

WOSB and EDWOSB Programs: Getting Certified and Staying Compliant

Presented By:

Pam Mazza
Managing Partner, PilieroMazza
pmazza@pilieromazza.com
(202) 857-1000

Overview

- ❖ WOSB/EDWOSB programs trending up
- ❖ Eligibility criteria
- ❖ Understanding the application process
- ❖ Taking full advantage of the WOSB/EDWOSB programs
- ❖ Maintaining eligibility and avoiding pitfalls
- ❖ Q&A

Recent Program Improvements

- ❖ No more dollar caps for competitive set-aside contracts – this is now a reality!
- ❖ Lifting of dollar caps will help open up a program that has been little used
- ❖ Mentor-protégé program coming soon?
- ❖ Sole source authority in the works?

WOSB Spending Is Up

- ❖ Recent survey shows WOSB Program is trending up
 - WOSBs won \$15.4B in federal contracts in FY13, despite downturn in federal spending
 - WOSBs accounted for 4.34% of all small business federal contracts in FY13, up from 3.5% in FY09
 - WOSBs accounted for 4.8% of all eligible federal contracts through first month of FY14
 - WOSBs most active in IT, health, construction, and manufacturing industries
- ❖ How does DOE fare?
 - DOE spent \$321M (eligible dollars) on WOSBs in FY13
 - Only 1.48% of DOE's total eligible dollars – short of its 5% goal

The Eligibility Criteria

- ❖ Must be a SMALL business
- ❖ Size of a firm includes any affiliates
 - Multiple ways that affiliation can arise
 - Key is when one firm controls or has the power to control the other, or a third party or parties control or have the power to control both, even if this control is not exercised (13 C.F.R. § 121.103)
- ❖ Can have affiliates, but must be small combined

Ownership & Control

- ❖ At least 51% owned and controlled by one or more women who are U.S. citizens
 - Not 50.9%
 - Ownership must be unconditional and direct
 - No restrictions on ownership
 - Not owned through another entity, like a holding company or ESOP (but a revocable trust is okay)
 - Control = long-term decision making and day-to-day management and administration of business operations

WOSB Industries

- ❖ Participate in an industry that has been identified by the SBA as one where WOSBs are “substantially underrepresented”
 - Not all NAICS codes apply – only 133 WOSB NAICS codes
 - For example, NAICS code 562910, Remediation Services, is not included. DOE spent over \$1.5 billion in 2013 on prime contracts under 562910.

Negative Control

- ❖ Be careful of provisions in operating documents that could give a male or non-economically disadvantaged woman “negative” control over the company
- ❖ Examples of negative control:
 - Operating Agreement requires each member to sign a contract in order to bind the company
 - Withdrawals and transfers from company bank account requires signature of each member
 - Operating Agreement states that no member, without the written consent of the other member(s), may release company debts or dispose of company assets

Position Matters

- ❖ A woman must hold the highest officer position in the company – whatever the operating document defines as the highest position
- ❖ However, the CEO of the company does not also need to be the owner in order to be a WOSB
 - A woman must hold the highest officer position and a woman or women must directly own and control at least 51% of the company – could be separate women filling ownership and management roles
- ❖ Company should be her focus (full-time, normal working hours), not a side project

Experience Matters, Too

- ❖ A woman (or women) must have managerial experience of the extent and complexity needed to run the business
- ❖ A woman does not need the technical expertise or possess the required license in order to control the company if she can demonstrate she has the ultimate managerial and supervisory control over those who have the technical expertise and licenses
 - However, if a man possesses the required license and has an equity interest in the business, he may be found to control the company
- ❖ The controlling woman's resume should reflect the industry of the company

Hypothetical: Does Sally Control?

- ❖ Sally was a social worker for many years and now she runs and owns an architecture firm
- ❖ Sally's husband, Sam, works at the architecture firm and owns a minority interest
- ❖ Sam has worked as a licensed architect for 10 years
- ❖ Is the firm an eligible WOSB?
 - Probably not. Sally would need to show she has ultimate management and supervisory control over Sam and the other architects, despite the fact she has no experience in this line of business
 - Since Sam has the required license, an equity interest, and experience, the SBA would probably find Sam controls

EDWOSB Eligibility Criteria

- ❖ An EDWOSB is, by definition, a WOSB, so same eligibility requirements apply (and EDWOSBs may compete for WOSB opportunities)
- ❖ Participate in an industry that has been identified by the SBA as one where EDWOSBs are “underrepresented” or “substantially underrepresented”
 - 197 EDWOSB NAICS codes
- ❖ For a WOSB to be deemed “economically disadvantaged,” its owner(s) must demonstrate economic disadvantage
 - “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.” 13 C.F.R. § 127.203(a)

Economic Disadvantage Factors

- ❖ Personal net worth must be less than \$750,000
 - Excluding ownership interest in firm, equity interest in personal residence, and funds invested in retirement account that are unavailable until retirement age without a significant penalty
- ❖ Adjusted gross income cannot exceed \$350,000 averaged over the last three years (preceding certification)
 - Rebuttable presumption: may show (high) income level was unusual, losses related to earnings were suffered, or income not indicative of lack of economic disadvantage
- ❖ Fair market value of all assets, including interest in firm and equity interest in personal residence, may not exceed \$6 million

Effect of Spouse and Families on Economic Disadvantage

- ❖ When married, a woman must submit separate financial information for her spouse
 - SBA may consider her spouse's financial situation in determining her access to credit and capital
 - SBA will consider her spouse's financial situation where spouse has a role in the business, has provided financial support to the business, or has a company in the same/similar line of work and the firms have similar names, employees, etc.
- ❖ Asset transfers during two years leading up to certification still count as part of woman's assets if transferred to an immediate family member or family trust
 - Except if transferred to immediate family member for education, medical expenses, essential support, or for special event such as birthday, graduation, anniversary, etc.

Understanding the Certification Process



- ❖ No formal application process (unlike the 8(a) and HUBZone Programs)
- ❖ Two ways to certify status:
 - Option 1: “Modified” self certification by uploading eligibility documentation to WOSB Program Repository
 - Option 2: obtain certification by an SBA-approved Third Party Certifier
- ❖ Once one of the two ways to certify status is completed, company must register and represent its status in SAM.gov

Option 1: Modified Self-Certification

- ❖ Upload eligibility documents via SBA's General Login System (GLS) at: <https://eweb.sba.gov/gls>
- ❖ Necessary documents include:
 - Copies of birth certificate, naturalization papers, or unexpired passport for woman owner(s)
 - All corporate records (e.g., operating agreement/bylaws, articles of incorporation, stock certificates, etc.)
 - Copy of joint venture agreement, if applicable
 - For WOSBs, WOSB Program Certification (SBA Form 2413)
 - For EDWOSBs, all of the above, plus SBA Personal Financial Statement for each woman claiming economic disadvantage and a copy of the EDWOSB Program Certification (SBA Form 2414), not WOSB Program Certification

Document Tips

- ❖ Simpler process if firm is already in the 8(a) program
 - Just upload initial 8(a) Program certification, the appropriate WOSB/EDWOSB Program Certification Form, and register the appropriate status in SAM.gov
- ❖ Documents must be uploaded to the Repository in PDF or ZIP format – SBA recommends ZIP to reduce size
- ❖ Firms must keep all documents for a period of 6 years from the date of certification (initial and any subsequent certifications)
 - No trashing or shredding!

Option 2: Third Party Certifiers

- ❖ El Paso Hispanic Chamber of Commerce (www.ephcc.org)
- ❖ National Women Business Owners Corporation (www.nwboc.org)
- ❖ U.S. Women's Chamber of Commerce (www.uswcc.org/certification.aspx)
- ❖ Women's Business Enterprise National Council (WBENC) (www.wbenc.org)
 - At the request of WBENC, SBA has approved WBENC only for the certification of WOSBs and not certification of EDWOSBs

Third Party Certification Process

- ❖ Firm must submit an application, with many of the same documents that must be uploaded to the SBA using Option 1, and wait for approval
- ❖ Range of fees (\$250 to \$1,000), site visit/interview may be required, process times vary (30 days to 90 days)
- ❖ Once approved, firm must upload Third Party Certification to the SBA Repository (prior to initial offer), along with the appropriate Program Certification Form (either SBA Form 2413 or SBA Form 2414) and joint venture agreement (if applicable)
 - SBA may also ask firm to submit additional documents in the event of an eligibility examination or protest

Contract Opportunities

- ❖ Competitive set-aside contracts, but no sole source (yet...)
- ❖ Dollar cap threshold is gone!
- ❖ SBA’s “ChallengeHER” campaign matching WOSBs and EDWOSBs with agencies, increasing program awareness
- ❖ Know the NAICS codes
 - Not all industries are available
 - Current list of available industries can be found on the SBA’s website at:
http://www.sba.gov/sites/default/files/files/2012_WOSB_ED_WOSB_NAICS_Codes.pdf
- ❖ SBA can appeal a CO’s decision not to make a particular requirement available for the WOSB Programs

Joint Ventures

- ❖ A joint venture may qualify for an EDWOSB or WOSB set-aside contract if:
 - The joint venture partners are individually small, or collectively small, under the applicable size standard
 - Individually vs. collectively depends on type and value of procurement
 - EDWOSB or WOSB participant is listed as such in SAM.gov
 - Parties enter into a written joint venture agreement, including:
 - Purpose of the JV
 - Designating the EDWOSB or WOSB as the managing party and one of its employees as the project manager
 - 51% of the net profits must go to EDWOSB/WOSB
 - Parties must provide the JV agreement to the contracting officer

Keep Repository Documents Updated



- ❖ Any updates or amendments to eligibility documentation must be uploaded to the Repository
 - For example, if a firm amends its By-laws, the Amended By-laws must be uploaded to the Repository
- ❖ Before a firm submits an offer on any WOSB/EDWOSB set-aside contract, it should make sure its Repository documents are up-to-date
- ❖ The contracting officer on the procurement will verify all required documents are uploaded to the Repository

What Happens After the Documents are Uploaded?

- ❖ If a firm is the apparent successful offeror, log into GLS and the Repository and select the Agency and contracting officer/contract specialist for the solicitation from a drop down menu to then authorize document access for that individual
 - If the Repository is unavailable, be prepared to submit the documents directly to the CO if selected as apparent successful offeror
- ❖ Contracting officers will be authorized access by the WOSB for a 90-day period
 - The WOSB will have to repeat these steps each time additional access needs to be authorized for a contracting officer or contract specialist

Contracting Officer Verification

- ❖ If the apparent successful offeror fails to submit any required documents, the CO cannot award a WOSB/EDWOSB contract to that firm
- ❖ A CO may accept a firm's certification as a WOSB/EDWOSB if the firm has provided all the required documents and there has been no protest or “other credible information” that calls into question the firm's eligibility
 - When a CO has information that calls into question firm's eligibility or the firm fails to provide all the required documents, the CO shall refer the firm to SBA for an eligibility examination

What is an Eligibility Examination?

- ❖ An investigation that verifies the accuracy of any certification made or information provided as part of the certification process (including third-party certifications), or in connection with an EDWOSB or WOSB contract
- ❖ Eligibility examinations may verify that a concern meets the EDWOSB or WOSB eligibility requirements at the time of the examination
- ❖ SBA may perform eligibility examinations at any time after a concern self-certifies on SAM that it is an EDWOSB or WOSB

What's the Difference Between an Eligibility Examination and a Protest?

- ❖ An eligibility examination is the formal process through which SBA verifies the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or WOSB contract
 - An eligibility examination can be conducted at any time and is not tied to a particular solicitation or contract award
- ❖ An EDWOSB or WOSB status protest is a challenge of the EDWOSB or WOSB status of a concern in connection with a specific EDWOSB or WOSB requirement or contract
 - SBA may consider protest allegations set forth in a status protest when it performs an eligibility examination

Eligibility Examinations & Status

Protests – Be Prepared

- ❖ With lifting of \$\$ caps on WOSB/EDWOSB set-asides, more attention turning to programs
- ❖ SBA will notify a firm if its eligibility is being examined or its status protested
- ❖ SBA will request that a firm provide documents and information relating to its eligibility
- ❖ A firm may request an extension in providing the documents or information to SBA
 - However, SBA is not required to grant the extension and may draw an adverse inference if the firm fails to cooperate in providing the requested information

Documents Requested For Eligibility Examination and Protests

- ❖ For WOSBs & EDWOSBs:
 - All documents submitted to the Repository
 - Any other pertinent documents requested by the SBA, including copies of proposals or bids submitted in response to an EDWOSB or WOSB solicitation

- ❖ For EDWOSBs only:
 - Signed copies of SBA Form 413, Personal Financial Statement
 - 3 most recent personal income tax returns (including all schedules and W-2 forms) for the women claiming economic disadvantage and their spouses (unless legally separated)
 - SBA Form 4506-T, Request for Tax Transcript Form

What Happens if SBA Cannot Verify Eligibility?



- ❖ SBA Director/Government Contracting (D/GC) will send the concern a written notice explaining the reasons SBA believes the concern did not qualify at the time of certification or does not qualify as an EDWOSB or WOSB
- ❖ The concern then has 15 calendar days from the date of the notice to respond
- ❖ After that, the D/GC will consider the reasons of proposed ineligibility and any information the concern submitted in response, and will send a written decision with the findings

The SBA Determination

- ❖ If found not eligible, 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 SAM within 5 calendar days
- ❖ The D/GC's decision is effective immediately and remains in full force and effect unless a new examination verifies the concern is an eligible EDWOSB or WOSB or the concern is certified by a Third Party Certifier
- ❖ If a firm believes in good faith that it has cured the reasons for its ineligibility, it may request a new examination

Protest Process

- ❖ 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 CO may grant SBA
 - If there is no decision within 15 business days, the CO may award the contract (after contacting the SBA for status) if he or she determines in writing that there is an immediate need to award the contract and that waiting until SBA makes its determination will harm public interest
- ❖ SBA will notify the CO, the protestor, and the protested concern in writing of its determination
- ❖ The protested concern, the protestor, or the CO may file an appeal of the protest determination with SBA's Office of Hearings and Appeals (OHA)

Presumed Loss Rule

- ❖ Effective August 27, 2013
- ❖ Implements “presumption of loss” provisions of the Small Business Jobs Act of 2010
- ❖ Jobs Act established a presumption of loss to the Government from a size or status misrepresentation equal to the total amount expended on a contract obtained by misrepresentation
- ❖ Designed to prevent and deter fraud and misrepresentation in small business procurements
- ❖ Expected to boost prosecutions by increasing the dollar value of size/status misrepresentation cases

Changes to Limitations on Subcontracting

- ❖ Prime must perform a certain percentage of the work with its own personnel (e.g., 50% for services contracts)
- ❖ Important changes passed in January 2013:
 - ❖ Compliance will be based on the total amount paid to the small business, not the cost of the contract incurred for personnel
 - ❖ Small businesses will be able to meet their own performance requirements by subcontracting to other “similarly situated” small companies
 - ❖ Construction contracts TBD
 - ❖ New penalties for noncompliance
- ❖ New changes effective when the FAR is amended

Any questions?

Thank you for joining us today.

If you would like to speak with Pam about the WOSB/EDWOSB Programs, please contact her at:

Pam Mazza

pmazza@pilieromazza.com

(202) 857-1000