

(c) An agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an on-the-job injury or disease to report for an examination under 5 U.S.C. 8123 to determine medical limitations that may affect placement decisions.

(d) An agency may require an employee who is released from his or her competitive level in a reduction in force under part 351 of this chapter to undergo a relevant medical evaluation if the position to which the employee has assignment rights has medical standards or physical requirements that are different from those required in the employee's current position.

(e)(1) An agency may order a psychiatric examination (including a psychological assessment) only when:

(i) The result of a current general medical examination that the agency has the authority to order under this section indicates no physical explanation for behavior or actions that may affect the safe and efficient performance of the individual or the safety of others, or

(ii) A psychiatric examination or psychological assessment is specifically called for in a position having medical standards or under a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under paragraphs (e)(1)(i) or (ii) of this section must be conducted in accordance with accepted professional standards, by a licensed physician or practitioner authorized to conduct such examinations, and may only be used to make inquiry into a person's mental fitness as it directly relates to successfully performing the duties of the position without undue hazard to the individual or others.

#### **§ 339.302 Authority to offer examinations.**

An agency may, at its option, offer a medical examination (including a psychiatric examination or psychological assessment) in any situation where the agency needs additional medical documentation to make an informed management decision. This may include situations where an individual requests for medical reasons a change in duty status, assignment, working conditions, or any other different treatment (including reasonable accommodation or reemployment on the basis of full or partial recovery from a medical condition) or where the individual has a performance or conduct problem that may require agency action. Reasons for offering an examination must be documented. An offer of an examination

must be carried out and used in accordance with 29 CFR 1630.

#### **§ 339.303 Examination procedures.**

(a) When an agency orders or offers a medical or psychiatric examination or psychological assessment under this subpart, it must inform the applicant or employee in writing of its reasons for doing so, the consequences of failure to cooperate, and the right to submit medical information from his or her personal physician or practitioner. A refusal or failure to report for a medical examination ordered by the agency may be a basis for the agency to determine that the employee is not qualified for the position. A single notification is sufficient to cover a series of regularly recurring or periodic examinations ordered under this subpart.

(b) The agency designates the examining physician or other appropriate practitioner, but must offer the individual an opportunity to submit medical documentation from his or her personal physician or practitioner. The agency must review and consider all such documentation supplied by the individual's personal physician or practitioner.

#### **§ 339.304 Payment for examination.**

Agencies must pay for all examinations ordered or offered under this subpart, whether conducted by the agency's physician or the applicant's or employee's own physician or practitioner. This includes special evaluations or diagnostic procedures required by an agency. Applicants and employees must pay for a medical examination conducted by his or her own physician or practitioner where the purpose of the examination is to secure a change sought by an employee (e.g., a request for change in duty status, reasonable accommodation, and job modification).

#### **§ 339.305 Records and reports.**

(a) Agencies will receive and maintain all medical documentation and records of examinations obtained under this part in accordance with part 293, subpart E of this chapter.

(b) The report of an examination conducted under this subpart must be made available to the applicant or employee under the provisions of part 297 of this chapter.

(c) Agencies must forward to the Office of Workers' Compensation Programs (OWCP), Employment Standards Administration, Department of Labor, a copy of all medical documentation and reports of examinations of individuals who are receiving or have applied for injury

compensation benefits under 5 U.S.C. 81, including continuation of pay. The agency must also report to the OWCP the failure of such individuals to report for examinations that the agency orders under this subpart. When the individual has applied for disability retirement, this information and any medical documentation or reports of examination must be forwarded to OPM.

#### **§ 339.306 Processing medical eligibility determinations.**

(a) In accordance with the provisions of this part, agencies are authorized to medically disqualify a nonpreference eligible. A nonpreference eligible so disqualified has a right to a higher level review of the determination within the agency.

(b) OPM must approve the sufficiency of the agency's reasons to:

(1) Medically disqualify or pass over a preference eligible in order to select a nonpreference eligible for:

(A) competitive service positions

under part 332 of this chapter; and  
(B) excepted service positions in the executive branch subject to title 5, U.S.C. by statute or executive order;

(2) Medically disqualify or pass over a 30 percent or more compensably disabled veteran for a position in the U.S. Postal Service in favor of a nonpreference eligible;

(3) Medically disqualify a 30 percent or more compensably disabled veteran for assignment to another position in a reduction in force under § 351.702(d) of this chapter; or

(4) Medically disqualify a 30 percent or more disabled veteran for noncompetitive appointment, for example, under § 316.302(b)(4) of this chapter.

[FR Doc. E7-25108 Filed 12-26-07; 8:45 am]

BILLING CODE 6325-39-P

## **SMALL BUSINESS ADMINISTRATION**

### **13 CFR Parts 121, 125, 127, and 134**

**RIN 3245-AF40**

#### **Women-Owned Small Business Federal Contract Assistance Procedures**

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The U.S. Small Business Administration (SBA) proposes to amend its regulations governing small business contracting procedures. This proposed rule would add a new part that would implement procedures to increase procurement opportunities for

Women-Owned Small Business Concerns, as authorized under the Small Business Act. It would also make the relevant conforming amendments to SBA's current procurement regulations.

**DATES:** Comments must be received on or before February 25, 2008.

**ADDRESSES:** You may submit comments, identified by 3245-AF40, by any of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Mail, Hand Delivery/Courier:* Robert C. Taylor, Office of Contract Assistance, Office of Government Contracting, U.S. Small Business Administration, 409 3rd Street, SW., Washington, DC 20416.

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

**FOR FURTHER INFORMATION CONTACT:** Robert C. Taylor, Office of Contract Assistance, Office of Government Contracting, [WOSBProposedRegulation@sba.gov](mailto:WOSBProposedRegulation@sba.gov).

**SUPPLEMENTARY INFORMATION:**

**I. Background**

Women-owned businesses have been regarded as the fastest growing segment of the business community in the United States. Although between 1997 and 2002 the growth rate in the number of women-owned small businesses (WOSBs) was almost twice that of all firms, WOSBs have not generally received a commensurate increase in their share of Federal contracting dollars.

Several congressional and executive efforts over the years to increase Federal contracting with WOSBs have not enhanced the WOSB share of Federal contracting dollars as much as anticipated. For example, in 1979, when Executive Order 12138 charged Federal agencies with responsibility for providing procurement assistance to women-owned businesses, WOSBs received only 0.2 percent of all Federal procurements. More than 9 years later, the percentage of WOSB Federal procurements had grown to only one percent. Similarly, in 1988, the Women's Business Ownership Act, Public Law 100-588 (Oct. 25, 1988), was enacted to assist women in starting,

managing and growing small businesses. This program has been successful in assisting thousands of women in obtaining business financing and in business formation, but has enjoyed less success in the Federal procurement arena.

Section 7106 of the Federal Acquisition Streamlining Act (FASA), Public Law 103-355 (Oct. 13, 1994), amended the Small Business Act (the Act) by establishing a target that would result in greater opportunities for women to compete for Federal contracts. FASA, among other things, established a government-wide goal for participation by WOSBs in procurement contracts of not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. FASA also directed that WOSBs, like other small businesses and small disadvantaged businesses (SDBs), have the maximum practicable opportunity to become subcontractors for Federal contracts exceeding \$100,000, and it mandated that WOSBs be included in subcontracting plans required under Section 8(d) of the Act, 15 U.S.C. 637(d).

Federal Procurement Data System (FPDS) data indicates that since fiscal year (FY) 1996, Federal agencies have not met the separate 5 percent government-wide WOSB goal for prime contracts and subcontracts. However, the share of Federal prime contracting dollars to WOSBs has increased over the years. For example, in FY 2000, WOSBs received 2.3 percent of the approximately \$200 billion in Federal prime contract awards. The share of WOSB prime contract awards increased to 2.49 percent in FY 2001, and again to 2.90, 2.98, and 3.03 percent in FYs 2002, 2003 and 2004, respectively. In FY 2005, WOSB prime contract awards increased to 3.18 percent and in FY 2006, increased again to 3.41 percent of prime contract awards. Nonetheless, the total percent of WOSB prime contract awards stills falls short of the statutory goal of 5 percent.

The Government Accountability Office (GAO) published a report in February 2001 discussing the trends and obstacles in Federal contracting with WOSBs since FY 1996. *See Trends and Challenges in Contracting With Women-Owned Small Businesses*, GAO-01-346. In that report, GAO noted that contracting officials complain that one of the primary obstacles in achieving the statutory five percent WOSB goal was the absence of a "targeted government program for contracting with WOSBs."

Section 811 of the Small Business Reauthorization Act of 2000, Public Law 106-554, provided such a mechanism. Section 811, enacted on December 21,

2000, amended the Act by adding a new section 8(m), 15 U.S.C. 637(m), authorizing contracting officers to restrict competition to eligible WOSBs for certain Federal contracts in certain industries. 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) 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 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, SBA has drafted the proposed rule to account for this apparent drafting error based on its best understanding of the meaning and intent of section 8(m) read as a whole and has interpreted the statute to authorize set asides for industries in which WOSBs are determined to be underrepresented or substantially underrepresented in Federal procurement. In the absence of corrective legislation clarifying the confusing cross-references among these provisions, however, some degree of uncertainty will remain with respect to the question of whether section 8(m) effectively authorizes appropriate set-asides in industries where WOSBs are merely underrepresented rather than substantially underrepresented.

The new section 8(m) of the Act explicitly limits the contracting officer's authority to restrict competition to contracts not exceeding \$3 million (\$5 million for manufacturing). Furthermore, to be eligible as a WOSB under section 8(m) of the Act, the firm must be a "small business concern owned and controlled by women" as defined in section 3(n) of the Act, 15 U.S.C. 632(n). Section 8(m) also requires that such concerns be at least 51 percent owned by one or more women who are economically disadvantaged, except with respect to procurements in industries in which SBA has determined that WOSBs are substantially underrepresented in Federal contracting and has waived the economically disadvantaged requirement.

Moreover, section 8(m) of the Act requires SBA to establish standards for determining the eligibility of a concern as a WOSB or economically disadvantaged WOSB (EDWOSB). It also

charges SBA with responsibility for verifying a concern's eligibility and provides the penalties for a concern's misrepresentation of its status as an EDWOSB or WOSB.

Lastly, section 8(m) requires SBA to conduct a study to identify the industries in which WOSBs are underrepresented and substantially underrepresented in Federal procurement and requires the head of any department or agency to provide SBA with any information that SBA deems necessary to conduct the study. SBA initially completed the legislatively mandated study in September 2001. However, in March 2005, the National Academy of Science (NAS) issued an independent evaluation determining that SBA's original study was "fatally flawed." In response to the NAS's 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 the *Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND)* to complete a revised study of the availability and utilization of WOSBs in prime contracts. The RAND report was published in April 2007 and is available to the public at [http://www.RAND.org/pubs/technical\\_reports/TR442](http://www.RAND.org/pubs/technical_reports/TR442).

On June 15, 2006, the SBA published in the **Federal Register**, 71 FR 34550, a proposed rule, with request for comments, to amend its regulations in accordance with § 8(m) of the Small Business Act. Based on SBA's evaluation of the public and inter-agency comments received, discussions with the Department of Justice (DOJ) and the Office of Federal Procurement Policy (OFPP), and further examination of Section 8(m), it has been determined that the June 15, 2006, proposed rule requires significant changes that warrant further public comment and consideration. In addition, rather than propose a separate rulemaking, SBA believes it would be expeditious to include in this proposed rule implementation of the RAND study results which identified the industries in which WOSBs are underrepresented and substantially underrepresented in Federal procurement.

Whether SBA went forward with a final rule on WOSB status and procedures and simultaneously proposed a rule to implement the RAND Study results or combined the two rules into one comprehensive rule, any potential set-asides under the procedures could not be made until the RAND report rule had been finalized. Therefore, SBA's action of combining the RAND report rule with this re-

proposed June 15, 2006 rule not only obviates the need for a separate rulemaking but significantly, will not delay the implementation of the WOSB procedures.

## II. RAND Report Results

The RAND report outlined several approaches to identify underrepresentation of WOSBs in Federal procurement, each of which yields a different result. SBA has preliminarily adopted the approach set forth below.

RAND's report identifies 28 different approaches to determine underrepresentation and substantial underrepresentation. Twenty of these approaches compare FY 2006 Central Contractor Registration (CCR) registration data to FY 2005 Federal Procurement Data System/Next Generation (FPDS/NG) procurement data, while eight (8) compare the 2002 Survey of Business Owners (SBO) from the five-year Economic Census to FYs 2002/2003 FPDS/NG procurement data.

SBA eliminated the eight approaches based on a comparison of the 2002 SBO data to FYs 2002/2003 FPDS/NG procurement data for the following reasons: (1) The SBO does not distinguish between WOSBs and women-owned businesses (large and small), while the procedures authorized by Congress are specifically targeted towards WOSBs (only small businesses); (2) since the SBO is generally not available for two years after the survey is completed, the SBO is never current; and lastly (3) the SBO cannot fine-tune the industry groupings beyond the two-digit NAICS level.

In its 2005 report examining SBA's 2001 methodology, the NAS criticized SBA's use of the two-digit Major Group Standard Industrial Classification (SIC) industry classification as inadequate. The two-digit Major Group SIC designation corresponds to the current three-digit Subsector NAICS designation. Thus, while the NAS criticized SBA's use of two-digit SIC information, the SBO two-digit NAICS data is even less precise than the two-digit SIC data. Both the CCR and FPDS-NG, on the other hand, provide the capability to use four-digit NAICS classifications. For this reason, SBA also eliminated 16 approaches based on CCR comparisons to FPDS/NG 2005 procurement data which used two and three-digit NAICS codes.

As a result, four approaches were left as possibly viable, all based on 2004 CCR and 2005 procurement data and four-digit NAICS codes. Two of the four approaches were based on the dollar value of contracts awarded and the

other two were based on the number of contracts awarded. SBA eliminated the two approaches based on the number of the contracts awarded. When discussing whether to use dollars or numbers as the measure of underrepresentation, it was necessary to evaluate the benefits and limitations of either choice. After careful analysis, it was decided to adopt an approach consistent with Congressional measures, which use dollars. 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.

Finally and perhaps most importantly, Congress, through the Small Business Act, has given 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." Congress authorized the contracting assistance procedures in Section 8(m) as a result of the Federal Government's persistent deficiencies in achieving this goal. Thus, the disparity measure based on contract dollars is consistent with the five percent goal, which is also based on contract dollars.

Accordingly, two approaches remained available for SBA to use to determine underrepresentation. Of these two approaches, one was based on a full sample, and the other was based on a trimmed sample (eliminating the top and bottom 0.5 percent of the data). RAND stated in its report that it found little benefit to trimming the sample and that it puts more weight on the full-sample results (Chapter 4, Results, page 22). Accordingly, SBA eliminated the trimmed-sample results.

The four industries identified using the adopted approach from the RAND

report (NAICS codes 9281—National Security and International Affairs, 3328—Coating, Engraving, Heat Treating, and Allied Activities, 3371—Household and Institutional Furniture and Kitchen Cabinet Manufacturing, and 4412—Other Motor Vehicle Dealers) are those industries in which WOSBs are underrepresented or substantially underrepresented in government-wide Federal procurement. The RAND report does not, however, expressly find discrimination in the identified industries. 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.” In applying this standard, Federal courts have generally required that the government establish probative evidence of discrimination in the relevant industry 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). Based on these precedents, the Department of Justice has advised SBA that before a contracting officer may restrict competition to WOSBs under section 8(m), the concerned agency must determine through appropriate analysis (including analysis of its own procurement history) that the set-aside will be consistent with the foregoing constitutional standards. In particular, to ensure uniformity, SBA proposes that the agency must determine whether the set-aside is substantially related to remedying sex discrimination in that industry.

### III. Summary of Regulations

To implement the new section 8(m) of the Act, this proposed rule would establish procedures that will assist WOSBs in procuring contracting opportunities with the Federal Government. Although these procedures would be considered part of SBA’s government contracting programs set forth under part 125 of title 13 of the Code of Federal Regulations (CFR), for ease of reference, the proposed WOSB procedures would be contained in a new part 127 of title 13. As proposed, the regulations provide the general definitions and clarifications of the procedures and eligibility requirements

under subparts A and B of this rule. The regulations also provide the certification procedures and the process for appealing WOSB status protest determinations to SBA’s Office of Hearings and Appeals (OHA). These proposed regulations also provide the specific eligibility requirements for qualification as an EDWOSB or WOSB and state the requirement for each agency to conduct the appropriate analysis (including analysis of its own procurement history) to ensure that the set-aside will be consistent with constitutional standards.

This rule would also modify the process for reserving contract opportunities in industries in which SBA and agencies determine that WOSBs are substantially underrepresented in Federal procurement. To provide procuring activities greater flexibility in structuring their procurements to achieve WOSB Federal contracting goals, this rule would grant contracting officers the discretion to waive the requirement for competition by EDWOSBs in those industries in which WOSBs are determined to be substantially underrepresented. The rule also provides conforming amendments necessary to integrate these proposed procedures into SBA’s size and government contracting regulations.

SBA invites comment on all aspects of this proposed rule.

### IV. Section-by-Section Analysis

The following is a section-by-section analysis of the proposed rule.

#### A. Conforming Amendments to Parts 121 and 125

The authority citation for 13 CFR part 121 would be revised to include 15 U.S.C. 637(m), since part 121 would be amended to include references to the WOSB Procurement Opportunity Procedures (Procedures) Section 121.401 would be amended to add the procedures governing women-owned contracting requirements to the list of government procurement programs subject to size determinations. This would subject EDWOSBs and WOSBs to size protests and determinations under part 121 of title 13.

Section 121.1001 would be amended by adding a new paragraph (a)(9) to describe who may initiate a size protest in connection with a particular requirement set-aside for women-owned small business concerns. That section would provide that any concern that submits an offer for a specific requirement set-aside under the authority of § 8(m) of the Act, the

contracting officer, SBA Government Contracting Area Director and the Director for Government Contracting or designee, may protest the size of another offeror for the particular requirement.

Section 121.1008 would be amended by adding a sentence that requires the SBA Government Contracting Area Director, or designee, to notify SBA’s Director, Office of Government Contracting, of receipt of a size protest involving a concern that is designated in the Central Contractor Registration (CCR) as a certified EDWOSB or WOSB.

Section 125.6 would be amended to provide that EDWOSBs and WOSBs awarded a set-aside contract using these procedures must satisfy certain requirements if they intend to subcontract. These subcontracting limitations are the same limitations that are currently in place for an 8(a) contract or an unrestricted procurement where a concern has claimed a small disadvantaged price evaluation preference.

#### B. Addition of a New Part 127

A new part 127 would be added to title 13 of the CFR to implement the procedures that are required under the statute. Subpart A provides background information concerning contracting opportunities for women-owned small business concerns. Specifically, §§ 127.100 and 127.101 describe the purpose, legal basis and assistance available to eligible WOSBs. Section 127.102 defines the relevant terms used in part 127. Many of those definitions are identical to or derived from the definitions provided in parts 121 and 124 of this title, governing SBA’s size, 8(a) Business Development (BD) and SDB programs.

The proposed rule also uses several newly defined terms which SBA developed for ease of reference to various statutory requirements. For example, the proposed rule uses the term “economically disadvantaged WOSB” or “EDWOSB” to refer to the Act’s requirement that certain WOSBs be not less than 51 percent owned and controlled by one or more women who are U.S. citizens and economically disadvantaged. This rule also defines what constitutes “underrepresented” and “substantially underrepresented.” SBA has defined the terms “underrepresentation” and “substantial underrepresentation” in this proposed rule to be a disparity ratio representing either the WOSB share of Federal prime contract dollars divided by the WOSB share of total business receipts. If the disparity ratio falls between 0.5 and 0.8, underrepresentation is found. If the disparity ratio falls between 0.0 and 0.5,

substantial underrepresentation is found.

These disparity ratios were found to be reasonable by the NAS in its 2005 report analyzing the preliminary study conducted by SBA in 2001. See The National Academies Press, *Analyzing Information on Women-Owned Small Business in Federal Contracting* (2005), available at <http://www.nasonline.com>. SBA adopted the threshold value of 0.8 based in part on the Equal Employment Opportunity Commission's use of that threshold as a rule of thumb for defining underrepresentation in enforcing antidiscrimination employment laws. The threshold value of 0.8 also has the advantage, compared with a higher value, of reducing classification errors due to sampling variability or other sources of errors within the underlying procurement data. SBA adopted the threshold value of 0.5 largely because it is sufficiently below 0.8 and sufficiently higher than zero to distinguish substantial from less than substantial underrepresentation.

Subpart B describes the eligibility requirements for qualification as an EDWOSB or WOSB. Because these qualifications entail similar ownership, control and economic disadvantage criteria as used in the 8(a) BD and SDB programs, this proposed rule similarly requires that the concern be at least 51 percent unconditionally owned and controlled by one or more women who are United States citizens. For reasons of consistency, the economic disadvantage requirement in § 127.203 also has the same \$750,000 threshold for personal net worth as does the 8(a) BD program and the SDB program for purposes of determining a program participant's continuing eligibility. In order to qualify as an EDWOSB, the concern must also prove that it is economically disadvantaged. One notable exception is with respect to the application of community property laws. The Act explicitly provides that ownership shall be determined without regard to any community property laws. As a result, § 127.201 precludes the application of community property laws in WOSB ownership determinations.

Subpart C of the proposed rule sets forth the self-certification requirements for concerns that submit offers on procurements set aside. Section 8(m)(2)(F)(i) of the Act authorizes certification by "a Federal agency, a State government, or a national certifying entity" approved by SBA. Consistent with that provision, subpart C of this proposed rule establishes the procedures for obtaining EDWOSB or WOSB certification from SBA.

Specifically, proposed § 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 Online Representations and Certifications Application (ORCA) indicating that it qualifies as an EDWOSB or WOSB. That section would further detail the specific representations 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 generally the accepted representations process that concerns currently follow to self-certify other forms of small business status in Federal procurements, using that system for the WOSB self-certification process would minimize interference with the procurement process and the burden on contracting officers.

Sections 127.301 through 127.303 provide the specific procedures for obtaining EDWOSB and WOSB certification. SBA believes that the self-certification process set forth in this rule is consistent with the statutory framework of Section 8(m) and with prevailing Supreme Court precedent. It also would 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.

Proposed § 127.301 describes the circumstances under which a contracting officer may accept a concern's self-certification for the particular procurement for which the self-certification is made. That section would provide that when a contracting officer receives an EDWOSB or WOSB status protest from another offeror, or when the contracting officer has information that calls into question the eligibility of a concern, the contracting officer must refer the matter to SBA for verification of the concern's eligibility pursuant to the WOSB status protest procedures under Subpart F.

To minimize interference with the procurement process, this rule would also recognize a concern's certification as an EDWOSB or WOSB by an entity approved by SBA. In particular, §§ 127.300 and 127.302 would provide that a concern may use a certification by another entity as evidence of its status as a qualified EDWOSB or WOSB in support of its representations in ORCA if the concern: (1) Has a current, valid SBA certification as an 8(a) BD or SDB women-owned concern in good standing under those programs; (2) has a current valid certification as a woman-owned business under DOT's DBE program; or (3) has a current valid certification by an entity designated as an SBA-approved certifier on SBA's Web site located at <http://www.sba.gov/GC>. Sections 127.303 and 127.304 explain how entities are selected and identified as approved certifiers and how concerns may obtain certifications from such entities. Because all certifying entities may not use the same eligibility criteria applicable to EDWOSBs and WOSBs as provided under Subpart B of this rule, SBA does not intend to automatically accept third-party certifications for purposes of contracting with WOSBs. 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 Agency will maintain a list of all approved certifiers on its Web site.

Section 127.305 would explain the extent to which concerns that are determined not to qualify as an EDWOSB or WOSB may submit a self-certification under § 127.300(b). Specifically, under § 127.305, a concern that SBA or an SBA-approved certifier determines is not a qualified EDWOSB or WOSB would be prohibited from self-certifying unless SBA subsequently determines that the concern qualifies as an EDWOSB or WOSB pursuant to the examination procedures under § 127.405. Those procedures specifically allow concerns determined to be an ineligible EDWOSB or WOSB to request that SBA conduct an examination to determine their eligibility at any time the concern believes in good faith that it satisfies all of the eligibility requirements.

Together, §§ 127.300 through 127.305 describe the streamlined representations concerns must provide to contracting officers to certify eligibility and authorize contracting officers to refer questionable self-certifications to SBA for verification of eligibility pursuant to the protest procedures. Robust protest procedures coupled with the provisions for appropriate examinations to monitor

the eligibility of firms that self-certify their status under Subpart D, will minimize the potential for fraud and abuse. These procedures will also assist in ensuring that only eligible WOSBs receive the benefits consistent with prevailing Supreme Court precedent.

Proposed §§ 127.400 through 127.405 under subpart D discuss the examination process for determining the continuing eligibility of a firm that is designated on CCR as a certified EDWOSB or WOSB. Those sections explain when and how SBA will conduct the examination and the decertification procedures SBA will follow when it is unable to verify that a concern qualifies as an EDWOSB or WOSB.

Proposed § 127.401 also explains the distinctions between the examination process and the EDWOSB and WOSB protest mechanism provided under the proposed subpart F. The proposed § 127.401 makes clear that the examination process is intended to verify the continuing EDWOSB or WOSB eligibility of a concern generally, while an EDWOSB or WOSB status protest is designed to determine the EDWOSB or WOSB eligibility of a concern for a specific procurement. The separate WOSB or EDWOSB examination procedures will assist in maintaining the integrity of the certification process by subjecting certified concerns to examinations of their EDWOSB and WOSB eligibility certifications. Consequently, examinations will serve to supplement the protest mechanism by monitoring the continuing eligibility of firms that claim EDWOSB and WOSB status.

Moreover, § 127.401(a) further provides that if SBA is conducting an examination of a concern that has submitted an offer on a pending EDWOSB or WOSB requirement and SBA has credible information that the concern may not qualify as an EDWOSB or WOSB, SBA may file a protest under § 127.600 to challenge the concern's eligibility for award for the specific requirement.

The provisions governing the available Federal contract assistance for WOSBs and EDWOSBs are set forth in proposed subpart E. Sections 127.500 through 127.502 discuss the industries in which contracting officers are authorized to restrict competition to EDWOSBs and WOSBs. Section 127.500 explains that contracting officers may only restrict competition to EDWOSBs and WOSBs in industries in which (1) SBA has determined that WOSBs are either underrepresented or substantially underrepresented in Federal procurement and (2) the procuring

agency has found, through appropriate analysis of its own procurement history, that the set-aside would satisfy the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution. Sections 127.501 and 127.502 indicate how SBA will determine, identify and provide public notice of those industries. Those sections, like section 8(m) of the Act, do not specify how SBA will determine whether WOSBs are underrepresented or substantially underrepresented in a particular industry. Instead, § 127.501 provides generally that at least every five years SBA, or another entity authorized to act on its behalf (e.g., a contractor), will conduct a study to identify the underrepresented or substantially underrepresented industries. The study will include an analysis of the extent of disparity of WOSBs in Federal contracting. Based upon that analysis, SBA will designate by 4-digit NAICS Industry Subsector industries in which WOSBs are underrepresented or substantially underrepresented.

Under § 127.501(b), where an agency seeks to reserve a requirement for WOSBs or EDWOSBs in one of the industries identified by SBA as being an industry in which WOSBs are underrepresented or substantially underrepresented government-wide, the agency must ensure that the set-aside meets the equal protection requirements of the Due Process Clause of the Fifth Amendment to the Constitution. It must conduct an analysis of the agency's past procurement activities and make a finding of discrimination by that agency in that particular industry sufficient to ensure that the set-aside is substantially related to an important governmental objective. As the agency primarily charged with implementing this and other set-aside programs under section 8 of the Act, SBA proposes this requirement on contracting agencies to ensure that this program is implemented uniformly across the government and in a manner that ensures it will be constitutional under the current Supreme Court jurisprudence.

Section 127.502 indicates that SBA will post a list of the designated industries on its Internet Web site. 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.

Section 127.503 addresses when a contracting officer is authorized to restrict competition to WOSBs or EDWOSBs. It establishes a similar "rule-of-two" standard as used in small business set-asides. This standard

requires the contracting officer to reasonably expect that at least two eligible companies would bid if the contract is set aside, based on market research. That section further makes 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" and is intended to clarify that the implementation of this program does not affect the Administrator's authority or responsibilities under the 8(a) BD program. 15 U.S.C. 634(b)(6). SBA does not intend to imply through lack of mention other programs, such as HUBZone set-asides or service-disabled veteran-owned small business set-asides, that contract requirements currently being fulfilled through other set-aside programs must be brought into this program or that this program should be given preference over other set-aside programs.

Sections 127.504 and 127.505 describe the additional requirements a concern must satisfy to submit an offer on an EDWOSB or WOSB requirement. Section 127.504 indicates that in addition to the certification requirements under subpart C, offerors on EDWOSB or WOSB requirements must also certify that they are small under the size standard for the procurement and that they will comply with the limitations on subcontracting rule set forth in § 125.6 of this title. Section 127.505 explains that an EDWOSB or WOSB that is a non-manufacturer, as defined in § 121.406(b), may submit an offer for an EDWOSB or WOSB requirement if it meets the requirements of § 121.406(b). Proposed § 127.506 governs what is required of joint venture relationships involving WOSBs when submitting an offer on an EDWOSB or WOSB contract.

The proposed Subpart F sets forth the procedures for protesting the status of a concern as an EDWOSB or WOSB, including the procedures for filing protests, for rendering protest determinations and for appealing those determinations to SBA's Office of

Hearings and Appeals (OHA). Sections 127.600 through 127.602 describe who is authorized to file and decide EDWOSB and WOSB status protests and the permissible grounds for filing protests.

Sections 127.603 through 127.606 prescribe format, and applicable deadlines for filing and determining EDWOSB and WOSB protests and for appealing SBA's protest determinations. Unlike eligibility examinations under the proposed subpart D, protests are time-sensitive because they are tied to a particular procurement. As a result, §§ 127.604 and 127.605 prescribe filing and decision deadlines to minimize undue interruptions in the underlying procurement.

The final section of the proposed part 127, subpart G, § 127.700, prescribes the applicable penalties that may be imposed on any person or concern that misrepresents the status of a concern as an EDWOSB or WOSB for purposes of receiving a Federal procurement.

### C. Amendments to Part 134

SBA is also proposing to amend Part 134 to include procedures for an EDWOSB or WOSB to appeal a protest determination under Part 127 of this Chapter. Specifically, § 134.102 would be amended to give OHA jurisdiction to hear appeals on WOSB or EDWOSB protests. Further, § 134.515 would be revised to reflect a change in when a judge may reconsider an appeal.

A new subpart, Subpart G, would be added to prescribe the procedures for filing and processing the appeals before OHA. This subpart will only apply to appeals to OHA from formal protest determinations made by the Director, Office of Government Contracting (D/GC) in connection with a WOSB or EDWOSB status protest. Procedures for size determination protests and NAICS code designations are governed by Subpart C of this part.

Proposed § 134.701 outlines the scope of the rules under this subpart. Sections 134.702 and 134.703 describe who may appeal a protest determination and when that person must file an appeal. Under § 134.702, the protested concern, the protestor, or the contracting officer responsible for the procurement affected by the protest determination may file an appeal with OHA. Section 134.703 allows for an appeal petition to be made within 10 business days after the appellant receives the protest determination.

Section 134.704 describes the effects that the appeal will have on the procurement at issue. If OHA determines that a concern is ineligible

then the contracting officer may terminate the contract.

Sections 134.705, 134.706 and 134.707 set out the requirements for an appeal petition, what the service and filing requirements are and when the D/GC transmits the protest file and to whom. The standard of review is found in § 134.707. The standard is whether the D/GC's determination was based on clear error of fact or law.

Under § 134.709 the Judge is able to dismiss an appeal if it is untimely filed or has already been adjudicated by a court of competent jurisdiction over such matters. Section 134.710 sets out the requirements of who can file a response to an appeal petition. Sections 134.711–712 discuss discovery and limitations on new evidence. No discovery is permitted and no new evidence will be allowed to be admitted. Sections 134.713 and 134.714 set out the timing for the appeal petition. Under Section 134.713 the record will close when the time to file a response to an appeal petition expires pursuant to 13 CFR 134.710. Under § 134.714, the Judge must issue a decision within 15 business days after close of the record.

Section 134.715 allows for the OHA Judge to reconsider an appeal decision within 20 calendar days after issuance of the written decision. Any party who has appeared in the proceeding, or SBA, can 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.

*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

The Office of Management and Budget (OMB) has determined that this rule is a "significant" regulatory action under Executive Order 12866. The Regulatory Impact Analysis is set forth below.

#### Regulatory Impact Analysis

##### 1. Necessity of Regulation

This regulatory action implements section 8(m) of the Act, which was enacted as part of section 811 of the Small Business Reauthorization Act of 2000, Public Law 106–554. Section 8(m) authorizes the creation of the set-aside procurement mechanism described in this regulation. Under this regulation contracting officers will be allowed to restrict competition to EDWOSBs or WOSBs in industries in which SBA has determined that WOSBs are underrepresented and when the

procuring agency has conducted an appropriate analysis of the agency's procurement history and made a determination that there is sufficient evidence of relevant discrimination in that industry by that agency. This proposed rule will establish the requirements and procedures necessary to administer these restricted competitions.

#### 2. Alternative Approaches to Proposed Rule

In developing this proposed rule, SBA considered the costs and benefits of the alternatives for certification of small business concerns that claim EDWOSB or WOSB status, particularly the alternatives provided by section 8(m) of the Act. Specifically, section 8(m)(2)(F) provides that in order to qualify as a WOSB or EDWOSB, a concern must either be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, or, alternatively, must certify to the contracting officer that they are a small business concern owned and controlled by women. In light of this provision, SBA considered performing the certifications by requiring each concern to submit a formal application to SBA for a determination of its status. That approach would have entailed the electronic or paper submission of written documentation to support the concern's claim that it meets the eligibility criteria for being designated a WOSB or EDWOSB. SBA decided against utilizing this certification process as the method to establish WOSB or EDWOSB status primarily because of the paperwork burden and other costs that approach would impose on WOSBs.

However, as an additional approach to self-certification, SBA is proposing to permit contracting activities to accept formal certification gained by WOSBs and EDWOSBs as a result of their participation in Federal small business programs. This may be accomplished by designating as WOSB or EDWOSB-certified all those concerns that at the time of procurement: (1) Were SBA certified as 8(a) BD or SDB women-owned concerns in good standing; (2) held a current certification as a disadvantaged business enterprise (DBE) from a certifying entity of a Department of Transportation grant recipient; or (3) were certified by an SBA-approved certifier. SBA has rejected them as primary methods for WOSB or EDWOSB certification in favor of a self-certification process. In the event of a protest SBA will recognize these certifications as evidence of a concern's

representation in ORCA that it is a qualified EDWOSB or WOSB. The standards for meeting this requirement are discussed in more detail in the body of this proposed regulation.

SBA believes that the proposed self-certification process would be the most beneficial and cost-effective approach for the small business concerns because they will not have to submit formal applications to SBA to become eligible for restricted competition for WOSB and EDWOSB procurements. As proposed, the self-certification process is similar to the one that is used in other existing SBA set-aside programs. For example, the SBA programs for small businesses and service-disabled veteran-owned small businesses permit those concerns to self-represent their size and socio-economic status when bidding on Federal contracts. The set-aside program for small businesses has worked well for decades. The set-aside program for service-disabled veteran-owned small businesses, while more recent, is also working well. Both of these set-aside programs are credible because they are supported by robust protest procedures. In other words, when an interested party such as an unsuccessful offeror believes that the apparent successful bidder or offeror on a Federal contract is not a small business, or not a service-disabled veteran-owned small business in the case of a set-aside for service-disabled veteran-owned small businesses, there is a formal process by which the interested party may submit a protest to SBA. This action halts the procurement until SBA investigates the allegations and reaches a decision. The subject proposed rule adopts the same approach, whereby interested parties may submit protests to SBA.

The self-certification alternative will leverage two existing Federal electronic databases, the Central Contractor Registration (CCR) and the On-line Representations and Certifications Application (ORCA), to facilitate the self-certification process. The approach is also consistent with SBA's statutory responsibilities under section 8(m) of the Act to establish certification standards and procedures.

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

This rule directs benefits to EDWOSBs and WOSBs at a cost to concerns ineligible for the program and at some cost to the taxpayer through restrictions on competition, resulting in increased contract prices and decreased selection of products and services and new administrative costs of managing a Federal procurement set-aside program and the eligibility determination

processes. Generally, the cost of transferring a contract from one business to another has minimal cost to society as a whole, but the loss of efficiency through restrictions in contracting has broader impacts that depend highly on the use of this program by contracting officers and the availability of competition among EDWOSBs and WOSBs.

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. It is difficult to estimate the total number of potential beneficiaries or losers that will be eligible for Federal small business assistance as a result of this proposed rule. Based on the four NAICS codes (9281—National Security and International Affairs, 3328—Coating, Engraving, Heat Treating, and Allied Activities, 3371—Household and Institutional Furniture and Kitchen Cabinet Manufacturing, and 4412—Other Motor Vehicle Dealers) identified in the RAND study, utilizing the Dynamic Small Business Search (DSBS) engine in CCR, 1209 women-owned small businesses were identified as recipients of Federal contracts in these 4 NAICS codes. It is expected that the number of awards to EDWOSBs and WOSBs will increase within these NAICS codes, should an agency restrict competition to only those groups in accordance with the procedures in this proposed rule. This estimate is based on an analysis of EDWOSB and WOSB participation in Federal contracting and the industry market share identified in the RAND report. In addition, one purpose of this program is to draw additional EDWOSBs and WOSBs into Federal procurement through restricted competition in the identified NAICS codes. However, any such economic incentive to enter Federal procurement may represent a cost to the taxpayer and society in the form of higher contract prices or fewer choices of quality.

From the point of view of Federal procurement policy, as set by statute, Federal agencies may benefit from the increased availability of EDWOSBs and WOSBs in order to meet their statutory goals. However, in the short term, restriction of competition raises the cost of contracts and limits the selection of products available. As more EDWOSBs and WOSBs enter into the Federal arena, competition will likely increase, lowering the cost of the program and

ultimately eliminating underrepresentation within those industries and the industry's participation in the program. In the long run, even with the elimination of underrepresentation in all industries, small business opportunities may be enhanced by the experience gained in Federal contracting through set-asides under this program, but taxpayers ultimately bear the cost of small businesses inexperienced in Federal contracting learning through limited competition set-asides.

Further, large businesses serving the Federal government as prime contractors with small business subcontracting goals may also benefit from a larger pool of WOSBs by enabling them to better achieve their subcontracting goals and at lower prices. No estimate of cost savings from these contracting decisions can be made since data are not available to directly measure price or competitive trends on Federal contracts.

To the extent that additional firms become active in Government programs, this may entail some additional administrative costs to the Federal Government associated with additional bidders for Federal small business procurement programs, additional firms seeking SBA guaranteed lending programs, and additional firms eligible for enrollment in SBA's Dynamic Small Business Search data base. Among businesses in this group seeking SBA assistance, there will be some additional costs associated with compliance and verification associated with certification of small business status and protests of small business status. However, these activities are likely to generate minimal incremental costs since mechanisms are currently in place to handle these administrative requirements. In addition, SBA attempted to calculate the cost to agencies when determining if there has been discrimination against WOSBs or EDWOSBs in the designated industry groups. However, SBA does not have access to agency presolicitation market research or any other agency maintained data that would reveal the extent of an agency's efforts to consider or reject out-of-hand the offers of WOSBs or EDWOSBs in a post-contract award environment. SBA can however, state that the Government-wide study conducted by the Rand Corporation to determine industries where WOSBs were underrepresented cost approximately \$250,000.00. SBA estimates that similar studies conducted by agencies in this regard should not exceed that figure, if they must seek outside assistance to make their determinations.



This regulatory action promotes the Administration's objectives. One of SBA's goals in support of the Administration's objectives is to help individual small businesses succeed through fair and equitable access to capital and credit, government contracts, and management and technical assistance. Implementation of this proposed rule ensures that the intended beneficiaries have access to small business programs designed to assist them. This proposed rule does not interfere with state, local, and tribal governments in the exercise of their government functions. In a few instances, state and local governments have voluntarily adopted SBA's regulations for their programs to eliminate the need to establish an administrative mechanism for developing their own size standards.

#### **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 the Executive Order. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132.

In the event of a protest, this proposed 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 proposed 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 proposed 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 concerns 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. This proposed 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. Nonetheless, SBA would welcome any comments on the process as described.

#### *Regulatory Flexibility Act*

SBA has determined that this proposed rule establishing a set-aside mechanism for WOSBs may have a significant economic impact on a

substantial number of small entities within the meaning of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, *et seq.* Accordingly, SBA has prepared an Initial Regulatory Flexibility Analysis (IRFA) addressing the impact of this Rule in accordance with section 603, title 5, of the United States Code. The IRFA examines the objectives and legal basis for the proposed rule; the kind and number of small entities that may be affected; the projected recordkeeping, reporting, and other requirements; whether there are any Federal rules that may duplicate, overlap, or conflict with the proposed rule; and whether there are any significant alternatives to the proposed rule.

#### *1. What are the Reasons for, and Objectives of, the Proposed Rule?*

SBA is establishing procedures whereby Federal procuring agencies may use restricted competition in industries where WOSBs are underrepresented in Federal procurement and when certain other conditions are met. The purpose of the proposed rule is to create an initial framework and infrastructure for implementing these new procedures, thereby providing a tool for Federal agencies to increase Federal contracting to WOSBs.

The objective of this proposed rule is to increase the amount of Federal contract dollars awarded to WOSBs in industries where they are currently underutilized. 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. What is the Legal Basis for the Proposed Rule?*

SBA is proposing this regulation pursuant to section 8(m) of the Small Business Act, 15 U.S.C. 637(m), which authorizes the creation and implementation of a new mechanism for Federal contracting with WOSBs.

#### *3. What is SBA's Description and Estimate of the Number of Small Entities to Which the Rule will Apply?*

The RFA directs agencies to provide a description, and where feasible, an estimate of the number of small business concerns that may be affected by the rule. This proposed rule will ultimately establish in the 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. The rule may also affect other small businesses to the extent that small businesses not owned and controlled by women may be excluded from competing for certain Federal contracting opportunities.

A survey of WOSBs in the CCR DSBS on September 19, 2007, identified a total of 1,208 WOSBs in the four industries identified by the RAND Corporation as those in which WOSBs are underrepresented or substantially underrepresented. The actual number of WOSBs in these industries may be less than 1,208 since some firms may have appeared under more than one industry search, and there is no simple method of determining how many firms, if any, appeared more than once. In addition, many otherwise-qualified EDWOSBs and WOSBs will not find it advantageous to pursue set-asides for WOSBs, since the industries in which they do business are not one of the four industries that RAND has identified in its study that may eventually be eligible for set-asides. However, the actual number may be more if SBA approves additional industries for set-aside procurements under these procedures.

This proposed rule may also have a substantial adverse impact on small businesses other than WOSBs that are excluded from competition for Federal contracts that are set aside exclusively for WOSBs. Non-WOSB small businesses in the four designated industries identified in the Rand Corporation study may lose contracting opportunities when contracts are re-competed or may be excluded from opportunities from which they would have otherwise benefited. This would be particularly harmful for non-WOSBs in these industries that derive a significant portion of their business from Federal contracting. The number of small businesses that would be excluded under the proposed determination of eligible industries or future such determinations is not known at this time, but it could be a substantial number. SBA is seeking public comment on the adverse effects of this program on non-WOSB small business concerns through this proposed rule.

Additional contracting opportunities identified by Federal agencies as candidates to 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 by this rule. However, SBA does not expect many, if any, 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 contracting activities.

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

WOSBs are not required to be certified as such in order to contract with the Federal Government. This will still be true if the proposed rule is adopted. However, for a WOSB to be eligible for Federal contracts restricted to WOSBs or EDWOSBs, it will have to self-certify its status as a WOSB. This requirement ensures that participation in certain contracting opportunities is restricted to qualified WOSBs according to the terms of section 8(m) of the Act and the criteria in this proposed rule. Similar eligibility requirements apply to WOSBs desiring to participate in SBA's 8(a) or SDB programs or the Department of Transportation's Disadvantaged Business Enterprise program. Further, SBA proposes to accept for WOSB-restricted contracts, those WOSBs currently certified for those programs.

However, some WOSBs may choose to participate in procurements restricted for competition to WOSBs or EDWOSBs and may decide to pursue formal certification under one of the programs referred to in the previous paragraph to: (1) Obtain the additional benefits afforded to them by those Federal programs; and (2) to use that formal certification as an assurance that they are qualified for participation in procurements restricted to WOSBs and EDWOSBs.

This formal certification requirement will have associated costs, *i.e.*, labor costs, for participating WOSBs. At a minimum, potential participants must complete specific forms and provide adequate documentation of their qualifications. Documents may include what a business would normally have on hand, *e.g.*, ownership records, tax records, etc. Firms applying for certification will have to locate copy and submit supporting documents. SBA estimates that the cost to complete these activities based on similar requirements for other SBA programs, will be approximately \$150.00 per hour. After the tax and other business papers for documentation are assembled,

completing the process application is estimated to take about 2.5 hours. An estimated 2,000 firms per year are expected to apply using this process and thus, the total cost is estimated to be \$750,000 per year. The paperwork burden on the WOSB applying for certification is estimated from SBA's experience with SDB and 8(a) applications that require similar documentation to support the claim of economic disadvantage and 51 percent ownership and control of the firm.

As noted earlier in this rule, WOSBs and EDWOSBs will not be required to submit any information to SBA to participate in restricted competition, or to maintain any additional information as a result of this rule. Therefore, SBA does not anticipate any reporting or recordkeeping burden directly associated with this proposed rule. Any costs associated with the concerns use of CCR or ORCA to complete their self-certifications would be de minimis.

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

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

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

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

The Regulatory Flexibility Act (RFA) requires agencies to identify alternatives to the rule in an effort to minimize any significant economic impact of the rule on small entities. SBA has determined that the rule may have a significant economic impact on a substantial number of small entities.

This rule will implement the set-aside mechanism for WOSBs, as established by § 8(m) of the Act. All of the provisions of this rule reflect requirements under that statute. The legislation does provide SBA with alternative approaches, however, for the certification of WOSBs. Specifically, a WOSB may be certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator; or, alternatively, 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 or some other entity for formal certification. For the reasons discussed earlier, SBA has ruled out this approach as unnecessary and too costly. SBA believes that eligibility examinations and protest procedures incorporated into the proposed rule will minimize the likelihood of fraud and misrepresentation of WOSB and EDWOSB status.

In addition, SBA attempted to calculate the cost to agencies when determining if there has been discrimination against WOSBs or EDWOSBs in the designated industry groups. However, SBA does not have access to agency presolicitation market research or any other agency maintained data that would reveal the extent of an agency's efforts to consider or reject out-of-hand the offers of WOSBs or EDWOSBs in a post-contract award environment. SBA can, however, state the Government-wide study conducted by the Rand Corporation to determine industries where WOSBs were underrepresented cost approximately \$250,000.00. SBA estimates that similar studies conducted by agencies in this regard should not exceed that figure, if they must seek outside assistance to make their determinations.

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

## 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.

Accordingly, 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);

(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 happens 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?

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### Subpart C—Certification of EDWOSB or WOSB Status

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

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#### Subpart E—Federal Contract Assistance

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- 127.501 How will SBA and the agencies determine the industries 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 mandated 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) has determined that WOSBs are underrepresented or substantially underrepresented in Federal procurement and 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 under the penalty of perjury 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 a 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 that a set-aside in that industry would be in accordance with the equal protection requirements of the Due Process Clause of the Fifth Amendment of the Constitution, as specified in § 127.501(b).

##### **§ 127.501 How will SBA 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 is responsible for carrying out analysis sufficient to 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; 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.

##### **§ 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.

(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. 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.

Steven C. Preston,  
Administrator.

[FR Doc. E7-25056 Filed 12-26-07; 8:45 am]

BILLING CODE 8025-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### 18 CFR Part 284

[Docket No. RM08-1-000]

#### Enhancement of Competition in the Secondary Release Market; Notice of Extension of Time

December 14, 2007.

**AGENCY:** Federal Energy Regulatory Commission.

**ACTION:** Notice of Proposed Rulemaking; Extension of the Comment Date.

**SUMMARY:** On November 15, 2007, the Federal Energy Regulatory Commission issued a Notice of Proposed Rulemaking proposing revisions to its regulations governing interstate natural gas pipelines to reflect changes in the market for short-term transportation services on pipelines and to improve the efficiency of the Commission's capacity release mechanism. The date for filing comments on the proposed rule is being extended at the request of the American Gas Association, the American Public Gas Association, the Interstate Natural Gas Association of America and the Process Gas Consumers Group.

**DATES:** Comments are due on or before January 25, 2008.

**ADDRESSES:** You may submit comments, identified by docket number by any of the following methods:

- *Agency Web Site:* <http://ferc.gov>.

Documents created electronically using word processing software should be filed in native applications or print-to-PDF format and not in a scanned format.

- *Mail/Hand Delivery:* Commenters unable to file comments electronically must mail or hand deliver an original and 14 copies of their comments to: Federal Energy Regulatory Commission, Secretary of the Commission, 888 First Street, NE., Washington, DC 20426.

**FOR FURTHER INFORMATION CONTACT:**

Robert McLean, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, NE., Washington, DC 20426,  
[Robert.McLean@ferc.gov](mailto:Robert.McLean@ferc.gov), (202) 502-8156.

David Maranville, Office of the General Counsel, Federal Energy

Regulatory Commission, 888 First Street, NE., Washington, DC 20426,  
[David.Maranville@ferc.gov](mailto:David.Maranville@ferc.gov), (202) 502-6351.

**SUPPLEMENTARY INFORMATION:** On December 13, 2007, the American Gas Association, the American Public Gas Association, the Interstate Natural Gas Association of America, and the Process Gas Consumers Group (the Natural Gas Associations) filed a joint motion for an extension of time to file comments in response to the Commission's Notice of Proposed Rulemaking in this docket.<sup>1</sup> They request that the Commission extend the deadline for comments from January 10, 2008 to February 8, 2008. The motion states that the Natural Gas Associations require additional time in order to poll their members and weigh the major policy and factual issues raised in the Notice of Proposed Rulemaking.

Upon consideration, notice is hereby given that an extension of time for filing comments on the Notice of Proposed Rulemaking is granted to and including January 25, 2008.

Kimberly D. Bose,  
Secretary.

[FR Doc. E7-25001 Filed 12-26-07; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[Docket No. 071212833-7843-01]

RIN 0648-XB94

#### Fisheries of the Northeastern United States; Atlantic Bluefish Fisheries; 2008 Atlantic Bluefish Specifications

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS proposes 2008 specifications for the Atlantic bluefish fishery, including state-by-state commercial quotas, a recreational harvest limit, and recreational possession limits for Atlantic bluefish off the east coast of the United States. The intent of these specifications is to establish the allowable 2008 harvest

<sup>1</sup> *Promotion of a More Efficient Capacity Release Market*, 72 FR 65,916 (November 26, 2007), 121 FERC ¶ 61,170 (2007).

levels and possession limits to attain the target fishing mortality rate (F), consistent with the stock rebuilding program in Amendment 1 to the Atlantic Bluefish Fishery Management Plan (FMP).

**DATES:** Written comments must be received no later than 5 p.m. eastern standard time, on January 28, 2008.

**ADDRESSES:** You may submit comments, identified by 0648-XB94, by any one of the following methods:

- **Electronic Submissions:** Submit all electronic public comments via the Federal e-Rulemaking portal: <http://www.regulations.gov>,

- **Fax:** (978) 281-9135, Attn: Regional Administrator.

- **Mail:** Patricia A. Kurkul, Regional Administrator, NMFS, Northeast Regional Office, One Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope: "Comments on 2008 Bluefish Specifications",

Instructions: All comments received are part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publically accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Copies of the specifications document, including the Environmental Assessment and Initial Regulatory Flexibility Analysis (EA/IRFA) and other supporting documents for the specifications, are available from Daniel Furlong, Executive Director, Mid-Atlantic Fishery Management Council, Room 2115, Federal Building, 300 South Street, Dover, DE 19901-6790. The specifications document is also accessible via the Internet at <http://www.nero.noaa.gov>.

**FOR FURTHER INFORMATION CONTACT:**

Tobey Curtis, Fishery Policy Analyst, (978) 281-9273.

**SUPPLEMENTARY INFORMATION:**

#### Background

The regulations implementing the FMP are prepared by the Mid-Atlantic Fishery Management Council (Council) and appear at 50 CFR part 648, subparts A and J. Regulations requiring annual specifications are found at § 648.160. The management unit for bluefish (*Pomatomus saltatrix*) is U.S. waters of the western Atlantic Ocean.