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October 1, 2008

Re: Inability of ANC-Owned Concerns to Qualify as a Woman-Owned Small Businesses

This letter will discuss the inability of an Alaska Native Corporation-owned small business to self-certify as a woman-owned small business (WOSB) for purposes of SBA small business programs and the impact of the recently published SBA regulations for the WOB program.[1] In summary, ANC-owned concerns will no longer be able to claim WOSB status. The fatal element which prohibits an ANC-owned small business from claiming WOSB status is the addition of a regulatory requirement that women directly own the company.

If ownership, control and management are held by women (and nothing prohibited direct ownership), the concern meets the current statutory definition of a WOSB found in the Small Business Act: 15 USC 632(n): "Small business concern owned and controlled by women" defined - For the purposes of this chapter, a small business concern is a small business concern owned and controlled by women if-- (1) at least 51 percent of small business concern is owned by one or more women or, in the case of any publicly owned business, at least 51 percent of the stock of which is owned by one or more women; and (2) the management and daily business operations of the business are controlled by one or more women.

The fundamental mischief of the new rule is the requirement that ownership be direct (note: An EDWOSB is an Economically Disadvantaged Woman-Owned Small Business):

> **§ 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.
>
> ….
>
> **(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.

[1] The portion of the new regulations which addresses program eligibility is attached.

....

(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.

There does not appear to be an escape from the direct ownership requirement which can be found in any other law. The ANCSA provisions require that ANC-owned businesses be deemed be socially and economically disadvantaged, but do not cure the direct ownership defect. 43 USC § 1626 provides:

(e) Minority status (1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both (A) the total equity of the subsidiary corporation, joint venture, or partnership; and (B) the total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers.

(3) No provision of this subsection shall (A) preclude a Federal agency or instrumentality from applying standards for determining minority ownership (or control) less restrictive than those described in paragraphs (1) and (2), or (B) supersede any such less restrictive standards in existence on February 3, 1988.

I make no prediction on the receptiveness of SBA to an ANC-generated request to broaden the definition. I would caution that the WOSB requirement for direct ownership is essentially the same as the ownership for Service-Disabled Veteran Program.[2]

Sincerely,

Walker Reausaw

William K Walker

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[2] Sec. 125.9 Who does SBA consider to own an SDVO SBC? A concern must be at least 51% unconditionally and directly owned by one or more service-disabled veterans. More specifically:

(a) Ownership must be direct. Ownership by one or more service disabled veterans must be direct ownership. A concern owned principally by another business entity that is in turn owned and controlled by one or more service-disabled veterans does not meet this requirement. Ownership by a trust, such as a living trust, may be treated as the functional equivalent of ownership by service-disabled veterans where the trust is revocable, and service-disabled veterans are the grantors, rustees, and the current beneficiaries of the trust.

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SMALL BUSINESS ADMINISTRATION

13 CFR Parts 121, 125, 127, and 134

The Women-Owned Small Business Federal Contract Assistance Procedures

AGENCY: Small Business Administration.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Small Business Administration (SBA) regulations governing small business contracting programs to set forth procedures that will govern the new Women-Owned Small Business (WOSB) Federal Contract Assistance Procedures as authorized in the Small Business Act.

DATES: Effective Date: This rule is effective October 31, 2008.

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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127.203 What are the rules governing the requirement that economically disadvantaged women must own EDWOSBs?
....
Subpart A--General Provisions

Sec. 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 established under Section 15(g) of the Small Business Act.

Sec. 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) determines that WOSBs are underrepresented or substantially underrepresented in Federal procurement and in which 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.

Sec. 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 Sec. 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 Sec. Sec. 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 Sec. 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 Sec. Sec. 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

Sec. 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.

Sec. 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.

Sec. 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.

Sec. 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.