

# TGIC Exchange Briefing

## The Ever-changing World of Small Business: Major Changes to 8(a) and the Roll Out of the Women Owned Small Business Program

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# Pitfalls in the 8(a) Changes and WOSB regulations

- **Affiliation *still* matters**
  - Recent SBA and GAO Action
- **Potential 8(a) & WOSB/EDWOSB Pitfalls**
  - Joint Ventures
  - Mentor-Protégé
  - WOSB/EDWOSB

# Affiliation *still* matters

- Last year at this time, we were talking about the Small Business Contracting Protection Act (H.R. 4420 (2010) – Rep. Sestek, D-Pa.) which would have elevated penalties for being a “pass-through” business to the same level as misrepresenting a company’s size or ownership status.
- Even though this bill died in committee and has not been resurrected by the new Congress, there has been other significant SBA and GAO action in the past year that explains some of the proposed 8(a) changes and outlines where we see potential pitfalls in the WOSB/EDWOSB program

# Affiliation *still* matters, cont.

- **RECENT SBA and GAO ACTION**
  - **2010 GAO Report Critical of SBA's Monitoring of contractors participating in high-profile small business set aside programs**
    - GAO found that 14 ineligible firms received \$325 million as a result of "fraud or abuse" in sole source and set aside procurements
  - **GTSI Suspended and Prohibited from holding itself out as a Small Business**
    - Virginia-based software company dealing with sky-rocketing growth from small business set-asides
    - SBA Suspension
    - Whirlwind Correction and Reinstatement

# Affiliation *still* matters, cont.

- So, why do we care so much about affiliation?
- In set aside programs (i.e., procurements where size matters), affiliation matters because if the SBA finds that you are “affiliated” with another entity, it is going to ADD their annual receipts (or employees, depending upon size standard) to yours to determine whether you are “small” and therefore eligible for the set-aside procurement.

# Affiliation *still* matters (cont.)

- In a minute, we will talk about some of the exceptions to affiliation (that are carried over in the new 8(a) regulations), but first . . .
- Under the “General Principles of Affiliation” set forth in the SBA Regulations, businesses are “affiliates” of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. 13 C.F.R. § 121.103(a)

# **Potential Pitfalls for the 8(a) and WOSB/EDWOSB Program**

- **There are very specific SBA regulations that deal with the following types of affiliation, but the SBA can find affiliation under “the totality of the circumstances” as well**
  - 1) stock ownership;
  - 2) common management or “identity of interest”;
  - 3) the “newly organized concern” rule; and,
  - 4) the “ostensible subcontractor” rule.
- **So right away, you may be able to see the potential pitfalls. Think about the following scenarios:**
  - Small business (not a WOSB) husband and wife owners looking to reorganize into an WOSB/EDWOSB
  - Small/Large business with key employee (female/disadvantaged minority individual) looking to “spin off” an 8(a) or WOSB/EDWOSB
  - Woman-owned start-up or 8(a) looking to obtain assistance from large business, or another small business which (if affiliated) would bring over size standard
  - Woman-owned start-up or 8(a) teaming on a procurement with an incumbent who is no longer eligible for the contract (small business or 8(a) set aside)

# Potential Pitfalls for the 8(a) and WOSB/EDWOSB Program

- With the new 8(a) regulations, we also have new regulations for Joint Ventures under 13 C.F.R. 121.103(h) that affect 8(a) as well as non-8(a) small business set-aside procurements:
  - **THE PRIOR RULE**: “3 in 2 Rule” – stated that two firms are limited to pursuing three contract opportunities under one JV over two years. To “pursue” means to submit an offer.
  - **THE NEW RULE**: The “3 in 2” limitation has changed from three “offers” to three contract “awards” under one JV within two years.
    - The 2 years begins at the date of award of the first contract
    - JV can actually be awarded more than 3 contracts so long as the 4<sup>th</sup> (or subsequent) offer occurred during the 2-year period and the offer was made before the 3<sup>rd</sup> contract was awarded
- **Potential Pitfall**: Remember, if you violate this rule, the Joint Venturers will be deemed to be “affiliated”

# Potential Pitfalls for the 8(a) and WOSB/EDWOSB Program

- With the 8(a) Mentor Protégé program, the new regulations (13 C.F.R. 121.103(h)(3)(iii)) make clear that any JV seeking to use 8(a) Mentor Protégé status as a basis for an exception to affiliation – **regardless of whether the procurement is set aside for 8(a)** – must follow the 8(a) JV rules set forth in 13 C.F.R. 124.513(c)(d) which include, among other requirements, approval of the JV Agreement by SBA
- Previously, OHA had ruled that the 8(a) JV rules only apply to Mentor Protégé JVs that pursue 8(a) contracts
- **Potential Pitfall:** Again, if an 8(a) Mentor Protégé JV bids for a non-8(a) procurement and fails to follow the 8(a) JV rules, they **LOSE** their exempted status from affiliation

# Potential Pitfalls for the 8(a) and WOSB/EDWOSB Program

- The new 8(a) regulations (13 C.F.R. 124.520(d)(1)(i)) clarify that a Mentor Protégé Agreement must be approved **before** the two firms can submit a JV offer as a small business
- **Potential Pitfall**: If you submit an offer before approval by SBA – you will be affiliated. A “pending” application is not enough!

# **Potential Pitfalls for the WOSB/EDWOSB Program**

- WOSBs and EDWOSBs must meet the small business size standard for BOTH:
  - Their primary NAICS code, AND
  - The NAICS code applicable to the set aside contract
  - POTENTIAL PITFALL: WOSB/EDWOSB is small under their primary NAICS code, but bids for a procurement where they are “other than small” under the NAICS code for that RFP. They are not eligible for that procurement.

# Potential Pitfalls for the WOSB/EDWOSB Program

- Eligibility Requirements for the new WOSB/EDWOSB Program include:
  - For WOSBs: Must be not less than 51% owned by one or more women and the management and daily business of the concern is “controlled” by one or more women
  - For EDWOSBs: Must be not less than 51% owned by one or more women who are both “economically disadvantaged” and who “control” the management and daily business of the concern

# **Potential Pitfalls for the WOSB/EDWOSB Program**

- 13 C.F.R. 127.202 defines “Control”
  - “Control by one or more women means that both the long-term decision making and the day-to-day management and administration of the business operation must be conducted by one or more women.”
  - **POTENTIAL PITFALL**: A woman does not actually “control” the day-to-day and long term decision making/administration
- “Control” also requires a certain level of Managerial position and experience:
  - “A woman must hold the highest officer position in the concern (usually President or Chief Executive Officer) and must have managerial experience of the extent and the complexity needed to run the concern.”
  - **POTENTIAL PITFALL**: A woman does not hold the highest officer position or have managerial experience needed to run the concern

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## CONTACT INFORMATION

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