July 15, 2019

Ms. Brenda Fernandez  
U.S. Small Business Administration  
Office of Policy, Planning, and Liaison  
409 Third Street SW, 8th Floor  
Washington, DC 20416


Dear Ms. Fernandez,

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (“Section”), I am submitting comments on the Proposed Rule cited above. The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA’s Board of Governors. The views expressed herein are presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.

1 Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Scott Flesch, Marian Blank Horn, and Kristine Kassekert, members of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

2 This letter is available in pdf format at http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments.html under the topic “Small Business and Socioeconomic Issues.”
I. BRIEF SUMMARY OF PURPOSE FOR THE PROPOSED REGULATIONS

The U.S. Small Business Administration (“SBA”) is proposing to amend its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (“WOSBs”) and Economically Disadvantaged Women-Owned Small Business Concerns (“EDWOSBs”) that are participating in the WOSB Contract Program (“WOSB Program”), which is set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), as amended by Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, 128 Stat. 3292 (December 19, 2014) (the “FY 2015 NDAA”).

Section 825 of the FY 2015 NDAA amended the Small Business Act to require that a WOSB or EDWOSB concern be certified by a federal agency, a state government, the SBA, or a national certifying entity approved by the SBA in order to be awarded a contract set aside for the WOSB Program. On December 18, 2015, SBA issued an Advance Notice of Proposed Rulemaking (“ANPR”) (80 Fed. Reg. 78984) to seek public comments for the purpose of assisting the SBA in drafting a proposed rule to implement the WOSB/EDWOSB certification program.

The summary of the Proposed Rule confirms that SBA is now amending its regulations to make them consistent with the requirements created by the FY 2015 NDAA. The SBA intends to amend its regulations to impose the certification requirement and to implement policies and procedures to ensure that WOSB and EDWOSB concerns have necessary administrative procedures to obtain the certification.

The proposed rule was published in 84 Fed. Reg. 21256 on May 14, 2019, and would amend 13 C.F.R. Parts 124 and 127.

II. COMMENTS

The Section is pleased to offer comments on the SBA’s Proposed Rule. The Section believes that the Proposed Rule is necessary and should be implemented quickly to eliminate the current inconsistency between the requirements of Section 825 of FY 2015 NDAA and the current SBA regulations. The Proposed Rule also clarifies how WOSB and EDWOSB concerns can obtain the required certification from an approved source and eliminates the current ambiguities related to self-certification under the current regulations and SBA procedures.

The Section first addresses the SBA’s specific requests for comments from the Proposed Rule. The Section next provides comments on particularly positive amendments made by the Proposed Rule. The Section concludes by offering commentary on matters that the SBA may want to consider in the implementation of the Proposed Rule, together with some matters that the SBA could clarify to improve the implementation of the WOSB Program certification requirements.
A. The Section’s Response to Specific SBA Requests for Comments.

1. Selecting a personal net worth standard

The SBA requests comments on whether the $375,000 net worth standard or the $750,000 net worth standard should be used for both the 8(a) Business Development and EDWOSB programs, including comments on how the different standards would impact small business owners participating in the federal marketplace. 84 Fed. Reg. at 21257. The Section supports the SBA’s decision to adopt the current EDWOSB threshold of the $750,000 net worth standard for an applicant’s personal worth for both the initial and continued eligibility for both the 8(a) Business Development ("BD") and EDWOSB programs.

By selecting the higher threshold, the SBA allows those EDWOSBs that are currently deemed as economically disadvantaged to retain their status. If the SBA elected to use the $375,000 net worth standard, many existing EDWOSBs will lose their status without any change in their net worth and despite having been considered economically disadvantaged for years. Additionally, the $750,000 net worth standard still aligns with the existing standard for continued 8(a) BD participants.

The Section agrees with the proposition to simplify the eligibility requirements for the 8(a) BD and EDWOSB programs as the current thresholds are complicated. Because the thresholds for economic disadvantage are based solely upon an applicant’s net worth and revenue, the standard should be consistent for all programs. The proposed changes will result in a single standard for the three thresholds, which we applaud.

2. Avoiding a bottleneck in certification

The SBA requests comments about its proposed solution to avoid a bottleneck of firms seeking certification at the same time—allowing a WOSB/EDWOSB firm to submit proposals with a “conditional” certification if an application for certification has been submitted to the SBA. Id. at 21258. If the firm then became the apparent successful offeror before a determination of status by the SBA, that firm’s application would be prioritized and the status of the firm determined within 15 days. Id. The SBA requests comments about other possible solutions that could be used to avoid a likely bottleneck created by all current WOSB/EDWOSB concerns (approximately 10,000) seeking certification from the SBA immediately after implementation of a final rule.

The Section agrees with the SBA’s prediction that a significant number of the approximately 10,000 current WOSB and EDWOSB concerns will apply for certification soon after the final rule is implemented. Any WOSB and EDWOSB concern that relies on its status to compete for government contracts will be diligent to make sure that its status remains the same under the new regulations. The voluminous, simultaneous applications will likely overwhelm the SBA and will delay the certification process, causing consternation for contractors.

The Section agrees that the SBA’s conditional certification approach is the best available method to address the problem. This approach, however, will encounter significant difficulties if it is implemented with an effective date of the publication of the final rule. With an immediate
effective date, WOSBs/EDWOSBs will not have an opportunity to submit an application before proposals will be due. As a result, the Section recommends delaying the effective date of the final rule by six months from its publication. This will allow businesses to submit applications in a timely manner and then be covered by SBA’s proposed conditional certification procedure by the effective date of the rule.

B. The Section’s Support of Additional Positive Amendments Made by the Proposed Rule.

The Section commends the SBA for issuing the Proposed Rule and recommends the quick implementation of a final rule that incorporates the Section’s comments. The Section also expresses its support for the following additional positive amendments made by the SBA’s proposed rule.

1. Elimination of the current self-certification process under the WOSB Program to ensure consistency between Section 825 of the FY 2015 NDAA and the SBA’s regulations

The FY 2015 NDAA, enacted on December 19, 2014, eliminated self-certification of WOSB concerns under the WOSB program. For several years, the statute at 15 U.S.C. § 637(m)(2)(E) has required each WOSB concern seeking a set aside or sole source contract under section 8(m) of the Small Business Act to be “certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the Administrator as a small business concern owned and controlled by women.” But neither the SBA’s regulations nor its procedures have been updated to comply with this mandate. WOSB concerns have continued to self-certify for the WOSB Program for several years when the statute does not allow for it.

The Section recommends that the SBA prioritize issuance of a final rule that implements the requirements of the FY 2015 NDAA. Confusion is caused when statutes governing the SBA are inconsistent with the SBA’s own regulations and practices. Therefore, the Section supports the elimination of the current self-certification process to ensure consistency between the FY 2015 NDAA and the SBA’s regulations.

2. A free electronic application process for all firms seeking certification

The SBA proposes to allow WOSBs to submit their applications through the existing certification portal at https://certify.sba.gov. 84 Fed. Reg. at 21259. Additionally, the SBA proposes to require all applications be submitted electronically to improve accuracy of submissions and processing times. See id.

The Section supports allowing multiple options for certification, especially maintaining a free electronic application process similar to that available for the 8(a) Business Development and Veteran Owned Small Business programs. A free electronic application supports the goals of building a small business economy by reducing barriers to entry because many small businesses cannot afford the expense associated with a Third Party Certifier, an organization approved by SBA to certify small and disadvantaged status. Applicants may elect which option they prefer
depending on the needs of the individual business including whether to pay a third party for assistance in understanding the requirements or obtaining no cost assistance from the Procurement Technical Assistance Centers.

The Section also agrees with the decision to require all applications be submitted electronically through https://certify.sba.gov for the reasons stated in the Proposed Rule.

3. **Consistency between the 8(a) Business Development Program and the economic disadvantage requirements for woman-owned firms seeking EDWOSB status**

The Section supports the Proposed Rule’s elimination of the distinction in the 8(a) BD program for initial entry into and continued eligibility for the program. The elimination of this distinction will make the economic disadvantage requirements for the 8(a) Business Development Program consistent with the economic disadvantage requirements for woman-owned firms seeking EDWOSB status. This will avoid the current confusion and inconsistency between the two programs, which can result in a woman entrepreneur qualifying as economically disadvantaged for EDWOSB purposes, but not 8(a) BD participation.

**C. The Section’s Commentary on Areas for Further Consideration.**

1. **Oversight of Third Party Certifiers**

   The Proposed Rule establishes a one year waiting period to reapply if a firm’s application is declined or a firm is decertified by the SBA or a Third Party Certifier. 84 Fed. Reg. at 21258. The Proposed Rule also includes a reconsideration process for both a declination of an application or decertification from the program that would allow the applicant to submit documentation to support its position. *Id.*

   The Proposed Rule establishes consistent requirements for firms to request reconsideration of a decision by the SBA or a Third Party Certifier. The Proposed Rule, however, does not describe how the SBA will ensure consistency by Third Party Certifiers in determining whether applicants are eligible. A major concern expressed by commenters during the ANPR involved consistency in interpreting the regulations by the Third Party Certifiers.

   Although the SBA may revoke its approval of a Third Party Certifier, there is no periodic process to audit or reauthorize the Third Party Certifier. Implementing such a process would provide assurances regarding consistency. There is also no mechanism to provide redress to applicants that had been harmed by a Third Party Certifier failing to apply consistent standards. One potential solution would be to require the SBA to review all declined applications if its audit finds the Third Party Certifier failed to apply consistent standards.

2. **Requirements for formal certifications**

   The Proposed Rule requires WOSB concerns to be certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the SBA only when
those concerns wish to compete for set aside or sole source prime contracts under the WOSB Program. The Proposed Rule therefore allows WOSB concerns that do not participate in the WOSB Program to continue self-certifying their status to receive non-Program awards, which includes unrestricted contracts awarded by agencies and subcontracts awarded by large prime contractors pursuant to FAR 52.219-9. The Proposed Rule allows an agency to count the non-WOSB-Program awards toward the agency’s WOSB goals even though the certification process for those awards is far less rigorous than awards under the WOSB Program. The Section is concerned that the inconsistent certification requirements may cause unnecessary confusion for contractors and contracting officers and also may not align with the underlying purpose of the changes implemented by the FY 2015 NDAA.

The FY 2015 NDAA’s elimination of self-certification for WOSB concerns was implemented soon after NASA’s Office of Inspector General and the Government Accountability Office issued separate reports in 2013 and 2014 raising concerns about whether only eligible businesses were obtaining WOSB set aside contracts. The intent of the certification requirements included in the FY 2015 NDAA is to ensure that only qualified WOSB concerns are awarded WOSB set aside awards. Although the FY 2015 NDAA did not expressly require those same certification requirements for subcontracts issued under FAR 52.219-19 and for unrestricted awards issued by federal agencies, the Section does not understand the SBA’s intent for using a different certification process for these non-Program awards. A consistent certification process would ensure that the agency’s WOSB procurement goals were all obtained by WOSB concerns who meet the same standards.

The non-standardized certification requirements also may cause unnecessary confusion. For example, while the SBA states that concerns may continue to self-certify as small for non-WOSB-Program awards, the Proposed Rule does not specify whether prime contractors must accept a concern’s self-certification. Some prime contractors in certain long-term contracts may prefer that their WOSB subcontractors be certified by a Federal agency, a State government, the Administrator, or a national certifying entity to ensure the status is appropriate and to avoid any future compliance problems. Under the current regulations, it is unclear whether prime contractors can require this certification for WOSB concerns for their own purposes when the regulations do not require it.

Based on these reasons and avoiding confusion caused by non-standardized certification requirements, the Section recommends that the SBA consider implementing standardized certification requirements for all WOSB concerns.

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3. Procedure for how a certification from a state or other federal program converts to a formal certification

The SBA’s regulations currently authorize the following WOSB/EDWOSB certifications: (1) certification by Third Party Certifiers approved by SBA, (2) certification by SBA as a Participant in the 8(a) BD program where the concern is owned and controlled by one or more women, and (3) concerns certified as owned and controlled by women and certified as Disadvantaged Business Enterprises (“DBEs”) by states pursuant to the U.S. Department of Transportation’s (DOT’s) DBE program. 13 CFR 127.300(d). The SBA intends, through the Proposed Rule, to use existing governmental entities at the federal and state levels that have valid WOSB certification programs as an option SBA could accept in lieu of the SBA-only process (i.e., the process outlined in Section II.C.2. above). While EDWOSB certification by a Third Party Certifier or the 8(a) BD program will be accepted, because of the differing rules utilized in DBE programs, the Proposed Rule will require firms to apply to SBA to demonstrate their economic disadvantage in order to be certified as EDWOSBs.

The Section advises that the Proposed Rule, as currently drafted, has ambiguity as to how existing WOSB and EDWOSB certifications procedurally convert to a formal SBA certification. This ambiguity may leave contractors without clear direction as to how to complete the certification process and when that certification becomes effective.

The Section advises that the Proposed Rule currently lacks detail as to whether any state certification program transfers. The Section also recommends that the final rule provide more detail as to the specific procedure of converting a certification from a state or other federal program into a formal certification. The final rule should clarify, for example, whether an offeror is deemed certified automatically by submission of the state or federal program certification (or Third Party Certifier certification) or whether the SBA still needs to confirm the certification by reviewing the evidence and issuing the contractor a confirmation letter (or something similar). Furthermore, the SBA should consider whether it is worthwhile to work with the DOT DBE program to attempt to harmonize state standards for EDWOSB to lessen the burden on SBA where a state entity has approved the WOSB as an EDWOSB.

The Section also advises that the Proposed Rule currently lacks detail on the relevant date the certification becomes effective, which is important in the event of a size protest or status protest.

These important issues should be resolved in the final rule.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.
Sincerely,

Kara M. Sacilotto
Chair, Section of Public Contract Law

cc:
Linda Maramba
Susan Warshaw Ebner
Jennifer L. Dauer
Annejanette Heckman Pickens
Council Members, Section of Public Contract Law
Chairs and Vice Chairs, Small Business & Other Socioeconomic Programs Committee
Craig Smith
Samantha S. Lee