

Please send comments by the closing date for comment for this Proposed Rule

to SBA Desk Officer, Office of Management and Budget, Office of Information and Regulatory Affairs, 725 17th Street, NW., Washington, DC 20503 and to Dean Koppel, Assistant Director, Office of Government Contracting, U.S. Small Business Administration, 409 Third Street, SW., Washington, DC 20416.

#### Regulatory Flexibility Act

SBA has determined that this Proposed 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 has prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule in accordance with section 603, title 5, of the United States Code. The IRFA examines the objectives and legal basis for this Proposed Rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with this Proposed Rule; and whether there are any significant alternatives to this Proposed Rule.

#### 1. What Are the Reasons for, and Objectives of, This Proposed Rule?

SBA is establishing procedures whereby Federal procuring agencies may use restricted competition in industries where WOSBs are substantially underrepresented, or, in some cases, underrepresented in Federal procurement and when certain other conditions are met. The purpose of this Proposed Rule is to create an initial framework and infrastructure for implementing these new procedures, thereby providing a tool for Federal agencies to ensure that WOSBs have an equal opportunity to participate in Federal contracting. The objectives of this Proposed Rule are to overcome the effects of sex discrimination on women's opportunities to participate equally in Federal contracting, to ensure a level playing field on which women-owned small businesses have a fair opportunity to compete for Federal contracts, and to ensure that the WOSB Program is substantially related to the Congressional goals in accordance with applicable law.

#### 2. What Is the Legal Basis for This Proposed Rule?

SBA is proposing this regulation pursuant to section 8(m) of the Small Business Act, 15 U.S.C. 637(m), which authorizes the creation and

implementation of a new mechanism for Federal contracting with WOSBs.

#### 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 Proposed Rule will ultimately establish in the FAR a new procurement mechanism to benefit WOSBs. Therefore, WOSBs that compete for Federal contracts are the specific group of small business concerns most directly affected by this rule. The rule may also affect other small businesses to the extent that small businesses not owned and controlled by women may be excluded from competing for certain Federal contracting opportunities.

SBA searched CCR's DSBS and determined that there were approximately 76,000 WOSBs listed. However, it is not likely that all of these firms will be affected by this rule because not all of these firms likely do business in one of the 83 four-digit NAICS codes identified as underrepresented or substantially underrepresented by the Proposed Rule. SBA attempted to approximate the number of WOSBs in the 83 industries, but there is no simple method of determining how many firms actually participated in these NAICS codes. SBA did review the DSBS to determine that, as of June 30, 2009, there were approximately 230,005 WOSBs identified in the 83 industries that will be eligible for contract assistance under the WOSB Program. However, this approach counted a WOSB multiple times if it listed itself in more than one NAICS code, and therefore likely overstates the number of WOSBs that will be affected by this rule. Therefore, the best estimate of the maximum number of currently registered WOSBs that could be affected by this rule is approximately 76,000. However, there may be more WOSBs affected if additional firms list themselves in DSBS or if SBA approves additional industries for set-aside procurements under these procedures. However, the number could be less because many otherwise-qualified EDWOSBs and WOSBs will not find it advantageous to participate in the WOSB Program, since the industries in which they do business are not one of the 83 eligible industries.

This Proposed Rule would affect small businesses other than WOSBs that are excluded from competition for Federal contracts that are included in the Program. Non-WOSBs in the 83

designated industries may be excluded from opportunities from which they would have otherwise benefited. However, the Federal government purchases billions of dollars of goods and services every year, and SBA believes that there are sufficient acquisitions available for all small businesses. Therefore, the number of small businesses that could be excluded under the proposed determination of eligible industries or future such determinations is not known at this time.

Additional contracting opportunities identified by Federal agencies as candidates for the WOSB program 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 by this rule.

#### 4. What Are the Projected Reporting, Recordkeeping, Paperwork Reduction Act and Other Compliance Requirements?

WOSBs are not required to be certified as such in order to contract with the Federal Government; this will still be true if this Proposed Rule is adopted. For a WOSB to be eligible for Federal contracts restricted to WOSBs or EDWOSBs, however, it will have to self-certify its status as a WOSB in ORCA and CCR. Any WOSB or EDWOSB that is the apparent successful offeror will have to provide certain documents to the contracting officer, prior to award, to verify its eligibility. This procedure is required by statute. This requirement ensures that participation in certain contracting opportunities is restricted to qualified WOSBs according to the terms of section 8(m) of the Act and the criteria in this Proposed Rule. In addition, concerns would have to submit information to SBA in the context of a protest or examination. In the case of a protest or examination, SBA might request that a particular WOSB submit documentation to substantiate its claim. WOSBs or EDWOSBs are required to retain documentation demonstrating satisfaction of the eligibility requirements for six (6) years from date of self-certification in ORCA. SBA proposes to require the documents be kept for six (6) years from the date of a self-certification because the government can bring an action under 31 U.S.C. 3730 for false claims six (6) years from the date the false claim is made. 31 U.S.C. 3731.

The proposed document retention will require WOSBs and EDWOSBs to

have a filing system to retain the documents; however, SBA believes this information is already retained by a WOSB or EDWOSB in the ordinary course of business. Therefore this Proposed Rule will not likely impose any additional burden on WOSBs and EDWOSBs. To the extent that WOSBs and EDWOSBs typically retain this information for less than six (6) years, the concern may have to increase the capacity of its filing and document tracking system.

In addition, any documents submitted to a contracting officer as part of an offer are considered source selection sensitive under FAR and cannot be released prior to award of a contract. 48 CFR 3.104-3. After award of a contract, all information and/or documents submitted to a Federal agency, including SBA, are protected to the fullest extent permitted by law, including the Privacy Act and Freedom of Information Act, 5 U.S.C. 552.

The Paperwork Reduction Act requirements are addressed further below. SBA would welcome any comments on the process as described.

#### 5. What Relevant Federal Rules May Duplicate, Overlap, or Conflict With This Rule?

SBA has not identified any relevant Federal rules currently in effect that duplicate or conflict with this rule. The restricted-competition feature of the WOSB program will be an addition to the existing contracting programs that agencies currently administer, such as small business set-asides, HUBZone set-asides, service-disabled veteran-owned small business set-asides, and contracts reserved for the 8(a) Business Development Program. For any particular contract, a contracting officer may have a range of set-aside options from which to select. Because any contract awarded to a WOSB will also count towards an agency's small business goal, these procedures may lead a contracting officer to select this program in lieu of another.

Therefore, although there may be some overlap, the addition of the set-aside mechanism for women-owned small business should complement rather than conflict with the goals of existing set-aside programs.

#### 6. What Significant Alternatives Did SBA Consider That Accomplish the Stated Objectives and Minimize Any Significant Economic Impact on Small Entities?

The RFA requires agencies to identify alternatives to the rule in an effort to minimize any significant economic impact of the rule on small entities. SBA

has determined that this rule may have a significant economic impact on a substantial number of small entities. This rule will implement the set-aside mechanism for WOSBs, as established by section 8(m) of the Act. All of the provisions of this rule reflect requirements under that statute.

The legislation does provide SBA with alternative approaches, however, for the certification of WOSBs. Specifically, a WOSB may be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator. SBA has reviewed some sources and believes that such certification is different depending on the location and size of the business and that the range for such a certification is approximately \$200–\$1000 for the initial certification and every year thereafter for recertification. In some cases, the costs may be higher. Thus, the WOSB may, in the alternative, self-certify in ORCA and provide adequate documentation to the contracting officer (via an electronic repository or directly to the contracting officer if the repository is unavailable) that it is a WOSB in accordance with standards established by the Administration, with minimal costs (to include document retention). SBA did consider limiting certification to either third party certification or self-certification with the provision of documents, but SBA believes that this Proposed Rule provides the most flexibility to WOSBs and EDWOSBs in participating in the program. SBA estimates that implementation of this regulation will require no additional proposal costs for WOSBs, as compared to submitting proposals under any other small business set-aside program. Moreover, WOSBs currently represent their status for purposes of data collection that is needed to implement 15 U.S.C. 644(g). In addition, although WOSBs or EDWOSBs must make available documentation to the contracting officer at the time of certification in ORCA, the documents provided are kept in the normal course of business and therefore should not require additional proposal costs.

#### List of Subjects

##### 13 CFR Part 121

Government procurement, Government property, Grant programs—business, Individuals with disabilities, Loan programs—business, Small businesses.

##### 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 withdraws the Proposed Rule published on October 1, 2008 at 73 FR 57014, and proposes to amend 13 CFR parts 121, 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, and 662(5); 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 Assistance 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 Assistance 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. \* \* \*

5. 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?

**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, and to ensure that the WOSB Program is substantially related to Congressional goals 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 Women-Owned Small Businesses (WOSBs) are underrepresented or substantially underrepresented in Federal procurement and 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.

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

*Central Contractor Registration (CCR)* means the system that functions as the central registration and repository of contractor data for the Federal government and is a means for conducting searches of small business contractors. In general, prospective Federal contractors must be registered in CCR prior to award of a contract or purchase agreement, unless the award results from a solicitation issued on or before May 31, 1998.

*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 U.S. 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* means the Online Representations and Certifications Application at <https://orca.bpn.gov>, a required registration for contractors interested in submitting an offer, bid or quote on most Federal contracts.

*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 applicant or Participant.

*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 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; 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 or 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, a 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. 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.

(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. 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 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.

(b) *Managerial position and experience.* A woman must hold the highest officer position in the concern and must have managerial experience of the extent and complexity needed to run the concern. The woman 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 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 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 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 must serve as management members, with control over all decisions of the limited liability company.

(f) *Control over a corporation.* One or more women must 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 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 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 may consider a spouse's financial situation in determining a woman's access to credit and capital. SBA does not take into consideration community property laws when determining economic disadvantage when the woman has no 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 S corporation 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.

(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.

(c) *Factors that may be considered.*

(1) *General.* The personal financial condition of the woman claiming

economic disadvantage, including her personal income for the past two 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, may be considered in determining whether she is economically disadvantaged.

(2) *Income.*

(i) When considering a woman's personal income, if the adjusted gross yearly income averaged over the two years preceding the certification exceeds \$200,000, 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 earned by S corporations, which is reinvested in or the distribution was solely for the purposes of paying taxes arising in the normal course of operations of the business concern, is exempted from income for purposes of this section provided that documentary evidence is submitted demonstrating this use. Likewise, S corporation losses may not be subtracted from a woman's income to reduce that income.

(3) *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 \$3 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) and have a current self-certification posted on the Online Representations and Certifications Application (ORCA) that it qualifies as an EDWOSB or WOSB.

(b) *Form of certification.* In conjunction with its required registration in the CCR database, the concern must submit a self-certification to the electronic annual representations and certifications at <http://orca.bpn.gov>, that it is a qualified EDWOSB or WOSB. The self-certification must include a representation, subject to penalties for misrepresentation, that:

(1) The concern 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) *General.* At the time of certification in ORCA, the WOSB or EDWOSB that has been certified as a WOSB or EDWOSB by a certifying entity approved by SBA must provide a copy of the certification to the WOSB Program Repository. If the 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 certification to the contracting officer verifying that it was a WOSB or EDWOSB at the time of initial offer. In addition, the EDWOSB or WOSB must also provide a copy of the joint venture agreement, if applicable. Within thirty (30) days of the repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository.

(2) *U.S. Department of Transportation (DOT) Certification.* At the time of certification in ORCA, the WOSB or EDWOSB that has been certified as a as a DOT Disadvantaged Business Enterprise must submit a copy of the DBE certification showing that it received such certification because it is owned and controlled by one or more women to the WOSB Program Repository. If the repository is unavailable, then prior to award of a WOSB or EDWOSB contract, the apparent successful offeror must provide a copy of the DOT Disadvantaged Business Enterprise certification to the contracting officer showing that it received such certification because it is owned and controlled by one or more women, verifying that it was a WOSB or EDWOSB at the time of initial offer. In addition, the WOSB or EDWOSB must provide a statement identifying the woman or women upon whom eligibility was based and documents, such as birth certificates or passports, evidencing that the women are citizens of the United States, as defined in § 127.102. Within thirty (30) days of the 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 must provide documents to the WOSB Program Repository. If the 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 repository becoming available, the WOSB or EDWOSB must provide the same documents to the repository. These documents must include the following:

(1) Birth certificates, Naturalization papers, or 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, the assumed/fictitious name certificate(s); and

(7) For EDWOSBs, in addition to the above, the 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.

(f) *Update of certification and documents.*

(1) The concern must update its 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 representations and self-certification are effective for a period of one year from the date of submission or update to ORCA.

(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 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 repository becoming available, the WOSB or EDWOSB must provide the same documents to the 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). 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.

(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's self-certification to SBA for verification of the concern's eligibility by filing an EDWOSB or WOSB status protest pursuant to subpart F of this part.

**§ 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 due to their status as a women-owned concern; 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).

(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 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.

**§ 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?**

Eligibility examinations are investigations that verify the accuracy of any certification made or information provided as part of the certification process 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. SBA may consider protest allegations set forth in a protest in determining whether to conduct an examination of a concern pursuant to this 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(c) 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 a copy of a 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, 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 it receives 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 contract, 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 Program 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) 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.

**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 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 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.* Only if the contracting officer determines that the market research indicates that the criteria in paragraph (a) of this section are not met for restricting competition to EDWOSBs may the contracting officer then restrict competition to WOSBs. In addition, to restrict competition to WOSBs, the contractor must determine that the following criteria are met:

(1) The requirement is in an industry that SBA has designated as substantially underrepresented with respect to WOSBs; and

(2) The contracting officer has a reasonable expectation based on market research that—

- (i) Two or more WOSBs will submit offers;
- (ii) 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
- (iii) 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 awarding 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.* 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 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. 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, should 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 a as underrepresented or, with respect to WOSBs, substantially underrepresented, industry.

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

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:

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

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

(c) There has been no material change in any of its circumstances affecting its EDWOSB or WOSB eligibility; and

(d) It will 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.

### 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 credible evidence that the concern is not 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(c).

#### § 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.

(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(c)(2) (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 solicitation. In addition, EDWOSBs will be required to submit a copy 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, and 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 its determination will harm public interest.

(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 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 may 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) If a contracting officer receives such a determination after contract

award, 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 initial determination finding that the protested concern is ineligible, the contracting officer shall either terminate the contract or not exercise the next option.

(2) The contracting officer must update the Federal Procurement Data System—Next Generation (FPDS—NG) and other procurement reporting databases to reflect the final agency decision.

(3) A concern that has been found to be ineligible may not represent itself as a WOSB or EDWOSB on another procurement until it cures the reason for its ineligibility. 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 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**

6. 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**

7. Section 134.102(s) is republished 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**

8. Section 134.515(b) is republished 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.

\* \* \* \* \*

9. 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 a 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 the contracting officer awarded the contract to a concern that OHA finds to be ineligible, then the contracting officer shall terminate the contract, not exercise any options, or not award further task or delivery orders.

**§ 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: February 19, 2010.

**Karen Gordon Mills,**  
*Administrator.*

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