

CHANGES ON THE HORIZON FOR THE SBA 8 (M) WOMEN-OWNED SMALL BUSINESS PROGRAM

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Additional regulations governing the federal contracting “set-aside” program and now also the “sole source” program applied to women-owned small business (WOSB) are on the horizon. The WOSB program is referred to as the 8(m) program and was officially launched in 2011.

Proposed regulations were issued on May 1, 2015. They foreshadow a new certification process to be administered by SBA in place of the current self-certification process. In addition, the proposed regulations also implement the sole source aspect of the program which applies to federal contracts not exceeding \$6.5 million for manufacturing and \$4 million for all others.

To be considered a WOSB, an enterprise must i) meet ownership and operational requirements, ii) meet gross revenue thresholds, and iii) be in an industry in which WOSB's have been historically underrepresented. The owner of a WOSB need not be economically disadvantaged, as is required for the 8(a) program.

A WOSB must be at least 51 percent directly and unconditionally owned and controlled by one or more women who are citizens of the United States. Control means that the highest officer position must be held by a woman who must devote her full time and efforts to the business. Women must conduct the long-term decision making for the enterprise, along with its day-to-day management and administration. Women do not need to have technical expertise or licenses required to conduct all of the operations of the business, but women must demonstrate that they have the ultimate managerial and supervisory control over those who do.

A size standard also applies to WOSBs. They must have annual gross revenues below the threshold set according to the business's NAICS code (the “size standard”). For example, the size standard for specialty building contractors is \$15 million and for general freight trucking is \$27.5 million. Each NAICS code has a specific threshold set by the SBA to define whether a business should be considered a “small business” in its industry.

A WOSB eligible for the 8(m) program must operate in one of 83 industries identified by the SBA as eligible for the program. There are a wide variety of eligible

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industries in the construction, transportation, manufacturing, telecommunications, and service industries.

The process to be recognized as a WOSB remains in flux. An entity can be certified by a third-party certification organization recognized by the Small Business Administration such as the U.S. Women's Chamber of Commerce. More commonly, though, until the adoption of the 2015 National Defense Authorization Act (NDAA), entities could self-certify by providing documentation to the federal contracting agency directly. The NDAA provided that self-certification would no longer be permitted. A report issued in the fall of 2014 by the Government Accounting Office found that inadequate monitoring and controls under the self-certification process resulted in awards to a large percentage of firms that were not eligible WOSBs.

In the proposed regulations issued on May 1, 2015, notwithstanding the clear Congressional prohibition on self-certification in the NDAA, the SBA confirmed that self-certification would remain permissible until it adopts its own certification program. The SBA provides no further guidance on when or how it will implement a certification process. Certification through third parties, such as the U.S. Women's Chamber of Commerce, also remains permitted, both by the statute and the SBA rules.