

SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 125, 127, and 134

RIN: 3245-AF40

The Women-Owned Small Business Federal Contract Assistance Procedures

AGENCY: Small Business Administration.

ACTION: Final Rule.

SUMMARY: This final rule amends the U.S. Small Business Administration (SBA) regulations governing small business contracting programs to set forth procedures that will govern the new Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures as authorized in the Small Business Act.

DATES: Effective Date: This rule is effective [INSERT 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Applicability Date: This final rule will be effective 30 days after publication..

This final rule does not identify the industries in which WOSBs are underrepresented or substantially underrepresented in Federal procurement because SBA is awaiting comments on its proposed rule before concluding its eligibility determinations. SBA's determination of the industries in which WOSBs are underrepresented or substantially underrepresented in Federal procurement will be effective not less than 30 days after its publication date.

FOR FURTHER INFORMATION CONTACT: Linda Korbol, Assistant Administrator for Women's Procurement, Office of Government Contracting, (202) 205-7341 or Linda.Korbol@sba.gov.

SUPPLEMENTARY INFORMATION:

On December 27, 2007, SBA proposed to amend its regulations in the Federal Register, 72 FR 73285, with a request for comments to implement the WOSB Federal Contract Assistance Procedures (Procedures). These Procedures are authorized under Section 811 of the Small Business Reauthorization Act of 2000, Public Law 106-554, which is codified at Section 8(m) of the Small Business Act (Act), 15 U.S.C. § 637(m).

The proposed rule concerned procedures to increase Federal procurement opportunities for WOSBs. More specifically, the proposed rule contained provisions that would authorize contracting officers to restrict competition to eligible WOSBs for Federal contracts not exceeding \$3 million (\$5 million for manufacturing) in those industries in which WOSBs are underrepresented or substantially underrepresented and in which the procuring agency has determined that the set-aside would satisfy constitutional requirements. The proposed rule also set forth the standards for determining the eligibility of a concern as a WOSB or EDWOSB and required any firm receiving a contract under these procedures to certify its status as a "small business concern owned and controlled by women" as defined in § 3(n) of the Small Business Act, 15 U.S.C. § 632(n). In addition, the proposed rule identified the industries in which WOSBs were determined to be underrepresented and substantially underrepresented in Federal contracting. The proposed rule also established standards for eligibility examinations and protest procedures, as well as the penalties that can be imposed for a concern's

misrepresentation of its status as an EDWOSB or WOSB. Lastly, the rule proposed the relevant conforming amendments to SBA's current procurement and appeal procedure regulations.

#### Discussion of Comments on the Proposed Rule

The comment period for the Proposed Rule closed on March 31, 2008. SBA received approximately 1,720 comments. These comments are available to the public for viewing at <http://www.regulations.gov>. The large majority of comments were received from individuals. Of the 1,720 comments, SBA received approximately 1,610 comments from individuals, thirty-one comments from individuals using form letters from various associations or organizations, forty-five comments from associations or organizations, thirty-one comments from members Congress, and three comments from other Federal agencies through the public comment process and posted online at [www.regulations.gov](http://www.regulations.gov).

Of the 1,720 comments received, approximately twenty-seven of the comments were not applicable to the rule; four of the comments requested an extension of the public comment period; and 1,689 of the comments requested withdrawal of the proposed rule and/or stated opposition to some portion of the proposed rule. Of the comments that opposed the proposed rule, 1,591 comments requested that the proposed rule be withdrawn; 828 comments stated that some aspect of the proposed rule frustrated Congressional intent; 173 comments opposed the method by which the proposed rule requires a procuring agency to determine that the set-aside is consistent with constitutional standards; 104 comments were concerned with the methodology used by SBA to determine industries in which WOSBs were underrepresented or substantially underrepresented; thirty-six comments alleged that SBA and/or the Kauffman-RAND

Institute for Entrepreneurship Public Policy (RAND) study applied the incorrect level of scrutiny to determine underrepresentation or otherwise addressed Constitutional concerns; seven comments addressed SBA's use of the value of contract dollars to determine underrepresentation; and four comments opposed the proposed self-certification process.

#### Extension of the Public Comment Period

The SBA received several comments that requested an extension of the public comment period. In response to these comments and the general high level of interest that the proposed rule generated during the public comment period, SBA agreed with the recommendation in these comments and therefore reopened the comment period for an additional 30 days in order to allow the public more time to submit comments on the proposed rule. See 73 FR 10697. As a result, the comment period closed on March 31, 2008 and SBA received approximately 1,720 comments.

#### General Comments on Implementation of the Procedures

Of the comments that opposed the proposed rule, over 700 requested that SBA withdraw the proposed rule but did not provide a substantive reason why SBA should take such action. Accordingly, and for the reasons below, SBA will continue with this final rule setting forth the contracting procedures for WOSBs. In addition, SBA points out that Congress authorized the contracting assistance procedures for WOSBs contained in the final rule as a result of the Federal government's inability to reach the government-wide WOSB contracting goal of 5% of the value of all contract awards. Congress enacted Section 8(m) to authorize creation of a targeted procurement mechanism for WOSBs and it charged SBA with the responsibility for establishing and implementing the

governing standards and regulations for these Procedures. The Procedures in the final rule will not only benefit WOSBs, but should help Federal agencies achieve their WOSB participation goals under Section 15(g) of the Small Business Act, 15 U.S.C. § 644(g). For all of these reasons, SBA will not withdraw the proposed rule, but instead has decided to move forward with this final rule based on the authority in Section 8(m).

Eligible Industries in Which WOSBs are Underrepresented or Substantially Underrepresented

The SBA received approximately 104 comments expressing concern that the proposed rule limited WOSB eligibility for restricted-competition contracts to only four industry sectors. These comments stated that SBA should have used a broader methodology in the RAND study to identify the industries in which WOSBs are underrepresented or substantially underrepresented. The comments also state that SBA, without substantive justification, declined to adopt the approach in the RAND study that would have classified 87% of industries as underrepresented, and instead promulgated a rule based on the most restrictive approach proposed by the report. In addition, SBA received comments stating that it was the intent of Congress to increase federal contracts going to WOSBs and that the proposed rule will not accomplish increased participation by WOSBs. Lastly, SBA received a comment stating that the RAND report and therefore the proposed rule based its conclusions on the erroneous assumptions that the past contract opportunities analyzed by the RAND study are and will remain constant across all of the potentially affected industries.

In response to these comments, SBA notes that Section 8(m) requires SBA to conduct a study to identify the industries in which WOSBs are underrepresented and

substantially underrepresented in Federal procurement. SBA initially completed the legislatively mandated study in September 2001. However, in March 2005, the National Academy of Sciences (NAS) issued an independent evaluation determining that SBA's original study was "fatally flawed." In response to the NAS findings, SBA issued a solicitation in October 2005 seeking a contractor to perform a revised study in accordance with the NAS report. In February 2006, SBA awarded a contract to RAND to complete a revised study of the underrepresentation of WOSBs in Federal procurement in accordance with the NAS findings. The RAND report was published in April 2007. The report, along with the supporting back-up datasets used to identify underrepresentation, are available to the public at [http://www.rand.org/pubs/technical\\_reports/TR442/](http://www.rand.org/pubs/technical_reports/TR442/).

The RAND study outlines twenty-eight different approaches for measuring the underrepresentation of WOSBs by using a disparity ratio. Each approach uses a different data source or a different version of the same data source, and each of the data sources was recommended by the NAS findings. Depending on the approach used, the RAND study yielded different levels of WOSB representation in Federal procurement. For the reasons set forth in the proposed rule, SBA eliminated various non-justifiable approaches and selected the approach that it believed most appropriately conformed to the applicable statutory requirements, most accurately reflected the measure employed, and was legally justifiable. The selected approach compared the percentage of Federal contract dollars going to WOSBs to the percentage of total revenue from all sources going to WOSBs in 4-digit NAICS codes ("disparity ratio"). Using this approach, SBA issued a proposed rule that identified four industries in which WOSBs were underrepresented or

substantially underrepresented. The comments that SBA received were opposed to the determination that WOSBs were eligible for contracts in only four industries.

Although SBA did not receive any comments on the reliability of the data sources used for the selected approach, as indicated above, SBA did receive a large number of comments opposing the selected approach. As a result, SBA engaged in a further review and examination of the RAND study, including the data sources and in particular the CCR data set, which was relied upon to arrive at the four industries in which WOSBs were found to be underrepresented and substantially underrepresented. As a result of this further examination, SBA has now identified a limitation inherent in the CCR data set. Specifically, when RAND computed the disparity ratio to determine underrepresentation, each firm's total revenue was counted in every NAICS code associated with the firm. This has resulted in firms' total revenue being counted for multiple NAICS codes, overstating the aggregate revenue figures. Although the CCR data set was publicly available along with the RAND report at [http://www.rand.org/pubs/technical\\_reports/TR442/](http://www.rand.org/pubs/technical_reports/TR442/), this CCR data set limitation was not specifically disclosed in the RAND study or to the public in the proposed rule.

Therefore, concurrently with the issuance of this final rule, SBA is issuing a Proposed Rule; Request for Comment that seeks input from the public on what effect, if any, the CCR data has on the disparity ratio, and ultimately, the determination that WOSBs are underrepresented or substantially underrepresented in the various industries. This CCR data limitation is fully explained in the Proposed Rule; Request for Comment. The Proposed Rule; Request for Comment also seeks comment on an alternative data set not analyzed by RAND or included in the proposed rule.

In light of the foregoing, this final rule does not identify the industries in which WOSBs are underrepresented or substantially underrepresented in Federal procurement. Therefore, SBA has determined that it is premature to address the public comments opposing SBA's identification of the eligible industries. Once SBA has received and evaluated the public's comments on the data limitation in response to the Proposed Rule; Request for Comments, SBA will publish a Notice in the Federal Register that contains the rationale for its final determination and a list of eligible industries. SBA will also post on its Internet Web site a list of 4-digit NAICS Industry Subsector industries it designates under § 127.501(a).

#### Use of Dollars as the Measure of WOSB Underrepresentation

As indicated above, SBA determined that the most justifiable approach to determining WOSB representation compared the percentage of contract dollars going to WOSBs to the percentage of revenue dollars going to WOSBs. SBA received several comments on the decision to use contract dollars as the measure of underrepresentation. These comments stated that the use of the number of contracts as the measure of underrepresentation will more likely help to achieve the 5% goal and is therefore consistent with Congressional intent.

SBA disagrees with these comments and believes that the use of contract dollars as the measure is more consistent with the relevant statutory requirements and Congressional intent. When considering whether to use the dollar value of contract awards or the number of contract awards as the measure of underrepresentation, SBA evaluated the benefits and limitations of either choice. As indicated in the proposed rule, after careful analysis, SBA decided to adopt an approach consistent with statutory

measures, which use dollars. Most importantly, Congress, through the Small Business Act, has given relevant direction only in dollars. Section 15(g)(1) is the section in the Act that provides direction on counting small business goals. All of those goals are aimed at achieving a dollar amount (total value) relative to all dollars expended in Federal procurement. In particular, the goal for small business concerns owned and controlled by women states that: “The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the *total value* of all prime contract and subcontract awards for each fiscal year.” 15 U.S.C. 644(g)(1) (emphasis added). Congress authorized the contracting assistance procedures in Section 8(m) to assist Federal agencies in achieving this goal.

In addition, Congress appropriates Federal funding in dollars, the Federal budget is divided in dollars, all Federal government contracts are awarded in dollars, and the accounting and auditing processes focus on how these dollars are spent. Dollar amounts can easily be compared across agencies, programs and NAICS codes. Tracking dollar amounts also avoids problems that arise from the contracting nuances of the individual agencies. Contract actions do not allow for an accurate accounting of the financial benefits and business development that occur when small businesses receive a Federal contract.

Based on the above, a measure that determines underrepresentation based on the number of contract awards going to WOSBs would not align with the purpose behind Congress’s passage of the Section 8(m) legislation or with the other Congressional measures. On the other hand, a measure based on contract dollars is consistent with the 5% goal, which is also based on contract dollars, and therefore conforms more closely to

the Congressional intent and purpose of Section 8(m). Based on this determination, the proposed rule defined “substantial underrepresentation” and “underrepresentation” as a ratio representing the WOSB share of Federal prime contract dollars divided by the WOSB share of total business receipts. For the reasons stated above, the final rule adopts the definitions of underrepresentation and substantial underrepresentation without modification.

#### Agency-by-Agency Determination

Commenters also 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 frustrates Congressional intent by applying a strict-scrutiny standard when gender-based preferences need only satisfy the standard of intermediate scrutiny. The comments also state that the disparity study analysis conducted by RAND is sufficient to satisfy the intermediate scrutiny standard and that the agency determination of discrimination requirement has no basis in law. The comments further state that the requirement would unduly limit the industries in which WOSBs were underrepresented or substantially underrepresented. Lastly, the comments state that this requirement would substantially burden the procuring agencies and that the procuring agencies will avoid set-asides to avoid self-incrimination and litigation.

As reflected in both the proposed rule and in this final rule, SBA agrees that the intermediate scrutiny standard applies to gender-based set-asides. The equal protection requirements of the Fifth Amendment prohibit Federal agencies from discriminating on

the basis of sex in awarding contracts unless the preference furthers important governmental objectives and the means employed are substantially related to the achievement of those objectives. *See United States v. Virginia*, 518 U.S. 515, 533 (1996). This standard, which requires an “exceedingly persuasive justification,” *id.*, is commonly referred to as “intermediate scrutiny” and sometimes as “heightened scrutiny.” *See id.* at 555. The RAND study and the final rule acknowledge the application of the intermediate scrutiny standard to gender-based preferences.

In applying this standard, Federal courts have generally required that the government establish probative evidence of discrimination in the relevant economic sphere in order to justify sex-based contracting preferences. See, e.g., *Engineering Contractors Ass’n of South Florida v. Metropolitan Dade County*, 122 F.3d 895, 910 (11th Cir. 1998); *Contractors Ass’n of Eastern Penna. v. City of Philadelphia*, 6 F.3d 990, 1010-11 (3d Cir. 1993); *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade County*, 333 F.Supp.2d 1305, 1317 (S.D. Fla. 2004). Based on the Federal Court precedents, the U.S. Department of Justice has advised SBA that before a contracting officer may restrict competition to WOSBs under section 8(m), it must be determined through appropriate analysis (which analysis may include examination of the concerned agency’s procurement history) that the set-aside will be consistent with the foregoing constitutional standards. In particular, it must be determined whether the set-aside is substantially related to remedying sex discrimination in the affected industry. For the foregoing reasons, SBA cannot agree with the comments that section 127.501(b) of the proposed rule has no basis in the law and is inconsistent with intermediate scrutiny. As the cases above illustrate, intermediate scrutiny has been held to require evidence of

discrimination in the relevant economic sphere in order to justify gender-based set asides in that sphere. The standard in section 127.501(b) is fully consistent with this judicially recognized discrimination requirement, and in fact represents one of the soundest, most reliable means of ensuring compliance with it. In addition, because the RAND study correctly acknowledges that the unrefined disparity ratios it found are not in and of themselves measures of discrimination, SBA disagrees with the comments that contend the RAND study alone is sufficient to satisfy the intermediate scrutiny.

As to the comments that the requirement of agency-specific findings of discrimination would be too burdensome for agencies, the SBA believes that individual contracting agencies are in a better position than the SBA to evaluate the connection between disparity and discrimination in certain contracting sectors because SBA does not have access to details of procurement history within other agencies. Accordingly, although requiring contracting agencies to identify evidence of discrimination in relevant contracting spheres would no doubt impose some burden, this allocation is less costly and burdensome than having SBA try to make discrimination findings based upon private sector or agency procurement data to which the agency does not have access. Furthermore, these additional agency findings will further augment the data upon which the RAND study is based and, in this way, more than compensate for any burden the procuring authorities might encounter.

The SBA further disagrees with the concern that an agency finding of discrimination could be perceived as an admission of unlawful conduct. An agency-specific finding of past discrimination would not necessarily constitute an admission of liability for past unlawful conduct because courts have noted that agency discrimination

may in some instances result from an agency's passive participation in a discriminatory market.

For the foregoing reasons, the final rule adopts § 127.501 without any change.

#### Substantially Underrepresented Industries

SBA received at least one comment that was concerned with SBA's statement in the proposed rule that the provisions of Section 8(m) appear literally to authorize set-asides for Federal contracts only in industries in which WOSBs are determined to be substantially underrepresented. See 15 U.S.C. § 637(m)(2)(C), (3). The comment states that this provision is unclear and conflicting, resulting in a disingenuous partial implementation of the statute that is not aligned with Congressional intent. The comment recommends SBA to recognize that, in industries where women are substantially underrepresented, the requirement of being economically and socially disadvantaged should not apply at all because of the disparity between utilization and availability.

As SBA accurately stated in the proposed rule, due to an apparent drafting error in the cross-reference and the inter-relationships between subparagraphs (2)(C), (3) and (4) of 15 U.S.C. 637(m), subparagraph (2)(C) -- by its express cross-reference to subparagraph (3) rather than to subparagraph (4) -- literally appears to authorize set-asides for Federal contracts only in industries in which WOSBs are determined to be substantially underrepresented. However, if the statute were construed by SBA not to authorize set-asides in industries in which WOSBs were merely underrepresented, the provision in the statute requiring SBA to conduct a study to determine industries in which WOSBs are underrepresented, as well as the section's waiver provision, would arguably be rendered inoperative or contradictory.

Accordingly, based on the above reasoning, and as already stated in the proposed rule, SBA believes that the legislation is properly interpreted to authorize set-asides industries in which WOSBs are determined to be underrepresented or substantially underrepresented.

#### Effect of Status Protest

SBA received two comments regarding the proposed protest procedures in § 127.600, *et seq.* These comments were concerned that the proposed rule did not address what would happen to a pending or already issued WOSB contract award when a status protest was filed with the contracting officer.

SBA agrees that proposed § 127.604 fails to provide any direction to contracting officers as to whether they are required to suspend the contract award or performance on the award until the status protest has been resolved. Therefore, SBA has amended § 127.604(f) to allow a contracting officer to award a contract or begin performance after receipt of a protest, but only if the contracting officer has determined that the award must be made to protect the public interest. The proposed rule's preamble did give some guidance for this decision, stating generally that a status protest "halts the procurement until SBA investigates the allegations and reaches a decision." For the foregoing reasons, the following provision to § 127.604(d) will be added: The contracting officer may award the contract or begin performance after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the public interest.

#### Self-Certification Process

SBA received several comments on the self-certification process. These comments criticize SBA for creating a new certification process for these Procedures by

requiring WOSBs to self-certify. The comments urge SBA to instead accept WOSB certifications from other organizations as the sole method for certification. In addition, a comment recommended that the certification rules be rewritten to prevent large corporate influence over the certification process. This comment fails to include any suggestion on how the recommendation can be accomplished.

SBA believes that the self-certification process set forth in this final rule is consistent with the statutory framework of Section 8(m) and with prevailing Supreme Court precedent. Section 127.300 requires WOSBs to be registered in the Central Contractor Registration (CCR) and have a current self-certification posted on Online Representations and Certifications Application (ORCA) that it qualifies as an EDWOSB or WOSB. Specifically, § 127.300 provides that at the time a concern submits an offer on a specific contract reserved for competition under these procedures, it must be registered in the CCR and have a current self-certification posted on the ORCA affirming that it qualifies as an EDWOSB or WOSB. That section further details the specific representations that concerns must include as part of their self-certification, including that: (1) the firm is a small business concern under the size standard assigned to the particular procurement; (2) 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 (3) neither SBA nor an SBA-approved certifier has determined that the concern does not currently qualify as an EDWOSB or WOSB.

Because ORCA is the Federal Government's generally accepted representations and certifications process that concerns currently utilize to self-certify other forms of

small business status in Federal procurements, using that system for the WOSB self-certification process for Federal procurement would be the logical choice and would minimize interference with the procurement process and the burden on contracting officers and WOSBs. In addition, because certifying entities may not all use the same eligibility criteria applicable to EDWOSBs and WOSBs as provided under this rule, SBA does not intend automatically to accept additional third-party certifications for purposes of these Procedures. Rather, once SBA has determined that a certifier uses the same criteria and follows appropriate procedures and standards, SBA may designate that entity as an approved certifier. The SBA will maintain a list of all approved certifiers on its Web site.

SBA also believes the self-certification process in this rule will minimize delays and disruption to the contracting process by utilizing the existing system of representations and certifications in Federal procurement and by not requiring contracting officers to review voluminous documents supporting a concern's self-certification. It also puts a minimum burden on the EDWOSB and WOSB desiring to do business with the Federal government. At the same time, the self certification in the CCR and ORCA will help minimize the likelihood of fraud and misrepresentation of WOSB and EDWOSB status through the use of robust protest procedures coupled with the provisions for appropriate examinations to monitor the eligibility of firms that self-certify their status and existing fraud statutes and procedures. These procedures are also consistent with other contracting preferences procedures.

#### Other SBA Contracting Preferences

SBA received one comment stating that the proposed rule wrongly creates

procedures that must compete with other set-aside incentives, such as the 8(a) Business Development Program, for the attention of agency contracting officers.

In response to this comment, SBA assumes that the commenter was referring to § 127.503(c) of the proposed rule, which made clear that 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. Because this limitation on the restriction of competition serves to reconcile the goal requirements of 15 U.S.C. § 644(g) with the requirements of section 8(m), it is authorized by the Administrator's general authority to "make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter." 15 U.S.C. § 634(b)(6). This final rule does not create an order of preference among SBA's contracting programs and is intended to be consistent with SBA's policy of parity among its contracting programs.

In addition, SBA notes that the Federal government spends billions of dollars each year in Federal procurement. Lastly, § 127.502 is necessary to ensure the integrity of the business development aspects of the 8(a) BD Program. Generally, the requirement will be retained for 8(a) participation, but may be released by SBA as indicated in the regulation. Thus, SBA has not amended the final rule to adopt this comment.

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

Executive Order 12866

Regulatory Impact Analysis

The Office of Management and Budget (OMB) has determined that this rule constitutes a “significant regulatory action” under Executive Order 12866, thereby necessitating a regulatory impact analysis. OMB has also determined that this rule is not a major rule as defined by the Congressional Review Act.

The SBA received one comment on the regulatory impact analysis. That comment questioned SBA’s rationale that the Procedures will result in increased costs to the taxpayer. The comment cites a Department of Defense study which showed that price preference did not increase costs in contracts won by small disadvantaged businesses.

Although SBA did state in its regulatory impact analysis that the rule directs benefits to EDWOSBs and WOSBs at some cost to the taxpayer through restrictions on competition, the SBA also noted that, generally, the cost of transferring a contract from one business to another has minimal cost to society as a whole. In addition, the analysis stated that the loss of efficiency through restrictions in contracting has broader impacts that depend highly on the use of these Procedures by contracting officers and the availability of competition among EDWOSBs and WOSBs. SBA further analyzed that the most significant effect of this rule will be the transfer of contract dollars to EDWOSBs and WOSBs through the contracting officers’ ability to restrict competition to EDWOSBs or WOSBs in industries in which SBA has determined that WOSBs are underrepresented and substantially underrepresented and where certain threshold determinations are made by an agency.

As to the remainder of SBA’s Regulatory Impact Analysis, SBA did not receive any comments and is not aware of any additional information that would require revision

of its initial conclusions. Therefore, SBA continues to believe that the initial analysis was accurate.

#### Executive Order 12988

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

#### Executive Order 13132

This rule does not have federalism implications as defined in Executive Order 13132. 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.

In the event of a protest, this final rule will allow a WOSB concern to substantiate its self-certifications by submitting an existing certification from an SBA approved State Government certifier. In order for SBA to accept a State's certification, the State must show that its certification process meets certain standards, including a showing that its process is based on the same criteria for WOSB or EDWOSB eligibility, as set forth in this regulation. However, this final rule will not mandate how the States conduct their certification processes, and as such the rule will not have a direct effect on the States. Therefore, for the purposes of Executive Order 13132, SBA determines that this final rule has no federalism implications warranting preparation of a federalism assessment.

#### Paperwork Reduction Act (PRA)

For purposes of the Paperwork Reduction Act, 44 U.S.C. chapter 35, SBA has determined that this proposed rule does not impose any new reporting or recordkeeping requirements. The certification process described in Subpart C, §§ 127.300 to 127.305, is not an information collection. In general, certifications are not subject to the PRA notice and review requirements unless such certifications are used as a substitute for collecting information. The proposed self-certification process does not require any concern seeking to benefit from Federal contracting opportunities designated for WOSBs or EDWOSBs to submit or maintain any information. Rather, the concern will use the existing electronic contracting system (i.e., ORCA) to confirm the following statements, under penalty of perjury:

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

(2) The concern meets each of the applicable individual eligibility requirements described in subpart B, 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 a EDWOSB or WOSB. The process for the annual recertification is similar in nature and as such also does not require any reporting or recordkeeping

The only occasion on which concerns would have to submit information to SBA would be in the context of a protest or examination, when SBA might request that a particular WOSB submit documentation to substantiate its claim; however, this rule does not require the WOSBs to maintain any specific information for this purpose. Further, any request for substantiation would not be standardized but rather would be specific to a WOSB's particular status, and as such are also not subject to the PRA.

#### Regulatory Flexibility Act

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

#### 1. What are the Reasons for, and Objectives of, this Final Rule?

SBA is establishing procedures pursuant to the SBA Reauthorization Act, Pub. L. 106-554, enacted December 21, 2000, codified at Section 8(m) of the Small Business

Act, which authorizes the creation and implementation of a new mechanism for Federal contracting with WOSBs. The purpose of the final rule is to create a framework and infrastructure for implementing these Procedures, thereby providing a tool for Federal agencies to increase Federal procurement opportunities to WOSBs. SBA is finalizing this regulation pursuant to section 8(m) of the Small Business Act, 15 U.S.C. 637(m).

These Procedures will assist Federal agencies in achieving the Federal Government's goal of awarding five percent of Federal contract dollars to WOSBs, as provided in the Federal Acquisition Streamlining Act of 1994. Federal procurement was just over \$340 billion in FY 2006, the most recent fiscal year for which procurement data are available, and only \$11.6 billion, or barely more than 3.4 percent, was awarded to WOSBs.

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

SBA has set forth an analysis of the public comments on the Proposed Rule near the beginning of this final rule. However, the Agency did not receive any comments in response to the IRFA and is not aware of any additional information that would require revision of its initial conclusions. Therefore, SBA continues to believe that the initial analysis was accurate.

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

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. This

final rule will ultimately establish in the Federal Acquisition Regulation (FAR) a new procurement mechanism to benefit WOSBs. Therefore, WOSBs that compete for Federal contracts are the specific group of small business concerns most directly affected by this rule. More specifically, when the required procuring agency determination is made, this rule may affect EDWOSBs that participate in Federal procurement in industries where SBA determines that WOSBs are underrepresented or substantially underrepresented and may affect WOSBs that participate in Federal procurement in industries where SBA determines that WOSBs are substantially underrepresented. In addition, the rule may affect other small businesses, as described below, to the extent that small businesses not owned and controlled by women or non-eligible WOSBs may be excluded from competing for certain Federal contracting opportunities.

The 2002 Survey of Business Owners published by the U.S. Bureau of the Census reported 6,489,493 women-owned businesses in the United States. More than 900,000 of these businesses have one or more paid employees. Most women-owned businesses, however, do not participate in the Federal contracting market. In addition, the SBO number represents all women-owned business (large and small) and only WOSBs are eligible under the regulations. As of January 21, 2007, approximately 93,000 businesses represented themselves as WOSBs in the Federal Government's CCR as actual or potential Federal contractors. The study conducted by the RAND Corporation for SBA narrowed the pool of WOSBs in the CCR to approximately 56,000 to more closely approximate the universe of firms who are ready, willing, and able to do

business with the Government.<sup>1</sup> However, far fewer than 56,000 WOSBs are likely to be affected by this final rule because the number of entities to which the rule will apply will greatly depend on SBA's determination of the industries in which WOSBs are underrepresented or substantially underrepresented.

In addition, WOSBs who are not economically disadvantaged could be affected only to the extent that they compete for Federal contracts in industries in which WOSBs are determined to be substantially underrepresented. For industries in which WOSBs are determined to be substantially underrepresented, the potential number of WOSBs that could be direct beneficiaries of these Procedures restricting certain Federal contracts to WOSBs is also likely to be much fewer than the number of WOSBs registered in CCR, since not all WOSBs will satisfy the eligibility requirements for EDWOSB status. The CCR currently lists only 4,210 SDBs owned and controlled by one or more women. This is a useful statistic because the \$750,000 net worth requirement is the same for SDBs and for WOSBs. While SBA acknowledges that there may be other WOSBs in existence besides those listed in the CCR as being certified by SBA as SDBs, it is difficult to envision more than 6,000 WOSBs that could meet SBA's eligibility criteria and that are also ready, willing, and able to bid on Government contracts.

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

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<sup>1</sup> RAND eliminated firms with less than \$1,000 in annual revenue; counted a firm only once if they were registered more than once for multiple locations; eliminated other apparent duplications; and eliminated

EDWOSBs and WOSBs may not find it advantageous to pursue contract opportunities under these Procedures.

This final rule will also affect non-WOSBs (small businesses not 51 percent owned and controlled by women) seeking Federal contracts for which competition has been restricted to participants in these Procedures. This would be particularly harmful for those businesses that derive a significant portion of their business from Federal contracting. As of January 2007, the CCR lists approximately 376,000 small businesses that are not WOSBs. To the extent that contracting officers use these Procedures, non-WOSBs may be excluded from competing for certain Federal contracting opportunities. However, this would occur only in industries in which WOSBs have been found to be underrepresented or substantially underrepresented and where the anticipated dollar value of the procurement does not exceed \$3 million or \$5 million, in the case of manufacturing contracts. The number of small businesses that would be excluded from eligibility for a set-aside under these procurements or from future such determinations is not known at this time, but it could be a substantial number.

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

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vendors that were only interested in competing for grants (as opposed to contracts).

contracting activities. It is acknowledged, however, that some redistribution of contracts among the various socioeconomic groups is likely to occur as a result of these Procedures.

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

As explained above, WOSBs and EDWOSBs will not be required to undergo any formal certification process to participate in these Procedures. Accordingly, there are no reporting or recordkeeping requirements on the affected industry. There will be some recordkeeping requirements for the Government; but since the Government already tracks procurement awards to WOSBs, the additional reporting requirements will require minimal changes to existing systems. SBA is working with the Integrated Acquisition Environment, which is managed by GSA, to ensure that CCR, ORCA, and the Federal Procurement Data System-Next Generation (FPDS-NG) contain the fields needed to capture the new socio-economic data. EDWOSB will be a new classification that the Government has not previously used.

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

SBA has minimized the significant economic impact on small entities. As discussed in the previous section, WOSBs and EDWOSBs will not be required to

undergo any formal certification process to participate in these Procedures. Section 8(m) of the Small Business Act, which is the authorizing statutory provision for these Procedures, allows SBA to decide on the type of certification needed to implement these Procedures. Specifically, a WOSB may be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator; or a WOSB may self-certify to the contracting officer that it is a small business concern owned and controlled by women, along with adequate documentation in accordance with standards established by the Administration. As discussed earlier, SBA will allow EDWOSBs and WOSBs to self-certify their status in the existing CCR and ORCA databases.

An alternative approach would have been to require EDWOSBs and WOSBs to apply to SBA for formal certification. SBA has ruled out this approach as unnecessary and too costly. The SBA believes that eligibility examinations and protest procedures incorporated into the final rule will minimize the likelihood of fraud and misrepresentation of WOSB and EDWOSB status. SBA has decided that allowing self-certification and the option for firms to apply for certification from SBA-approved certifiers, when combined with random eligibility examinations and a formal protest procedure, is a more viable approach than formal certification by SBA and greatly reduces the burden on small entities.

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

requirement on WOSBs.

Pursuant to Executive Order 13272 dated August 16, 2002, agencies issuing final rules are required to discuss any comments received from SBA's Office of Advocacy in response to the proposed rule. In this case, SBA's Office of Advocacy submitted formal comments on February 20, 2008, which recommended that the Final Regulatory Flexibility Analysis provide cost data on the effort required by WOSBs and EDWOSBs to play a role in compelling agencies to make a finding of discrimination prior to using a set-aside process for WOSB contract. With respect to this recommendation, SBA notes that each agency is responsible for conducting an analysis and making a determination of whether there has been past discrimination in a particular industry by that agency.

Advocacy's position rests on the assumption that there is an expectation that WOSBs should play a role in the determination process. WOSBs are not required, nor are they expected, to participate in this process. The Small Business Act has set the Government-wide goals for contracts awarded to WOSBs at not less than 5% of the total value of all prime contract and subcontract awards for each fiscal year. SBA believes that the procuring agencies which have not achieved their agency goals for WOSB awards are likely to move forward to determine if there is discrimination in order to achieve the agency's individual goals for WOSB awards. Thus, SBA does not anticipate any cost to WOSBs and EDWOSBs to compel an agency to make a determination of discrimination.

Furthermore, the procuring agencies are best-suited to make a determination of whether there is discrimination within a certain industry because they have the necessary agency procurement data and history more readily available than the SBA. Therefore, while the SBA can conduct government-wide disparity studies identifying the industries

that have been underrepresented by women, the individual procuring agencies have the necessary information to justify individual WOSB awards. This does not translate into an additional cost for WOSBs or EDWOSBs as they are not required or expected to participate in the process of determining evidence of discrimination.

#### 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 125

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

##### 13 CFR Part 127

Government procurement, Reporting and recordkeeping requirements, Small businesses.

##### 13 CFR Part 134

Administrative practice and procedure, Claims, Equal access to justice, Lawyers, Organization and functions, Rules of practice for appeals, Appeals of size determinations, Appeals of NAICS code designations, Appeals under the 8(a) Program, Appeals from service-disabled veteran-owned small business concerns protests.

For the reasons stated in the preamble, SBA amends 13 CFR parts 121, 125, 127 and 134 as follows:

PART 121—SMALL BUSINESS SIZE REGULATIONS

1. The authority citation for 13 CFR part 121 is revised to read as follows:

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

§ 121.401 [Amended]

2. Amend § 121.401 by adding the phrase “the Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures,” after the phrase “SBA’s HUBZone Program”.

3. Amend § 121.1001 by adding a new 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 Procedures, 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;

(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 new sentence after the second sentence to read as follows:

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

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

## PART 125—GOVERNMENT CONTRACTING PROGRAMS

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

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

6. Amend § 125.6 by revising paragraph (a) introductory text to read as follows:

§ 125.6 Prime contractor performance requirements (limitations on subcontracting).

(a) In order to be awarded a full or partial small business set-aside contract, an 8(a) contract, a WOSB or EDWOSB contract pursuant to part 127 of this chapter, or an unrestricted procurement where a concern has claimed a 10 percent small disadvantaged business (SDB) price evaluation preference, a small business concern must agree that:

\* \* \* \* \*

7. Add a new part 127 to read as follows:

## PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT ASSISTANCE PROCEDURES

### 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 EDOWSB or WOSB status protest pursuant to subpart F of this part?
- 127.402 How will SBA conduct an eligibility 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 and the agencies determine the industries that are eligible for EDWOSB or WOSB requirements in which WOSBs are underrepresented or substantially underrepresented?
- 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 increase Federal contracting opportunities for women-owned small businesses (WOSBs) and to assist agencies in achieving their WOSB participation goals established under Section 15(g) of the Small Business Act.

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

This part authorizes contracting officers to restrict competition to eligible WOSBs for certain Federal contracts in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented or substantially underrepresented in Federal procurement and in which the procuring agency has satisfied itself through appropriate analysis (including analysis of its own procurement history), that the set-aside would meet all applicable legal requirements, including the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution.

§ 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. CCR also serves as the single portal for conducting searches of small business contractors. 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 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 title and that is at least 51% 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, 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 bidding 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.

Small disadvantaged business (SDB) means a concern that SBA has certified in accordance with subpart B of part 124 of this chapter, and is designated on CCR as an SDB.

Substantial underrepresentation means a disparity ratio between 0.0 and 0.5; *i.e.*, the ratio representing the WOSB share of Federal prime contract dollars divided by the WOSB share of total business receipts.

Underrepresentation means a disparity ratio between 0.5 and 0.8; *i.e.*, the ratio

representing the WOSB share of Federal prime contract dollars divided by the WOSB share of total business receipts.

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

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 trusts) 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 an EDWOSB or WOSB, the management and daily business operations of the concern must be controlled by one or more women. 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 (usually President or Chief Executive Officer) 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 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% 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.

(b) Limitation on personal net worth. 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 equity in her primary personal residence.

(c) Factors that may be considered. 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.

(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 a EDWOSB or WOSB by a certifying entity approved by SBA and there have been no changes in its circumstances affecting its eligibility since certification; or

(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 a EDWOSB or WOSB.

(c) Update of certification. 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.

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

(a) General. A contracting officer may accept a concern's self-certification on ORCA as accurate for a specific procurement reserved for award under this Part in the absence of a 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.

(b) Referral to SBA. When the contracting officer has information that calls into question the eligibility of a concern as a EDWOSB or WOSB, the contracting officer must 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?

(a) General. 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:

- (1) SBA as an 8(a) BD or SDB women-owned concern in good standing;
- (2) The Department of Transportation as a disadvantaged business enterprise (DBE) that is at least 51 percent owned and controlled by one or more women; or
- (3) An entity designated as an SBA-approved certifier on SBA's Web site located at <http://www.sba.gov/GC>.

(b) [Reserved]

§ 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 or national certifying entity if SBA determines that the entity's certification process complies with SBA-approved certification standards and is based upon the same 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) Its certification process will require applicant concerns to pre-register on CCR

and submit sufficient information 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.

(3) 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 of subpart D, 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?

An eligibility examination is an investigation by SBA to verify that a concern meets the EDWOSB or WOSB eligibility requirements at the time of the examination. SBA may, in its sole discretion, perform an examination at any time after a concern self-certifies in CCR or ORCA that it is an EDWOSB or WOSB.

§ 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 continuing eligibility of a concern that is designated on CCR or ORCA as an EDWOSB or WOSB. For purposes of an examination, the D/GC will determine the eligibility of a concern as of the date SBA notifies the concern that it will conduct the examination. The D/GC's eligibility decision

constitutes the final agency decision and will be effective and apply to all solicitations issued on or after the date of the decision issued pursuant to §§ 127.403, 127.404(b), or 127.405(e). 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 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 5 business days before commencing an examination, SBA will notify the concern in writing that it will conduct an examination to determine the status of the concern as an EDWOSB or WOSB. The notification also will advise the concern that its EDWOSB or WOSB eligibility will be determined based on the status of the concern on the date of the notification.

(b) Request for information. SBA may request that the concern provide documentation and information related to the concern's EDWOSB or WOSB eligibility.

SBA may draw an adverse inference where a concern fails to cooperate in providing the requested information.

§ 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 at the time of the eligibility examination, 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.

§ 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 at the time of the examination, then the D/GC will send the concern a written notice explaining the reasons SBA believes the concern does not qualify as an EDWOSB or WOSB. The notice will advise the concern that it has 15 calendar days from the date it receives the notice to respond.

(b) SBA determination. Following the 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 finding that it either qualifies or does not qualify as an EDWOSB or WOSB.

(1) If SBA verifies that the concern qualifies as an EDWOSB or WOSB at the time of the examination, then the D/GC will send the concern a decision to that effect and will allow the concern to continue to self-certify its EDWOSB or WOSB status.

(2) 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 business days after the date of the decision.

§ 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 or an SBA-approved certifier 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 Procedures Examination.”

(d) Notice of receipt of request. SBA will immediately notify the concern in writing once SBA receives its request for an examination. The notification will advise the concern that its eligibility will be determined based on the status of the concern on the date of the notification. SBA may 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 F 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 as of the date of the decision and applies to all solicitations issued on or after the effective date.

#### 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(a), and the procuring agency finds, pursuant to the method specified in § 127.501(b), that a set-aside in that industry would be consistent with the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution.

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

(a) SBA determination of underrepresented or substantially underrepresented

industries.

(1) Approximately every five years, SBA will conduct a study to identify the industries in which WOSBs are underrepresented or substantially underrepresented in Federal contracting. The study will include an analysis of the extent of disparity of WOSBs in Federal contracting.

(2) Data collection. In determining the extent of disparity of WOSBs in Federal contracting, SBA may request that the head of any Federal department or agency provide SBA, or other designated entity, data or information necessary to analyze the extent of disparity of WOSBs in Federal contracting.

(3) Based upon its analysis, SBA will designate by 4-digit NAICS Industry Subsector industries in which WOSBs are underrepresented or substantially underrepresented.

(b) Agency determination of discrimination. Each agency that is considering restricting competition with respect to a contract in an industry pursuant to this rule is responsible for carrying out a relevant analysis that would justify a restriction on competition under the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution. Where an agency seeks to reserve a procurement for competition exclusively among WOSBs or EDWOSBs within an industry designated by SBA in paragraph (a)(3) of this section, the agency must conduct an appropriate analysis of the agency's procurement history and make a determination of whether there is evidence of relevant discrimination in that industry by that agency.

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

SBA will post on its Internet Web site a list of 4-digit NAICS Industry Subsector

industries it designates under § 127.501(a). 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. If market research indicates that the criteria in paragraph (a) are not met for restricting competition to EDWOSBs, then the contracting officer may restrict competition to WOSBs if:

(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) Contract file. When restricting competition to WOSBs in accordance with § 127.503(b), 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 substantially underrepresented industry with respect to WOSBs.

§ 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).

§ 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 EDWOSB or WOSB must be the managing venturer of the joint venture, and an employee of the managing venturer must be the project manager responsible for the performance of the contract;

(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); and

(e) The EDWOSB or WOSB venturer must perform a significant portion of the contract.

## 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% owned and controlled by one or more women who are economically disadvantaged.

### § 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, or by U.S. mail (postmarked within the applicable time period) 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, an interested party must submit its protest by 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, an interested party must submit its protest by close of business on the fifth business day after bid opening.

(3) Any protest submitted after the time limits 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, 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. 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.

(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.

(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 of its right to submit information responding to the protest within five business days from the date of the notice; 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 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 15-day period, the contracting officer may award the contract, unless the contracting officer has granted SBA an extension. The contracting officer may award the contract or begin performance after receipt of a protest if the contracting officer determines in writing that an award must be made to protect the 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.

(f) Effect of determination. SBA's determination is effective immediately and is

final unless overturned by OHA on appeal pursuant to § 127.605 of this part.

(1) The purpose of the protest process is to ensure that contracts are awarded to, and performed by, eligible WOSB and EDWOSB concerns. A contracting officer shall not award a contract to an ineligible concern, and shall not authorize an ineligible concern to begin performance.

(2) Where award was made and performance commenced before receipt of a negative final agency decision, the contracting officer may terminate the contract, not exercise any option, or not award further task or delivery orders.

(3) Whether or not a contracting officer decides to not allow an ineligible concern to fully perform a contract under paragraph (f)(2) of this section or under § 134.704 of this title, 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.

(4) 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 the 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, subpart 9.4 of title 48 of the Code of Federal Regulations;

(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**

8. The Authority citation for 13 CFR 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**

9. Amend § 134.102 by redesignating paragraph (s) as paragraph (t) and adding new paragraph (s) 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

10. Amend § 134.515 by revising paragraph (b) to read as follows:

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

\* \* \* \* \*

(b) The Judge may reconsider an appeal decision within 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 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.

\* \* \* \* \*

11. Add new 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

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

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

Subpart G—Rules of Practice for Appeals From Women-Owned Small Business

Concern (WOSB) and Economically Disadvantaged WOSB Concern (EDWOSB)

Protests

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

(a) The rules of practice in this subpart G apply to all appeals to OHA from formal protest determinations made by the Director for Government Contracting (D/GC) in connection with a Women-Owned Small Business (WOSB) or Economically Disadvantaged WOSB (EDWOSB) status protest issued pursuant to part 127 of this chapter. 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% 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 Subpart 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 10 business days after the appellant receives the WOSB or EDWOSB protest determination (see § 134.204 for filing and service requirements). An untimely appeal will 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 may 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 will 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 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 13 CFR 134.710.

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

The Judge shall issue a decision, insofar as practicable, within 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 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 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:

Sandy Baruah,  
Acting Administrator.

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