

# Proposed Rules

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This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

## SMALL BUSINESS ADMINISTRATION

### 13 CFR Parts 124 and 127

RIN 3245–AG75

#### Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business—Certification

**AGENCY:** U.S. Small Business Administration.

**ACTION:** Proposed rule.

**SUMMARY:** The Small Business Administration (SBA) is proposing to amend its regulations to implement a statutory requirement to certify Women-Owned Small Business Concerns (WOSB) and Economically Disadvantaged Women-Owned Small Business Concerns (EDWOSB) participating in the Women-Owned Small Business Contract Program.

**DATES:** Comments must be received on or before July 15, 2019.

**ADDRESSES:** You may submit comments, identified by RIN: 3245–AG75, by any of the following methods:

- *Federal eRulemaking Portal:* <https://www.regulations.gov>. Follow the instructions for submitting comments.

- *For mail, paper, disk, or CD/ROM submissions:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416.

- *Hand Delivery/Courier:* Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416. SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). If you wish to submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov), please submit the information to Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, 8th Floor, Washington, DC 20416, or send an email to [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov). Highlight the information that

you consider to be CBI and explain why you believe SBA should hold this information as confidential. SBA will review the information and make the final determination on whether it will publish the information.

**FOR FURTHER INFORMATION CONTACT:**

Brenda Fernandez, U.S. Small Business Administration, Office of Policy, Planning and Liaison, 409 Third Street SW, Washington, DC 20416; (202) 207–7337; [brenda.fernandez@sba.gov](mailto:brenda.fernandez@sba.gov).

**SUPPLEMENTARY INFORMATION:** The WOSB Federal Contract Program (hereinafter referred to as the “Program”), set forth in section 8(m) of the Small Business Act, 15 U.S.C. 637(m), authorizes Federal contracting officers to restrict competition to eligible WOSBs or EDWOSBs for Federal contracts in certain industries. Section 825 of the National Defense Authorization Act for Fiscal Year 2015, Public Law 113–291, 128 Stat. 3292 (December 19, 2014) (2015 NDAA), amended the Small Business Act to grant contracting officers the authority to award sole source awards to WOSBs and EDWOSBs and shorten the time period for SBA to conduct a required study to determine the industries in which WOSBs are underrepresented. In addition, section 825 of the 2015 NDAA amended the Small Business Act to create a requirement that a concern be certified as a WOSB or EDWOSB by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the authority of section 8(m) of the Small Business Act. 15 U.S.C. 637(m)(2)(E). The certification requirement applies only to participants wishing to compete for set-aside or sole source contracts under the Program. Once this rule is finalized, WOSBs that are not certified will not be eligible to compete on set asides for the Program. Other women-owned small business concerns that do not participate in the Program may continue to self-certify their status, receive contract awards outside the Program as WOSBs, and count toward an agency’s goal for awards to WOSBs. For those purposes, contracting officers would be able to accept self-certifications without requiring them to verify any documentation. SBA is proposing to provide certification, to accept certification from certain identified

government entities, and to allow certification by SBA-approved third party certifiers. As part of the changes necessary to implement a certification program, SBA is also proposing to amend its regulations with regard to continuing eligibility and program examinations. SBA is also proposing to adjust the economic disadvantage thresholds applicable to determining whether an individual qualifies as economically disadvantaged for participation in the 8(a) Business Development (BD) Program to make them consistent with the thresholds applicable to whether a woman qualifies as economically disadvantaged for EDWOSB status.

On September 14, 2015, SBA published in the **Federal Register** a final rule to implement the sole source authority for WOSBs and EDWOSBs and the revised timeline for SBA to conduct a study to determine the industries in which WOSBs are underrepresented. 80 FR 55019. SBA did not address the certification portion of the 2015 NDAA in this final rule because its implementation is more complicated, could not be accomplished by merely incorporating the statutory language into the regulations, and would have delayed the implementation of the sole source authority unnecessarily. SBA notified the public that because it did not want to delay the implementation of the WOSB sole source authority by combining it with the new certification requirement, SBA decided to implement the certification requirement through a separate rulemaking.

As part of the process to craft the regulations governing the WOSB/EDWOSB certification program, SBA issued an Advance Notice of Proposed Rulemaking (ANPR) on December 18, 2015. 80 FR 78984. The ANPR solicited public comments to assist SBA in drafting a proposed rule to implement a WOSB/EDWOSB certification program. SBA received 122 comments in response to the ANPR. SBA has reviewed all the comments while crafting this proposed rule and received additional input from interested stakeholders.

This proposed rule also proposes changes to § 124.104(c), to make the economic disadvantage requirements for the 8(a) BD program consistent to the economic disadvantage requirements for women-owned firms seeking EDWOSB

status. The proposed change would eliminate the distinction in the 8(a) BD program for initial entry into and continued eligibility for the program. The economic disadvantage criteria for EDWOSBs equate to the continuing eligibility criteria for the 8(a) BD program. This has resulted in the anomaly of a concern applying for EDWOSB and 8(a) BD status simultaneously and being found to be economically disadvantaged for EDWOSB purposes, but denied eligibility for the 8(a) BD program based on not being economically disadvantaged. This proposed rule intends to make economic disadvantage for the 8(a) BD program consistent to that for a woman seeking to qualify as economically disadvantaged for the EDWOSB program. SBA does not believe that it makes sense to allow a woman to qualify as economically disadvantaged for EDWOSB purposes, but to then be declined from 8(a) BD participation for not being economically disadvantaged.

In addition, SBA notes that in September 2017, SBA awarded a contract to conduct a study to assist the Office of Business Development in defining or establishing criteria for determining what constitutes “economic disadvantage” for purposes of firms applying to the 8(a) BD program. The results supported a \$375,000 adjusted net worth for initial eligibility, as compared to the current \$250,000 threshold. The study did not, however, consider differences in economic disadvantage between applying to the 8(a) BD program and continuing in the program once admitted. Because SBA believes that it is important to have the same economic disadvantage criteria for the 8(a) BD program as for the EDWOSB program, to avoid confusion and inconsistency between the programs, SBA considered applying a \$375,000 net worth standard to both the 8(a) BD and EDWOSB programs. SBA concluded that the \$375,000 net worth standard may not be appropriate as the standard for determining economic disadvantage because it related to entry into the 8(a) BD program as opposed to participation in the free enterprise system as an economically disadvantaged business owner. As such, this rule proposes to adopt the \$750,000 net worth continuing eligibility standard for all economic disadvantage determinations in the 8(a) BD program. SBA specifically requests comments on whether the \$375,000 net worth standard or the \$750,000 net worth standard should be used for both the 8(a) BD and EDWOSB

programs. In particular, SBA requests comments on how the different standards would affect small business owners participating in the federal marketplace.

SBA is proposing to amend 13 CFR 127 subpart C to establish the process by which SBA will certify firms as WOSBs or EDWOSBs. Proposed § 127.300(a) would provide that SBA will provide a free electronic application process to all firms seeking to be certified as WOSBs or EDWOSBs. In the pursuit of speed, efficiency, and ease of administrative burden, applicants would apply online through an electronic application process. Electronic applications are much faster to process than paper applications as the information can be sorted and searched for digitally. Electronic applications force all mandatory fields to be completed, thereby eliminating incomplete applications. Moreover, through electronic applications, notifications can be sent to applicants to confirm receipt of their applications, along with any follow-up electronic correspondence, rather than through time-consuming paper mail. Transitioning to purely electronic applications will also reduce transactions costs for the agency, saving taxpayer dollars in the process. Data analysis will also be enhanced as applications move to be only electronic. The ability to process WOSB and EDWOSB certifications in an expedited fashion will further SBA’s mission to increase the number of WOSBs that win Federal Government contracts.

SBA is proposing that applicants would have the opportunity to request reconsideration of an initial decline decision, which would be consistent with the 8(a) BD application process. The contract protest mechanism, allowing interested parties to challenge the WOSB/EDWOSB status of an apparent successful offeror, will remain the same with an appeal right and will serve as a means to ensure that concerns awarded a Federal contract based on their WOSB or EDWOSB certifications are eligible for award.

SBA’s regulations currently authorize the following WOSB/EDWOSB certifications: (1) Certification by third party national certifying entities approved by SBA, (2) certification by SBA as a Participant in the 8(a) BD program where the concern is owned and controlled by one or more women, and (3) concerns certified as owned and controlled by women and certified as Disadvantaged Business Enterprises (DBEs) by states pursuant to the U.S. Department of Transportation’s (DOT’s) DBE program. 13 CFR 127.300(d).

Although the current program principally relies on self-certification, it also permits SBA to have non-governmental third party certifiers approved by SBA. SBA approved four non-governmental entities for that purpose as an alternative option for WOSB or EDWOSBs. These entities are not restricted from assessing fees for certification. In the ANPR, SBA sought comments on how those certification processes are working, how they can be improved, and how best to incorporate them into the new certification requirements. Almost all of the 122 comments that SBA received mentioned third party certifiers or their process. Overwhelmingly the commenters urged SBA to craft a system that would be as uniform as possible, with applicants not being treated differently depending on whom they chose for certification purposes. Almost every commenter that mentioned the topic also wanted the certification process by SBA to be free for all applicants. Commenters noted that 8(a) BD program applicants and HUBZone program applicants do not pay a fee for certification. Overall, commenters suggested that SBA create a clear, transparent, consistent, and free certification process. Commenters supportive of authorized third party certifiers offered that speed to certification is one attraction that might be worth the cost. SBA also received comments concerning whether a third party certifier could be a for-profit entity. The legislation does not limit participation as a third party certifier to entities that are non-profit, and SBA is not proposing any limitation. The proposed rule would also require any approved third party certifier to notify an applicant of its fees and the ability to apply online with SBA at no cost.

After evaluating the comments, SBA has determined that the new legislation permits a balance of options for the public. SBA has previously determined that the act of certifying a firm as eligible to receive a federal contract is generally an inherently governmental function. However, the 2015 NDAA specifically gives to SBA the authority to use a non-governmental certifying entity approved by SBA which is unique to the WOSB Program and does not affect inherently governmental authorities for approval as required in the 8(a) BD or HUBZone programs. SBA proposes to exercise this authority and will promulgate the requirements that prospective national certifying entities must adhere to in order to be approved.

SBA also proposes to use existing government entities at the Federal and State levels that have valid certification programs which SBA could accept in

lieu of an SBA only process. In addition to those that will apply directly to SBA for WOSB or EDWOSB certification, or through an approved national entity, the proposed rule would authorize SBA to accept certifications that have been issued by SBA, a Federal agency or State authority under the DOT/DBE program. SBA already certifies firms as eligible for its 8(a) BD and HUBZone programs without concerns being charged a fee for applying. The Department of Veterans Affairs (VA) certifies veteran-owned small businesses (VOSBs) and service-disabled veteran-owned small businesses (SDVOSBs) at no cost through its Center for Verification and Evaluation (CVE). Many veterans are also women. This rule proposes that SBA accept certifications by SBA (for the 8(a) BD and HUBZone programs) and VA that a firm is owned and controlled by women for purposes of WOSB/EDWOSB certification. The DOT DBE program has authority for certifying women under its State-run programs. Similarly, SBA proposes to accept these certifications that a firm is owned and controlled by women as well. SBA is therefore proposing to amend § 127.300 by deleting paragraphs (b) through (f) and explaining that the certification process will be handled by SBA and that SBA will accept, under certain conditions, the aforementioned Federal or State third party certifications.

SBA will accept from the VA, VOSB or SDVOSB certification for women veterans, provided that the business concern is 51% owned and controlled by one or more women who are veterans or service-disabled veterans. VA applies SBA's standards of ownership and control under its Center for Verification and Evaluation (CVE) program. Because VA does not determine economic disadvantage, SBA will only accept VA certifications as evidence of ownership and control by women. Women veterans or service-disabled veterans seeking EDWOSB status would have to apply directly to SBA for this certification. In such a case, SBA would accept VA's determination that the firm is owned and controlled by women, but the firm would still have to demonstrate that the women are economically disadvantaged.

Similarly, SBA will accept the DOT/DBE certification for WOSB eligibility. Because the thresholds of economic disadvantage are different between SBA and DOT's DBE program, SBA cannot accept the economic disadvantage determination of a DBE for the EDWOSB certification. Interested parties seeking EDWOSB status will have to apply directly to SBA for this certification.

SBA believes that there may difficulty in processing all the potential

applications of those seeking WOSB or EDWOSB certifications in a timely manner. There are currently approximately 10,000 firms in the WOSB repository. SBA's 8(a) Business Development program processes approximately 3,000 applications a year, and SBA's HUBZone program processes approximately 1,500 applications per year. Because the WOSB/EDWOSB program is being designed so that only firms that have been certified are eligible for contracts through the program, SBA expects a large influx of applications as soon as these rules are finalized. If all those firms currently in the repository seek WOSB/EDWOSB certification from SBA immediately, there most likely will be a delay for many firms seeking certification. SBA is requesting comments on possible solutions to this potential bottleneck. One solution that SBA is considering is to adapt a process similar to that previously used by SBA in certifying firms as small disadvantaged businesses (SDBs) when there was an SDB program. Under such an approach, a firm could submit an offer as a WOSB or EDWOSB if it had submitted an application to SBA and had not received a negative determination regarding that application at the time it submits its offer. A concern would be required to notify the procuring agency of this conditional status in its offer. If a concern then becomes the apparent successful offeror on a WOSB/EDWOSB contract, the contracting officer would notify SBA and SBA would prioritize the firm's application and make a determination within 15 days from the date SBA received the contracting officer's notification. Such a timeframe should not be detrimental since it is the same afforded for size and status protests today. SBA specifically requests comments on this alternative and other possible approaches that would help ease the transition from self-certification to a required certification program.

Proposed § 127.301 and § 127.306 would provide guidance on how a concern may apply to the WOSB/EDWOSB Program. Proposed § 127.301 would provide guidance on initial applications, and proposed § 127.306 would address the procedures for denied applications and decertifications. Proposed § 127.305 would provide that WOSB Program applicants will be permitted to request reconsideration, within 30 calendar days of notification of an initial decline decision. In proposed § 127.306, SBA would require a one-year waiting period for a concern to re-apply after a decline or decertification. Currently the 8(a) BD

program requires a concern to wait one year to reapply after a denied application. 13 CFR 124.207. SBA will render a final decision within 60 calendar days of a reconsideration request. In response to the SBA ANPR, many commenters requested that SBA adopt an appeal process for denied applications similar to the 8(a) BD development program. Other commenters wanted to emphasize giving concerns an ability to ask SBA to reconsider the application and make changes. SBA's HUBZone certification process does not currently utilize an appeal or reconsideration process. SBA is not proposing to adopt an appeal process similar to the 8(a) BD program for the WOSB Program, but would allow concerns the ability to request reconsideration. SBA believes that the reconsideration process should be sufficient for a firm to understand its deficiencies and come into compliance with the HUBZone eligibility requirements.

Proposed § 127.302 would provide information on how a concern may apply for certification. SBA is proposing to process all applications online. SBA is currently already processing all 8(a) BD program and HUBZone program applications electronically, and this would be an extension of that application process to the WOSB Program. Current participants in the WOSB Program have been using <https://certify.sba.gov> to self-certify for the past year.

Proposed § 127.303(a) would describe the information and documents that must be submitted during the electronic application process. In the ANPR, SBA requested comments on what information and documents should be collected during an application. Most commenters believed that SBA should continue to collect the documents listed in the current version of § 127.300(e). SBA agrees with these comments and while that list is not exhaustive, SBA believes that it is illustrative of the amount and types of documents that SBA will be collecting during the electronic application process. SBA is proposing to maintain the list of required documents on its website, and that the list of required documents "may include, but is not limited to, corporate records, and business and personal financial records, including copies of signed Federal personal and business tax returns, individual and business bank statements." This is similar to the approach of SBA's other programs, in which SBA provides more detail of the documents required on SBA's website as well as part of the application process.

Proposed § 127.303(b) would make clear that SBA may need to request additional documents during the application process in order to confirm eligibility. Proposed § 127.303(c) would state that it is the concern's responsibility to notify SBA of any changes that could affect the firm's eligibility while SBA is reviewing the application. SBA is proposing to add new paragraphs § 127.303(d) and (e) to detail the additional information that concerns reapplying after a denial or decertification are required to submit. The proposed rule provides that concerns reapplying for certification will have to submit information showing what changes have been made to remedy the issues of ineligibility in the initial application.

Proposed § 127.304 would detail how SBA will process applications. WOSB program applicants will have their packages reviewed, similar to the 8(a) BD program, within 15 calendar days for completeness of an application. Concerns will be notified if required information is missing, and that SBA will not process incomplete applications. SBA proposes that it will make its determination within 90 days after a concern submits a complete application. This is consistent with the time frames and policies established for SBA's other certification programs. The 90-day time frame will not begin to run on submitted but incomplete applications. SBA proposes that after a complete application is submitted, SBA could still need additional information from an applicant. Proposed paragraph (c) would provide that it is the applicant's responsibility to demonstrate its eligibility and that SBA could draw adverse inferences when a concern fails to provide documents and information that SBA has requested. Proposed paragraph (d) would provide that a concern must be eligible when it applies, and must maintain its eligibility throughout the time SBA is evaluating its application. Proposed paragraph (e) would provide that any changes in circumstances may be relevant to a concern's eligibility, that a concern has an affirmative duty to notify SBA of any changes, and that SBA may decline to certify a concern that fails to notify SBA of changed circumstances. Proposed paragraphs (f) and (g) would provide that any decision regarding an application will be in writing. Proposed paragraph (f) would also state that it will be SBA's responsibility to update <https://certify.sba.gov> (or any successor system) and the System for Award Management, to indicate the firm has been certified by SBA.

Proposed § 127.305 would authorize a reconsideration process, which would permit a firm found to be ineligible to address deficiencies and change its bylaws, articles of incorporation, or other ownership documents to come into compliance with SBA's ownership and control requirements. As mentioned above, this is consistent with SBA's current application and continuing eligibility process for the 8(a) BD program. The goal of this proposed change is to allow eligible concerns to become certified as quickly as possible, even if there were deficiencies or eligibility issues on their initial applications.

Proposed § 127.306 would provide that concerns may reapply to the program one year after a final decline or decertification decision.

### Third Party Certification

SBA is proposing to further amend subpart C of part 127 to establish procedures for Third Party Certification in the context of a required certification program. In proposed § 127.350, SBA is proposing that all Third Party Certifiers (TPCs) must be approved by SBA. Under the proposed rule, an approved TPC need not be a non-profit entity. SBA is also clarifying that a TPC is a non-governmental entity, in contrast to the governmental certifications (8(a), DOT/DBE, VA/CVE) that SBA will accept for WOSB/EDWOSB certification purposes.

SBA is proposing that in order to be certified by a TPC, an applicant must be registered in the System for Award Management (SAM) and must upload all required documents in *certify.gov*. An applicant using a TPC would be required to provide the TPC with access to the documents in *certify.sba.gov*. A firm certified by a TPC would need to upload the written certification from a TPC to <https://certify.sba.gov> (or any successor system). Proposed § 127.352 would provide that SBA will maintain the instructions for becoming a TPC on SBA's website.

Proposed § 127.353(a) would permit TPCs to charge a fee. As noted above, commenters generally favored free certification, but those comments pertained to certification by the Government and other commenters recognized a value to having TPCs in certain instances. SBA notes that any applicant that wishes to have its application for certification processed without a fee would always be able to submit its application to SBA. SBA recognizes that TPCs currently charge a fee to certify WOSBs, and believes that this option should not be eliminated for any applicant seeking the services of a

TPC. Further, § 127.353(a)(1) and (2) would provide that all TPCs must notify potential applicants of the free option offered by SBA at the beginning of the application process. In addition, proposed § 127.353(b) would require that the method of the notification must be approved by SBA.

Proposed § 127.354 would provide the certification standards that TPCs must meet. The proposed rule identifies minimum standards that need to be met. As noted above, SBA received suggestions that consistency between certification options offered by various certifiers would be helpful for participants, and help alleviate possible confusion from having multiple certification options. These baseline standards will provide some consistency between various certifiers, ensuring that all certifiers are meeting the same minimum requirements.

Proposed § 127.355 would establish procedures that SBA will utilize to ensure that TPCs are meeting the requirements of subpart D. Specifically, SBA is proposing that it will conduct periodic compliance reviews, and that SBA may revoke its approval of a TPC that is not meeting the requirements.

Proposed § 127.356 would create the process for certification by a TPC. SBA is proposing that concerns submit their applications directly to the TPC, register in SAM, and upload all of the documents to *certify.sba.gov*. The applicant will provide the TPC with access to its documents in *certify.sba.gov*. Once certified, the applicant will upload the approval document to *certify.sba.gov*.

Proposed § 127.357 would address ineligibility determinations made by TPCs. Proposed § 127.357(a) would permit a concern found to be ineligible by a TPC to request reconsideration and a redetermination, at no additional cost to the concern. Proposed § 127.357(a) would also require the TPC to complete the reconsideration process within 60 calendar days. Finally, the proposed rule would prohibit a declined firm from reapplying for WOSB or EDWOSB certification by SBA or a TPC for a one-year period.

SBA is proposing to amend subpart D of part 127 to establish procedures for maintaining a concern's certification as WOSB or EDWOSB and conducting program examinations of WOSB program participants after certification. Proposed § 127.400 would require that concerns recertify their eligibility every three years. SBA proposes that failure to recertify in the time period provided will result in the concern being decertified, and thus removed as a certified WOSB or EDWOSB from the

Dynamic Small Business Search (DSBS) system.

Proposed § 127.401 would establish the ongoing obligations of certified WOSB Program participants. Specifically, this provision would provide that all certified concerns have an affirmative duty to notify SBA of any material changes in writing. Proposed § 127.402 would address the failure of a concern to recertify every three years or to notify SBA of a material change. The proposed language makes clear that such concerns would be decertified.

Proposed § 127.403 pertains to program examinations. Program examinations under the new regulations will serve a similar function as they had previously. However, they will be inherently different with the proposed new SBA certification. Proposed paragraph (a) would establish that an examination is an investigation by SBA to verify the accuracy of any WOSB/EDWOSB certification and to ensure that currently certified concerns continue to meet the eligibility criteria of the WOSB Program. Proposed paragraph (b) would provide that program examinations will be conducted by SBA staff, SBA field staff or others designated by the SBA's Director of Government Contracting (D/GC).

Proposed paragraph § 127.403(c) establishes that the scope of review for examinations is any information that is related to a concern's eligibility. SBA may conduct site visits when appropriate as part of the program examination. Further, proposed paragraph (d) would require that it is the program participant's responsibility to ensure that all required information has been submitted to SBA and that all that information is up to date and accurate. Additionally, this proposed section would provide that all of the required information is considered material by SBA in determining a concern's eligibility and that the information is assumed to be truthful and current.

Proposed § 127.404 would authorize SBA to conduct program examinations at its discretion any time after a concern has submitted an application to be certified. This regulation also clarifies that SBA may initiate an examination of a concern without notification. As noted above, in order to apply to the WOSB program and maintain eligibility a concern must provide SBA with required documents and information. This provision would provide that SBA may review any previously submitted information at any time as part of a program examination. Given that SBA may not need additional information

when it begins the examination, it is not necessary to notify concerns that SBA is reviewing material that has already been submitted to SBA. Proposed § 127.405 would make clear that in addition to reviewing material already submitted, SBA may also request additional information when conducting a program examination.

Proposed § 127.406 would authorize SBA to decertify concerns that fail to provide or maintain the required certifications or documents. As noted above, SBA will maintain a list of all the required documents that a concern must provide and keep up-to-date. Concerns that fail to meet this requirement would be proposed for decertification. SBA would also propose decertification for firms that SBA determines no longer meet the eligibility requirements. Concerns would be proposed for decertification pursuant to § 127.406(a). Concerns proposed for decertification would be given 15 calendar days to respond. Proposed § 127.406(a)(3) would be added to establish that SBA will generally not consider new evidence in a response. SBA also proposes to add § 127.406(b) which would state that when a concern is decertified pursuant to this section, the D/GC will issue that decision in writing and will consider all the reasons why the firm was proposed for decertification. Further, this section would provide that SBA may draw adverse inferences when making this eligibility determination. Proposed § 127.406(c) would provide that decertified firms would be able to reapply to the program one year after decertification.

SBA is proposing to remove § 127.505, as the pertinent information in this provision is already detailed in § 121.406(b).

This proposed rule would not change the general procedures concerning WOSB/EDWOSB protests in relation to contract actions. A concern that has been determined ineligible as part of a status protest could continue to appeal that decision pursuant to newly redesignated § 127.605. However, SBA is proposing to amend newly redesignated § 127.604(f)(4) to clarify that firms found to be ineligible would need to reapply rather than request a reexamination. The proposed language also provides a citation to the appropriate regulation for reapplication procedures.

**Compliance With Executive Orders 12866, 13563, 12988, 13132, and 13771, the Paperwork Reduction Act (44 U.S.C. Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601–612).**

#### **Executive Order 12866**

The Office of Management and Budget (OMB) has determined that this proposed rule is a significant regulatory action for the purposes of Executive Order 12866. Accordingly, the next section contains SBA's Regulatory Impact Analysis. This is not a major rule, however, under the Congressional Review Act.

#### **Regulatory Impact Analysis**

##### *1. Is there a need for the regulatory action?*

The U.S. Small Business Administration (SBA) is required by statute to administer the WOSB Federal Contract Program (WOSB Program). The Small Business Act (Act) sets forth the certification criteria for the WOSB Program. Specifically, the Act states that a WOSB or EDWOSB must, "be certified by a Federal agency, a State government, the Administrator, or a national certifying entity approved by the SBA Administrator, as a small business concern owned and controlled by women." 15 U.S.C. 637(m)(2)(E).

The Federal Acquisition Regulation (FAR) and SBA regulations require that in order to be certified as a WOSB or EDWOSB a small business concern must provide documents supporting its WOSB or EDWOSB status to SBA. See 13 CFR 127.300 and FAR 19.1503(b)(3). The specific documents firms are required to provide are outlined in §§ 127.300(d) and (e). The Act also states that the SBA is authorized to conduct eligibility examinations of any certified WOSB or EDWOSB, and to handle protests and appeals related to such certifications. Id. § 637(m)(5)(A) and (5)(B).

Under the current system firms may be certified by third party certifiers, or they may essentially self-certify and upload the required documents to *sba.certify.gov*. In order to award a WOSB set-aside or sole source contract, the contracting officer must document that the contracting officer reviewed the firm's certifications and documentation. 13 CFR 127.503(g); FAR 19.1503(b)(3). The lack of required certification, coupled with the requirement that the contracting officer must verify that documents have been uploaded, may contribute to reluctance to use the program, resulting in the failure to meet the statutory goal of 5% of all prime contract dollars being awarded to

WOSBs. In FY 2017, the government wide WOSB goal of 5% was not met with actual performance at 4.71% (\$20.8B). The government has only met the goal once (FY 2015). While the amount of dollars awarded to WOSBs under the set aside program are trending up, they still account for less than 0.016% of dollars awarded to WOSBs. A certification could help entice agencies to set aside more contracts for WOSBs, so that the government can meet the statutory 5% goal.

## 2. What are the potential benefits and costs of this regulatory action?

The benefit of the proposed regulation is a significant improvement in the confidence of contracting officers to make Federal contract awards to eligible firms. Under the existing system, the burden of eligibility compliance is placed upon the awarding contracting officer. Contracting officers must review the documentation of the apparent successful offeror on a WOSB or EDWOSB contract. Under this proposed rule, the burden is placed upon SBA and/or third party certifiers. All that a contracting officer need do is to verify that the firm is fact a certified WOSB or EDWOSB in SAM. A contracting officer

would not have to look at any documentation provided by a firm or prepare any internal memorandum memorializing any review. This will encourage more contracting officers to set aside opportunities for WOSB Program participants as the validation process will be controlled by SBA in both SAM and DSBS. Increased procurement awards to WOSB concerns can further close a gap of underrepresentation of women in industries where in the aggregate WOSB represent 12 percent of all sales in contrast with male-owned businesses that represent 79% of all sales (per SBA Office of Advocacy Issue Brief Number 13, dated May 31, 2017 <https://www.sba.gov/sites/default/files/advocacy/Womens-Business-Ownership-in-the-US.pdf>).

Another benefit of the proposed regulation is to reduce the cost associated with the time required for completing WOSB certification by replacing the WOSB Program Repository with *Certify.SBA.gov* ("Certify") in the regulation. It is also anticipated that the proposed WOSB certification methodology and likely increased use of WOSB/EDWOSB set asides may increase program participation levels by approximately 32%. Under the prior

WOSB Program Repository, SBA determined that the average time required to complete the process required by the WOSB Program Repository was two hours, whereas the use of Certify results requires only one hour. Across an estimated 12,347 firms, the total cost savings is significant, as discussed below. Another potential benefit is the reduction of time and costs to WOSB firms through the reduction of program participation costs. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially from \$2,533,200 to \$967,965.

Based on the calculations below, the total estimated number of respondents (WOSBs and EDWOSBs) for this collection of information varies depending upon the types of certification that a business concern is seeking. For initial certification, the total estimated number of respondents is 9,349. The total number was calculated using the two-year average number of business concerns that have provided information through Certify from March 2016 through February 2018. For annual updates, the total number is 12,347. For examinations and protests, the total number is 130.

Type of certification	Number of respondents	Source
Initial certification .....	9,349	Average annual number of respondents to Certify between March 2016 and February 2018.
New certifications each year .....	500	Program participation is expected to remain constant after initial year of certification, with 500 new certifications annually.
Annual updates to certification .....	11,847	Program participation is expected to remain constant after initial year of certification, with a reduction of 500 participants annually through attrition.
Total annual responses .....	12,347	Annual new certifications plus annual updates.

Each respondent submits one response at the time of initial certification and one at the time of annual update. Estimated burden hours vary depending upon the type of certification that a WOSB or EDWOSB pursues. SBA conducted a survey among a sample of entities that assist WOSBs and EDWOSBs to provide information through Certify. The majority of those surveyed stated that for initial certifications the estimated time for completion is one hour per submission. For annual updates, because of the need to submit little if

any additional information, the estimated burden is 0.5 hour per submission. For examinations and protests, the estimated burden is 0.25, which is much lower because firms have already provided the required documents identified in 13 CFR 127.300(d) and (e) through Certify. It is estimated that the initial certification will involve 9,349 existing participants and 2,998 new respondents in the first year. After the first year, initial certifications are expected for 500 new respondents annually with an additional 11,847 annual certifications

for existing participants for a total of 12,347 participants in each succeeding year. The participant level is expected to remain stable at 12,347 participants annually with 500 new respondents and 500 attritions from the program annually. Further, 130 respondents are expected to participate in protests and appeals. The respondent's cost of burden hours for a five year period and average is provided in the following table.

## COST OF BURDEN HOURS—5 YEAR COST ESTIMATE AND AVERAGE

Year	Initial—existing 1 hr @ \$77.58 per participant	Initial—new participants 1 hr @ \$77.58 per participant	Annual updates .5 hr @ \$77.58 per participant	Examinations and protests .25 hr @ \$77.58 per participant	Annual totals
<b>Number of Program Participants</b>					
1 .....	9,349	2,998	.....	130	12,477
2 .....	.....	500	11,847	130	12,477
3 .....	.....	500	11,847	130	12,477
4 .....	.....	500	11,847	130	12,477
5 .....	.....	500	11,847	130	12,477
<b>Costs</b>					
1 .....	\$725,295	\$232,585	.....	\$2,521	\$960,402
2 .....	.....	38,790	\$459,545	2,521	500,856
3 .....	.....	38,790	459,545	2,521	500,856
4 .....	.....	38,790	459,545	2,521	500,856
5 .....	.....	38,790	459,545	2,521	500,856
5 Year Total: .....	.....	.....	.....	.....	2,963,828
Annual Cost Avg .....	.....	.....	.....	.....	592,766

## (a) Respondent's Cost of Burden Hours:

Initial certification—transition of existing participants (one time cost):

Estimated officer's salary = \$77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

*Total estimated burden:* 9,349 × 1 hour × \$77.58/hour = \$725,295.

Initial certification—new participants (first year cost):

Estimated officer's salary = \$77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

*Total estimated burden:* 2998 × 1 hour × \$77.58/hour = \$232,585.

Initial certification—new participants (cost for each succeeding year after initial year):

Estimated officer's salary = \$77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

*Total estimated burden:* 500 × 1 hour × \$77.58/hour = \$38,790.

Annual update:

Estimated officer's salary = \$77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

*Total estimated burden:* 11,847 × .5 hour × \$77.58/hour = \$459,545.

## Examinations and Protests (each year):

Estimated officer's salary = \$77.58/hour (based on General Schedule 15 Step 10, Washington-Baltimore-Northern Virginia area), which would be equivalent to a senior manager in an average small business firm.)

*Total estimated burden:* 130 × .25 hour × \$77.58/hour = \$2,521.

SBA previously stated that the estimated total respondent's cost of burden hours was \$2,533,200 annually. By successfully leveraging technology, SBA has reduced the total cost of burden hours substantially from \$2,533,200 to \$960,402 for the initial year and \$500,856 annually in succeeding years, with respective savings of \$1,572,798 in the initial year and annual savings in successive years of \$2,032,344 and a five year savings of \$9,702,174 for WOSB to redirect as revenue generating resources to close the noted revenue disparity with male-owned businesses.

SBA believes that there are no additional capital or start-up costs or operation and maintenance costs and purchases of services costs to respondents as a result of this rule because there should be no cost in setting up or maintaining systems to collect the required information. As stated previously, the information requested should be collected and retained in the ordinary course of business.

## 3. What are the alternatives to this proposed rule?

The proposed regulations are required to implement specific statutory provisions which require promulgation of implementing regulations. One alternative considered would be to rely solely on third party certifiers to certify WOSBs and EDWOSBs. However, there is a cost to small businesses for third party certifiers. Firms submit the same documentation to third party certifiers that would submit to SBA, but third party certifiers charge on average \$380 annually. Consequently, the cost of relying completely on third party certifiers would be \$3,552,620.00 a year (9,349 initial applicants × \$380). If third party certifiers were used for the anticipated increase to 12,477 annual participants, the cost would be \$4,741,260. In addition, SBA maintains that certification for Federal procurement purposes is an inherently governmental function. Consequently, even if SBA utilized third party certifiers for an initial or preliminary review, SBA or a governmental entity would still have to be involved in reviewing those certifications. In addition, there is an intended benefit of certification. The intent is to increase confidence in the eligibility of firms so that contracting officers and activities utilize the sole source authority. Although trending upwards, WOSB/EDWOSB set aside and sole awards only accounted for 3.4% of total dollars awarded to WOSBs in FY 2017. The Federal Government has met the statutory WOSB goal of 5% of total



dollars awarded to WOSBs only once (FY 2015).

#### **Executive Order 13563**

As part of its ongoing efforts to engage stakeholders in the development of its regulations, on December 18, 2015, SBA issued an Advance Notice of Proposed Rulemaking in the **Federal Register**, 80 FR 78984. In response to that notice, SBA received 122 comments. SBA has incorporated those comments and suggestions in the proposed regulation to the extent feasible. In addition, SBA shared the proposed rule with the Small Business Procurement Advisory Council and the Federal Acquisition Regulation small business committee. In addition, the agency met with stakeholders.

#### **Executive Order 12988**

For purposes of Executive Order 12988, SBA has drafted this proposed rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of Executive Order 12988, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

#### **Executive Order 13132**

For the purpose of Executive Order 13132, SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this proposed rule has no federalism implications warranting preparation of a federalism assessment.

#### **Executive Order 13771**

This proposed rule is expected to be an Executive Order 13771 regulatory action. Details on the estimated costs of this proposed rule can be found in the rule's economic analysis.

#### **Paperwork Reduction Act, 44 U.S.C. Ch. 35**

In carrying out its statutory mandate to provide oversight of certification related to SBA's WOSB Federal Contract Program, SBA is currently approved to collect information from the WOSB applicants or participants through SBA Form 2413, and for EDWOSB applicants or participants, through SBA Form 2414. (OMB Control Number 3245–0374). This collection of information also requires submission or retention of documents that support the applicant's certification.

SBA has implemented a certification and information collection platform—

Certify—that replicates the currently approved information collection. In other words, the information collected through Certify includes eligibility documents previously collected in the WOSB Repository, and information collected on SBA Form 2413 (WOSB) and SBA Form 2414 (EDWOSB). SBA recently revised this information collection to establish that the agency has discontinued these paper forms and will collect the information and supporting documents electronically through Certify. The recent submission made minor changes to add one question to request information on classes of stock for a corporation and eliminated one question that was redundant.

As currently approved this collection of information is submitted by small business applicants or program participants who self-certify or who obtain certification from an SBA approved third-party certifier. SBA has determined that this proposed rule does not add any additional burden to what is already in place for the current documentation required for self-certification.

As discussed above, this rule proposes to fully implement the statutory requirement for small business concerns to be certified by a Federal agency, a State government, SBA, or a national certifying entity approved by SBA, in order to be awarded a set aside or sole source contract under the WOSB program. As a result of these changes, the rule proposes to eliminate the option to self-certify, set the standards for certification by SBA, and clarify the third-party certification requirements. SBA does not anticipate that these changes would impact the content of the information currently collected; however, it would be necessary to propose changes to the instructions, especially as they relate to self-certification, to make it clear that the option is no longer available. SBA does not believe that any required change to the instructions require the agency to resubmit the information collection to OMB for review and approval.

SBA notes that personal financial information reported on SBA Form 413 (Control Number 3245–0188) will also be submitted electronically through Certify by those applicants seeking SBA certification as an EDWOSB. However, applicants using third-party certifiers will continue to use the paper version of Form 413. This rule does not propose to make any changes to that collection. However, if comments on this proposed rule result in revisions to these WOSB/EDWOSB related collections of information, SBA will seek OMB

approval, if necessary, before the rule is finalized.

#### **Regulatory Flexibility Act, 5 U.S.C. 601–612**

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines “small entity” to include “small businesses,” “small organizations,” and “small governmental jurisdictions.” This proposed rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect “small organizations” or “small governmental jurisdictions.” SBA's contracting programs generally apply only to “business concerns” as defined by SBA regulations, in other words, to small businesses organized for profit. “Small organizations” or “small governmental jurisdictions” are non-profits or governmental entities and do not generally qualify as “business concerns” within the meaning of SBA's regulations.

As stated in the regulatory impact analysis this rule will impact approximately 9,000–12,000 women-owned small businesses. If adopted in final form, these businesses will have to apply to SBA for certification. However, SBA has proposed to minimize the impact on WOSBs by accepting certifications already received from SBA, through DOT's DBE program, or the VA's CVE program, and by providing firms that have been certified by third party certifiers with a one-year grace period for certification. The costs to WOSBs for certification should be de minimis, because the required documentation already exists: Such as articles of incorporation, bylaws, stock ledgers or certificates, tax records, etc. In addition, this information is already required to be provided either to third party certifiers, governmental certifying entities (e.g., DOT DBE, SBA 8(a) Business Development, VA CVE) or to SBA through Certify. Thus, the Administrator certifies that the rulemaking is not expected to have a significant economic impact on a substantial number of small entities.



**List of Subjects****13 CFR Part 124**

Administrative practice and procedure, Government procurement, Minority businesses, Reporting and recordkeeping requirements, Technical assistance.

**13 CFR Part 127**

Government contracts, Reporting and recordkeeping requirements, Small businesses.

For the reasons stated in the preamble, SBA proposes to amend 13 CFR parts 124 and 127 as follows:

**PART 124—8(a) BUSINESS DEVELOPMENT/SMALL DISADVANTAGED BUSINESS STATUS DETERMINATIONS**

■ 1. The authority citation for part 124 continues to read as follows:

**Authority:** 15 U.S.C. 634(b)(6), 636(j), 637(a), 637(d), 644 and Pub. L. 99–661, Pub. L. 100–656, sec. 1207, Pub. L. 101–37, Pub. L. 101–574, section 8021, Pub. L. 108–87, and 42 U.S.C. 9815.

■ 2. Amend § 124.104 as follows:

- a. Remove the first two sentences of paragraph (c)(2) introductory text and add one sentence in their place;
- b. Remove the first two sentences of paragraph (c)(3)(i) and add one sentence in their place; and
- c. Revise the first sentence of paragraph (c)(4).

The additions and revision read as follows:

**§ 124.104 Who is economically disadvantaged?**

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \* The net worth of an individual claiming disadvantage must be less than \$750,000. \* \* \*

(3) \* \* \* (i) SBA will presume that an individual is not economically disadvantaged if his or her adjusted gross income averaged over the three preceding years exceeds \$350,000. \* \* \*

(4) \* \* \* An individual will generally not be considered economically disadvantaged if the fair market value of all his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds \$6 million. \* \* \*

**PART 127—WOMEN-OWNED SMALL BUSINESS FEDERAL CONTRACT PROGRAM**

■ 3. The authority citation for part 127 continues to read as follows:

**Authority:** 15 U.S.C. 632, 634(b)(6), 637(m), 644 and 657r.

■ 4. Revise subpart C to read as follows:

**Subpart C—Certification of EDWOSB or WOSB Status**

**Certification by SBA**

Sec.

- 127.300 How is a concern certified as an WOSB or EDWOSB?
- 127.301 When may a concern apply to SBA for certification?
- 127.302 Where can a concern apply for certification from SBA?
- 127.303 What must a concern submit to SBA?
- 127.304 How will SBA process the application for certification?
- 127.305 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?
- 127.306 May declined or decertified concerns seek recertification at a later date?

**Certification by Third Party**

Sec.

- 127.350 What is a third party certifier?
- 127.351 What third party certifications may a concern use as evidence of its status as a qualified WOSB or EDWOSB?
- 127.352 What is the process for becoming a third party certifier?
- 127.353 May third party certifiers charge a fee?
- 127.354 What are the minimum required certification standards for a third party certifier?
- 127.355 How will SBA ensure that approved third party certifiers are meeting the requirements?
- 127.356 How does a concern obtain certification from an approved certifier?
- 127.357 What happens if a firm is found not eligible by a third party certifier?

**Subpart C—Certification of WOSB or EDWOSB Status**

**Certification by SBA**

**§ 127.300 How is a concern certified as an WOSB or EDWOSB?**

(a) *WOSB certification.* (1) A concern may apply to SBA for WOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A concern may submit evidence to SBA that it is a women-owned concern that is a certified 8(a) Participant, certified by the Department of Veterans Affairs (VA) CVE as a Service-Disabled

Veteran Owned Business or Veteran-Owned Business, or certified as a Disadvantaged Business Enterprise (DBE) by a state agency authorized by the Department of Transportation (DOT); or

(3) A concern may submit evidence that it has been certified as a WOSB by an approved Third Party Certifier in accordance with this subpart.

(b) *EDWOSB certification.* (1) A concern may apply to SBA for EDWOSB certification. There is no cost to apply to SBA for certification. SBA will consider the information provided by the concern in order to determine whether the concern qualifies. SBA, in its discretion, may rely solely upon the information submitted to establish eligibility, may request additional information, or may verify the information before making a determination. SBA may draw an adverse inference and deny the certification where the concern fails to cooperate with SBA or submit information requested by SBA.

(2) A women-owned business that is a certified 8(a) Participant qualifies as an EDWOSB;

(3) Firms certified by the VA or under DOT's DBE program as women-owned business concerns will be deemed to be owned and controlled by women, but must apply to SBA to demonstrate their economic disadvantage in order to be certified as EDWOSBs; or

(4) A concern may submit evidence that it has been certified as an EDWOSB by a third party certifier under this subpart.

(c) *SBA notification and designation.* If SBA determines that the concern is a qualified WOSB or EDWOSB, it will issue a letter of certification and designate the firm as a certified WOSB or EDWOSB on the Dynamic Small Business Search (DSBS) system, or successor system.

**§ 127.301 When may a concern apply to SBA for certification?**

A concern may apply for WOSB or EDWOSB certification and submit the required information whenever it can represent that it meets the eligibility requirements, subject to the restrictions of § 127.306. All representations and supporting information contained in the application must be complete and accurate as of the date of submission. The application must be signed by an officer of the concern who is authorized to represent the concern.

**§ 127.302 Where can a concern apply for certification from SBA?**

A concern seeking certification as a WOSB or EDWOSB may apply to SBA

for certification via <https://certify.sba.gov> or any successor system. Certification pages must be validated electronically or signed by a person authorized to represent the concern.

**§ 127.303 What must a concern submit to SBA?**

(a) To be certified by SBA as a WOSB or EDWOSB, a concern must provide documents and information demonstrating that it meets the requirements set forth in part 127 subpart B. SBA maintains a list of the minimum required documents that can be found at <https://certify.sba.gov>. A firm may submit additional documents and information to support its eligibility. The required documents must be provided to SBA during the application process electronically. This may include, but is not limited to, corporate records, business and personal financial records, including copies of signed Federal personal and business tax returns, and individual and business bank statements.

(b) In addition to the minimum required documents, SBA may request additional information from applicants in order to verify eligibility.

(c) After submitting the application, an applicant must notify SBA of any changes that could affect its eligibility.

(d) If a concern was decertified or previously denied certification, it must include with its application for certification a full explanation of why it was decertified or denied certification, and what, if any, changes have been made. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

(e) If the concern was decertified for failure to notify SBA of a material change affecting its eligibility pursuant to § 127.401, it must include with its application for certification a full explanation of why it failed to notify SBA of the material change. If SBA is not satisfied with the explanation provided, SBA may decline to certify the concern.

**§ 127.304 How will SBA process the application for certification?**

(a) The SBA's Director of Government Contracting (D/GC) or designee is authorized to approve or decline applications for certification. SBA must receive all required information and supporting documents before it will begin processing a concern's application. SBA will not process incomplete applications. SBA will advise each applicant within 15 calendar days after the receipt of an application whether the application is complete and suitable for evaluation

and, if not, what additional information or clarification is required to complete the application. SBA will make its determination within ninety (90) calendar days after receipt of a complete package, whenever practicable.

(b) SBA may request additional information or clarification of information contained in an application or document submission at any time.

(c) The burden of proof to demonstrate eligibility is on the applicant concern. If a concern does not provide requested information within the allotted time provided by SBA, or if it submits incomplete information, SBA may presume that disclosure of the missing information would adversely affect the business concern's eligibility or demonstrate a lack of eligibility in the area or areas to which the information relates.

(d) The applicant must be eligible as of the date it submitted its application and up until the time the D/GC issues a decision. The decision will be based on the facts contained in the application, any information received in response to SBA's request for clarification, and any changed circumstances since the date of application.

(e) Any changed circumstances occurring after an applicant has submitted an application will be considered and may constitute grounds for decline. After submitting the application and signed representation, an applicant must notify SBA of any changes that could affect its eligibility. The D/GC may propose decertification for any EDWOSB or WOSB that fails to inform SBA of any changed circumstances that affected its eligibility for the program during the processing of the application.

(f) If SBA approves the application, SBA will send a written notice to the concern and update <https://certify.sba.gov> or any successor system, and update DSBS and the System for Award Management (or any successor systems) to indicate the firm has been certified by SBA.

(g) A decision to deny eligibility must be in writing and state the specific reasons for denial.

(h) A copy of the decision letter will be sent to the electronic mail address provided with the application. SBA will consider any decision sent to this electronic mail address provided to have been received by the applicant firm.

(i) The decision of SBA to decline certification is the final Agency decision, unless the applicant seeks reconsideration pursuant to § 127.305.

**§ 127.305 Can an applicant ask SBA to reconsider SBA's initial decision to decline its application?**

(a) A concern whose application is declined may request that SBA reconsider its decision by filing a request for reconsideration at <https://certify.sba.gov>, or any successor system, within 30 calendar days of the date of SBA's decision.

(b) At the time of its request for reconsideration, the applicant must provide any additional information and documentation pertinent to overcoming the reason(s) for the initial decline, whether or not available at the time of initial application, including information and documentation regarding changed circumstances.

(c) SBA will issue a written decision within 60 calendar days of SBA's receipt of the applicant's request for reconsideration. SBA may approve the application, deny it on the same grounds as the original decision, or deny it on other grounds. If denied, the D/GC will explain why the applicant is not eligible for admission to the EDWOSB or WOSB program and give specific reasons for the decline.

(d) If SBA declines the application solely on issues not raised in the initial decline, the applicant can ask for reconsideration as if it were an initial decline.

(e) The decision of SBA to decline certification is the final Agency decision.

**§ 127.306 May declined or decertified concerns seek recertification at a later date?**

A concern that SBA has declined or decertified may seek certification after one year from the date of decline or decertification if it believes that it has overcome all of the reasons for decline or decertification and is currently eligible. A concern found to be ineligible during a WOSB/EDWOSB status protest is precluded from applying for certification for one year from the date of the final agency decision (the D/GC's decision if no appeal is filed or the decision of SBA's Office of Hearings and Appeals (OHA) where an appeal is filed pursuant to § 127.605).

**Certification by Third Party**

**§ 127.350 What is a third party certifier?**

A third party certifier is a non-governmental entity that SBA may approve to certify that an applicant firm is qualified for the WOSB or EDWOSB contracting program. A third party certifier may be a for-profit or non-profit entity. The list of SBA-approved third

party certifiers may be found on SBA's website at [sba.gov](http://sba.gov).

**§ 127.351 What third party certifications may a concern use as evidence of its status as a qualified EDWOSB or WOSB?**

In order for SBA to accept a third party certification that a concern qualifies as a WOSB or EDWOSB, the concern must have a current, valid certification from an entity designated as an SBA-approved certifier. The third party certification must be submitted to SBA through <https://certify.sba.gov> (or a successor system).

**§ 127.352 What is the process for becoming a third party certifier?**

SBA will periodically hold open solicitations. All entities that believe they meet the criteria to act as a third party certifier will be free to respond to the solicitation. SBA will review the submissions, and if SBA determines that an entity has demonstrated it meets SBA criteria, SBA will enter into an agreement and designate the entity as an approved third party certifier.

**§ 127.353 May third party certifiers charge a fee?**

(a) Third party certifiers may charge a reasonable fee, but must notify applicants first, in writing, that SBA offers certification for free.

(b) The method of notification and the language that will be used for this notification must be approved by SBA. The third party certifier may not change its method or the language without SBA approval.

**§ 127.354 What are the minimum required certification standards for a third party certifier?**

(a) All third party certifiers must enter into written agreements with SBA. This agreement will detail the requirements that the third party certifier must meet. SBA may terminate the agreement if SBA subsequently determines that the entity's certification process does not comply with SBA-approved certification standards or is not based on the same program eligibility requirements as set forth in subpart B of this part or conducts itself in a manner contrary to SBA's values.

(b) Third party certifiers' certification process must comply with SBA-approved certification standards and track the WOSB or EDWOSB eligibility requirements set forth in subpart B of this part.

(c) In order for SBA to enter into an agreement with a third party certifier, the entity must establish the following:

(1) It will render fair and impartial WOSB/EDWOSB Federal Contract Program eligibility determinations;

(2) It will provide the approved applicant a valid certificate for entering into the SBA electronic platform, and will retain documents used to determine eligibility for a period of six (6) years to support SBA's responsibility to conduct a status protest, eligibility examination, agency investigation or audit of the third party determinations;

(3) Its certification process will require applicant concerns to register in SAM (or any successor system) and submit sufficient information as determined by SBA to enable it to determine whether the concern qualifies as a WOSB. This information must include documentation demonstrating whether the concern is:

(i) A small business concern under the SBA size standard corresponding to the concern's primary industry, as defined in 13 CFR 121.107;

(ii) At least 51 percent owned and controlled by one or more women who are United States citizens; and

(4) It will not decline to accept a concern's application for WOSB/EDWOSB certification on the basis of race, color, national origin, religion, age, disability, sexual orientation, marital or family status, or political affiliation.

**§ 127.355 How will SBA ensure that approved third party certifiers are meeting the requirements?**

(a) SBA will require third party certifiers to submit quarterly reports to SBA. These reports will contain information including the number of applications received, number of applications approved and denied, and other information that SBA determines may be helpful for ensuring that third party certifiers are meeting their obligations or information or data that may be useful for improving the program.

(b) SBA will conduct periodic compliance reviews of third party certifiers to ensure that they are properly applying SBA's WOSB/EDWOSB requirements and certifying firms in accordance with those requirements.

(1) SBA will conduct a compliance review on at least one third party certifier per year and will ensure that every third party certifier undergoes a full compliance review every three years.

(2) At the conclusion of each compliance review SBA will provide the third party certifier with a written report detailing SBA's findings with regard to the third party certifier's compliance with SBA's requirements. The report will include recommendations for possible improvements, and detailed

explanations for any deficiencies identified by SBA.

(c) If SBA determines that a third party certifier is not meeting the requirements, SBA may revoke the approval of that third party certifier.

**§ 127.356 How does a concern obtain certification from an approved certifier?**

(a) A concern that seeks WOSB or EDWOSB certification from an SBA-approved third party certifier must submit its application directly to the approved certifier in accordance with the specific application procedures of the particular certifier.

(b) The concern must register in the System for Award Management (SAM), or any successor system.

(c) The approved certifier must ensure that all documents used to determine that a firm is approved for certification are uploaded in <https://certify.sba.gov> or any successor system.

**§ 127.357 What happens if a firm is found not eligible by a third party certifier?**

(a) The concern may request, at no additional cost to the applicant, a redetermination within 30 calendar days from the third party certifier that initially declined its application and cannot represent itself as a qualified WOSB or EDWOSB unless and until it receives a determination of eligibility.

(b) The third party certifier must complete the redetermination within 60 calendar days of request. If the applicant is declined, the third party certifier shall notify SBA.

(c) The concern must wait one year to request a reexamination from either SBA or a third party certifier.

(d) The concern may not seek certification from any other third party certifier during this waiting period.

■ 5. Revise subpart D to read as follows:

**Subpart D—Maintaining WOSB and EDWOSB Status and Eligibility Examinations**

Sec.

127.400 How does a concern maintain its WOSB or EDWOSB certification?

127.401 What are an EDWOSB's and WOSB's ongoing obligations to SBA?

127.402 What happens if a concern fails to recertify or notify SBA of a material change?

127.403 What is a program examination, who will conduct it, and what will SBA examine?

127.404 When may SBA conduct program examinations?

127.405 May SBA require additional information from a WOSB or EDWOSB during a program examination?

127.406 What happens if SBA determines that the concern is no longer eligible for the program?

## Subpart D—Maintaining WOSB and EDWOSB Status and Eligibility Examinations

### § 127.400 How does a concern maintain its WOSB or EDWOSB certification?

(a) A certified WOSB or EDWOSB must recertify every three years to SBA that it continues to meet all of the WOSB and EDWOSB eligibility requirements. Concerns wishing to remain in the program without any interruption must recertify their continued eligibility to SBA within 30 calendar days before the third anniversary date of their initial certification and each subsequent three-year period. Failure to do so will result in the concern being decertified. The process for completing the recertification can be found on SBA's website at <https://certify.sba.gov> (or successor system).

(b) A concern certified by a third party certifier prior to the effective date of SBA's certification may maintain that status for three years from the date of its certification or most recent recertification by the third party certifier.

### § 127.401 What are an EDWOSB's and WOSB's ongoing obligations to SBA?

Once certified, a WOSB or EDWOSB must immediately notify SBA of any material changes that could affect its eligibility. Material change includes, but is not limited to, a change in the ownership, business structure, or management. The notification must be in writing, and must be uploaded into the firm's profile with SBA. The method for notifying SBA can be found on <https://certify.sba.gov>. A concern's failure to notify SBA of such a material change may result in decertification and removal from SAM and DSBS (or any successor system) as a designated certified WOSB/EDWOSB concern. In addition, SBA may seek the imposition of penalties under § 127.700.

### § 127.402 What happens if a concern fails to recertify?

If a WOSB or EDWOSB fails to recertify its status on <https://certify.sba.gov> (or successor system) pursuant to § 127.400 or SBA determines that a concern has not notified SBA of a change that could affect its WOSB or EDWOSB eligibility, SBA will decertify the concern from the program. In the case of a concern failing to recertify its status as a WOSB or EDWOSB, SBA will decertify the firm from the program on the day after the third anniversary date of initial certification or recertification. SBA will

issue a written notice explaining why the concern has been decertified. This decertification will be SBA's final decision and may not be appealed.

### § 127.403 What is a program examination, who will conduct it, and what will SBA examine?

(a) A program examination is an investigation by SBA officials, which verifies the accuracy of any certification of a concern issued by a third party certifier or other Federal or State agency or in connection with a WOSB or EDWOSB contract. Thus, examiners may verify that the concern currently meets the program's eligibility requirements, and that it met such requirements at the time of its application for certification, its most recent recertification, or its certification in connection with a WOSB or EDWOSB contract.

(b) Examiners may review any information related to the concern's eligibility requirements. SBA may also conduct site visits.

(c) It is the responsibility of program participants to ensure the information provided to SBA is kept up to date and is accurate. SBA considers all required information and documents material to a concern's eligibility, and assumes that all information and documentation submitted are up to date and accurate unless SBA has information that indicates otherwise.

### § 127.404 When may SBA conduct program examinations?

SBA may conduct a program examination at any time after a concern has been certified as a WOSB or EDWOSB.

### § 127.405 May SBA require additional information from a WOSB or EDWOSB during a program examination?

At the discretion of the D/GC, SBA has the right to require that a WOSB or EDWOSB submit additional information as part of the certification process, or at any time thereafter. SBA may draw an adverse inference from the failure of a concern to cooperate with a program examination or provide requested information.

### § 127.406 What happens if SBA determines that the concern is no longer eligible for the program?

If SBA believes that a concern does not meet the program eligibility requirements, the concern has not provided or maintained all the required certifications and documentation, or the concern has failed to notify SBA of a material change, SBA will propose the

concern for decertification from the program.

(a) *Proposed Decertification.* The D/GC or designee will notify the concern in writing that it has been proposed for decertification. This notice will state the reasons why SBA has proposed decertification, and that the WOSB or EDWOSB must respond to each of the reasons set forth.

(1) The WOSB or EDWOSB must respond in writing to a proposed decertification within 20 calendar days from the date of the proposed decertification.

(2) If the initial certification was done by a third party, SBA will also notify the third party certifier of the proposed decertification in writing.

(b) *Decertification.* The D/GC or designee will consider the reasons for proposed decertification and the concern's response before making a written decision whether to decertify. The D/GC may draw an adverse inference where a concern fails to cooperate with SBA or provide the information requested. The D/GC's decision is the final Agency decision.

(c) *Reapplication.* A concern decertified pursuant to this section may reapply to the program pursuant to § 127.306.

### § 127.505 [Removed and reserved]

■ 6. Remove and reserve § 127.505.

### § 127.602 [Amended]

■ 7. Amend § 127.602 by removing the last sentence.

### § 127.603 [Amended]

■ 8. Amend § 127.603 by removing the second to last sentence in paragraph (d).

■ 9. Revise § 127.604(f)(4) to read as follows:

### § 127.604 How will SBA process an EDWOSB or WOSB status protest?

\* \* \* \* \*

(f) \* \* \*

(4) A concern that has been found to be ineligible will be decertified from the program and may not submit an offer as a WOSB or EDWOSB on another procurement until it is recertified. A concern may be recertified by reapplying to the program pursuant to § 127.306.

Christopher M. Pilkerton,  
Acting Administrator.

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