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SBA Women-Owned Small Business Federal Contracting Program

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SUMMARY

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SBA Women-Owned Small Business Federal Contracting Program

The Small Business Administration's (SBA's) Women-Owned Small Business (WOSB) Federal Contracting Program is designed to provide greater access to federal contracting opportunities for WOSBs and economically disadvantaged women-owned small businesses (EDWOSBs). By doing so, the program aims to help federal agencies achieve their statutory goal of awarding 5% of their federal contracting dollars to WOSBs.

Under this program, federal contracting officers may set aside federal contracts (or orders) for WOSBs (including EDWOSBs) in industries in which the SBA determines WOSBs are substantially underrepresented in federal procurement and for EDWOSBs exclusively in industries in which the SBA determines WOSBs are underrepresented in federal procurement. The SBA has identified 646 six-digit North American Industry Classification System (NAICS) industry codes (out of 1,023) in which WOSBs are substantially underrepresented, meaning that federal contracting officers may award set-aside and sole source contracts to WOSBs (including EDWOSBs) in these 646 industries. The SBA has also identified 113 six-digit NAICS industry codes (out of 1,023) in which WOSBs are underrepresented, meaning that federal contracting officers may award set-aside and sole source contracts exclusively to EDWOSBs in these 113 industries.

Federal agencies may award sole source contracts to WOSBs and EDWOSBs in eligible industries under the following conditions: the contracting officer does not have a reasonable expectation that offers would be received by two or more eligible WOSBs and EDWOSBs; the award can be made at a fair and reasonable price; and the anticipated total value of the contract, including any options, does not exceed $4.5 million ($7 million for manufacturing contracts).

To participate in the program, WOSBs must

- be a small business (as defined by the SBA);
- be at least 51% unconditionally and directly owned and controlled by one or more women who are U.S. citizens;
- have women manage day-to-day operations and make long-term decisions; and
- be certified by a federal agency, a state government, the SBA, or a national certifying entity approved by the SBA.

EDWOSBs must

- meet all WOSB contracting program requirements;
- be owned and controlled by one or more women, each with a personal net worth less than $750,000;
- be owned and controlled by one or more women, each with $350,000 or less in adjusted gross income averaged over the previous three years; and
- be owned and controlled by one or more women, each having $6 million or less in personal assets (including business value and primary residence).

The statutorily required distinctions between WOSBs and EDWOSBs and among underrepresented, substantially underrepresented, and other NAICS codes were designed to shield the WOSB program from legal challenges related to the heightened level of legal scrutiny applied to contracting preferences after the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena* (1995). That case involved contracting preferences for small disadvantaged businesses. The Court found in that case that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review.

The SBA's difficulty in defining underrepresentation contributed to a 10-year delay in the program's implementation and may help to explain why it took nearly six years for the SBA to implement its own WOSB certification process as required by P.L. 113-291, the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015.

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Introduction

The Small Business Administration's (SBA's) Women-Owned Small Business (WOSB) Federal Contracting Program is one of several contracting programs Congress has approved to provide greater opportunities for small businesses to win federal contracts. Congress's interest in promoting small business contracting dates back to World War II and the outbreak of fighting in Korea. At that time, Congress found that thousands of small business concerns were being threatened by war-induced shortages of materials coupled with an inability to obtain defense contracts or financial assistance.[1] In 1953, concerned that many small businesses might fail without government assistance, Congress passed, and President Dwight Eisenhower signed into law, the Small Business Act (P.L. 83-163). The act authorized the SBA.

The Small Business Act specifies that it is Congress's declared policy to promote the interests of small businesses to "preserve free competitive enterprise."[2] Congress indicated that one of the ways to preserve free competitive enterprise was to increase market competition by insuring that small businesses received a "fair proportion" of federal contracts and subcontracts.[3]

Since 1953, Congress has used its broad authority to impose requirements on the federal procurement process to help small businesses receive a fair proportion of federal contracts and subcontracts, primarily through the establishment of federal procurement goals and various contracting preferences—including restricted competitions (set-asides), sole source awards, and price evaluation adjustment/preference in unrestricted competitions—for small businesses.[4] Congress has also authorized the following:

- government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to small businesses generally and to specific types of small businesses, including at least 5% to WOSBs;[5]

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[1] U.S. Congress, Senate Select Committee on Small Business, *Small Business Administration*, committee print, 83rd Cong., 1st sess., August 10, 1953 (Washington, DC: GPO, 1953), p. iii. Also, see U.S. Congress, House Committee on Banking and Currency, *Small Business Act of 1953*, report to accompany, 83rd Cong., 1st sess., May 28, 1953, H.Rept. 83-494 (Washington, DC: GPO, 1953). For further information related to small business contracting, see CRS Report R45576, *An Overview of Small Business Contracting*, by Robert Jay Dilger.

[2] 15 U.S.C. §631(a); and P.L. 83-163, the Small Business Act of 1953 (as amended), see https://legcounsel.house.gov/Comps/Small%20Business%20Act.pdf.

[3] U.S. Congress, House Committee on Small Business, *Small Business Contracting Program Improvements Act*, report to accompany H.R. 3867, 110th Cong., 1st sess., October 22, 2007, H.Rept. 110-400 (Washington, DC: GPO, 2007), p. 4.

[4] *Set-aside* is a commonly used term to refer to a contract competition in which only small businesses, or specific types of small businesses, may compete. Set-asides can be total or partial, depending on whether the entire procurement, or just a severable segment of it, is restricted.

Sole source awards are noncompetitive procurements that are made after soliciting and negotiating with only one source.

A *price evaluation adjustment/preference* involves a reduction in the price of bids or offers by eligible parties (in this case for small businesses located in a Historically Underutilized Business Zone (HUBZone). The reduction is generally equivalent to a certain percentage of the price of the bid or offer. For example, a 10% price evaluation adjustment made to a $100,000 bid would result in the bid being reduced for comparative purposes by $10,000 to $90,000. $90,000 would then be used in determining which bid or offer is lowest priced or represents the "best value" for the government. "Best value" is determined based on price and various nonprice evaluation factors selected by the federal agency. For more information related to best value see 48 C.F.R. §15.304.

[5] The current government-wide small business procurement goals are at least the following: 23% for all small businesses (P.L. 100-656, the Business Opportunity Development Reform Act of 1988 (20%) and P.L. 105-135, the Small Business Reauthorization Act of 1997 (23%)); 5% for small disadvantaged businesses (SDBs) (P.L. 100-656, the

- an annual Small Business Goaling Report to measure progress in meeting these goals;
- a general requirement for federal agencies to reserve (set aside) contracts that have an anticipated value greater than the micro-purchase threshold (currently $10,000) but not greater than the simplified acquisition threshold (currently $250,000);[6] and, under specified conditions, contracts that have an anticipated value greater than the simplified acquisition threshold exclusively for small businesses.[7] A *set-aside* is a commonly used term to refer to a contract competition in which only small businesses, or specific types of small businesses, may compete;
- federal agencies to make *sole source* awards to small businesses when the award could not otherwise be made (e.g., only a single source is available, under urgent and compelling circumstances);
- federal agencies to set aside contracts for, or grant other contracting preference to, specific types of small businesses (e.g., 8(a) Business Development small businesses, Historically Underutilized Business Zone (HUBZone) small businesses, WOSBs, and service-disabled veteran-owned small businesses (SDVOSBs));[8] and

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Business Opportunity Development Reform Act of 1988); 5% to women-owned small businesses (WOSBs) (P.L. 103-355, the Federal Acquisition Streamlining Act of 1994); 3% to small businesses located in a HUBZone (P.L. 105-135, the HUBZone Act of 1997—Title VI of the Small Business Reauthorization Act of 1997); and small businesses owned and controlled by a service-disabled veteran (SDVOSBs) (P.L. 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999).

The federal government uses aspirational procurement goals instead of requiring federal agencies to award specific percentages of federal contracts to various types of small businesses primarily to avoid legal challenges under the equal protection component of the Fifth Amendment's Due Process Clause. See, for example, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (finding unconstitutional a municipal ordinance that required the city's prime contractors to award at least 30% of the value of each contract to minority subcontractors) and Adarand Constructors, Inc. v. Pena 515 U.S. 200 (1995) (finding that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review).

[6] The contracting officer must have a reasonable expectation that offers will be obtained from two or more responsible small businesses (Rule of Two) that are competitive in terms of market prices, quality, and delivery of the goods or services being purchased. See P.L. 115-91, the National Defense Authorization Act for Fiscal Year 2018; 15 U.S.C. §644(j)(1); and Federal Acquisition Regulation (FAR) §19.502-2.

[7] See FAR §19.203(c):

> For acquisitions of supplies or services that have an anticipated dollar value exceeding the simplified acquisition threshold … the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs (i.e., 8(a), HUBZone, SDVOSB, or WOSB programs) before considering a small business set-aside (see FAR §19.502-2(b)). However, if a requirement has been accepted by the Small Business Administration (SBA) under the 8(a) Program, it must remain in the 8(a) Program unless the SBA agrees to its release in accordance with 13 C.F.R. parts 124, 125, and 126.

Before setting aside an acquisition over the simplified acquisition threshold for small businesses, the contracting officer must have a reasonable expectation that offers will be obtained from two or more responsible small businesses (Rule of Two) that are competitive in terms of market prices. See FAR §19.502-2.

[8] For Minority Small Business and Capital Ownership Development Program (8(a) program) participants, see P.L. 95-507, A bill to amend the Small Business Act and the Small Business Investment Act of 1958 and 15 U.S.C. §637(a). For HUBZone participants, see P.L. 105-135, the HUBZone Act of 1997—Title VI of the Small Business Reauthorization Act of 1997, and 15 U.S.C. §657a. For WOSBs, see H.R. 5654, the Small Business Reauthorization Act of 2000, incorporated by reference in P.L. 106-554, the Consolidated Appropriations Act, 2001, and 15 U.S.C.

- the SBA and other federal procurement officers to review and restructure proposed procurements to maximize opportunities for small business participation.

Additional requirements are in place to maximize small business participation as prime contractors, subcontractors, and suppliers. For example, prior to issuing a solicitation, federal contracting officers must do the following, among other requirements:

- divide proposed acquisitions of supplies and services (except construction) into reasonably small lots to permit offers on quantities less than the total requirement;
- plan acquisitions such that, if practicable, more than one small business concern may perform the work, if the work exceeds the amount for which a surety may be guaranteed by the SBA against loss under 15 U.S.C. §694b [generally $6.5 million, or $10 million if the contracting officer certifies that the higher amount is necessary];[9]
- encourage prime contractors to subcontract with small business concerns, primarily through the agency's role in negotiating an acceptable small business subcontracting plan with prime contractors on contracts anticipated to exceed $750,000 or $1.5 million for construction contracts;[10] and
- under specified circumstances, provide a copy of the proposed acquisition package to an SBA procurement center representative (PCR) for his or her review, comment, and recommendation at least 30 days prior to the issuance of the solicitation. If the contracting officer rejects the PCR's recommendation, he or she must document the basis for the rejection and notify the PCR, who may appeal the rejection to the chief of the contracting office and, ultimately, to the agency head.[11]

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§637(m). For SDVOSBs, see P.L. 108-183, the Veterans Benefits Act of 2003 and 15 U.S.C. §657f.

[9] For additional information and analysis concerning the Small Business Administration's (SBA's) Surety Bond program, see CRS Report R42037, *SBA Surety Bond Guarantee Program*, by Robert Jay Dilger.

[10] Subcontracting plans are not required from small businesses, for personal services contracts, for contracts or contract modifications that will be performed entirely outside of the United States and its outlying areas, or for modifications that were within the scope of the contract. "[A]ny contractor or subcontractor failing to comply in good faith with the requirements of the subcontracting plan is in material breach of its contract." FAR §19.702(c). In addition, see FAR §19.702:

> Any contractor receiving a contract with a value greater than the simplified acquisition threshold must agree in the contract that small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns will have the maximum practicable opportunity to participate in contract performance consistent with its efficient performance.

[11] See FAR §19.202-1 for the specified conditions:

> (i) The proposed acquisition is for supplies or services currently being provided by a small business and the proposed acquisition is of a quantity or estimated dollar value, the magnitude of which makes it unlikely that small businesses can compete for the prime contract; (ii) The proposed acquisition is for construction and seeks to package or consolidate discrete construction projects and the magnitude of this consolidation makes it unlikely that small businesses can compete for the prime contract; or (iii) The proposed acquisition is for a consolidated or bundled requirement.

See FAR §19.505 for a description of the appeals process.

This report focuses on the SBA's WOSB Federal Contracting Program, authorized by H.R. 5654, the Small Business Reauthorization Act of 2000, and incorporated by reference in P.L. 106-554, the Consolidated Appropriations Act, 2001.[12]

The WOSB program is designed to help federal agencies achieve their statutory goal of awarding at least 5% of their federal contracting dollars to WOSBs (established by P.L. 103-355, the Federal Acquisition Streamlining Act of 1994 (FASA)) by allowing federal contracting officers to

- set aside acquisitions exceeding the micro-purchase threshold (currently $10,000) for bidding by WOSBs (including economically disadvantaged WOSBs (EDWOSBs)) exclusively in industries in which WOSBs are substantially underrepresented, and
- set aside contracts for bidding by EDWOSBs exclusively in industries in which WOSBs are underrepresented.

Congressional interest in the WOSB program has increased in recent years because the federal government has met the 5% procurement goal for WOSBs only twice—in FY2015 and FY2019—since the goal was authorized in 1994, and implemented in FY1996 (see **Table 1**).

WOSB federal contract award data suggest that federal procurement officers are using the WOSB program more often than in the past, but the amount of WOSB awarded contracts account for a relatively small portion of the total amount of contracts awarded to WOSBs. Most of the federal contracts awarded to WOSBs are awarded in full and open competition with other firms or with another small business preference, such as an 8(a) or HUBZone program preference. Relatively few federal contracts are awarded through the WOSB program (see **Table 1**).

In addition, the Government Accountability Office (GAO) and the SBA's Office of Inspector General (OIG) have noted deficiencies in the SBA's implementation and oversight of the program. For example, the WOSB program was authorized on December 21, 2000. The SBA took nearly 10 years to issue a final rule for the program (on October 7, 2010) and another four months before the program went into effect (on February 4, 2011).[13] The SBA attributed the delay primarily to its difficulty in identifying an appropriate methodology to determine "the industries in which WOSBs are underrepresented with respect to federal procurement contracting."[14]

P.L. 113-291, the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (NDAA 2015), enacted on December 19, 2014, prohibited small businesses from self-certifying WOSB eligibility to ensure that the program's contracts are awarded only to intended recipients. NDAA 2015 also required the SBA to implement its own WOSB certification process. The SBA issued an Advance Notice of Proposed Rulemaking in the *Federal Register* on December 18, 2015, to solicit public comments on drafting a proposed rule to meet these requirements. The proposed rule was not issued until May 14, 2019. Comments on the proposed rule were to be submitted by July 15, 2019. The final rule implementing the certification program and removing the self-certification option was issued on May 11, 2020.[15] The effective date for

[12] Legislative language authorizing the WOSB federal contracting program was initially in H.R. 4897, the Equity in Contracting for Women Act of 2000.

[13] SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register* 62258-62292, October 7, 2010.

[14] For a discussion of the various methodological approaches considered, see SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register* 62259-62292, October 7, 2010.

[15] SBA, "Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification," 85 *Federal Register* 27650-27665, May 11, 2020.

the new WOSB certification process was October 15, 2020, nearly six years after these requirements were enacted on December 19, 2014.[16]

Table 1. Women-Owned Small Business (WOSB) Contract Awards, Amount and Percentage of Small Business Eligible Contracts, FY1995-FY2020

($ in billions)

Fiscal Year	Amount	% of Small Business Eligible Contracts (including double counting)	WOSB and EDWOSB Set-Aside and Sole Source Awards	WOSB Set-Aside Awards	WOSB Sole Source Awards	EDWOSB Set-Aside Awards	EDWOSB Sole Source Awards
2020	$27.272	4.85%	$1.259	$1.085	$0.107	$0.056	$0.011
2019	$25.300	5.19%	$1.080	$0.897	$0.097	$0.075	$0.011
2018	$22.923	4.75%	$0.893	$0.742	$0.093	$0.050	$0.009
2017	$20.844	4.71%	$0.723	$0.583	$0.068	$0.064	$0.009
2016	$19.670	4.79%	$0.449	$0.318	$0.035	$0.085	$0.010
2015	$17.807	5.05%	$0.287	$0.201	—	$0.086	—
2014	$17.177	4.68%	$0.177	$0.106	—	$0.071	—
2013	$15.365	4.32%	$0.101	$0.040	—	$0.061	—
2012	$16.180	4.00%	$0.072	$0.033	—	$0.039	—
2011	$16.807	3.98%	$0.021	$0.015	—	$0.006	—
2010	$17.456	4.04%	—	—	—	—	—
2009	$14.419	3.21%	—	—	—	—	—
2008	$14.420	3.21%	—	—	—	—	—
2007	$12.926	3.41%	—	—	—	—	—
2006	$11.616	3.41%	—	—	—	—	—
2005	$10.187	3.18%	—	—	—	—	—
2004	$9.092	3.03%	—	—	—	—	—
2003	$8.300	2.98%	—	—	—	—	—
2002	$6.800	2.50%	—	—	—	—	—
2001	$5.500	2.49%	—	—	—	—	—
2000	$4.600	2.88%	—	—	—	—	—
1999	$4.510	2.25%	—	—	—	—	—
1998	$4.060	2.03%	—	—	—	—	—
1997	$3.590	1.84%	—	—	—	—	—

[16] SBA, "Women-Owned Small Business Federal Contracting program: Upcoming certification changes," at https://www.sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contracting-program.

Fiscal Year	Amount	% of Small Business Eligible Contracts (including double counting)	WOSB and EDWOSB Set-Aside and Sole Source Awards	WOSB Set-Aside Awards	WOSB Sole Source Awards	EDWOSB Set-Aside Awards	EDWOSB Sole Source Awards
1996	$3.441	1.74%	—	—	—	—	—
1995	$3.621	1.79%	—	—	—	—	—

Sources: White House (Clinton), *The State of Small Business: A Report of the President, 1996,* (Washington, DC: GPO, 1997), p. 325 [FY1995], at https://hdl.handle.net/2027/mdp.39015087497429; White House (Clinton), *The State of Small Business: A Report of the President, 1997* (Washington, DC: GPO, 1998), p. 194 [FY1996], at https://hdl.handle.net/2027/uva.x004466169; White House (Clinton), *The State of Small Business: A Report of the President, 1998* (Washington, DC: GPO, 1999), p. 250 [FY1997], at https://hdl.handle.net/2027/uiug.30112048180589; White House (G.W. Bush), *The State of Small Business: A Report of the President, 1999-2000* (Washington, DC: GPO, 2001), p. 132 [FY1998, FY1999], at https://hdl.handle.net/2027/uva.x004572085; U.S. Congress, House Committee on Small Business, Subcommittee on Contracting and Technology, *Subcommittee Hearing on Federal Government Efforts in Contracting with Women-Owned Businesses*, hearing, 110th Cong., 1st sess., March 21, 2007, serial no. 110-9 (Washington, DC: GPO, 2007), pp. 4, 46 [FY2000]; U.S. Congress, House Committee on Small Business, Subcommittee on Regulatory Reform and Oversight, *SBA's Procurement Assistance Programs*, hearing, 109th Cong., 2nd sess., March 30, 2006, serial no. 109-45 (Washington, DC: GPO, 2006), p. 31 [FY2001-FY2004]; U.S. General Services Administration (GSA), "Sam.Gov Data Bank, Static: Small Business Goaling Report [FY2005-FY2020], at https://sam.gov/reports/awards/static; GSA, "Federal Procurement Data System—Next Generation," accessed on August 14, 2020 (WOSB and economically disadvantaged WOSB (EDWOSB) set-aside and sole source awards, FY2011-FY2019); and data generated using GSA, "Sam.Gov Data Bank, Ad Hoc report," August 2, 2021 [2020], at https://sam.gov/reports/awards/adhoc.

Notes: The small business eligible baseline excludes certain contracts that the U.S. Small Business Administration (SBA) has determined do not realistically reflect the potential for small business participation in federal procurement (such as those awarded to mandatory and directed sources), contracts funded predominately from agency-generated sources (i.e., nonappropriated funds), contracts not covered by the Federal Acquisition Regulations System, acquisitions on behalf of foreign governments, and contracts not reported in the GSA's Federal Procurement Data System—Next Generation (such as government procurement card purchases and contracts valued less than $10,000). About 15% to 18% of all federal contracts are excluded in any given fiscal year. In FY2019 and FY2020, in accordance with federal law, the SBA provided double credit, for scorecard purposes only, for prime contracts awarded in disaster areas that are awarded as a local set aside and a small business or other socioeconomic set aside when the vendor state is the same as the place of performance (see 15 U.S.C. §644(f)) and for prime contracts awarded to businesses in Puerto Rico and covered territories dated on or after August 13, 2018, and only for awards that do not already qualify for double credit under 15 U.S.C. §644(f) (see 15 U.S.C. §644(x)(1)). Without double credits, women-owned small businesses received 5.04% of small business eligible contracts in FY2019 and 4.71% in FY2020.

The WOSB Program's Origins

The following sections provide an overview of the history of small business contracting preferences, focusing on executive, legislative, and judicial actions that led to the creation of the WOSB program and influenced its structure.

Federal Agency Small Business Procurement Goals and Executive Order 12138: A National Program for Women's Business Enterprise

Since 1978, federal agency heads have been required to establish federal procurement goals, in consultation with the SBA, "that realistically reflect the potential of small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals" to participate in federal procurement. These reports are submitted to Congress and

are presently made available to the public on the General Services Administration's (GSA's) website. Initially, WOSB goals were not included.[17]

On May 18, 1979, President Jimmy Carter issued Executive Order 12138, which established a national policy to promote women-owned business enterprises.[18] Among other provisions, the executive order required federal agencies "to take appropriate affirmative action in support of women's business enterprise," including promoting procurement opportunities and providing financial assistance and business-related management and training assistance.[19]

Under authority provided by Executive Order 12138, the SBA added WOSB procurement goals to the list of small business contracting goals it negotiated with federal agencies. At that time, WOSBs received about 0.2% of all federal contracts.[20] By 1988, this percentage had grown, but to only 1% of all federal contracts.[21]

WOSB advocates argued that additional action was needed to help WOSBs win federal contracts because women-owned businesses are subject to "age-old prejudice, discrimination, and exploitation," the "promotion of women's business enterprise is simply not a high priority" for federal agencies, and federal "agency efforts in support of women's business enterprise have been weak and have produced little, if any measurable results."[22] Their efforts led to P.L. 100-533, the Women's Business Ownership Act of 1988.

P.L. 100-533 provided the SBA statutory authorization to establish WOSB annual procurement goals with federal agencies. The act also extended the goaling requirement to include subcontracts, as well as prime contracts, and added WOSBs to the list of small business concerns to be identified in required small business subcontracting plans (at that time, small business subcontracting plans were required for prime contracts exceeding $500,000, or $1 million for the construction of any public facility).[23]

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[17] P.L. 95-507, a bill to amend the Small Business Act and the Small Business Investment Act of 1958; and 15 U.S.C. §644(g)(2). Also, see P.L. 112-239, the National Defense Authorization Act for Fiscal Year 2013; SBA, "Small Business Procurement Scorecard Overview," at https://www.sba.gov/document/support-small-business-procurement-scorecard-overview; and General Services Administration (GSA), "Federal Procurement Data System—Next Generation: Small Business Goaling Reports (FY2005-2018)," at https://www.fpds.gov/fpdsng_cms/index.php/en/reports.html.

[18] Executive Order (E.O.) 12138, "Creating a National Women's Business Enterprise Policy and prescribing arrangements for developing, coordinating and implementing a national program for women's business enterprise," May 18, 1979, at https://www.archives.gov/federal-register/codification/executive-order/12138.html (hereinafter cited as E.O. 12138, 1979).

[19] E.O. 12138, 1979. President Clinton issued a memorandum on October 13, 1994, reaffirming the executive branch's commitment to providing small, small disadvantaged, and WOSBs the maximum practicable opportunity to participate in federal contracting. President Clinton also issued E.O. 13157, "Increasing Opportunities for Women-Owned Small Businesses," on May 23, 2000, to reaffirm the executive branch's commitment to meet or exceed the 5% procurement goal for WOSBs. See Executive Office of the President, "Continued Commitment to Small, Small Disadvantaged, and Small Women-Owned Businesses in Federal Procurement," 59 *Federal Register* 52397, October 17, 1994; and E.O. 13157, "Increasing Opportunities for Women-Owned Small Businesses," 65 *Federal Register* 34035-34037, May 25, 2000.

[20] U.S. Government Accountability Office (GAO), *Federal Procurement: Trends and Challenges in Contracting with Women-Owned Small Businesses*, GAO-01-346, February 16, 2001, p. 8, at https://www.gao.gov/products/GAO-01-346 (hereinafter cited as GAO-01-346, *Federal Procurement: Trends and Challenges in Contracting with WOSBs*).

[21] GAO-01-346, *Federal Procurement: Trends and Challenges in Contracting with WOSBs*.

[22] U.S. Congress, House Committee on Small Business, *Women's Business Ownership Act of 1988*, report to accompany H.R. 5050, 100th Cong., 2nd sess., September 22, 1988, H.Rept. 100-955 (Washington, DC: GPO, 1988), pp. 6-9 (hereinafter U.S. Congress, House Committee on Small Business, *Women's Business Ownership Act of 1988*).

[23] U.S. Congress, House Committee on Small Business, *Women's Business Ownership Act of 1988*, p. 8.

Government-Wide Small Business Procurement Goals

In a related development, P.L. 100-656, the Business Opportunity Development Reform Act of 1988, authorized the President to annually establish government-wide minimum procurement goals for small businesses and small businesses owned and controlled by socially and economically disadvantaged individuals (SDBs). Congress required the government-wide minimum goal for small businesses to be "not less than 20% [increased to 23% in 1997] of the total value of all prime contract awards for each fiscal year" and "not less than 5% of the total value of all prime contract and subcontract awards for each fiscal year" for SDBs.[24]

Advocates for a WOSB government-wide procurement goal argued that women owned approximately one third of the nation's businesses but received "a mere 1.3% of federal contracting dollars ... in FY1990."[25] Their efforts led to P.L. 103-355, FASA.

FASA created a 5% procurement goal for WOSBs each fiscal year. The 5% goal was implemented by regulations effective in FY1996.[26]

The conferees indicated in FASA's conference agreement that they did "not intend to create a new set aside or program of restricted competition for a specific designated group, but rather to establish a target that will result in greater opportunities for women to compete for federal contracts."[27] The conferees added that "given the slow progress to date in reaching the current award levels, the conferees recognize that this goal may take some time to be reached."[28]

Subsequently, 3% procurement goals were created for HUBZone small businesses (P.L. 105-135, the HUBZone Act of 1997; Title VI of the Small Business Reauthorization Act of 1997) and SDVOSBs (P.L. 106-50, the Veterans Entrepreneurship and Small Business Development Act of 1999).[29]

Figure 1 shows the percentage of small business-eligible federal contracts awarded to small businesses, SDBs, WOSBs, SDVOSBs, and HUBZone small businesses from FY2005 through FY2020. As detailed in the figure's notes, the small business-eligible baseline excludes certain contracts that the SBA has determined do not realistically reflect the potential for small business participation in federal procurement. About 15% to 18% of all federal contracts are excluded in any given fiscal year.

The federal government has had difficulty meeting the WOSB and HUBZone small business procurement goals. The 5% procurement goal for WOSBs was achieved in only 2 of the 16 fiscal

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Presently, contractors that are not considered small must submit an acceptable small business subcontracting plan on contracts anticipated to exceed $750,000, or $1.5 million for construction contracts. See 15 U.S.C. §633(h)(1). For additional information on subcontracting plan requirements, see FAR §19.702(a)(1); and 15 U.S.C. §637(d)(3).

[24] P.L. 100-656, the Business Opportunity Development Reform Act of 1988, 15 U.S.C. §644(g)(1). The government-wide procurement goal for small businesses was increased from 20% to 23% by P.L. 105-135, the Small Business Reauthorization Act of 1997.

[25] Rep. John J. LaFalce, "Remarks related to the Women's Business Procurement Assistance Act of 1993," extension of remarks in the House, *Congressional Record*, vol. 139, part 81 (June 9, 1993), p. E1439.

[26] GAO-01-346, *Federal Procurement: Trends and Challenges in Contracting with WOSBs*, p. 8.

[27] U.S. Congress, Committee of Conference, *Federal Acquisition Streamlining Act of 1994*, conference report to accompany S. 1587, 103rd Cong., 2nd sess., August 21, 1994, H.Rept. 103-712 (Washington, DC: GPO, 1994), p. 224 (hereinafter cited as Committee of Conference, Federal Acquisition Streamlining Act of 1994).

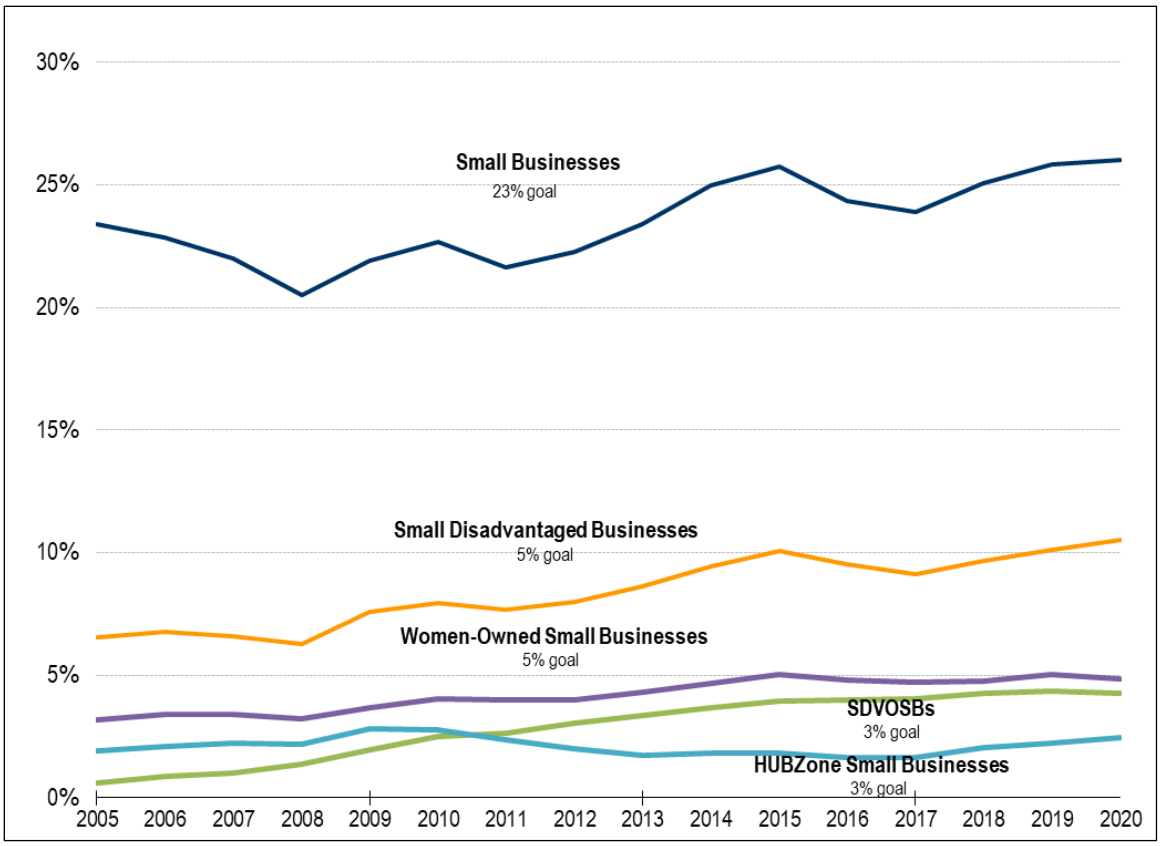
[28] Committee of Conference, Federal Acquisition Streamlining Act of 1994, p. 224.

[29] This goal was phased in, with an initial goal of 1% (effective in 1999) that rose by half a percentage point each year to its final level in 2003. The goal was later modified to include subcontract awards (P.L. 112-239, the National Defense Authorization Act for Fiscal Year 2013).

years (FY2015 and FY2019) reported in the figure. The 3% procurement goal for HUBZone small businesses was not achieved in any of the 16 fiscal years. In contrast, the 23% procurement goal for all types of small businesses was achieved in 9 of the 16 fiscal years reported in the figure (FY2005 and FY2013-FY2020), including the past 8 fiscal years. The 5% procurement goal for SDBs was achieved in each of the 16 fiscal years. The 3% procurement goal for SDVOSBs was achieved in 9 of the 16 fiscal years (FY2012-FY2020), including the last 9 fiscal years.

Figure 1. Small Business Contracting, Performance, by Type of Small Business, FY2005-FY2020

(percentage of small business eligible federal contracts)



Sources: U.S. General Services Administration (GSA), "Sam.Gov Data Bank, Static: Small Business Goaling Report [FY2005-FY2020], at https://sam.gov/reports/awards/static; and U.S. Small Business Administration, "Government-Wide Performance: FY2020 Small Business Procurement Scorecard," data as of April 15, 2021, at https://www.sba.gov/document/support-small-business-procurement-scorecard-overview.

Notes: The small business eligible baseline excludes certain contracts that the Small Business Administration has determined do not realistically reflect the potential for small business participation in federal procurement (such as those awarded to mandatory and directed sources), contracts funded predominately from agency-generated sources (i.e., nonappropriated funds), contracts not covered by the Federal Acquisition Regulations System, acquisitions on behalf of foreign governments, and contracts not reported in the GSA's Federal Procurement Data System—Next Generation (such as government procurement card purchases and contracts valued less than $10,000). About 15% to 18% of all federal contracts are excluded in any given fiscal year.

WOSB Set-Asides

As shown in **Table 1**, FASA conferees' prediction that it may take some time to reach the 5% goal was confirmed. The amount and percentage of federal contracts awarded to WOSBs increased slowly following the establishment of the 5% goal (implemented in FY1996).

Frustrated by the relatively slow progress toward meeting the 5% goal, WOSB advocates began to lobby for additional actions, including the establishment of a federal contracting set-aside program for WOSBs. As mentioned, a set-aside is a commonly used term to refer to a contract competition in which only small businesses, or specific types of small businesses, may compete.

WOSB advocates noted that other small businesses were provided contracting preferences. For example, at that time, SDBs were eligible for contract set-asides and a price evaluation adjustment of up to 10% in full and open competition in specified federal agencies, including the Department of Defense (DOD); participants in the SBA's 8(a) program were (and still are) eligible for both contract set-asides and sole source awards; and HUBZone small businesses were (and still are) eligible for contract set-asides, sole source awards, and a price evaluation adjustment of up to 10% in full and open competition above the simplified acquisition threshold.[30]

As a first step toward the enactment of a WOSB set-aside contracting program, P.L. 106-165, the Women's Business Centers Sustainability Act of 1999, required GAO to review the federal government's efforts to meet the 5% goal for WOSBs and to identify any measures that could improve the federal government's performance in increasing WOSB contracting opportunities. GAO issued its report on February 16, 2001:

> Among the government contracting officials with whom we spoke, there was general agreement on several suggestions for improving the environment for contracting with WOSBs and increasing federal contracting with WOSBs. They suggested creating a contract program targeting WOSBs, focusing and coordinating federal agencies' WOSB outreach activities, promoting contracting with WOSBs through agency incentive and recognition programs, including WOSBs in agency mentor-protégé programs, providing more information to WOSBs about participation in teaming arrangements, and providing expanded contract financing.[31]

[30] Several statutes at that time contained provisions to encourage contracting with SDBs, including P.L. 99-591 (originally), Making continuing appropriations for the fiscal year 1987, and for other purposes (Title X, the Defense Acquisition Improvement Act of 1986); P.L. 99-661, the National Defense Authorization Act for Fiscal Year 1987; P.L. 106-398, Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001; and P.L. 103-355, FASA. Between 1987 and 1995, SDBs were eligible to receive a 10% price evaluation preference in competitive Department of Defense (DOD) acquisitions and could compete for contracts set aside for SDBs for certain DOD acquisitions where agency officials believed there was a reasonable expectation that offers would be received from at least two responsible SDBs. FASA extended the authority to implement these benefits to all federal agencies, but in 1995, the Supreme Court ruled in Adarand Constructors, Inc. v. Pena (1995) "that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review. In other words, they 'must serve a compelling government interest, and must be narrowly tailored to further that interest.'" As a result of the Adarand decision, the federal government reexamined how it implemented "affirmative action" programs, including certain procurement preference programs. In light of the Adarand decision, regulations to implement FASA's provision to expand SDB program preferences to other federal agencies were delayed. Statutory authority for SDB price evaluation adjustments expired on December 9, 2004, for most federal procuring agencies, and at the end of 2009 for DOD, the National Aeronautics and Space Administration, and the Coast Guard. See Adarand Constructors, Inc., v. Pena, Oyez, at https://www.oyez.org/cases/1994/93-1841; GAO, *Small Business: Status of Small Disadvantaged Business Certifications*, GAO-01-273, January 19, 2001, pp. 3-6, at https://www.gao.gov/new.items/d01273.pdf; and SBA, "Small Disadvantaged Program," 73 *Federal Register* 57490-57495, October 3, 2008.

[31] GAO-01-346, *Federal Procurement: Trends and Challenges in Contracting with WOSBs*, p. 31.

By the time the GAO report was published, legislation had been enacted (H.R. 5654, the Small Business Reauthorization Act of 2000, incorporated by reference in P.L. 106-554, the Consolidated Appropriations Act, 2001) to authorize the WOSB program. As mentioned, the WOSB program provides greater access to federal contracting opportunities for WOSBs by providing federal contracting officers authority to set aside contracts for WOSBs (including EDWOSBs) exclusively in industries in which WOSBs are substantially underrepresented, and to set aside contracts for EDWOSBs exclusively in industries in which WOSBs are underrepresented.

A Targeted Approach to Avoid Legal Challenges

Congressional efforts to promote WOSB set-asides were complicated by Supreme Court decisions on legal challenges of contracting preferences for minority contractors, including *City of Richmond v. J.A. Croson Co*. (1989) (finding unconstitutional a municipal ordinance that required the city's prime contractors to award at least 30% of the value of each contract to minority subcontractors) and *Adarand Constructors, Inc. v. Pena* (1995) (finding that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review).

The *Adarand Constructors, Inc. v. Pena* case involved a challenge to federal subcontracting preferences for SDBs. The plaintiff claimed that contracting preferences based on race violate the equal protection component of the Fifth Amendment's Due Process Clause. The Supreme Court ruled that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review (i.e., they must serve a compelling government interest and must be narrowly tailored to further that interest). Following the *Adarand* decision, the federal government reexamined how it implemented "affirmative action" programs, including certain procurement preference programs.

When developing the WOSB set-aside program, its advocates were aware that the WOSB program would be subject to a heightened standard of judicial review given the Supreme Court's ruling that all racial classifications must serve a compelling government interest and be narrowly tailored. In the House report accompanying H.R. 4897, the Equity in Contracting for Women Act of 2000 (which was incorporated into H.R. 5654, the Small Business Reauthorization Act of 2000), advocates argued that a set aside program was needed (compelling interest) because of the slow progress in meeting the 5% procurement goal for WOSBs. The report noted that "the drive for efficiency in procurement often places Congressionally-mandated contracting goals for small businesses in general, and women-owned small businesses in particular, in jeopardy."[32] The report also noted that *contract bundling* (the consolidation of smaller contract requirements into larger contracts) and the increased use of the Federal Supply Schedules increase "the efficiency of government procurements ... [but] also may perpetuate the use of well-known firms that are not women-owned businesses."[33] As a result,

> the Committee believes that the goals expressed in FASA and reaffirmed in the Executive Order [Executive Order 13,157, issued on May 23, 2000 by President Clinton, reaffirming the Administration's support for increasing contracting opportunities for WOSBs] will not be achieved without the use of some mandatory tool which enables contracting officers to

[32] U.S. Congress, House Committee on Small Business, *Equity in Contracting For Women Act of 2000*, report to accompany H.R. 4897, 106th Cong., 2nd sess., September 21, 2000, H.Rept. 106-879 (Washington, DC: GPO, 2000), p. 2 (hereinafter cited as Committee on Small Business, *Equity in Contracting For Women Act of 2000 report*).

[33] Committee on Small Business, *Equity in Contracting For Women Act of 2000 report*, p. 2.

> identify WOSBs and establish competition among those businesses for the provision of goods and services.[34]

The House report also argued that the bill was narrowly tailored because it did not establish sole source authority for WOSBs and limited WOSB set-asides to industries in which WOSBs are underrepresented in obtaining federal contracts.

WOSB Program Requirements

The Consolidated Appropriations Act, 2001 (P.L. 106-554) specified that federal contracting officers could not set aside contracts for WOSBs or EDWOSBs unless (1) they had a reasonable expectation that two or more eligible business concerns would submit offers for the contract, (2) the anticipated award price of the contract (including options) does not exceed $5 million for manufacturing contracts and $3 million for all other contracts, and (3) the contract award can be made at a fair and reasonable price.

In 2011, the set-aside award caps were increased to $6.5 million for manufacturing contracts and $4 million for all other contracts to account for inflation.[35] In 2013, P.L. 112-239, the National Defense Authorization Act for Fiscal Year 2013, removed the caps.[36]

Eligibility Requirements

The Consolidated Appropriations Act, 2001 (P.L. 106-554) also specified recipient eligibility requirements (see below) and required the SBA to conduct a study to identify industries in which WOSBs are underrepresented (and, by inference, substantially underrepresented) with respect to federal procurement contracting. In addition, the SBA had to develop criteria to define an EDWOSB because the act did not define economic disadvantage. The WOSB program could not begin until those determinations were made.

To participate in the program, the act specified that WOSBs must

- be a small business (as defined by the SBA);
- be at least 51% unconditionally and directly owned and controlled by one or more women who are U.S. citizens;[37]
- have women manage day-to-day operations and make long-term decisions; and
- be certified by a federal agency, a state government, the SBA, or a national certifying entity approved by the SBA or self-certify their eligibility to the federal contracting officer with adequate documentation according to standards established by the SBA.

[34] Committee on Small Business, *Equity in Contracting For Women Act of 2000 report*, p. 3.

[35] Department of Defense, GSA, National Aeronautics and Space Administration, "Federal Acquisition Regulation; Women-Owned Small Business (WOSB) Program," 76 *Federal Register* 18305, April 1, 2011; and SBA, "Women-Owned Small Business Federal Contract Program," 77 *Federal Register* 1857, January 12, 2012.

[36] SBA, "Women-Owned Small Business Federal Contracting Program," 78 *Federal Register* 26504-26506, May 7, 2013.

[37] The statute specifies that ownership is to be determined without regard to community property laws.

Certification

As mentioned, P.L. 113-291 (NDAA 2015), among other provisions, removed the ability of small businesses to self-certify their eligibility for the WOSB program as a means to ensure that the program's contracts are awarded only to intended recipients. The act also required the SBA to implement its own certification process for WOSBs. The SBA announced in the *Federal Register* that it would implement its own certification process for the WOSB program and remove the ability of small businesses to self-certify their eligibility for the WOSB program on October 15, 2020.[38]

In the meantime, WOSBs and EDWOSBs had to be either self-certified or third-party certified to participate in the WOSB program. Self-certification requires the business to provide certification information annually through the SBA's certification web page (certify.SBA.gov) and have an up-to-date profile on the System for Award Management (SAM) website (sam.gov) indicating that the business is small and is interested in participating in the WOSB program.[39] Self-certification is free.

In addition, in 2011, the SBA approved four organizations to provide third-party certification (typically involving a fee): El Paso Hispanic Chamber of Commerce, National Women Business Owners Corporation, U.S. Women's Chamber of Commerce, and Women's Business Enterprise National Council.[40] Third-party certification continues to be an option.

WOSBs and EDWOSBS that are not certified are no longer eligible to participate in the WOSB program. Other women-owned small businesses may continue to self-certify their status as a WOSB, receive contract awards outside of the WOSB program, and count toward an agency's 5% procurement goal.[41]

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[38] SBA, "Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification," 85 *Federal Register* 27650, May 11, 2020.

[39] With a few exceptions, businesses interested in bidding on a federal contract must obtain a Dun & Bradstreet Data Universal Numbering System (DUNS) number (i.e., a unique nine-digit identification number) for each of the business's physical locations, and register with the federal government's System for Award Management (SAM). Government agencies use SAM for several purposes, including to find contractors. Businesses also must match their products and services to a North American Industry Classification System (NAICS) code. Businesses generally have a primary NAICS code and may have multiple NAICS codes if they sell multiple products and services. Businesses that identify themselves as a small business in SAM must (1) meet the Small Business Act's definition of a small business and (2) not exceed size standards established, and updated periodically, by the SBA. See SBA, "Federal Contracting Guide: Basic Requirements," at https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements; and U.S. Bureau of the Census, "North American Industry Classification System," at https://www.census.gov/eos/www/naics/. For additional information and analysis, see CRS Report R44490, *Unique Identification Codes for Federal Contractors: DUNS Numbers and CAGE Codes*, by L. Elaine Halchin; CRS Report RS22536, *Overview of the Federal Procurement Process and Resources*, by L. Elaine Halchin; and CRS Report R45576, *An Overview of Small Business Contracting*, by Robert Jay Dilger.

[40] SBA, "Women-Owned Small Business Federal Contracting program: Get certified as a women-owned small business," at https://www.sba.gov/federal-contracting/contracting-assistance-programs/women-owned-small-business-federal-contracting-program; and GAO, *Women-Owned Small Business Program: Actions Needed to Address Continued Oversight Issues*, GAO-19-563T, May 16, 2019, p. 3, at https://www.gao.gov/products/GAO-19-563T (hereinafter cited as GAO-19-563T, *WOSB Program: Continued Oversight Issues*).

[41] SBA, "Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business Certification," 85 *Federal Register* 27650, May 11, 2020.

Defining Economic Disadvantage

EDWOSBs must meet all WOSB contracting program requirements and be economically disadvantaged, which, as presently defined by the SBA, means that they must be

- owned and controlled by one or more women, each with a personal net worth less than $750,000;
- owned and controlled by one or more women, each with $350,000 or less in adjusted gross income averaged over the previous three years; and
- owned and controlled by one or more women, each with $6 million or less in personal assets.

The SBA defined economic disadvantage using its experience with the 8(a) program as a guide (i.e., reviewing the owner's income, personal net worth, and the fair market value of her total assets).[42]

As of March 24, 2022, there were 5,761 certified WOSBs and 1,987 certified EDWOSBs registered in the SBA's online database.[43] There were 83,866 self-certified WOSBs and WOSB joint ventures and 35,035 self-certified EDWOSBs and EDWOSB joint ventures registered in the SBA's online database on that date.[44]

The 10-Year Delay in WOSB's Implementation

As mentioned, the WOSB program's implementation was delayed for over 10 years, primarily due to the SBA's difficulty in identifying an appropriate methodology to determine "the industries in which WOSBs are underrepresented (and, by inference, substantially underrepresented) with respect to federal procurement contracting."[45]

The SBA completed a draft of the legislatively mandated study of underrepresented (and, by inference, substantially underrepresented) NAICS industrial codes in September 2001, using internal resources. The SBA then submitted proposed regulations to implement the WOSB program to the Office of Management and Budget (OMB), which is required by law to review all draft regulations before publication within 90 days of their submission to OMB.[46] However, the

[42] SBA, "The Women-Owned Small Business Federal Contract Assistance Program," 71 *Federal Register* 34551, June 15, 2006; and SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register* 62265, October 7, 2010.

[43] SBA, "Dynamic Small Business Search," accessed on March 24, 2022, at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm.

[44] SBA, "Dynamic Small Business Search," accessed on March 24, 2022, at https://web.sba.gov/pro-net/search/dsp_dsbs.cfm.

[45] For a discussion of the various methodological approaches considered, see SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register*, October 7, 2010, pp. 62259-62262.

[46] SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register* 62259, October 7, 2010.

> The North American Industry Classification System (NAICS, pronounced Nakes) was developed under the direction and guidance of the Office of Management and Budget (OMB) as the standard for use by Federal statistical agencies in classifying business establishments for the collection, tabulation, presentation, and analysis of statistical data describing the U.S. economy. ... NAICS is a 2- through 6-digit hierarchical classification system, offering five levels of detail. Each digit in the code is part of a series of progressively narrower categories, and the more digits in the code signify greater classification detail. The first two digits designate the economic sector, the third digit designates the subsector, the fourth digit designates the industry group, the fifth digit designates the

SBA withdrew the regulations on April 24, 2002, before the review was complete "because the SBA Administrator had concerns about the content and constitutionality of its draft industry study and believed that it needed to contract with the National Academy of Science (NAS) to review the draft industry study and recommend any changes the NAS believed were necessary."[47] The SBA awarded a contract to NAS in late 2003 to conduct the study.

NAS completed its analysis and issued a report on the SBA's study on March 11, 2005. The report indicated that the SBA asked NAS to conduct the review "because of the history of legal challenges to race- and gender-conscious contracting programs at the federal and local levels."[48]

NAS concluded that the SBA's study was "problematic in several respects, including that the documentation of data sources and estimation methods is inadequate for evaluation purposes." NAS made several recommendations for a new study, including that the SBA use more current data, different industry classifications, and consistent monetary and numeric utilization measures to provide more complete documentation of data and methods.[49] The SBA later characterized NAS's analysis as indicating that the SBA study was "fatally flawed."[50] In response to that finding, the SBA issued a solicitation in October 2005, seeking a private contractor to perform a revised study. In February 2006, a contract was awarded to the Kaufman-RAND Institute for Entrepreneurship Public Policy (RAND). The RAND study was published in April 2007.[51]

The RAND report noted that underrepresentation is typically referred to as a disparity ratio, a measure comparing the use of firms of a particular type (in this case, WOSBs) in a particular NAICS code to their availability for such contracts in that NAICS code. A disparity of 1.0 suggests that firms of a particular type are awarded contracts in the same proportion as their representation in that industry (there is no disparity). A disparity ratio less than 1.0 suggests that

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NAICS industry, and the sixth digit designates the national industry.

See U.S. Census Bureau, "North American Industry Classification System," at https://www.census.gov/eos/www/naics/faqs/faqs.html#q5.

[47] SBA, "Semiannual Regulatory Agenda," 67 *Federal Register* 34004, May 13, 2002; and *U.S. Women's Chamber of Commerce v. U.S. Small Business Administration*, November 30, 2005, at https://casetext.com/case/us-womens-chamber-of-commerce-v-us-small-business-admin.

[48] National Research Council, National Academy of Sciences (NAS), *Analyzing Information on Women-Owned Small Businesses in Federal Contracting*, Steering Committee for the Workshop on Women-Owned Small Businesses in Federal Contracting, Committee on National Statistics, Division of Behavioral and Social Sciences and Education (Washington, DC: The National Academies Press, 2005), p. 1, at https://www.nap.edu/catalog/11245/analyzing-information-on-women-owned-small-businesses-in-federal-contracting (hereinafter cited as NAS WOSB report, 2005).

[49] NAS WOSB report, 2005, pp. 3-8, 80-87.

The NAS report indicated that SBA's

> preliminary disparity ratio estimates were developed for industry categories (defined by 2-digit Standard Industrial Classification or SIC codes) by dividing the *utilization* share for each industry by the *availability* share. Utilization was defined as the share accruing to women-owned small businesses of the total dollar amount of contract actions for federal prime contracts over $25,000 in fiscal year 1999 for the particular industry. Availability was defined as the share of women-owned businesses with paid employees among all businesses with paid employees in the particular industry from the 1997 Survey of Women-Owned Business Enterprises.

NAS WOSB report, 2005, p. 2.

[50] SBA, "Women-Owned Small Business Federal Contract Assistance Procedures," 72 *Federal Register* 73287, December 27, 2007.

[51] SBA, "Women-Owned Small Business Federal Contract Assistance Procedures," 72 *Federal Register* 73287, December 27, 2007. Also, see Elaine Reardon, Nancy Nicosia, and Nancy Young Moore, *The Utilization of Women-Owned Small Businesses in Federal Contracting*, at https://www.rand.org/pubs/technical_reports/TR442.html.

the firms are underrepresented in federal contracting in that NAICS code. A ratio greater than 1.0 suggests that the firms are overrepresented.[52]

RAND identified 28 different approaches to determine underrepresentation and substantial underrepresentation of WOSBs in federal procurement, each of which yielded a different result. After examining each approach's benefits and deficiencies, the SBA defined underrepresentation as industries having a disparity ratio between 0.5 and 0.8, where the ratio represents the WOSB share of federal prime contract dollars divided by the WOSB share of total business receipts within a given NAICS code. Substantial underrepresentation was defined as industries with a disparity ratio between 0.0 and 0.5.[53]

Using that methodology, the SBA identified 83 four-digit NAICS industry groups in its final rule implementing the WOSB program (October 7, 2010, effective February 4, 2011):

- 45 four-digit NAICS industry groups in which WOSBs are underrepresented (225 out of the 1,057 six-digit NAICS industry codes at that time were made eligible for EDWOSB set-asides only), and
- 38 four-digit NAICS industry groups in which WOSBs are substantially underrepresented (171 out of the 1,057 six-digit NAICS industry codes at that time were made eligible for WOSB (including EDWOSB) set-asides).[54]

Mandated Updates of Underrepresented and Substantially Underrepresented NAICS Codes

In 2014, Congress passed legislation (P.L. 113-291) requiring the SBA to update the list of underrepresented and substantially underrepresented NAICS codes by January 2, 2016, and then conduct a new study and update the NAICS codes every five years thereafter. The SBA asked the Department of Commerce's Office of the Chief Economist (OCE) for assistance in conducting a new study.

The OCE examined the odds of women-owned businesses winning a federal prime contract relative to otherwise similar firms in FY2013 and FY2014 in each of the four-digit NAICS code industry groups, controlling for the firm's size and age, legal form of organization, level of government security clearance, past federal prime contracting performance ratings, and membership in various categories of firms having federal government-wide procurement goals. OCE found that women-owned businesses were less likely to win federal contracts in 254 of the 304 industry groups in the study, and women-owned businesses in 109 of the 304 industry groups had statistically significant lower odds of winning federal contracts than otherwise similar businesses not owned by women at the 95% confidence level.[55]

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[52] SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register* 62259, October 7, 2010.

[53] SBA, "Women-Owned Small Business Federal Contract Assistance Procedures," 72 *Federal Register* 73287-73289, December 27, 2007.

[54] SBA, "Women-Owned Small Business Federal Contract Program," 75 *Federal Register* 62259-62262, October 7, 2010; and U.S. Bureau of the Census, "North American Industry Classification System: 60 digit 2007 Code files," at https://www.census.gov/eos/www/naics/downloadables/downloadables.html.

[55] David N. Beede and Robert N. Rubinovitz, "Utilization of Women-Owned Businesses in Federal Prime Contracting," U.S. Department of Commerce, Office of the Chief Economist, Economics and Statistics Administration, December 31, 2015, at https://www.sba.gov/sites/default/files/wosb_study_report.pdf; and SBA, "Women-Owned Small Business Federal Contract Program; Identification of Eligible Industries," 81 *Federal Register* 11341, March 3,

Based on the OCE study, the SBA increased the number of underrepresented and substantially underrepresented four-digit NAICS codes from 83 to 113, effective March 3, 2016 (21 in which WOSBs are underrepresented (EDWOSB set-asides only) and 92 in which WOSBs are substantially underrepresented (WOSB and EDWOSB set-asides).[56]

OMB updates the NAICS every five years. In response to OMB's release of NAICS 2017, which replaced NAICS 2012, the SBA reduced the number of underrepresented and substantially underrepresented four-digit NAICS codes from 113 to 112, effective October 1, 2017. The reduction took place because NAICS 2017 merged two four-digit NAICS industry groups that affected the WOSB program. The merger also resulted in the number of four-digit NAICS industry groups in which WOSBs are substantially underrepresented (WOSB and EDWOSB set-asides) to fall from 92 to 91.[57] Overall, WOSB set-asides were provided to WOSBs (including EDWOSBs) in 364 (out of 1,023) six-digit NAICS industry codes and to EDWOSBs exclusively in 80 (out of 1,023) six-digit NAICS industry codes.[58]

In FY2020, the SBA contracted with an independent research firm to reassess the underrepresentation of WOSBs in federal contracting. The firm used a methodology similar to that developed by the Kauffman-RAND Institute for Entrepreneurship Public Policy that was issued in 2007. Based on this study, the SBA announced that, as of March 18, 2022,

- WOSBs are substantially underrepresented in 646 six-digit North American Industry Classification System (NAICS) industry codes (out of 1,023), meaning that federal contracting officers may award set-aside and sole source contracts to WOSBs (including EDWOSBs) in these 646 industries.
- WOSBs are underrepresented in 113 six-digit NAICS industry codes (out of 1,023), meaning that federal contracting officers may award set-aside and sole source contracts exclusively to EDWOSBs in these 113 industries.[59]

The SBA indicated that over 85% of four-digit NAICS codes (759 of 891) were identified by this latest study as being eligible for either WOSB or EDWOSB procurement procedures, compared with less than half of those codes prior to this change.[60]

Sole Source Award Authority

P.L. 113-291 (NDAA 2015), enacted in 2014, provides federal agencies authority to award sole source contracts to WOSBs (including EDWOSBs) eligible under the WOSB program if

- the contract is assigned a NAICS code in which the SBA has determined that WOSBs are substantially underrepresented in federal procurement;

2016.

[56] SBA, "Women-Owned Small Business Federal Contract Program; Identification of Eligible Industries," 81 *Federal Register* 11340-11343, March 3, 2016.

[57] SBA, "Women-Owned Small Business Federal Contract Program NAICS Code Updates," 82 *Federal Register* 47278-47287 October 11, 2017.

[58] SBA, "Qualifying NAICS for the Women-Owned Small Business Federal Contracting program," at https://www.sba.gov/document/support—qualifying-naics-women-owned-small-business-federal-contracting-program.

[59] SBA, "Women-Owned Small Business Federal Contracting Program; Identification of Eligible Industries," 87 *Federal Register* 15468-15481, March 18, 2022.

[60] SBA, "Women-Owned Small Business Federal Contracting Program; Identification of Eligible Industries," 87 *Federal Register* 15470, March 18, 2022.

- the contracting officer does not have a reasonable expectation that offers would be received from two or more WOSBs (including EDWOSBs); and
- the anticipated total value of the contract, including any options, does not exceed $6.5 million for manufacturing contracts (now $7.0 million) and $4.0 million for other federal contracts (now $4.5 million).[61]

NDAA 2015 also provides federal agencies authority to award sole source contracts exclusively to EDWOSBs eligible under the WOSB program if

- the contract is assigned a NAICS code in which SBA has determined that WOSB concerns are underrepresented in federal procurement;
- the contracting officer does not have a reasonable expectation that offers would be received from two or more EDWOSB concerns; and
- the anticipated total value of the contract, including any options, does not exceed $6.5 million for manufacturing contracts (now $7.0 million) and $4.0 million for other federal contracts (now $4.5 million).[62]

Expanding the WOSB program to include sole source contracts was designed, along with WOSB set-asides, to help federal agencies achieve their statutory goal of awarding at least 5% of their federal contracting dollars to WOSBs. The SBA published a final rule expanding the WOSB program to include sole source awards on September 14, 2015 (effective October 14, 2015).[63]

Current Administrative Issues

Both GAO and the SBA's OIG have issued reports and audits of the WOSB program that have been critical of the SBA's implementation and oversight of the program.[64] For example, GAO has criticized the SBA for delays in implementing the WOSB program and, in 2019, reported that the SBA had not fully addressed WOSB program oversight deficiencies, first identified by GAO in 2014, related to third-party certifiers, the procedures used to conduct annual eligibility examinations of WOSBs, and "reviews of individual businesses found to be ineligible to better understand the cause of the high rate of ineligibility in annual reviews and determine what actions are needed to address the causes."[65] GAO argued that

[61] FAR §19.1506(b), FAR §19.1506(c), and P.L. 116-283, the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.

The Federal Acquisition Regulatory Council has the responsibility of adjusting each acquisition-related dollar threshold (including those for the 8(a), HUBZone, Service-Disabled Veteran-Owned, and Women-Owned Small Business contracting programs), on October 1, of each year that is evenly divisible by five. As a result, these thresholds may differ from those in statute. The next adjustment for inflation will take place on October 1, 2025. See 13 C.F.R. §124.506(a); and 41 U.S.C. §1908(c)(2).

[62] FAR §19.1506(a), FAR §19.1506(c), and P.L. 116-283, the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021.

[63] SBA, "Women-Owned Small Business Federal Contract Program," 80 *Federal Register* 55019, September 14, 2015.

[64] For example, see GAO-01-346, *Federal Procurement: Trends and Challenges in Contracting with WOSBs*; GAO, *Women-Owned Small Business Program: Certifier Oversight and Additional Eligibility Controls Are Needed*, GAO-15-54, October 8, 2014, at https://www.gao.gov/products/GAO-15-54 (hereinafter cited as GAO-15-54, *WOSB Program: Certifier Oversight and Eligibility Controls*); GAO, *Small Business Administration: Actions Needed to Improve Confidence in Small Business Procurement Scorecard*, GAO-18-672, September 27, 2018, at https://www.gao.gov/products/GAO-18-672; GAO, *WOSB: Ongoing Oversight Issues*; and GAO-19-563T, *WOSB Program: Continued Oversight Issues*.

[65] GAO-15-54, *WOSB Program: Certifier Oversight and Eligibility Controls*; and GAO-19-563T, *WOSB Program:*

> the deficiencies in SBA's oversight of the WOSB program limit SBA's ability to identify potential fraud risks and develop any additional control activities to address these risks. As a result, the program continues to be exposed to the risks of ineligible businesses receiving set-aside contracts.[66]

In addition, GAO noted that, from April 2011 through June 2018, about 3.5% of WOSB set-aside contracts were awarded for ineligible goods or services [NAICS codes].[67]

In 2015, the SBA's OIG analyzed 34 WOSB program awards made between October 1, 2013, and June 30, 2014, (17 WOSB set-aside awards totaling $6.6 million and 17 EDWOSB set-aside awards totaling $7.9 million) and found "15 of the 34 set-aside awards were made without meeting the WOSB program's requirements," and these awards totaled approximately $7.1 million.[68] Specifically, 10 of the 34 WOSB program set-aside awards were made "for work that was not eligible to be set aside for the program" and 9 of the 34 awards went to firms that did not have any documentation in the WOSB program's repository, including 7 of the 17 WOSB set-aside awards, or 41%, and 2 of the 17 EDWOSB set-aside awards, or 12%."[69] The SBA OIG found that "this occurred because agencies' contracting officers did not comply with the regulations prior to awarding these awards and SBA did not provide enough outreach or training to adequately inform them of their responsibilities and the program's requirements."[70]

In a related development, in 2018, the SBA's OIG analyzed 56 WOSB sole source contracts awarded between January 1, 2016, and April 30, 2017, and found that 50 of the 56 contracts, totaling approximately $52.2 million, were made "without having the necessary documentation to determine eligibility" of the award recipients.[71] Examples of missing documentation included WOSB and EDWOSB self-certifications, articles of incorporation, birth certificates, and financial information.[72]

Current Oversight and Legislative Issues

Issues of particular interest to Congress during the 117th Congress may include congressional oversight of the SBA's implementation of the WOSB program's certification procedures; congressional oversight of the SBA's training of federal procurement officers to ensure that WOSB awards are made only to eligible firms in eligible industries; the performance of federal

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Continued Oversight Issues, pp. 3, 4.

[66] GAO-19-168, *WOSB: Ongoing Oversight Issues*, pp. 10-25; and GAO-19-563T, *WOSB Program: Continued Oversight Issues*, p. 5.

[67] GAO-19-563T, *WOSB Program: Continued Oversight Issues*, p. 5.

[68] SBA, OIG "Improvements Needed in SBA's Management of the Women-Owned Small Business Federal Contracting Program," Report No. 15-10, May 14, 2015, p. 4, at https://www.sba.gov/document/report-15-10-evaluation-report-15-10-improvements-needed-sbas-management-women-owned-small-business-federal (hereinafter cited as SBA, OIG report, *SBA's Management of the WOSB Program*).

[69] Four of the set-aside awards "were improperly set-aside using NAICS codes that SBA had not identified as being substantially, underrepresented or underrepresented by women-owned businesses. The other six awards should have been set aside for an EDWOSB but were misclassified as WOSB set-aside awards." See SBA, OIG report, *SBA's Management of the WOSB Program*, pp. 4, 5.

[70] SBA, OIG report, *SBA's Management of the WOSB Program*, p. 4.

[71] SBA, OIG "SBA's Women-Owned Small Business Federal Contracting Program," Report No. 18-18, June 20, 2018, p. 4, at https://www.sba.gov/document/report-18-18-sbas-women-owned-small-business-contracting-program (hereinafter cited as SBA, OIG report, *SBA's WOSB Federal Contracting Program*).

[72] SBA, OIG report, *SBA's WOSB Federal Contracting Program*, p. 4.

agencies in achieving the 5% procurement goal for WOSBs; and the WOSB program's efficacy in helping to meet the 5% goal.

As shown in **Table 1**, federal procurement officers' use of the WOSB program has increased from about $21 million in FY2011 to $1.259 billion in FY2020, with most of that increase resulting from rising use of WOSB set-asides (from $15 million in FY2011 to $1.085 billion in FY2020). Although WOSB program usage is increasing, WOSB set-asides and sole source awards continue to account for a relatively small portion of the federal contracts awarded to WOSBs. Although the WOSB program has been operational since 2011, many federal agencies have little experience with the program.

For example, in FY2020, about 34% of the federal contracts awarded to WOSBs were awarded in full and open competition with other firms, about 61% were awarded with another small business preference (such as the 8(a) and HUBZone programs), and about 5% were awarded with a WOSB preference.[73]

Also, GAO found that from the third quarter of FY2011 through the third quarter of FY2018, six federal agencies accounted for nearly 83% of the contract amount awarded under the WOSB program: DOD (48.6%), Department of Homeland Security (DHS) (12.4%), Department of Commerce (8.0%), Department of Agriculture (6.3%), Department of Health and Human Services (4.0%), and GSA (4.0%). All other federal agencies accounted for 16.8%.[74]

GAO conducted an audit of the WOSB program from October 2017 to March 2019. As part of the audit, GAO interviewed 14 stakeholder groups (staff from DHS, DOD, and GSA, eight contracting officers within these agencies, and three WOSB third-party certifiers) to obtain their views on WOSB program usage. The stakeholder groups identified several positive aspects about the WOSB program, including that it provided WOSBs greater opportunities to win federal contracts, and that the SBA had several initiatives underway to help improve collaboration between federal agencies and the small business community.[75] The stakeholders also identified several impediments that limited the WOSB program's use by federal contracting officers, including the following:

- **Sole Source Authority Rules.**

  Executing sole source authority under the WOSB program is difficult for contracting officers because rules for sole source authority under the WOSB program are different from those under SBA programs.... For example, the FAR's [Federal Acquisition Regulation] requirement that contracting officers must justify, in writing, why they do not expect other WOSBs or EDWOSBs to submit offers on a contract is stricter under the WOSB program that it is for the 8(a) program.[76]

[73] Data generated using GSA, "Sam.Gov Data Bank, Ad Hoc report," August 2, 2021, at https://sam.gov/reports/awards/adhoc.

[74] GAO-19-168, *WOSB: Ongoing Oversight Issues*, p. 29. From the third quarter of FY2011 through the third quarter of FY2018, these six federal agencies accounted for about 77.6% of total federal contract award amounts: DOD (65.2%), Department of Homeland Security (DHS) (3.98%), Department of Commerce (0.6%), Department of Agriculture (1.16%), Department of Health and Human Services (4.5%), and GSA (2.14%). All other federal agencies accounted for 12.4%. GSA, Federal Procurement Data System—Next Generation, accessed on April 21, 2020, at https://www.fpds.gov/fpdsng/.

[75] GAO-19-168, *WOSB: Ongoing Oversight Issues*, p. 34.

[76] GAO-19-168, *WOSB: Ongoing Oversight Issues*, p. 31.

- **Industry Restrictions.**

  13 of the 14 stakeholder groups ... commented on the requirement that WOSB program set-asides be awarded within certain industries, represented by NAICS codes. For example, two third-party certifiers ... recommended that the NAICS codes be expanded or eliminated to provide greater opportunities for WOSBs to win contracts under the program.[77]

- **Eligibility Documentation Requirements.**

  7 of the 14 stakeholder groups discussed the requirement for the contracting officer to review program eligibility documentation and how this requirement affects their decision to use the program.

  For example, staff from one contracting office said that using the 8(a) or HUBZone programs is easier because 8(a) and HUBZone applicants are already certified by the SBA; therefore, the additional step to verify documentation for eligibility is not needed.... GSA officials noted that eliminating the need for contracting officers to take additional steps to review eligibility documentation for WOSB-program set-asides could create more opportunities for WOSBs by reducing burdens on contracting officers.[78]

- **Need for Additional Guidance.**

  13 of the 14 stakeholder groups discussed guidance available to federal contracting officers under the WOSB program. For example, two third-party certifiers identified the need for additional training and guidance for federal contracting officers, and staff from two federal contracting offices said that the last time that they had received training on the WOSB program was in 2011, when the program was first implemented.[79]

In a related development, during the 116th Congress, the House passed legislation (H.R. 190, the Expanding Contracting Opportunities for Small Businesses Act of 2019) that would have, among other provisions, eliminated the inclusion of option periods in the award price for sole source contracts awarded to qualified HUBZone small businesses, SDBs, SDVOSBs, and WOSBs (including EDWOSBs). This provision would have increased the number of contracts available for sole source awards to these recipients because the option years would not count toward the statutory caps on sole source awards (the WOSB sole source caps are currently $7 million for manufacturing contracts and $4.5 million for other federal contracts).

Also, some WOSB advocates have suggested that the WOSB program should be amended to (1) eliminate the distinction and disparate treatment of WOSBs and EDWOSBs when awarding contracts, and/or (2) allow set-asides and sole source awards to WOSBs (including EDWOSBs) in all NAICS industry codes regardless of WOSB representation, as is the case for other small business preference programs.[80] Both legislative options could lead to an increase in the amount of contracts awarded to WOSBs. In the first instance, WOSBs would be eligible for set-asides and sole source awards in both underrepresented and substantially underrepresented NAICS codes, instead of just substantially underrepresented NAICS codes. In the latter instance, WOSBs and EDWOSBs would be eligible for set-asides and sole source awards in all NAICS industry codes, not just underrepresented or substantially underrepresented NAICS industry codes.

As mentioned in the "A Targeted Approach to Avoid Legal Challenges" section, one of the reasons the WOSB program provides disparate treatment to WOSBs and EDWOSBs, and makes

[77] GAO-19-168, *WOSB: Ongoing Oversight Issues*, p. 32.

[78] GAO-19-168, *WOSB: Ongoing Oversight Issues*, p. 33.

[79] GAO-19-168, *WOSB: Ongoing Oversight Issues*, p. 34.

[80] For example, see Rachel N. Herrington, "Five Years In: A Review of the Women-Owned Small Business Federal Contracting Program," *Public Contract Law Journal*, vol. 45, no. 2 (Winter 2016), pp. 359-382.

distinctions among underrepresented, substantially underrepresented, and other NAICS industry codes was to address the heightened level of legal scrutiny related to contracting preferences following the Supreme Court's decision in *Adarand Constructors, Inc. v. Pena*. The Supreme Court ruled that all racial classifications, whether imposed by federal, state, or local authorities, must pass strict scrutiny review (i.e., they must serve a compelling government interest and must be narrowly tailored to further that interest). Although the WOSB program is not based on racial classifications, it was expected to receive a heightened level of judicial scrutiny. As such, it lead the WOSB program's advocates to create these distinctions in an effort to shield it from legal challenges.

Concluding Observations

As mentioned in the "Introduction" the WOSB program is one of several contracting programs that Congress has approved to provide greater opportunities for small businesses to win federal contracts. Its legislative history is a bit more complicated than others, primarily due to the distinctions between WOSBs and EDWOSBs and among underrepresented, substantially underrepresented, and other NAICS codes. These distinctions, and the SBA's difficulty in defining them, led to the 10-year delay in the program's implementation and may also help to explain why the SBA's implementation of the SBA's certification program was delayed nearly six years.

The SBA's implementation of the WOSB program is likely to remain a priority for congressional oversight during the 117th Congress, as is federal agency use of the program. As mentioned, the federal government has met the 5% procurement goal for WOSBs only twice (in FY2015 and FY2019) since the goal was authorized in 1994, and implemented in FY1996.

Also, the data on WOSB federal contract awards suggest that federal procurement officers are using the WOSB program more often than in the past, but the program accounts for a relatively small portion of WOSB contracts. Most of the federal contracts awarded to WOSBs are awarded in full and open competition with other firms or with another small business preference program (such as the 8(a) and HUBZone programs). Relatively few federal contracts are awarded through the WOSB program. Determining why this is the case, and if anything can, or should be done to address this, is likely to be of continuing congressional interest.

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