

# PTAC Link

PROCUREMENT TECHNICAL ASSISTANCE CENTER - CONNECTING BUYERS & SUPPLIERS

Progress Through Regional Cooperation In The Alleghenies

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## New Years Greetings!

Happy New Year from the Southern Alleghenies PTAC staff! We're looking forward to helping you in the new year with any aspects in government contracting!

Looking ahead, we have some interesting outreach events, such as Government Contracting 101, and PennDOT's SBE program overview. As we firm up dates, we'll get the information out to you.

Thank you again,  
James, Brandon & Gloria

**Women's Federal Contracting Program Gains Sole Source Authority**

## WOSB Program: 2015 NDAA Eliminates Self-Certification

With little fanfare, Congress just passed legislation eliminating the ability of WOSBs to self-certify for purposes of WOSB set-aside contracts.

The [2015 National Defense Authorization Act](#) rewrites the portion of the Small Business Act governing WOSB set-asides, deleting what I have called the "trust but verify" option: the ability for putative WOSBs to self-certify as such, then back up their self-certifications by submitting supporting documentation to the WOSB Document Repository. Instead, the 2015 NDAA would appear to require a formal certification in order for a small business to be awarded a WOSB set-aside contract.

Section 825 of the 2015 NDAA is entitled "sole source contracts for small business concerns owned and controlled by women." As the title suggests, the 2015 NDAA authorizes sole source awards for WOSBs and EDWOSBs-more on that soon in a separate blog post. But the NDAA also amends the portion of the Small Business Act dealing with WOSB set-asides generally. [15 U.S.C. § 637\(m\)\(2\)](#) currently states, in relevant part:

### (2) Authority to restrict competition

*In accordance with this subsection, a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if -*

\*\*\*

*(E) each of the concerns-*

*(i) is certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, as a small business concern owned and controlled by women; or*

*(ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate documentation, in accordance*

Women-owned businesses racked up a huge win mid-December when Congress passed the Defense Authorization Act (NDAA) which included Women Owned Small Business (WOSB) sole source authority. Sole source authority, a critical tool to increase awards of federal contracts to women-owned businesses, was one of few amendments to be included to the \$577 billion measure. In addition to adding sole source authority, the NDAA modifies the WOSB program in two ways. It requires WOSBs to be certified by either a federal agency, the SBA, state governments, or 3rd party certifiers approved by SBA. The legislation does not make clear how this impacts WOSBs currently registered in the program. In addition, the law accelerates the process by which SBA identifies which industries are eligible to participate in the program.

Much like other socio-economic programs, the provision will allow contracts of up to \$4 million (\$6.5 for manufacturing contracts) to be directly awarded to companies certified as WOSBs. A contracting officer will be able to award contracts through the WOSB program, if he or she "does not have a reasonable expectation that two or more [women-owned] business will submit offers," and it can be awarded at "a fair and reasonable price."

Barbara Kasoff, President of Women Impacting Public Policy (WIPP) state "WIPP has been a tireless advocate for improving the WOSB program not just for parity's sake, but also to foster strong economic growth for women-owned businesses."

WIPP's Chief Advocate, Ann Sullivan commented that "The original law wasn't written that way back in the year 2000, but through WIPP's persistence for 14 years, we finally have a program that is sustainable. We worked for 11 years to implement the first WOSB law, and then succeeded in removing the low dollar cap or limit on the size of the contracts that could be awarded to WOSBs. This is critical tool used by the federal government to award contracts to minorities, veterans and HUBZone firms and now women are part of this market as well."

There are still a few hurdles to clear after the President signs the bill. Initially, the Small Business Administration (SBA) will promulgate rules to implement the law passed by Congress. Then the Federal Acquisition Regulations Council, which oversees contracting rules, must approve the changes. Finally, contracting officers and small business offices in the government need to understand the change in the law

*with standards established by the Administration, to support such certification.*

In this way, the Small Business Act currently provides that a company can qualify for a WOSB set-aside contract in two-ways: either by formal certification, or by self-certification accompanied by the submission of documents backing that certification.

The 2015 NDAA amends [15 U.S.C. § 637\(m\)\(2\)\(E\)](#) to delete the self-certification option. After the amendment, the statute will read, in relevant part, as follows:

**(2) Authority to restrict competition**

*In accordance with this subsection, a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if-*

\*\*\*

*(E) each of the concerns is certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the Administrator as a small business concern owned and controlled by women.*

Interestingly, this amendment was not included in the [original House bill passed in May](#), nor was it included in the Senate's original version of the NDAA. It appears to have been added late in the process, perhaps in response to a [recent GAO report](#) suggesting that Contracting Officers dislike the "trust but verify" option-and that their dislike may be partly to blame for the underwhelming number of WOSB set-aside contracts that have been awarded since 2011.

The NDAA has passed both the House and Senate, and is expected to be signed into law soon. For better or for worse, 15 U.S.C. § 637(m) is about to be amended, and I don't see any room for self-certification in this revised text. Unless the SBA reads it differently, WOSB self-certification-and the WOSB Document Repository-my soon go the way of the dinosaurs.

*Article posted courtesy of  
Steven Koprince*

## **Court Of Federal Claims Invalidates Key Component Of The SBA's Non-manufacturer Rule**

It has been the common understanding within the SBA, and the small business government contracting community as a whole, that the SBA's non-manufacturer rule applies only to contracts for the provision of supplies (i.e., goods) and not to service contracts, regardless of whether or not such service contracts have a supply component. The SBA

and start using this WOSB program.

The NDAA also included other small business contracting changes, including prohibitions on reverse auctions for certain contracts, increased transparency on bundled contracts, and simplified design-build acquisition processes.

*Article posted courtesy of  
Gloria Larkin, President of Targetgov and  
APTAC Contributor*

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memorialized this understanding in a 2011 rulemaking. According to 13 C.F.R. § 121.406(b)(3), the non-manufacturer rule does not apply to procurements that are assigned a services, construction, or specialty trade construction code.

The U.S. Court of Federal Clams (COFC) recently turned this common understanding about the non-manufacturer rule on its head. In its September 19, 2014, decision in *Rotech v. United States*, COFC No. 14-502C (2014), the COFC invalidated 13 C.F.R. § 121.406(b)(3). Specifically, the COFC found that the plain language of the non-manufacturer rule in the Small Business Act indicates the rule applies to "any" supplies being procured via a small business set-aside contract. Thus, the COFC reasoned that "any" supplies means even those supplies procured as an ancillary part of a contract assigned a services or construction code.

As a result of the COFC's ruling in *Rotech*, small businesses must now comply with the non-manufacturer rule for any supplies provided, even under a contract primarily for services. It is unclear how broad the reach of the decision could be but, in theory, it could have a massive impact on how small businesses perform federal contracts and how contracting officers solicit such contracts. The non-manufacturer rule requires eligible small businesses to meet requirements that are different from the standard limitation on subcontracting rules. Specifically, to qualify as a non-manufacturer, a small business must:

1. Have 500 employees or less;
2. Be primarily engaged in the retail or wholesale trade and normally sell the items being supplied under the contract;
3. Take ownership or possession of the items being supplied with its own personnel or facilities; and
4. Supply the end item of a small business manufacturer unless the contracting officer obtains a waiver or a class waiver exists for the items being supplied.

Based on *Rotech*, small businesses entering into service contracts where supplies are also being provided must apply this four-part test to the supply portion of the contract, in addition to meeting the standard performance of work requirements for the services portion of the project.

Further, contracting officers must now make a determination, prior to the issuance of any service contract where supplies are a component, as to whether a small business exists that can manufacture the supplies required by the contract. If there is a

small business, the supplies being used under the service contract must come from a small business manufacturer. This means that, by way of example, an IT company providing certain computer components must provide components manufactured by a small business or it would be in violation of the rule and not qualify as "small" for the procurement. If there is no small business manufacturer for the supplies being used (i.e., say you need Cisco routers and no small business supplies the same or similar routers) then the contracting officer would have to check if the SBA has issued a class waiver to the non-manufacturer rule for those items or whether a contract-specific waiver is required. If there is no class waiver, then the contracting officer will either have to issue the contract as a full-and-open procurement, likely excluding most or all small businesses, or he/she will have to prepare a written justification for the non-manufacturer, contract-specific waiver and request said waiver from SBA. SBA will then review the issue, investigate whether any small businesses exist who manufacture the supplies requested, and then, if and only if, no small business exists, issue the requested contract specific waiver - thereby allowing small businesses to compete for the procurement. Thus, before even soliciting a service contract where supplies are required, the contracting officer will have to do substantial additional due diligence.

Another major concern for small businesses, due to the COFC's ruling, is whether small business service contractors would ever be able to qualify as small under the non-manufacturer rule at all because they are service providers, not companies "primarily engaged in the retail or wholesale trade" or "normally sell[] the type of item being supplied" as the rule requires. Thus, if an IT service provider is not "primarily engaged in the retail or wholesale trade" o routers, they just install them and service them, but a procurement requires routers to be supplied (regardless of how small a portion of the contract that supply actual is) the IT service provider would not be an eligible small business under the non-manufacturer rule and would, thus, no longer qualify as "small" for the entire contract. This is clearly not what was intended by Congress when drafting the Small Business Act, but due to imprecise drafting, it is now how the COFC is forced to interpret the Act. This is extremely unfortunate and, unless and until the recent decision is limited through future legislation, this could have a major impact on small business service contractors.

*Article posted courtesy by:  
Cy Alba*

**About Us**

The PTAC at SAP&DC is an economic development entity that bridges the gap between supplier and buyer in the government marketplace. The PTAC stands ready to support businesses in the Alleghenies region in their pursuit to secure contracts with local, state and/or federal government agencies nationwide by:

- Identifying niche government markets and specific contract opportunities
- Assisting with bid and proposal preparation
- Preparing the required vendor registrations
- Navigating your company through the requirements and procedures of government contracting
- Enhancing competition by obtaining applicable socio-economic certifications
- Providing guidance to ensure successful post-award contract performance

**Due to the generous support of our Commonwealth and Federal funding partners, services provided by the PTAC are free of charge.**

Whether you are an experienced contractor or new to the government marketplace, the PTAC will provide one-on-one counseling utilizing the following program resources to increase your share of contact awards.

#### **PTAC Resources**

- Electronic Bid Matching for products and services
- Military/Commercial specifications and standards
- Past procurement information and pricing histories
- State and Federal regulations guidance
- Professional training and outreach events
- Quality assurance and packaging guidance

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