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## SMALL BUSINESS ADMINISTRATION

13 CFR Part 127

RIN 3245-AG75

Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business – Certification

AGENCY: U.S. Small Business Administration.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The U.S. Small Business Administration (SBA) is seeking input and comments on certification of Women-Owned Small Businesses (WOSB) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSB) in connection with the Women-Owned Small Business Federal Contract Program (WOSB Program). SBA is planning to amend its regulations to implement section 825 of the National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA). Section 825 of the 2015 NDAA removed the statutory authority allowing WOSBs and EDWOSBs to self-certify. SBA intends to draft regulations to implement the statutory changes.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: You may submit comments, identified by RIN 3245-AG75, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- For mail, paper, disk, or CD-ROM submissions: Brenda J. Fernandez, Procurement Analyst, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8<sup>th</sup> Floor, Washington, DC 20416.
- Hand Delivery/Courier: Brenda J. Fernandez, Procurement Analyst, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8<sup>th</sup> Floor, Washington, DC 20416.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to: Brenda J. Fernandez, Procurement Analyst, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street, SW, 8<sup>th</sup> Floor, Washington, DC 20416, or send an email to [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov). Highlight the information that you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

FOR FURTHER INFORMATION CONTACT: Brenda J. Fernandez, Procurement Analyst, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 205-7337; [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov).

#### SUPPLEMENTARY INFORMATION:

The WOSB Program, set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible Women-Owned Small Businesses (WOSBs) and Economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) for Federal contracts in certain industries. Congress amended the WOSB Program with section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law

113-291, 128 Stat. 3292 (December 19, 2014) (2015 NDAA), which included language granting contracting officers the authority to award sole source awards to WOSBs and EDWOSBs and shortening the time period for SBA to conduct a required study to determine the industries in which WOSBs are underrepresented in federal contracting. In addition, section 825 of the 2015 NDAA amended the Small Business Act to create a requirement that a firm be certified as a WOSB or EDWOSB by a Federal Agency, a State government, SBA, or a national certifying entity approved by SBA. 15 USCS 637(m)(2)(E).

On September 14, 2015, SBA published in the Federal Register a final rule to implement the sole source authority for WOSBs and EDWOSBs and the revised timeline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented. 80 FR 55019. SBA did not implement the certification portion of section 825 of the 2015 NDAA in this final rule because its implementation is more complicated, could not be accomplished by merely incorporating the statutory language into the regulations, and would have delayed the implementation of the sole source authority unnecessarily. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority by combining it with changes in the certification requirements, SBA decided to implement the certification requirement through a separate rulemaking. This advance notice of proposed rulemaking (ANPR) seeks to solicit public comments to assist SBA in drafting a viable proposed rule to implement a WOSB/EDWOSB certification program.

SBA seeks to better understand what the public believes is the most appropriate way to structure a WOSB/EDWOSB certification program. Although the language of section 825 of the 2015 NDAA authorizes four different types of certification programs (by a Federal Agency, a State government, SBA, or a national certifying entity approved by SBA), SBA requests

comments as to whether each of the four types should be pursued, or whether one or more of the types of certification are not feasible. SBA also requests comments on whether there should be a grace period after implementation to give firms that have self-certified the time necessary to complete the certification process. If a grace period were implemented, how long should that period be? In addition, in drafting any proposed rule to implement a WOSB/EDWOSB certification process, SBA must also consider what should happen to the current WOSB repository. As such, SBA requests comments as to whether the repository should continue to be maintained after the certification program is implemented, and if so, why and in what capacity should it be used in the future.

SBA's regulations currently authorize WOSB and EDWOSB certifications by third party national certifying entities approved by SBA, by SBA where the firm is owned and controlled by one or more women and has been certified as a Participant in the 8(a) Business Development (BD) Program, and by states that have certified firms owned and controlled by women to be Disadvantaged Business Enterprises (DBEs) for the U.S. Department of Transportation's (DOT's) DBE program. 13 CFR 127.300(d). SBA seeks comments on how those certification processes are working, how they can be improved, and how best to incorporate them into any new certification requirements.

To better understand how SBA should structure the new certification processes, this ANPR seeks comments in response to the questions below, relating to each of the four certification approaches.

#### Third Party Certification

As noted above, SBA regulations currently provide for certification by third party national certifying entities that have been approved by SBA. To date, SBA has approved four third party entities to certify firms as WOSBs and EDWOSBs.

1. How many third party certifiers would be needed to adequately serve the full community of WOSBs and EDWOSBs seeking certification?
2. Should SBA modify its regulations to add more information about the procedures and processes used by third party certifiers to certify firms as WOSBs and EDWOSBs for SBA's WOSB program?
3. Should SBA regulations contain information on how to become an approved third party certifier?
4. What type of notice should be required to identify third party certifiers?
5. Should cost to EDWOSB and WOSBs be part of the criteria that SBA considers when deciding whether to approve one or more additional third party certifiers? If so, what if any methodology should SBA utilize when considering cost?
6. Should SBA consider the ongoing cost of recertification when evaluating third party certifiers?
7. Should SBA determine the term period a third-party certification is valid? If so, what should be an appropriate term for certification validity?
8. Should SBA authorize a third-party limited access to an applicant's repository file for the purpose of directly uploading approved certification documents?
9. Should SBA change its current processes regarding denials by third party certifiers?

10. In the future, should SBA consider allowing third party certifiers to approve mentor-protégé agreements and joint venture agreements involving EDWOSB and WOSB participants?

#### Certification by States and Other Federal Agencies

The changes to the WOSB program made by section 825 of the 2015 NDAA authorize WOSB and EDWOSB certifications by other Federal agencies and State governments. SBA's current regulations authorize SBA to recognize WOSB certifications made by states that have certified firms that are owned and controlled by women to be DBEs for the DOT's DBE program. The regulations do not, however, recognize any other State certifications and do not authorize other Federal agencies to certify WOSBs and EDWOSBs.

1. Should the authority to certify WOSBs and EDWOSBs be extended to States generally? If the authority should be extended, how should SBA authorize individual States to participate as WOSB and EDWOSB certifying entities (i.e., what sort of approval process should be implemented to ensure that SBA's WOSB and EDWOSB requirements are properly applied)?
2. Should SBA accept DBE certifications for women-owned firms as conclusive of WOSB ownership and control status or should SBA look further at one or more specific eligibility requirement(s)?
3. What other State entities might have sufficient expertise to make WOSB and EDWOSB certifications?
4. Should SBA consider other Federal agencies as entities that can certify WOSBs and EDWOSBs? If so, how should that occur? Should an agency be able to certify a WOSB or EDWOSB only for purposes of a specific WOSB or EDWOSB contract with that

agency? Which office within those agencies should bear the responsibility for this certification authority?

5. Should there be a protest mechanism that would allow an interested party to protest the WOSB or EDWOSB status of a firm certified by a State or other Federal agency to SBA?

### SBA Certification Program

The changes to the WOSB program made by section 825 of the 2015 NDAA authorize SBA to certify firms as WOSBs and EDWOSBs. SBA currently runs two certification programs. SBA certifies firms as 8(a) BD Program Participants under the 8(a) BD Program, and SBA certifies firms as HUBZone SBCs under the HUBZone Program. 13 CFR 124.201 through 124.207, and 126.300 through 226.309; see also <https://www.sba.gov/content/steps-applying-8a-program>; <https://www.sba.gov/content/applying-hubzone-program>. SBA's regulations currently recognize certification as an 8(a) BD Program Participant as evidence of a concern's status as a WOSB and EDWOSB, where it is clear that the firm is owned and controlled by one or more women. This is because the 8(a) BD program regulations have similar ownership and control requirements as those applicable to WOSBs and EDWOSBs under the WOSB Program. In addition, the requirements governing economic disadvantage for EDWOSBs under the WOSB Program are similar to those applicable to Participants in the 8(a) BD program. The ownership and control requirements for the HUBZone Program differ from those applicable to the WOSB Program. As such, certification as a HUBZone SBC does not qualify as certification as a WOSB or EDWOSB.

If SBA were to set up its own WOSB/EDWOSB certification program, SBA would want to ensure that it creates an efficient system that enables eligible firms to become certified in a reasonable amount of time, with a reasonable amount of effort, while also providing the

necessary oversight to ensure that this Program is not used by ineligible firms. In carrying out these objectives, there are many different forms and structures that SBA could adopt. For example, SBA could adopt a framework under which only minimal documentation is collected and reviewed at the time of application (such as corporate documents and some financial records). In such a scenario, SBA could then use its authority to conduct program examinations and carry out status protests to serve an oversight role. This approach would provide for a faster application and certification process, while still maintaining oversight by providing in-depth examination and protests relating to specific contracts. On the other hand, SBA could adopt a method that includes a detailed initial review, requiring extensive document production. Such a certification process would be similar to the 8(a) BD certification program. This would be a more thorough review providing additional oversight, and would be more time-consuming for both the SBA and WOSB/EDWOSB applicants.

1. Should SBA limit its WOSB and EDWOSB certifications only to those made through the 8(a) BD program, as is currently authorized in SBA's regulations?
2. Should SBA's regulations be clarified to specify how a women-owned firm applying to the 8(a) BD program can simultaneously receive certification as a WOSB and EDWOSB?
3. Recognizing that SBA has limited resources, should SBA create a new certification program specific to WOSBs and EDWOSBs? If so, how should SBA structure such a certification program so that the limited resources do not cause the time period for certification to be overly lengthy? How should SBA handle the likelihood of a large number of firms seeking certification once the certification process is operational?



Should SBA consider or attempt to establish an online WOSB/EDWOSB certification program, with dynamic feedback during the certification process?

4. What, if any, documents should SBA collect when certifying a firm as a WOSB or EDWOSB? Are the current repository document requirements unnecessary or significantly burdensome and if so, why?
5. Should SBA and third-party certifiers utilize the same processes for certifying concerns as EDWOSBs and WOSBs?
6. How long should the ED/WOSB certification process take? How would this compare with the current amount of time required for self-certification?
7. Should firms that SBA finds ineligible during the application process have the right to a request for reconsideration or an appeal of that decision? If an appeal, should it be to SBA's Office of Hearings and Appeals (OHA)? Currently, firms denied certification for the 8(a) BD program may appeal to OHA.
8. How long should a certification be valid? Currently the System for Award Management (SAM) requires users to update and verify their information annually. Should firms certified by SBA as EDWOSBs or WOSBs be required to update their certifications manually?
9. Should firms need to be recertified annually? If not annually, how long should WOSB or EDWOSB certification last? How should a firm be re-certified as a WOSB or EDWOSB once the time period for certification expires: should it have to re-apply anew, or should it be able to submit only those items to SBA for review that have changed since its initial certification? Should there be an online process that facilitates application or re-

certification? If no changes have occurred, should the firm be able to submit an affidavit or declaration to that effect and be automatically re-certified?

10. If a firm was previously certified by a third-party certifier, should it be able to apply to SBA for certification (or re-certification), or should it be permitted to apply only to the entity that originally certified it?

The SBA welcomes comments on the above questions and any other certification aspect of the WOSB Program. The SBA also welcomes any available data to help substantiate recommendations made in response to the foregoing questions, or other potential policy options. SBA reminds commenters that all submissions by commenters are available to the public upon request.

Maria Contreras-Sweet,  
Administrator.

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