

The SBA's Proposed
Women-Owned Small Business
Contract Assistance Program
The Alaska DOT WBE Program

Christine V. Williams

Patton Boggs LLP

cwilliams@pattonboggs.com

(907) 263-6386

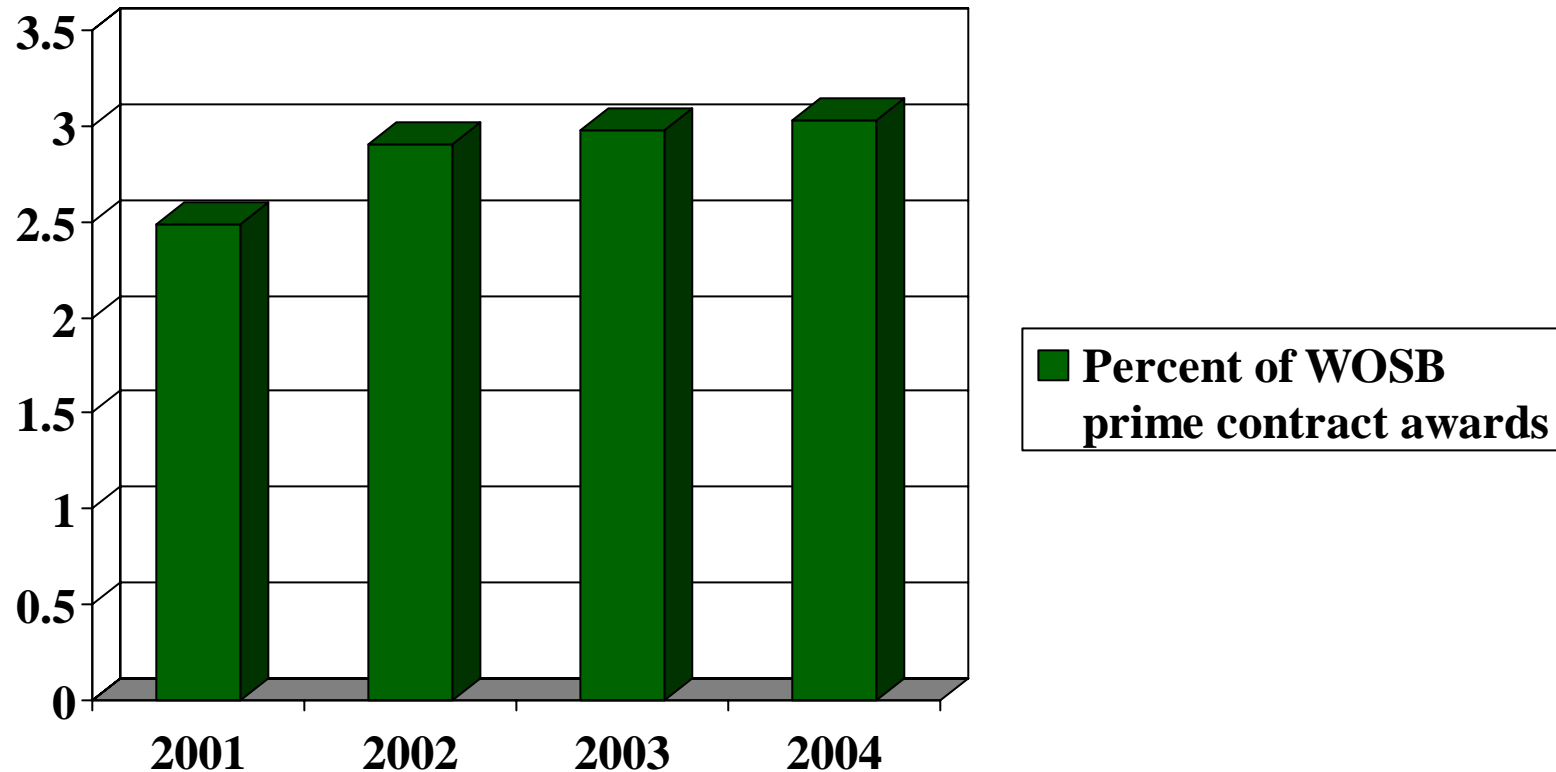
History and Authority

- The Women-Owned Small Business Contract Assistance Program was authorized through the Small Business Reauthorization Act of 2000.
- Six years later, on June 15, 2006, SBA issued a proposed rule to implement the program.

The Status Quo

- Currently, federal agencies have contracting goals which include “WOSB” contracts.
- The Government-wide goal is 5% of prime contracts.
- Agencies have been making progress but have fallen short.

WOSB Prime Contract Track Record



What is a WOSB?

Under current law a WOSB must be:

- A Small Business Concern, and
- Owned and controlled by women:
 - “owned” means 51% owned by one or more women;
 - “controlled” means the management and day-to-day operations business operations must be conducted by one or more women. (But see proposed new section 127.202 for more detailed requirements.)

What does this proposed rule do?

- Generally, the proposed rule creates a targeted government program for contracting with WOSB's.
- To do this, the rule would permit “set aside” competitions limited to WOSB's – no sole source capability!!!
- But there are limits on the set-asides...

WOSB Set-Asides: Limitations

- Set-aside competitions cannot exceed \$3 million (\$5 million for manufacturing);
- The Agency must determine it will receive “fair market price” (the same requirement applies for other SBA contracting programs);
- SBA must determine that, for the industry, WOSB’s are underrepresented or substantially underrepresented in federal procurement (Not all WOSB’s may be able to participate!!!)

Source: (127.503)

What are EDWOSB's?

- Only WOSB's owned by “economically disadvantaged” women automatically qualify for participation in set-asides.
- “Economically disadvantaged” means:
 - Demonstrating that the individual's capital and credit opportunities have been diminished compared to others in the same line of business;
 - Personal net worth is less than \$750,000 (excluding equity in the concern and equity in personal residence.)
 - But all 8(a) and SDB women-owned concerns automatically qualify as “economically disadvantaged.”

EDWOSB's (cont.)

- WOSB's may also participate if SBA has “waived” the requirement for “economic disadvantage” by the owners, but, it is not clear what the standards are for obtaining such a waiver.

Source: 127.503(b)

Certification

- The Proposed Rule also imposes a certification requirement.
- SBA will develop an online, electronic application.
- Certifications will last for three years.
- Participants must “re-certify” within 60 days of their current term.
- Concerns must also “immediately notify” SBA of any change which would affect their eligibility.

Other issues

- Joint Ventures: Allowed in circumstances similar to 8(a);
- Limitation on Subcontracting: Subject to the same limits which apply to other SBC's, 8(a)'s, HUBZone SBC's, etc.
- Status as a EDWOSB or WOSB may be protested.

The Rule-Making Process

- Comments were due by July 17, 2006.
- SBA will then evaluate comments and may revise the proposed rule based on the comments received.
- When will it become final? Good Question.
- The comments are being summarized and digested now.

Alaska Preferences

Under Alaska Statutes, a preference is given to women owned businesses.

This statute was ruled unconstitutional by the Alaska Supreme Court.

- Preference was given to economically disadvantaged female residents. Alaska Stat. Sec. 36.10.175. (25 % preference)

Alaska Hire Preferences and Case Law Conflict

- The Court classified the right to work as an important right and any restriction of that right must be closely scrutinized.
- The Court found the State's goal of assisting one region over another as illegitimate and found the statute was not narrowly tailored.
- This case line reflects an older way of thinking, and preferential hire statutes in the country are being given more deference.
- To get the Court to recognize legitimacy, the State would have to re-work its law and perform studies to support it.

Alaska Hire Preferences and Case Law Conflicts

- Rather than re-working its statutes, the State “encourages” businesses to look for certain features when hiring, and has done so itself.
- Additionally, the State has embraced a residency requirement (found Constitutional) to give preference to Alaska businesses. (See below)
- It can also use federal programs, as discussed below.

Disadvantaged Business Enterprise Certification

- When federal funds are involved, they tend to stick requirements on them for DBE involvement.
- Alaska agencies adhere to the federal regulations and certify who is a DBE. One example, Ak. DOT.
- Alaska looks to 49 C.F.R. Part 26 to certify its businesses to be a “DBE”
- This requires extensive documentation coupled with an on-site visit to determine
 - If the proposed DBE has the required personnel and equipment to do the work and
 - If the disadvantaged owners have the requisite control.

Differences in the State and Federal Programs

- State and federal programs serve separate functions
 - SBA certification is for direct federal contracting with federal government agency
 - State DBE program is for federal aid projects assisted by US DOT
 - Federal aid means there is a recipient like a state, local or non-profit agency involved and not a federal agency.
- No set-asides under the State law like there is in federal law.

DBE Hiring Preferences Challenged

- In July of 2005, the 9th Circuit, the federal court with DBE federal jurisdiction over Alaska, ruled on state hiring preferences in a Washington case. *Western States Paving Company, Inc. v. Wa. DOT*, 407 F.3d 983 (9th Circuit 2005).
- Because federal funding was involved, the federal court had jurisdiction and entertained two primary challenges to the Washington law, which closely resembles the Alaska law.

DBE Hiring Preferences Challenged Continued

- The court looked to the constitutionality of the law to see if it was (1) facially constitutional, and (2) if it was narrowly tailored and *applied* constitutionally.
- The court found that based on the federal research and findings, the law was facially constitutional.
- The court found, however, that there were no specific state findings supporting the application of the law. Meaning, no state studies to back up the need for the application of the law to Washington.

DBE Hiring Preferences Challenged Continued

- The State of Washington was directed to make those findings before it could continue the program.
- The State of Washington made those findings and the DBE participation goals went up for the programs.

DBE Hiring Preferences Challenged Continued

- On January 10, 2006, the US DOT clarified its DBE goals.
- In its April 2006 *Alaska Procurement Connection* publication, the Alaska DOT & PF implemented a “race [and gender] neutral” DBE program and set its participation goals at ZERO.
- Alaska DOT & PF directed that prime contractors must provide equal opportunity.
- Alaska DOT & PF must now conduct a disparity study to determine the parity of contractors.

DBE Hiring Preferences Challenged Continued

- The State of Alaska sent out to bid the contract to conduct the disparity study.
- The State awarded the contract in mid-November.
- The contract gives the recipient one year in which to complete the study. (November/December 2007)
- ?? As to implementation.
- Municipality of Anchorage and the Alaska Railroad are also sponsors of the study.

Questions?