

# Cooley

June 16, 2015

The Small Business Administration ("SBA") recently issued a proposed rule to address statutory changes that would permit agency contracting officers to award sole-source contracts to women-owned small businesses ("WOSBs") and economically disadvantaged women-owned small businesses ("EDWOSBs"). The proposed SBA rule would allow a contracting officer to make a sole-source award to WOSBs or EDWOSBs of a manufacturing contract not exceeding \$6.5 million in value and other contracts not exceeding \$4 million in value. The proposed rule also addresses the statutory change that eliminates the ability of a WOSB to self-certify its status and submit supporting documentation. The SBA's proposed rule highlights significant opportunities as well as new challenges for WOSBs.

In December 2014, the National Defense Authorization Act for Fiscal Year 2015 ("the NDAA") brought about a change that would allow WOSBs and EDWOSBs to enjoy a benefit provided to 8(a) contractors but previously denied to WOSBs and EDWOSBs—the chance to receive a sole-source contract award. The NDAA included language that granted contracting officers the authority to award sole-source contracts to WOSBs and EDWOSBs. The contracting officer may award a manufacturing contract with a value up to \$6.5 million on a sole-source basis, and contracts for other industries with a value up to \$4 million. The NDAA provision on sole-source awards also specified that sole-source awards are permitted only in the industries in which WOSB and EDWOSB set-aside contracts currently are permitted.

Significantly, the NDAA also altered the current mechanism by which WOSBs certify their woman-owned status. Previously, the applicable statute provided two options for WOSB certification: (1) certification through a federal agency, a state government or a national third-party certifying entity approved by the SBA; or (2) self-certification to the contracting officer, followed by submission of supporting documentation to the WOSB Document Repository. The NDAA eliminated this latter option, requiring a WOSB to obtain independent certification.

On May 1, 2015, the SBA issued a proposed rule to address the NDAA's WOSB changes. The proposed rule would add new language to the SBA regulations to provide that where a contracting officer conducts market research in an industry where a WOSB or EDWOSB set-aside is authorized and cannot identify two or more WOSBs or EDWOSBs that can perform the requirement at a fair and reasonable price but identifies one WOSB or EDWOSB that can perform at a fair and reasonable price, the contracting officer can award the contract on a sole-source basis, if the value of the contract (including options) does not exceed \$6.5 million for manufacturing contracts and \$4 million for all other contracts.

The SBA's proposed rule also acknowledges the NDAA's deletion of the WOSB self-certification requirement. In the proposed rule, the SBA notes that the statutory change to the certification process "appears to apply to both sole source and set asides under the WOSB Program, and may require substantial resources. Establishing a certification requirement and process will require a more prolonged rulemaking before SBA can establish such a program. In our view, there is no evidence that Congress intended to halt the existing WOSB Program until such time as SBA establishes the infrastructure and issues regulations implementing the statutory certification requirement. Instead, we maintain that the new WOSB sole source authority can and should be implemented as quickly as possible, using existing program rules and procedures, while SBA proceeds with implementing the certification requirement through a separate rulemaking."

Despite the clear directive of the NDAA, the SBA in its proposed rule takes the position that reliance upon self-certification by a WOSB continues to be a viable option. The SBA's stance not only raises questions about the SBA's authority to adopt such a view, it places WOSBs in a difficult position in determining the appropriate method by which to certify their woman-owned status. A

WOSB that relies upon the SBA's statement could find its self-certification challenged by a competitor or questioned by an agency seeking to issue a sole-source award. WOSBs should be cognizant of this tension between the NDAA's direction and the SBA's statement in its proposed rule, and examine appropriate options in weighing the appropriate method by which to certify WOSB status.

The SBA's proposed rule is published at 80 Federal Register 24846 (May 1, 2015). Comments on the proposed rule are due by June 30, 2015.

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our [legal notices](#).

---

## Key Contacts

Christopher Kimball Washington, DC	ckimball@cooley.com +1 202 842 7892
---------------------------------------	--

---

This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.