

**THE SISYPHEAN COURSE OF COMBATING  
GENDER DISCRIMINATION IN  
THE FEDERAL MARKETPLACE FOR PRIME  
CONTRACTS: ROLLING THE BOULDER OF SMALL  
BUSINESS SIZE**

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## INTRODUCTION

Women play an important role in the American economy.<sup>1</sup> In 2009, women-owned businesses<sup>2</sup> “had an economic impact of nearly \$3 trillion,” and created or maintained 23 million jobs, which represented 16% of all jobs in the United States.<sup>3</sup> In 2013, 29% (an estimated 8.6 million) of all firms in the United States were women-owned businesses, which produced over \$1.3 trillion in revenues, and if they were combined with 50-50 male-female owned firms, women owned 46% (13.6 million) of all businesses in the United States.<sup>4</sup> These women-owned firms employed nearly 7.8 million workers in 2013.<sup>5</sup> Based on the data from the 2012 Survey of Business Owners conducted by the U.S. Census Bureau, despite the constant growth in the number of women-owned businesses, the revenues generated by them showed a shortfall of over \$10 trillion dollars annually.<sup>6</sup> In addition, the total number of registered small businesses that are eligible to compete for federal procurements also continued to drop since 2012, and only 273,072 firms are currently available to perform federal contracts.<sup>7</sup>

Congress has long found that despite undeniable improvements in the socio-economic status of women over the past two decades, women—as a group—are

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<sup>1</sup> See 15 U.S.C. § 631(h)(1)(A) (2012).

<sup>2</sup> Women-owned small businesses are firms in which one or more women own at least 51% of the stock or equity of the business. 15 U.S.C. § 637(m) (2012); NATIONAL WOMEN’S BUS. COUNCIL, FACT SHEET: WOMEN-OWNED BUSINESSES 1 n.1 (2015), <https://www.nwbc.gov/sites/default/files/Women%20Owned%20Businesses%20Fact%20Sheet.pdf>; see *infra* Part III.C.

<sup>3</sup> MARIA CANTWELL, MAJORITY REPORT OF THE U.S. SENATE COMM. ON SMALL BUSINESS AND ENTREPRENEURSHIP, 21ST CENTURY BARRIERS TO WOMEN’S ENTREPRENEURSHIP 5 (2014).

<sup>4</sup> U.S. WOMEN’S CHAMBER OF COMMERCE, WOMEN’S ECONOMIC PRIORITIES 9 (2014), <https://www.swipe.to/0814q>.

<sup>5</sup> *Id.*

<sup>6</sup> *Women’s Businesses Hit with Annual \$10 Trillion Opportunity Loss*, BUS. OWNERSHIP COUNCIL (Aug. 19, 2015), <https://uswcc.org/2015/08/womens-businesses-hit-with-10-trillion-opportunity-loss/>. In 2012, women owned 35.95% of all businesses in the United States but generated only 4.82% of all revenues. *Id.* If the women-owned firms were also able to generate 35.95% of all sales receipts, their annual revenues would be \$12 trillion annually. *Id.* Instead, these businesses earned only \$1.6 trillion in revenues on annual basis. *Id.*

<sup>7</sup> “Contracting and the Industrial Base II: Bundling, Goaling, and the Office of Hearings and Appeals”: *Hearing Before the Subcomm. on Contracting & the Workforce, Comm. on Small Bus.*, 114th Cong. 21-22 (Mar. 17, 2015), [http://smbiz.house.gov/UploadedFiles/3-17-2015\\_Hearing\\_memo.pdf](http://smbiz.house.gov/UploadedFiles/3-17-2015_Hearing_memo.pdf) [hereinafter *Contracting and Industrial Base II*].

still the subject of gender discrimination in their entrepreneurial endeavors, and the discriminatory barriers should be removed expeditiously.<sup>8</sup> At the present time, among these women are transgender and gender non-confirming women who experience discrimination in public accommodations, education, health care, and especially at work.<sup>9</sup> In 2014, President Barack Obama issued Executive Order 13672 to provide “a uniform policy for the federal government to prohibit discrimination . . . based on sexual orientation and gender identity.”<sup>10</sup> The Order amended the prohibited bases of discrimination by adding sexual orientation and gender identity.<sup>11</sup> While also protecting transgender federal workers, the Order and the implementing regulations target federal government contractors and subcontractors, and prohibit discrimination based on sexual orientation or gender identity of their job applicants and employees.<sup>12</sup> At signing, the President declared, “America’s federal contracts should not subsidize discrimination against the American people.”<sup>13</sup>

In 1994, Congress enacted the Federal Acquisition Streamlining Act, which established a goal for the federal government that in each fiscal year not less than 5% of the total value of federal contracting obligations should be awarded to small businesses owned and controlled by women (“WOSBs”).<sup>14</sup> However, prime contract awards to WOSBs have remained below the 5% goal even after the federal government launched the WOSB Program in 2011—the year ending over a decade-long delay in implementation of the program, which authorized federal contracting officers<sup>15</sup> to set aside federal procurements for competition solely among WOSBs

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<sup>8</sup> See 15 U.S.C. § 631(h) (2012).

<sup>9</sup> JAIME M. GRANT ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL. & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 5 (2011), <http://www.transequality.org/issues/resources/national-transgender-discrimination-survey-full-report>. The estimated size of the transgender population in the U.S. is 0.3% or 697,529 individuals—both women and men. GARY J. GATES, HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 6 (2011).

<sup>10</sup> Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity, in 79 Fed. Reg. 42,971 (July 21, 2014).

<sup>11</sup> Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985, 72,986 (Dec. 9, 2014) (to be codified at 41 C.F.R. pts. 61-1, 60-2, 60-4, and 60-50).

<sup>12</sup> *Id.*; U.S. Dep’t of Labor, Office of Fed. Contract Compliance Programs, Directive (DIR) 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014), [http://www.dol.gov/ofccp/regcs/compliance/directives/dir2014\\_02.html](http://www.dol.gov/ofccp/regcs/compliance/directives/dir2014_02.html).

<sup>13</sup> Office of the Press Sec’y, *Remarks by the President at Signing of Executive Order on LGBT Workplace Discrimination* (July 21, 2014, 10:39 AM), <https://www.whitehouse.gov/the-press-office/2014/07/21/remarks-president-signing-executive-order-lgbt-workplace-discrimination>.

<sup>14</sup> See Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7106, 108 Stat. 3243, 3369 (codified as amended at 15 U.S.C. § 644(g)(1) (2012)).

<sup>15</sup> A contracting officer is a person authorized to enter into, administer, or terminate procurement contracts on behalf of the procuring agency, and make findings and determinations related to the procurement contracts. FAR 2.101 (2015). Thus, the contracting officers have the authority to bind the federal government. *Id.* A prime contract is a contract or contractual action by the United States to obtain supplies, materials, equipment or services from a prime contractor. See, e.g., 48 C.F.R. § 3.502-1 (2015). A prime contractor is a person or a firm who enters into a prime contract with the United States.

or economically disadvantaged WOSBs (“EDWOSBs”).<sup>16</sup> If the 5% contracting goal for federal agencies had been achieved over the eleven years since the creation of the WOSB Program in 2000, WOSBs would have received an additional \$63 billion in federal procurement contracts.<sup>17</sup> Instead, from 2011 to 2014, WOSBs obtained only 0.44%, or \$228.9 million, in contract awards under the WOSB Program, and \$50.3 billion in all other contract awards for WOSBs.<sup>18</sup>

Furthermore, on October 8, 2014, the United States Government Accountability Office (“GAO”) issued a report revealing that the U.S. Small Business Administration (“SBA”)—the agency charged with implementing and administering the WOSB Program—cannot “provide reasonable assurance that only eligible businesses” obtain contracts specifically set aside for competition among EDWOSBs or WOSBs under the WOSB Program.<sup>19</sup> As a result, fraud in the small business size and status certifications of eligibility for participation in the WOSB Program, and the lack of appropriate enforcement of the eligibility requirements, significantly contribute to inhibiting the ability of women-owned small businesses to receive their fair share of the federal contract awards.<sup>20</sup> In reaction to the GAO’s report,<sup>21</sup> in 2014, Congress struck down the statutory provisions that allowed women-owned small businesses to self-certify their status as EDWOSBs or WOSBs specifically under the WOSB Program.<sup>22</sup> However, it is uncertain whether the SBA will grandfather self-certifications in the EDWOSB or WOSB procurement contracts that have already been awarded under the program once the agency launches a new system of eligibility certifications.<sup>23</sup> Despite this setback, after a long battle for parity among the small business set-aside procurement programs, Congress also authorized federal agencies to award sole

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*Id.* A subcontract is a contract or contractual action entered into under a prime contract by a prime contractor or a higher tier subcontractor to obtain supplies, materials, equipment, or services from another prime contractor or a lower tier subcontractor. *Id.*

<sup>16</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-15-54, WOMEN-OWNED SMALL BUSINESS PROGRAM: CERTIFIER OVERSIGHT AND ADDITIONAL ELIGIBILITY CONTROLS ARE NEEDED 22 (2014) [hereinafter GAO’S CERTIFIER OVERSIGHT REPORT]; see discussion *infra* Part III.C and Part IV.A.

<sup>17</sup> CANTWELL, *supra* note 3, at 19.

<sup>18</sup> GAO’S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 21.

<sup>19</sup> *Id.* at 9.

<sup>20</sup> See discussion *infra* Part IV.C.

<sup>21</sup> Unlike the House bill, the Senate committee-reported version of the bill did not contain the provision authorizing sole source contracting with WOSBs. CARL LEVIN AND HOWARD P. “BUCK” MCKEON NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2015, LEGISLATIVE TEXT AND JOINT EXPLANATORY STATEMENT TO ACCOMPANY H.R. 3979 P.L. 113-291, at 810 (Com. Print 2014).

<sup>22</sup> Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 825, 128 Stat. 3292, 3437 (codified as 15 U.S.C. § 637(m) (2012)) [hereinafter NDAA FY 2015].

<sup>23</sup> The SBA’s current regulations still require that the size and status of the business be determined on the date a business self-certifies its size and status in every bid, proposal, or initial offer that also includes the price. See, e.g., 13 C.F.R. § 121.404 (2015); 13 C.F.R. § 127.300 (2015); 13 C.F.R. § 127.7300 (2015). Generally, a business self-certifying its size as small and status as an EDWOSB or a WOSB will retain such size and status classification for the life of the awarded contract. 13 C.F.R. § 121.404 (2015); 13 C.F.R. § 127.503 (2015).

source contracts under the WOSB Program— i.e., prime contracts where there is only one available EDWOSB or WOSB that is qualified to perform a given procurement contract.<sup>24</sup>

Part I of this Note explores the statutory framework of federal procurement for acquiring goods and services for the benefit and use by the federal government, and the mechanisms of Congressional oversight of federal procurement. Part II briefly describes the preferential set-aside programs for disadvantaged small businesses, which also compete for prime federal contracts with EDWOSBs and WOSBs. Part III reviews the history of gender discrimination in federal procurement and the ten-year delay in implementation of the WOSB Program. This Part also discusses the essential components of the WOSB Program. Part IV focuses on the challenges in meeting the Congressional mandate for federal agencies to reach the 5% goal for prime contract awards to WOSBs. This Part also discusses the sole source authority to illustrate its limiting effect on competition in the federal procurement marketplace, and to emphasize the efforts of the WOSB Program proponents to achieve parity with other set-aside programs for disadvantaged small businesses. In addition, Part IV examines the eligibility certification processes and the lack of sufficient oversight of the eligibility certification procedures by the SBA. Part V recommends establishing a rebuttable presumption that transgender women—as a group— are “socially disadvantaged” in order to facilitate their full participation in the WOSB Program. This Part also proposes reforms of the EDWOSB and WOSB protest proceedings to allow whistleblowers to protest alleged eligibility fraud in the WOSB Program. In addition, this Part describes the contours of a *qui tam* action under the False Claims Act, which EDWOSBs and WOSBs could use to police eligibility of the firms receiving procurement contracts under the WOSB Program, and to ascertain that only intended beneficiaries participate in the program.

#### I. THE U.S. FEDERAL GOVERNMENT AS A BUYER OF GOODS AND SERVICES

In 2014, the federal government spent \$440 billion on contract obligations.<sup>25</sup> The United States enters into contractual transactions as a buyer in a specialized acquisition process that is utilized to purchase goods and services from nonfederal sources for the direct benefit or use by the federal government.<sup>26</sup> In federal

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<sup>24</sup> Sole source contracts can be awarded under the WOSB Program when the contracting officer cannot satisfy the “rule of two.” The rule of two requires that the contracting officer “does not have a reasonable expectation” that at least two qualified EDWOSBs or WOSBs would submit offers and the contract could be made at fair and reasonable price. Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 55,019, 55,022 (Sept. 14, 2015) (to be codified at 13. C.F.R. pt. 127). If the contracting officer identifies only one qualified EDWOSB or WOSB, she or he can award the contract to that business concern. *Id.*

<sup>25</sup> *Contracting and Industrial Base II*, *supra* note 7, at 20.

<sup>26</sup> JOHN CIBINIC, JR. ET AL., *FORMATION OF GOVERNMENT CONTRACTS* 1 (4th ed. 2011). In addition to the procurement of goods and services, the other categories of transactions for which the federal government uses contractual agreements are purchase of real property, sale of real and personal

procurement, the major acquisition categories include supplies (personal property),<sup>27</sup> construction,<sup>28</sup> transportation and travel services,<sup>29</sup> public utility services,<sup>30</sup> advisory and assistance services,<sup>31</sup> research and development,<sup>32</sup> and rental of real property.<sup>33</sup> The United States engages in the contracting activities through individual organizations in the legislative, executive, and judicial branches of the federal government.<sup>34</sup> Nonetheless, the executive branch performs the majority of all federal procurements.<sup>35</sup>

#### *A. Federal Procurement and the Procuring Agencies*

Congress vested the authority to bind the federal government in the “executive agencies,” which have a mandate to use procurement contracts as a legal instrument to purchase, lease, or barter property or services for the federal government.<sup>36</sup> The term “executive agency” has a broad application, however, and includes any executive department, a corporation wholly owned by the federal government, or an independent establishment in the executive branch.<sup>37</sup> Even an organization that is not a federal agency may be deemed an executive agency for the purposes of federal procurement,<sup>38</sup> including an Article I court, such as the United States Court of Federal Claims. Conversely, certain executive agencies may claim exceptions from the requirement that they must comply with the laws, rules, and regulations governing federal procurement when they make purchases and contract for goods and services, if they can rely on a statute expressly authorizing a procurement exemption<sup>39</sup> or when Congressional intent to exempt the agency is evident.<sup>40</sup>

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property, grants, cooperative agreements, cooperative research and development agreements, and employment agreements. *Id.* at 2. See also FAR 2.101, providing that, “Contracting means purchasing, renting, leasing, or otherwise obtaining supplies or services from nonfederal sources. Contracting includes description (but not determination) of supplies and services required, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.” FAR 2.101 (2015); 48 C.F.R. § 2.101 (2015).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> CIBINIC, JR. ET AL., *supra* note 26, at 6.

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.* at 9-10.

<sup>32</sup> *Id.* at 13-14.

<sup>33</sup> *Id.* at 14.

<sup>34</sup> *Id.* at 25.

<sup>35</sup> *Id.* at 27.

<sup>36</sup> 31 U.S.C. § 6303 (2012); see also *id.* at 3. While “barter” is included in the statutory definition of “acquisition,” the definition of “acquisition” in Federal Acquisition Regulation 2.101 omitted the word “barter.” CIBINIC, JR. ET AL., *supra* note 26, at 3 (comparing 31 U.S.C. § 6303 with FAR 2.101 and citing Marketing & Mgmt. Info., Inc. v. United States, 57 Fed. Cl. 665 (2003) (concluding that “barter” was omitted deliberately based on the legislative history of 31 U.S.C. § 6303)).

<sup>37</sup> 40 U.S.C. § 102 (2012).

<sup>38</sup> CIBINIC, JR. ET AL., *supra* note 26, at 31, 33.

<sup>39</sup> *Id.* at 32 (citing 41 U.S.C. § 3101(c): “In general.—This division does not apply—(A) to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration; or (B) except as provided in paragraph (2), when this division is made inapplicable pursuant to law.”

The procurement of services and goods by contract for the federal government—at fair and reasonable price paid by the federal government with Congressionally appropriated funds—is called an “acquisition.”<sup>41</sup> Pursuant to the Buy American Act, the federal government must acquire, with certain exceptions, domestic end products and domestic construction materials regardless of the nationality of the company that manufactures the end-items.<sup>42</sup>

The acquisition process consists of three major phases: (1) the acquisition planning and market research; (2) solicitation of offers and selection of sources, including awards of contracts; and (3) contract performance and administration.<sup>43</sup> The acquisition planning begins with establishing the need and requirements for goods or services, and involves developing a strategy for managing the acquisition.<sup>44</sup> Before soliciting offers, the procuring agencies are also required to conduct a market research to determine, among other things, availability of competent sources—“responsible”<sup>45</sup> government contractors and qualified vendors, including small businesses such as EDWOSBs or WOSBs.<sup>46</sup> One of the most important goals of this phase is to use effective and meaningful competition whenever it is feasible<sup>47</sup> for procurement contracts over specified threshold amounts.<sup>48</sup> The Competition in Contract Act of 1984<sup>49</sup> specifically provides that

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(emphasis added)).

<sup>40</sup> *Id.*

<sup>41</sup> 48 C.F.R. § 2.101 (2015).

<sup>42</sup> Buy American Act, 41 U.S.C. §§ 8301-8305 (2012); FAR 25.001 (2015). For exceptions, see FAR 25.001(b) (2015); FAR 25.100 (2015); FAR 25.103 (2015); FAR 25.200 (2015); FAR 25.202 (2015).

<sup>43</sup> 48 C.F.R. § 2.101.

<sup>44</sup> *Id.*

<sup>45</sup> 48 C.F.R. § 9.104-1 provides: “To be determined responsible, a prospective contractor must—(a) Have adequate financial resources to perform the contract, or the ability to obtain them (see 9.104-3(a)); (b) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments; (c) Have a satisfactory performance record (see 48 CFR 9.104-3(b) and part 42, subpart 42.15). A prospective contractor shall not be determined responsible or non-responsible solely on the basis of a lack of relevant performance history, except as provided in 9.104-2; (d) Have a satisfactory record of integrity and business ethics (for example, see Subpart 42.15); (e) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors) (see 9.104-3(a)); (f) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them (see 9.104-3(a)); and (g) Be otherwise qualified and eligible to receive an award under applicable laws and regulations (see also inverted domestic corporation prohibition at 9.108).” 48 C.F.R. § 9.104-1 (2015). If the offeror is a small business that fails to meet certain requirements of responsibility, the SBA may issue a Certificate of Competency to overrule the determination of the procuring agency’s officer that a business does not qualify as a responsible contractor. 48 C.F.R. § 9.105-2 (2015).

<sup>46</sup> 41 U.S.C. § 3307 (2012); 48 C.F.R. § 10.002 (2015).

<sup>47</sup> 10 U.S.C. § 2304(a)(1) (2012); HEROS, Inc., B-292043, 203 CPD ¶ 111 (Comp. Gen. June 9, 2003).

<sup>48</sup> See, e.g., sources cited *infra* note 234.

<sup>49</sup> Competition in Contracting Act of 1984, Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended at 31 U.S.C. §§ 3551-3556 (2012), 41 U.S.C. §§ 1705, 1708, 3308, 3701-3708, 4702 (2012)).

contracting agencies are obligated to obtain “full and open competition,” and in doing so, they are required to use competitive acquisition procedures to determine the firm best suited for a given procurement, unless otherwise explicitly authorized by statute.<sup>50</sup> “Full and open competition” is achieved when all “responsible” government contractors are permitted to compete.<sup>51</sup>

The competition preference can also be found in the U.S. small business procurement policy, which provides that “[t]he essence of the American economic system of private enterprise is free competition.”<sup>52</sup> Furthermore, “the preservation and expansion of [c]ompetition is basic not only to the economic well-being” of the nation but also to national security.<sup>53</sup> However, Congress recognized that:

Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the *interests of small-business concerns in order to preserve free competitive enterprise*, to insure that a *fair proportion of the total purchases and contracts or subcontracts for property and services for the Government . . . be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises*, and to maintain and strengthen the overall economy of the Nation.<sup>54</sup>

For these reasons, Congress established procurement assistance programs that authorize federal agencies to give contracting preferences to disadvantaged small businesses, such as EDWOSBs and WOSBs.<sup>55</sup>

## *B. Congressional Oversight of Federal Procurement and the Procuring Agencies*

### 1. Fiscal Oversight of Federal Procurement by Congress

The Constitution of the United States vested in Congress the authority to approve and fund expenditures for goods and services purchased through the federal acquisition method.<sup>56</sup> Congress establishes new contracting programs for the federal government and allocates monies to pay for them in the “budget and appropriation” process<sup>57</sup> governed mainly by the Congressional Budget and

<sup>50</sup> Competition in Contracting Act of 1984, § 303(a)(1), 41 U.S.C. § 3301(a)(1) (2012); see 10 U.S.C. § 2304(a)(1); *cf.* JT Constr. Co., Inc., B-244404.2, 92-1 CPD ¶ 1 (Comp. Gen. Jan. 2, 1992).

<sup>51</sup> See 41 U.S.C. § 107(a) (2012); FAR 6.102 (2015); 48 C.F.R. § 10.001 (2012).

<sup>52</sup> 15 U.S.C. § 631(a) (2012).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* (emphasis added).

<sup>55</sup> See 13 C.F.R. pts. 124-127 (2015).

<sup>56</sup> CIBINIC, JR. ET AL., *supra* note 26, at 39 (citing U.S. CONST. art I, § 9, cl. 7: “No money shall be drawn from the treasury, but in consequence of appropriations made by law; and a regular statement and account of receipts and expenditures of all public money shall be published from time to time.”).

<sup>57</sup> *Id.* The budget and appropriations process consists of the budget formulation phase, the authorization phase, and the appropriations phase. *Id.* at 41.

Impoundment Control Act of 1974.<sup>58</sup> Federal agencies may enter into contracts and legally obligate funds only if Congress granted them proper “budget authority” and the agencies received sufficient amounts to pay for the incurred expenditures or obligations.<sup>59</sup> The most common form of the budget authority is an appropriation of specified amounts from the Treasury to fund federal programs and other activities.<sup>60</sup> Appropriations must be used only for the purpose for which they were made and the purpose must bear logical relationship to the appropriations.<sup>61</sup> However, Congress may also grant an appropriation of a lump sum—a general purpose appropriation—for a group of objects to allow an executive agency flexibility in execution of a broad function.<sup>62</sup> The majority of appropriations designated for acquisition of supplies, services, or research and development, by the procuring agencies, are general purpose appropriations.<sup>63</sup>

## 2. Congressional Oversight of the Procuring Agencies

Through investigations and hearings of its committees, Congress by itself or by the GAO as its agent, exercises oversight functions over the procuring agencies of the federal government.<sup>64</sup> Legislative committees of Congress, such as the Small Business Committee, have authority over implementation of statutes governing specific procurement programs and monitor procurement practices of the executive branch agencies.<sup>65</sup> Congressional committees also issue

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<sup>58</sup> *Id.* at 38-39; see Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. §§ 601-691(f) (2012). Each year, Congress makes available funds for agency programs or activities in twelve annual appropriation statutes that are subject to separate appropriation authorization acts. CIBNIC, JR. ET AL., *supra* note 26, at 43. Congress may also combine several appropriation statutes into one “Consolidated Appropriations Act.” *Id.* at 44. Appropriations acts allocate appropriations according to the functional breakdown of federal agencies that include programs such as operation or procurement. *Id.* If the appropriations process is not completed by the beginning of a given fiscal year, Congress will appropriate funds to agencies for continuing their operations by passing “continuing resolutions.” *Id.* at 43. The Congressional Budget and Impoundment Control Act of 1974 gives the President the authority to request a rescission (cancellation) bill or deferral (delay) resolution for the obligated budget funds. *Id.* at 65.

<sup>59</sup> The budget authority is an authority granted to executive agencies by federal law authorizing the government to incur financial obligations. 2 U.S.C. § 622(2) (2012); *Id.* at 39.

<sup>60</sup> Aside from the appropriation authority, the budget authority provides for contractual, borrowing, and offsetting receipts and collections authority. Contractual authority to incur obligations does not require Congressional grant of appropriations. CIBNIC, JR. ET AL., *supra* note 26, at 40. Borrowing authority allows federal agencies to liquidate contractual obligations with borrowed funds. *Id.* Offsetting receipts and collections authority constitutes a revolving fund that allows an agency to deposit the income the agency generates, and spend money to finance its operations, through a use of a fund account or an appropriation account. *Id.* at 41.

<sup>61</sup> *Id.* at 46. A procuring agency may use an appropriation during a given fiscal year if the appropriation’s purpose covers an EDWOSB or a WOSB procurement and the appropriated funds are available at the time the agency enters into a procurement contract with an EDWOSB or a WOSB. See *id.* at 45.

<sup>62</sup> *Id.* at 47.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 64.

<sup>65</sup> *Id.*

recommendations.<sup>66</sup> When the agencies do not follow them, Congress will often enact statutes with additional limitations or requirements.<sup>67</sup> For example, in the report on the Concurrent Resolution on the Budget for Fiscal Year 2015, the House of Representatives Committee on the Budget concluded that the SBA did not complete any of the Congressionally mandated changes to the small business contracting programs the agency oversees.<sup>68</sup> Moreover, the Committee pointed out that the SBA did not request additional funds to complete the changes, or mentioned them in its budget justification for FY 2015, and recommended that “resources should be relocated to help small business enter and succeed” in the federal procurement marketplace.<sup>69</sup>

Congress has given to the GAO broad investigative and audit powers to oversee federal procurement.<sup>70</sup> With that goal, each agency is required to provide any information requested by the GAO that is necessary for the GAO to audit the agency with regard to the use of public funds, financial transactions, or other activities of the agency.<sup>71</sup> The GAO also has broad powers in its ability to subpoena agencies to produce documents, or even bring civil actions,<sup>72</sup> including the right to audit the relevant records of government contractors that have obtained negotiated government contracts.<sup>73</sup> Further, the GAO regularly issues agency audit reports about implementation of the procurement programs and provides recommendations for improvements.<sup>74</sup> Since the GAO’s remedies are limited to making recommendations, federal agencies are not legally bound by them—partly because of the doctrine of separation of powers—but, they rarely fail to follow these recommendations.<sup>75</sup>

The GAO also has a non-exclusive jurisdiction to hear objections, or protests, submitted by any “actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> STAFF OF H.R. COMM. ON THE BUDGET, 113TH CONG., SERIAL NO. CP-3, VIEWS AND ESTIMATES OF COMM. OF THE HOUSE ON THE CONCURRENT RESOLUTION ON THE BUDGET FOR FISCAL YEAR 2015, at 282 (Comm. Print 2014). Changes relevant to the WOSB Program included taking the following actions: (1) adjusting the SBA’s databases to identify large businesses that were misclassified as small; (2) filing a report explaining why agencies failed to meet their annual contracting goals; (3) promulgating regulations that create a safe harbor for those small businesses that actually make a good faith effort to comply with the size-standard rules; (4) publishing a guide, in plain English, about how to comply with the size-standard rules; (5) issuing regulations governing the suspension or debarment that ban businesses from obtaining procurement contracts; and (6) creating a website for large government contractors to post opportunities for subcontract work for small businesses. *Id.* at 282.

<sup>69</sup> *Id.*

<sup>70</sup> See CIBINIC, JR. ET AL., *supra* note 26, at 67.

<sup>71</sup> *Id.*; 31. U.S.C. § 716(a) (2012).

<sup>72</sup> 31. U.S.C. § 716(c) (2012); CIBINIC, JR. ET AL., *supra* note 26, at 67.

<sup>73</sup> CIBINIC, JR. ET AL., *supra* note 26, at 67.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 1740. The GAO has a reporting obligation to provide annual reports to Congress about all cases in which the procuring agencies failed to implement all of the GAO’s recommendations. *Id.*

contract,” from procurement decisions or procedures conducted by federal agencies.<sup>76</sup> In these cases, the GAO itself is bound by the SBA’s determinations of small business size and status for various socioeconomic categories of businesses, including EDWOSBs and WOSBs.<sup>77</sup>

*C. Oversight of the Set-Aside Contracting Programs by  
the U.S. Small Business Administration*

Congress has authorized four major set-aside contracting programs to assist disadvantaged small businesses in federal procurement: the 8(a) Minority Small Business and Capital Ownership Development Program, the HUBZone Program, the Service-Disabled Veteran-Owned Small Business Program, and the Women-Owned Small Business Program.<sup>78</sup> These programs were promulgated under the Small Business Act of 1953<sup>79</sup> (“Small Business Act”), and are under the supervision and control of the SBA.<sup>80</sup>

The SBA is an independent federal agency established “to aid, counsel, assist and protect the interests of small business concerns, to preserve free competitive enterprise, and to maintain and strengthen” the national economy.<sup>81</sup> More specifically, the SBA’s function is to ensure that small businesses receive a fair proportion of the federal government’s contracts and sales.<sup>82</sup> For example, the SBA may appeal a contracting officer’s decision to exclude a particular requirement for goods or services from being available for a contract award under the WOSB Program.<sup>83</sup> In addition, each agency negotiates with the SBA its annual maximum practicable goal for contract awards for each of the various small business categories, including women-owned small businesses.<sup>84</sup> The SBA and the Administrator for Federal Procurement Policy are obligated to ascertain that the

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<sup>76</sup> See 31 U.S.C. § 3551 (2012); 31 U.S.C. § 3551(2)(A)(1) (2012); cf. 28 U.S.C. § 1491(b)(1) (2012).

<sup>77</sup> See 13 C.F.R. § 121.101(a) (2015); 13 C.F.R. § 141.402 (2015); see also *infra* note 320 and accompanying text.

<sup>78</sup> See 13 C.F.R. pts. 124-127 (2015).

<sup>79</sup> Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232 (codified as amended at 15 U.S.C. §§ 631-657, 657a-657b, 657d-657f, 657i-657o, 657q-657s (2012)). The history of the SBA dates back to the era of Great Depression and its predecessor agencies: the Reconstruction Finance Corporation established by President Hoover in 1932 to provide relief funds to solvent businesses during the Great Depression; the Smaller War Plants Corporation that was authorized by the Small Business Mobilization Act of 1942 mainly to make loans to small business concerns; the Office of Small Business in the U.S. Department of Commerce whose role was to educate and train entrepreneurs; and, the Small Defense Plans Administration, which was established during the Korean War to certify small businesses as qualified to perform government contracts. NAT’L RESEARCH COUNCIL, ANALYZING INFORMATION ON WOMEN-OWNED SMALL BUSINESSES IN FEDERAL CONTRACTING 12-13 (2005), <http://www.nap.edu/catalog/11245.html> [hereinafter NRC REPORT ON WOSBs].

<sup>80</sup> Small Business Act §§ 204, 212-223; see also 15 U.S.C. §§ 631-632 (2012).

<sup>81</sup> See *Mission*, U.S. SMALL BUS. ADMIN., [https://www.sba.gov/about-sba/what\\_we\\_do/mission](https://www.sba.gov/about-sba/what_we_do/mission) (last visited Jan. 20, 2015).

<sup>82</sup> NRC REPORT ON WOSBs, *supra* note 79, at 13.

<sup>83</sup> 13 C.F.R. § 127.508 (2015).

<sup>84</sup> 15 U.S.C. § 644(g) (2012).

“cumulative annual prime contract goals for all federal agencies” meet the 23% Government-wide small business goal, including the individual 5% goal for women-owned small businesses; yet, there is no penalty if the agencies fail to meet their goals.<sup>85</sup>

The SBA has the mandate to perform eligibility examinations to verify information provided for the purpose of self-certification or obtaining a certification as an EDWOSB or a WOSB from the SBA or the approved third-party certifiers, and decide protests brought by eligible parties challenging the size or status of a women-owned small business.<sup>86</sup> The SBA cannot abandon this Congressionally vested duty by deferring to the judgment of the contracting officer of a procuring agency.<sup>87</sup>

## II. THE EVOLUTION OF SMALL BUSINESS SET-ASIDE PROGRAMS

The federal procurement assistance programs focusing mainly on minority-owned, and socially and economically disadvantaged small businesses, emerged in the 1960s.<sup>88</sup> Following the 1967 Detroit race riots, the National Advisory Commission on Civil Disorders prepared the Kerner Report, which found that minorities “enjoyed no appreciable ownership of small businesses.”<sup>89</sup> In 1969, President Nixon issued Executive Order 11458, through which the federal government launched a policy of “establishment, preservation and strengthening of minority business enterprise.”<sup>90</sup> As a result, three programs were created to assist minority-owned businesses in federal procurement, but no similar policy or program was developed to assist businesses owned by non-minority women.<sup>91</sup> Subsequently, the SBA promulgated regulations that required federal agencies to set aside procurement contracts for businesses owned by “socially and

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<sup>85</sup> *Id.*

<sup>86</sup> 13 C.F.R. § 127.400 (2015); 13 C.F.R. §§ 127.600-127.604 (2015). 13 C.F.R. § 127.401(a) states that “[a]n eligibility examination is the formal process through which SBA verifies and monitors the accuracy of any certification made or information provided as part of the certification process or in connection with an EDWOSB or [a] WOSB requirement.” 13 C.F.R. § 127.401(a) (2015). A status protest is a mechanism used to challenge or verify an EDWOSB’s or a WOSB’s eligibility for a specific requirement. 13 C.F.R. § 127.401(b) (2015).

<sup>87</sup> *See, e.g.,* Y.S.K. Const. Co. v. United States, 30 Fed. Cl. 449, 456 (1994). In *Y.S.K. Const. Co.*, the Court ruled that the SBA must determine the Small Disadvantaged Business Status of the procurement contract awardee when the SBA declined to determine the plaintiff’s status as a small disadvantaged business. *Id.* at 459.

<sup>88</sup> NRC REPORT ON WOSBS, *supra* note 79, at 13.

<sup>89</sup> S. REP. NO. 95-1070, at 14 (1978); *see also* U.S. COMM’N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS, at i (1975).

<sup>90</sup> Exec. Order No. 11458, 34 Fed. Reg. 4937 (Mar. 5, 1969), *superseded by* Exec. Order 11625, 36 Fed. Reg. 19,967 (Oct. 13, 1971), *revoked by* Exec. Order No. 12007, 42 Fed. Reg. 42,839 (Aug. 22, 1977).

<sup>91</sup> U.S. COMM’N ON CIVIL RIGHTS, *supra* note 89, at i. The U.S. Commission on Civil Rights reported that among forty-one interviewed female entrepreneurs, both minorities and whites, only eight obtained government contracts. *Id.* at 12. Despite the fact that twenty-six females from this group submitted contract bids in the competitive bidding process on a regular basis, none of them received contract awards. *Id.*

economically disadvantaged” individuals.<sup>92</sup> Minorities—all Blacks, Hispanics, Asians, and Native Americans—qualified as “socially and economically disadvantaged”;<sup>93</sup> again, non-minority women did not.

#### A. The 8(a) BD Program

The earliest set-aside program is the 8(a) Minority Small Business and Capital Ownership Development Program (“8(a) BD Program”).<sup>94</sup> In 1978, Congress amended section 8 of the Small Business Act to establish the 8(a) BD Program for the purpose of assisting small businesses that are controlled and at least 51% unconditionally owned by one or more socially and economically disadvantaged persons to “compete in the American economy through business development.”<sup>95</sup> The eligible firms participating in the 8(a) BD Program graduate from it nine years after admission.<sup>96</sup>

The Small Business Act and Federal Regulations define “socially disadvantaged individuals” as those persons “who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identity as a member of a group without regard to their individual qualities” under circumstances that are beyond their control.<sup>97</sup> “Economically disadvantaged” individuals are those socially disadvantaged persons who may not be able to compete in the private sector because they have limited access to capital and credit opportunities, and their personal net worth is less than \$250,000 for the first initial eligibility determination and less than \$750,000 after admission to the program.<sup>98</sup> The 8(a) DB minority business concerns must also demonstrate that they have “reasonable prospects for success in competing in the private sector” by showing that the firms operated and generated revenues for a minimum of two years before applying to the 8(a) BD Program and their management possesses the requisite technical and managerial experience.<sup>99</sup>

The 8(a) BD certified firms are eligible for restricted contracts, such as reserves, set-aside awards and orders, and sole source contracts.<sup>100</sup> However, the total value of the sole source contracts that an 8(a) BD certified firm could obtain while in the program cannot exceed the lesser of \$100 million or five times the size

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<sup>92</sup> NRC REPORT ON WOSBS, *supra* note 79, at 14.

<sup>93</sup> *Id.*

<sup>94</sup> KATE M. MANUEL & ERIKA K. LUNDER, CONG. RESEARCH SERV., R41945, SMALL BUSINESS SET-ASIDE PROGRAMS: AN OVERVIEW AND RECENT DEVELOPMENTS IN THE LAW 6 (2012).

<sup>95</sup> *Id.*; Small Business Act of 1953, Pub. L. No. 95-507, 92 Stat. 1757, 1761-63 (codified as amended at 15 U.S.C. § 637(a) (2012)); 13 C.F.R. § 124.1 (2015); 13 C.F.R. § 124.101 (2015); 13 C.F.R. § 124.106 (2015).

<sup>96</sup> 13 C.F.R. § 124.2 (2015).

<sup>97</sup> 15 U.S.C. § 637(a)(5) (2012); 13 C.F.R. § 124.103 (2015).

<sup>98</sup> 15 U.S.C. § 637(a)(4)(A) (2012); 13 C.F.R. § 124.104 (2015).

<sup>99</sup> 13 C.F.R. § 124.107 (2015).

<sup>100</sup> 13 C.F.R. § 124.501(a)-(b) (2015).

standard of the firm's receipts-based primary industry code.<sup>101</sup> In 2013, there were approximately 8,027 firms in the 8(a) BD Program.<sup>102</sup>

### *B. The HUBZone Program*

The HUBZone set-aside program ("HUBZone Program") was created by the Small Business Reauthorization Act of 1997.<sup>103</sup> The program allows the contracting officers to restrict competition to qualified small businesses that have their primary office located in one of the designated Historically Underutilized Business Zones ("HUBZones"), which were established for the purpose of "increas[ing] employment, investment, and economic development in such areas."<sup>104</sup> A HUBZone small business must be controlled and at least 51% unconditionally owned by U.S. citizens.<sup>105</sup> In the alternative, the business can be wholly owned by Alaskan native corporations, agricultural cooperatives, and one or more Indian Tribal Governments.<sup>106</sup> A HUBZone firm must also meet the size standards for its primary industry classification, and at least 35% of its employees must reside within a HUBZone.<sup>107</sup> The HUBZone contracts may include set-aside awards and orders, reserve awards, or sole source awards.<sup>108</sup> In 2013, there were approximately 5,712 firms in the HUBZone Program.<sup>109</sup> Remarkably, a qualified HUBZone small business concern may retain a large business as a subcontractor.<sup>110</sup>

### *C. The SDVO SB Program*

The Veterans Benefits Act of 2003 established the Service-Disabled Veteran-Owned Small Business set-aside program ("SDVO SB Program") for veteran-owned small businesses, or publicly owned firms, which are controlled and not less than 51% unconditionally owned by one or more service-disabled veterans.<sup>111</sup> The SDVO SB firms must meet the small business size requirements corresponding to the industry code assigned to a procurement contract at the time the firms submit contract offers.<sup>112</sup> The contracting officers can award contracts under the SDVO

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<sup>101</sup> 13 C.F.R. § 124.519 (2015).

<sup>102</sup> ROBERT J. DILGER & SEAN LOWRY, CONG. RESEARCH SERV., RL 33243, SMALL BUSINESS ADMINISTRATION: A PRIMER ON PROGRAMS 15 (2013), <http://fas.org/sgp/crs/misc/RL33243.pdf> [hereinafter CRS PRIMER].

<sup>103</sup> Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, §§ 601-607, 111 Stat. 2592, 2627-36 (codified as amended at 15 U.S.C. § 657a (2012)).

<sup>104</sup> 13 C.F.R. § 126.100 (2015).

<sup>105</sup> 13 C.F.R. § 126.200 (2015).

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> 13 C.F.R. § 126.600 (2015).

<sup>109</sup> CRS PRIMER, *supra* note 102, at 16.

<sup>110</sup> 13 C.F.R. § 126.615 (2015).

<sup>111</sup> 13 C.F.R. § 125.9 (2015); Veterans Benefits Act of 2003, Pub. L. No. 108-183, § 308, 117 Stat. 2651, 2661-62 (codified as amended at 15 U.S.C. § 657f (2012)).

<sup>112</sup> 13 C.F.R. § 125.11(a) (2015).

SB Program through the reserve awards, set-aside orders and awards, and sole source procurement methods.<sup>113</sup>

### III. GENDER DISCRIMINATION AND THE EMERGENCE OF THE WOSB PROGRAM

#### *A. History of Gender Discrimination Leading to Establishment of the WOSB Program*

In 1971, for the first time since the Fourteenth Amendment became effective in 1868, the Supreme Court in *Reed v. Reed*<sup>114</sup> struck down a state statute based on the finding of discrimination against women in violation of the Equal Protection Clause.<sup>115</sup> The *Reed* Court held that the gender-based distinction was “the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.”<sup>116</sup> In the following year, Congress passed the Equal Rights Amendment to the Constitution (“ERA”), which provided that: “Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.”<sup>117</sup> Subsequently, the ERA was submitted to the state legislatures for ratification; however, by 1982, the amendment received only thirty-five out of the required three-fourths of the state votes.<sup>118</sup> Despite being introduced in Congress each year since 1982, the ERA has never passed muster to become an operative part of the U.S. Constitution.<sup>119</sup>

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<sup>113</sup> 13 C.F.R. § 125.14 (2015). The Veterans Benefits, Health Care, and Information Technology Act of 2006 created an additional set-aside program for veteran-owned small businesses for procurements of the Department of Veterans Affairs; however, the program is not limited only to veterans with service-connected disabilities. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, §§ 502-503, 120 Stat. 3431, 3431-35 (codified as amended at 38 U.S.C. §§ 8127-8128 (2012)); MANUEL & LUNDER, *supra* note 94, at 23. In addition, a surviving spouse of a veteran whose death caused the business to be owned less than 51% by one or more veterans can be treated as if the spouse were a veteran for up to ten years. 38 U.S.C. § 8127(g)-(h) (2012).

<sup>114</sup> See *Reed v. Reed*, 404 U.S. 71, 74 (1971) (holding unconstitutional a provision in the Idaho Code giving preference to men over women where both were equally qualified and both filed competing applications for administration of decedent’s estate).

<sup>115</sup> *Supreme Court Decisions & Women’s Rights—Milestones to Equality: Breaking New Ground—Reed v. Reed*, 404 U.S. 71 (1971), SUPREME COURT HISTORICAL SOC’Y, [http://supremecourthistory.org/lc\\_breaking\\_new\\_ground.html](http://supremecourthistory.org/lc_breaking_new_ground.html) (last visited Nov. 15, 2015).

<sup>116</sup> *Reed*, 404 U.S. at 76.

<sup>117</sup> U.S. COMM’N ON CIVIL RIGHTS, A REPORT OF THE INTER-AMERICAN COMMISSION OF WOMEN, WOMEN’S RIGHTS IN THE UNITED STATES OF AMERICA 13 (1979).

<sup>118</sup> *Id.* The ERA needed only three more state ratifications. *Id.*

<sup>119</sup> NAT’L COUNCIL OF WOMEN’S ORGS., ERA TASK FORCE, *The Equal Rights Amendment* (Mar. 2013), [http://www.equalrightsamendment.org/misc/ERA\\_overview.pdf](http://www.equalrightsamendment.org/misc/ERA_overview.pdf). In 2012, 91% of Americans believed that the U.S. Constitution should explicitly guarantee equal rights of men and women. *Id.* In 2013, Senator Bob Mendez reintroduced the ERA in Congress. S.J. Res. 10, 113th Cong. (2013); *Unfinished Business for the Constitution*, ALICE PAUL INSTITUTE, <http://www.equalrightsamendment.org/congress.htm> (last visited Nov. 9, 2015). In 2014, Congresswoman Jackie Speier introduced a Joint Resolution eliminating the time limit on ratification of the ERA and declaring that the amendment should be part of the Constitution whenever the ERA is ratified by the legislatures of three-fourths of the states. H.R.J. Res. 113, 113th Cong. (2014); ALICE PAUL INSTITUTE, *supra*. In 2015, Rep. Carolyn Maloney introduced the ERA in House but the wording of Section 1 of the amendment was changed from the original version to add: “Women shall have equal rights in the United States and every place

In 1976, the Supreme Court in *Craig v. Boren* addressed the use of statistics as a tool to measure gender discrimination.<sup>120</sup> Before *Craig*, the Court upheld gender preferences where no statistical evidence was offered,<sup>121</sup> and decided cases both ways while relying in part on statistics.<sup>122</sup> In *Craig v. Boren*, however, the Court held that while the state's use of classification based on sex served an "important governmental objective," the use of statistics to meet the burden of showing that the gender-based distinction does not violate the Equal Protection Clause was improper.<sup>123</sup> The Court further reasoned that, "proving broad sociological propositions by statistics is a dubious business and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause."<sup>124</sup>

Two years later, Congress amended the Small Business Act to create the 8(a) BD Program for small business owned by socially and economically disadvantaged individuals.<sup>125</sup> While racial minorities were already presumed to be socially disadvantaged and could participate in the program, Congress did not decide how to treat white women.<sup>126</sup> As a result, a group of white women filed lawsuits to be admitted into the 8(a) BD Program alleging that it was too difficult for them to qualify individually for federal contracts.<sup>127</sup> In 1978, Congress amended the Small Business Act and the Small Business Investment Act of 1958<sup>128</sup> to require federal agencies to establish and negotiate with the SBA contracting goals for specified categories of small businesses, which did not include WOSBs until 1994.<sup>129</sup> In 1979, President Carter issued Executive Order 12138 compelling federal agencies to "take affirmative actions in support of women's business enterprise," including in federal procurement.<sup>130</sup> In the same year, women-owned businesses received only about 0.2% of all federal procurement actions.<sup>131</sup> Between 1980 and 1989,

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subject to its jurisdiction." H.R.J. Res. 52, 114th Cong. (2015); ALICE PAUL INSTITUTE, *supra*.

<sup>120</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

<sup>121</sup> *See, e.g.*, *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (upholding preferential employment treatment for women naval officers).

<sup>122</sup> *See, e.g.*, *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (holding that enrollment in a nursing school that was limited only to women violated the Equal Protection Clause); *Califano v. Webster*, 430 U.S. 313 (1977) (upholding a federal statute allowing women to eliminate additional three low-earning years from calculation of their retirement benefits as compared to similarly situated men).

<sup>123</sup> *Craig*, 429 U.S. at 201.

<sup>124</sup> *Id.* at 204.

<sup>125</sup> *See* discussion *supra* Part II.A.

<sup>126</sup> NRC REPORT ON WOSBS, *supra* note 79, at 15.

<sup>127</sup> *Id.*

<sup>128</sup> Small Business Investment Act of 1958, Pub. L. No. 95-507, § 221, 92 Stat. 1757, 1770 (codified as amended at 15 U.S.C. §§ 661-662, 671, 681-687m, 689-689q, 690-690q, 692-697g (2012)).

<sup>129</sup> Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7106, 108 Stat. 3243, 3369 (codified as amended at 15 U.S.C. § 644(g)(1) (2012)).

<sup>130</sup> Exec. Order No. 12138, § 1-101, 3 C.F.R. § 393 (1979); NRC REPORT ON WOSBS, *supra* note 79, at 15.

<sup>131</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,030 (proposed Mar. 4, 2010) (to be codified at 13 C.F.R. pts. 121, 127, 134); Women's Business Ownership Act of 1988, Pub. L. No. 100-588, 102 Stat. 2689 (repealed 2011).

this percentage increased to 1%.<sup>132</sup> In the succeeding years, when “the growth rate in the number of [WOSBs] was nearly twice of all firms between 1997 and 2002,” women-owned small businesses still did not receive a proportional increase in their share of federal procurements measured by the contract amounts.<sup>133</sup> In fact, from 1997 to 1999, the number of federal procurements awarded to women-owned businesses declined by approximately 38%.<sup>134</sup>

In the 1980s and 1990s, programs assisting minority-owned small businesses continued to expand to a greater degree than programs aimed at supporting women-owned small businesses.<sup>135</sup> In 1988, Congress enacted the Women’s Business Ownership Act “to assist women in starting, managing and growing small businesses.”<sup>136</sup> Additionally, under the Department of Transportation statute, women-owned small businesses became eligible to participate in the “disadvantaged business enterprise” program.<sup>137</sup> Subsequently, the Acquisition Streamlining Act of 1994 established the Government-wide goal that not less than 5% of the total value of federal prime contracts and subcontracts for each fiscal year must be awarded to women-owned small businesses.<sup>138</sup> Six years later, the Small Business Reauthorization Act of 2000<sup>139</sup> authorized the WOSB Program to address “decades of sex discrimination that have inhibited the ability of women to form firms and then to compete equally for contracts.”<sup>140</sup> Ten years later, in the 2010 Proposed Rule issued to implement the WOSB Program, the SBA stated that:

[T]he statute helps WOSBs overcome the economic barriers they have faced and helps ensure that the Federal government does not perpetuate the effects of economic sex discrimination. In enacting this statute, Congress acted against a backdrop of discrimination against women that has been examined in Congressional hearings over many years and which persists to this day, as well as a history of largely unsuccessful Federal attempts to remedy that discrimination and provide a level playing field for WOSBs to compete for Federal contracts. Women-owned firms have been persistently underrepresented in Federal procurement contracting.<sup>141</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> H.R. REP. NO. 106-879, at 2 (2000).

<sup>135</sup> NRC REPORT ON WOSBS, *supra* note 79, at 17.

<sup>136</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,030 (proposed Mar. 4, 2010) (to be codified at 13 C.F.R. pts. 121, 127, 134).

<sup>137</sup> NRC REPORT ON WOSBS, *supra* note 79, at 15.

<sup>138</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,030 (proposed Mar. 4, 2010) (to be codified at 13 C.F.R. pts. 121, 127, 134); Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7106, 108 Stat. 3243, 3369 (codified as amended at 15 U.S.C. § 644(g)(1) (2012)).

<sup>139</sup> Small Business Reauthorization Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763, 2763A-667 (codified as amended at 15 U.S.C. §§ 647g, 657d-657e (2012)).

<sup>140</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,030 (proposed Mar. 4, 2010) (to be codified at 13 C.F.R. pts. 121, 127, 134).

<sup>141</sup> *Id.*

However, despite this strong commitment of the federal government to eliminate discrimination against women in federal procurement, federal agencies have never achieved the aspirational goal of awarding 5% of prime contract dollar amounts to women-owned small businesses.<sup>142</sup>

*B. The Ten-Year Delay in Implementation of the WOSB Program*

Congress established the WOSB Program in the Equity in Contracting for Women Act of 2000 (“Women’s Act”), which was passed on December 21, 2000.<sup>143</sup> The Women’s Act is an amendment of the Small Business Act, to which Congress added section 8(m) Procurement Program for Women-owned Small Business Concerns, as part of the Small Business Reauthorization Act of 2000.<sup>144</sup> The new section 8(m) authorizes the contracting officers to restrict competition to eligible EDWOSBs and WOSBs for federal contracts in industries in which the SBA determines that women-owned small businesses are underrepresented or substantially underrepresented in federal procurement.<sup>145</sup> This authority to create a sheltered market for competition among EDWOSBs and WOSBs is commonly referred to as the WOSB Program.<sup>146</sup>

Justification of necessity for a preference program based on gender in federal contracting is oftentimes made by presenting statistical evidence.<sup>147</sup> In the context of federal procurement, this evidence needs to show disparities between the preferred group’s share of contracts awards (utilization) and the group’s share of the population of firms “that are ready, willing, and able to compete for government contracts” (availability).<sup>148</sup> Following this method and in order to implement the WOSB Program, Congress obligated the SBA<sup>149</sup> to conduct a study identifying industries within the categories of the North American Industry

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<sup>142</sup> GAO’S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 22.

<sup>143</sup> Equity in Contracting for Women Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-708 (codified as amended at 15 U.S.C. § 637(m) (2012)).

<sup>144</sup> Small Business Reauthorization Act of 2000 § 811.

<sup>145</sup> 15 U.S.C. § 637(m) (2012); *see also* 13 C.F.R. §§ 127.100-127.101 (2015).

<sup>146</sup> Congress established five criteria that must be met before a contracting officer may set aside an acquisition for the WOSB Program: (1) a business concern must meet the ownership criteria; (2) the contracting officer must have a reasonable expectation that at least two women-owned small businesses will submit offers for the prime contract; (3) the contract is for the procurement of goods within the NAICS industries where women are underrepresented (a WOSB procurement) or substantially underrepresented (an EDWOSB procurement); (4) “the contract award can be made at a fair and reasonable price”; and (5) the business must be duly certified as a WOSB or an EDWOSB. *See* 15 U.S.C. § 637(m)(2). With the exception of sole source contracts, the NDAA FY 2015 removed the maximum contract amount limitations for contracts awarded under the WOSB Program, which previously were \$5 million for manufacturing contracts and \$3 million for other contracts. NDAA FY 2015, *supra* note 23, § 825, at 146-47.

<sup>147</sup> *See* Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,259 (Oct. 7, 2010) (to be codified at 13. C.F.R. pts. 121, 124, 125, 126, 127, and 134).

<sup>148</sup> NRC REPORT ON WOSBS, *supra* note 79, at 23-24.

<sup>149</sup> *See* 15 U.S.C. § 637(m)(4) (2012); Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 62,258, 62,258 (Oct. 7, 2010) (to be codified at 13. C.F.R. pts. 121, 124, 125, 126, 127, and 134).

Classification System (“NAICS”) in which EDWOSBs and WOSBs were underrepresented in federal procurement.<sup>150</sup> As the SBA noted, the study had to pass the equal protection muster of the Fifth Amendment because the WOSB Program used gender as a factor to establish a sheltered market for EDWOSBs and WOSBs.<sup>151</sup> However, Congress did not define “underrepresentation,” or indicate that only one method of identifying underrepresentation can be used, thereby allowing the SBA to determine the appropriate method and disparity measure.<sup>152</sup>

Gender preferences in federal procurement are subject to the intermediate scrutiny standard of review enunciated by the Supreme Court in *Untied States v. Virginia*.<sup>153</sup> This standard requires a showing of “exceedingly persuasive justification” for gender preferences.<sup>154</sup> As a result, the federal government bears the burden of justification<sup>155</sup> and proving that the gender preferences at least “serve[] important government objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.”<sup>156</sup> Relying on *Califano v. Webster*<sup>157</sup> and *City of Richmond v. Croson Co.*,<sup>158</sup> the SBA stated that:

[I]n applying [the intermediate scrutiny] standard to the WOSB Program, the government ha[d] a sufficiently important objective: To redress the effects of past discrimination against women in contracting and to ensure that the effects of that discrimination do not serve to limit WOSBs’ opportunities to participate in Federal contracting opportunities.<sup>159</sup>

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<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 62,264.

<sup>152</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,034 (proposed Mar. 4, 2010) (to be codified at 13. C.F.R. pts. 121, 127, and 134).

<sup>153</sup> *United States v. Virginia*, 518 U.S. 515 (1996).

<sup>154</sup> *Id.* at 533. Justice Scalia criticized the majority opinion because the majority redefined the intermediate scrutiny standard for sex-based classification in such a way that “makes it indistinguishable from strict scrutiny.” *Id.* at 596 (Scalia, J., dissenting).

<sup>155</sup> The U.S. Supreme Court further explained that “[t]he justification must be genuine, not hypothesized or invented post hoc in response to litigation.” *Id.* at 533. It is also inadequate for the state to rely merely on “overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Califano v. Webster*, 430 U.S. 313, 318 (1977) (“[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives . . . . Reduction of the disparity in economic condition between men and women caused by the long history of discrimination against women has been recognized as such an important governmental objective.”); Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,043 (proposed Mar. 4, 2010) (to be codified at 13. C.F.R. pts. 121, 127, and 134).

<sup>158</sup> *City of Richmond v. Croson Co.*, 488 U.S. 469, 471 (1989) (“It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.”); Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,043 (proposed Mar. 4, 2010) (to be codified at 13. C.F.R. pts. 121, 127, and 134).

<sup>159</sup> Women-Owned Small Business Federal Contract Program, 75 Fed. Reg. 10,030, 10,043 (proposed Mar. 4, 2010) (to be codified at 13. C.F.R. pts. 121, 127, and 134).

In 2001, the SBA completed its own study of WOSBs underrepresentation, however, the SBA never published it because the agency had concerns about the content and constitutionality of its study.<sup>160</sup> Two years later, the SBA retained the National Academy of Science (“NAS”) to evaluate the SBA’s study and examine its statistical accuracy.<sup>161</sup> After another two years, in 2005, NAS concluded that the SBA’s study was “flawed” and should not be used.<sup>162</sup>

In light of these delays, the U.S. Women’s Chamber of Commerce (“WCC”) filed a complaint against the SBA seeking either an order or a writ of mandamus of the Court that would compel the SBA to complete a new study and promulgate procedures identifying WOSBs that are underrepresented in federal procurement within three months.<sup>163</sup> The WCC maintained that judicial intervention to force the SBA to publish a final study and procedures was required because the SBA’s delay to take these actions was unreasonable and in violation of section 555(b) of the Administrative Procedure Act.<sup>164</sup> The SBA argued that its employees were “working to insure that the WOSB[s] contracting program will be implemented in a way that conforms with the United States Constitution, something which is clearly within the scope of the [SBA’s] Administrator’s authority.”<sup>165</sup> Nonetheless, the Court found that the nearly five-year delay was unreasonable and that the SBA “acted outside the scope of [its] authority by enabling the delay.”<sup>166</sup> However, the Court refused to impose injunctive relief because the agency re-wrote the proposed rules and was in the process of searching for proposals to conduct the underrepresentation study.<sup>167</sup> Still, the Court retained jurisdiction in the case and monitored the SBA’s actions taken to fulfill its statutory obligation under the Women’s Act.<sup>168</sup> Subsequently, the SBA retained the Kaufmann-RAND Institute for Entrepreneurship Public Policy (“RAND”), and in 2007, the institute completed a “revised study of underrepresentation of WOSBs” in federal procurement within the NAICS codes (the “2007 RAND Report.”).<sup>169</sup> Albeit based on data from a

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<sup>160</sup> See *U.S. Women’s Chamber of Commerce v. (RBW) U.S. Small Bus. Admin.*, No. 1:04-CV-01889, 2005 WL 3244182, at \*2 (D.D.C. Nov. 30, 2005).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*; *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 62,258, 62,259 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, and 134).

<sup>163</sup> *U.S. Women’s Chamber of Commerce*, 2005 WL 3244182, at \*1.

<sup>164</sup> *Id.* at \*4 (citing 5 U.S.C. § 555(b) (2000)). The Women’s Chamber of Commerce argued that (1) the fact that the SBA failed to request funding for the WOSB Program in 2003 and 2005; and (2) the SBA’s Administrator did not respond to a letter from the House of Representative’s Committee on Small Business regarding the delay, evidenced that the SBA’s delay in conducting the WOSB underrepresentation study and establishing procedures to implement the WOSB Program was unreasonable. *Id.* at \*5.

<sup>165</sup> *Id.* at \*4.

<sup>166</sup> *Id.* at \*18.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 62,258, 62,259 (Oct. 7, 2010) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, 127, and 134). The 2007 RAND Report utilized two approaches to interpret the statutory term “underrepresentation:” the dollars approach and

decade ago—from fiscal years 2002 through 2005—the 2007 RAND Report is still used today.<sup>170</sup>

The implementation of the WOSB Program was further delayed by the decision of the U.S. Court of Appeals for the Federal Circuit in *Rothe Development Corporation v. Department of Defense* in 2008.<sup>171</sup> In *Rothe*, the Court held that “disparity studies were insufficient to form statistical core of ‘strong basis in evidence’ to uphold statute” that would give preference to minority-owned small businesses, and stated that the Court would be hesitant to find a nation-wide pattern of racial discrimination in federal procurement even if the studies were methodologically unimpeachable.<sup>172</sup> As a result, the SBA delayed implementation of the WOSB Program to “review[] the relevance of the standard for disparity studies discussed” in *Rothe*.<sup>173</sup> The WOSB Program finally became effective in the Federal Acquisition Regulations on April 1, 2011—over ten years after Congressional authorization.<sup>174</sup>

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the numbers approach. *Id.* The dollars approach “compare[d] the proportion of the dollar value of contracts in a particular NAICS code awarded to WOSBs with the proportion of gross receipts (revenues) in that NAICS code earned by WOSBs.” *Id.* at 62,260. The numbers approach, on the other hand, “compare[d] the proportion of contracts (calculated in terms of number of contracts) awarded to WOSBs in a particular NAICS code with the number of WOSBs [that were “ready, willing, and able to perform” government contracts] in that particular NAICS code.” *Id.* Underrepresentation was expressed as a “disparity ratio” between 0.5 and 0.8. *Id.* Substantial underrepresentation meant a disparity ratio of less than 0.5. *Id.* at 62,283. For WOSBs, a disparity ratio of 1.0 and above suggested that there was no underrepresentation because WOSBs obtained contract awards at least in the same proportion as they were represented in the particular industry. *Id.* at 62,260. Similarly, in cases of employment discrimination, the Equal Employment Opportunity Commission applied a four-fifths or 0.8 rule as a maximum value of the disparity threshold for a group’s underrepresentation status that is based on the group’s share of a total population. NRC REPORT ON WOSBs, *supra* note 79, at 23. However, courts did not find this threshold to be controlling and instead they preferred the more formal statistical tests. *Id.* The NDAA FY 2015 accelerated the deadline for the SBA to conduct a new study that would provide more up-to-date information about the industries in which EDWOSBs and WOSBs are underrepresented. According to the Act, the SBA is required to complete the study by January 2, 2016. Compare NDAA FY 2015, *supra* note 23, § 825, at 146–47, with 15 U.S.C. § 656(o) (2012).

<sup>170</sup> *Rothe Dev. Corp. v. Dep’t of Defense*, 545 F.3d 1023 (Fed. Cir. 2008); ELAINE REARDON ET AL., KAUFMANN-RAND INSTITUTE FOR ENTREPRENEURSHIP PUBLIC POLICY, THE UTILIZATION OF WOMEN-OWNED SMALL BUSINESS IN FEDERAL CONTRACTING, at x (2007), [http://www.rand.org/pubs/technical\\_reports/TR442.html](http://www.rand.org/pubs/technical_reports/TR442.html).

<sup>171</sup> See The Women-Owned Small Business Federal Contract Assistance Procedures—Eligible Industries, 74 Fed. Reg. 1153, 1153 (proposed Jan. 12, 2009) (to be codified at 13 C.F.R. pts. 121, 125, 127, and 134).

<sup>172</sup> *Rothe Dev. Corp.*, 545 F.3d at 1045. In *Rothe*, the statute authorized the Department of Defense to apply a 10% “price evaluation adjustment” to bids submitted by non-small and disadvantaged business bidders thereby increasing those bids by 10% of the price before the agency could compare them to bids submitted by the small disadvantaged businesses. *Id.* at 1027.

<sup>173</sup> The Women-Owned Small Business Federal Contract Assistance Procedures—Eligible Industries, 74 Fed. Reg. 1153 (proposed Jan. 12, 2009) (to be codified at 13 C.F.R. pts. 121, 125, 127, and 134).

<sup>174</sup> U.S. SMALL BUS. ADMIN. WOMEN-OWNED SMALL BUSINESS (WOSB) PROGRAM, SMALL ENTITY COMPLIANCE GUIDE TO THE WOSB PROGRAM 4 (2011), [https://www.sba.gov/sites/default/files/files/WOSB%20Compliance%20Guide\\_April2011.pdf](https://www.sba.gov/sites/default/files/files/WOSB%20Compliance%20Guide_April2011.pdf).

*C. The Essential Components of the WOSB Program*

To qualify for participation in the WOSB Program, a firm must meet size, ownership, and management control requirements. A qualified WOSB, therefore, is a business that is: (1) a small business; (2) not less than 51% unconditionally and directly owned and controlled by one or more women who are United States citizens;<sup>175</sup> and (3) the management and daily operations of the firm are controlled by one or more women.<sup>176</sup> Women exercise control over a corporation by sitting on the Board of Directors where they comprise majority of the directors, or have either the weighted voting power or percentage of voting stock that is necessary to overcome a voting supermajority; in a partnership, they exercise control by serving as a general partner who controls all partnership decisions; and, in a limited liability company, women exercise control by serving as managing members with control over all decisions concerning the business.<sup>177</sup>

Similarly, an EDWOSB is a small business at least 51% of which is unconditionally and directly owned and controlled by one or more women who are economically disadvantaged<sup>178</sup>—i.e., the woman-owner's ability to compete in the

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<sup>175</sup> 15 U.S.C. § 637(m) (2012). An EDWOSB or a WOSB cannot hold the minimum 51% equity ownership in a business through another firm or a trust. 13 C.F.R. § 127.201(c) (2015). Furthermore, the equity ownership of a woman-owner cannot be subject to any conditions, executory agreements, voting trusts, or be encumbered in other ways that would potentially cause a transfer of the ownership benefits to another person. *Id.* However, if the terms of a transaction involving the equity ownership conform with "normal commercial practices," a pledge or encumbrance of stock or other kind of ownership interest as collateral, including a seller-financed transaction, will not affect the ownership but an EDWOSB or a WOSB must still retain control of the business absent events of default or other contractual breaches specified in the transaction documents. *See id.* Moreover, unexercised stock options held by a woman or similar agreements are generally disregarded. 13 C.F.R. § 127.201(f) (2015). On the other hand, if any other person or business entity holds unexercised stock options, a right to convert non-voting stock or debentures into voting stock, or similar other agreements, the SBA will treat such rights and agreements as having been exercised. *Id.*

<sup>176</sup> 15 U.S.C. § 637(m). For both the EDWOSB and WOSB status categories, the women-owners are also required to be in charge of making long-term and day-to-day decisions about the business. 13 C.F.R. § 127.202(a) (2015). Furthermore, a woman must be the highest officer in the business and have the managerial experience needed to run it. 13 C.F.R. § 127.203(a)-(b) (2015). If a woman or an economically disadvantaged woman is the highest officer, she must manage the business and dedicate full-time to it during regular business hours. 13 C.F.R. § 127.202(c) (2015). She cannot work outside; she must devote "sufficient time and attention" to the business and conduct the daily operations. *Id.* However, a female-owner does not have to have the technical expertise or have the required license for the business; she only should have the "ultimate managerial and supervisory control" over the employees that hold licenses or have the technical expertise needed for the business. 13 C.F.R. § 127.202(b); Potomacwave Consulting, Inc., SBA No. EDWOSB-104, 2014 WL 3746541, at \*8 nn.2-3 (July 8, 2014) (concluding that women or economically disadvantaged women managers do not have to have the technical expertise to be found in control of the business and declining to apply a four-factor test created in V&M Precision Machining & Grinding, SBA No. SDBA-153, 2002 WL 34246328 (June 3, 2002) to determine a woman-owner's competency to control a business, which considered: (1) the characteristics of the business, (2) the education and employment history of the woman-owner (including any supervisory experience) vis-à-vis other non-disadvantaged managers of the firm; (3) her role at the business; and (4) the scope of her involvement in the operations of the business). Nevertheless, if a man has the requisite license and holds equity interest in the business, the SBA may find that he controls the business instead of the woman. *See* 13 C.F.R. § 127.202(g) (2015).

<sup>177</sup> 13 C.F.R. § 127.202 (2015).

<sup>178</sup> 15 U.S.C. § 637(m).

free market is limited by her diminished access to capital and credit as compared to other firms operating in the same or similar lines of business.<sup>179</sup> Moreover, an economically disadvantaged woman must have a personal net worth that cannot exceed \$750,000, irrespective of certain items, such as her ownership interest in the business, equity interest in her primary personal residence, or funds in a retirement account.<sup>180</sup> In addition, her annual adjusted gross income averaged over the past three years before certification must be lower than \$350,000.<sup>181</sup> However, the income level only creates a rebuttable presumption of lack of economic disadvantage and the SBA may consider even lower incomes as an indication that a woman is not economically disadvantaged.<sup>182</sup> Lastly, the market value of her assets cannot exceed \$6 million.<sup>183</sup>

Determining how many transgender women are participating in the WOSB Program might be currently impossible because the data about representation of transgender women in federal procurement is not publicly available and may not even exist. In addition, federal agencies generally do not ask about gender identity in official records, or conduct formal surveys.<sup>184</sup> Moreover, many transgender persons choose to hide their gender or gender transition to avoid being subjected to discrimination.<sup>185</sup> Regardless, since 1936, approximately 47,378 transgender women changed their names with the Social Security Administration.<sup>186</sup> Further, according to one survey of 6,450 transgender and gender non-conforming participants (both women and men), only 8% of the respondents were self-employed or owned a business, and another 4% were contract workers.<sup>187</sup> Notwithstanding the obvious problem of insufficient data, transgender women who cannot present congruent identification documents are likely barred from participating in the WOSB Program, while others may face obstacles in evidencing their status as transgender women.

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<sup>179</sup> 13 C.F.R. § 127.203 (2015).

<sup>180</sup> See 13 C.F.R. § 127.203 (2015). For example, for the purpose of an EDWOSB status certification, the SBA may consider the strength of the financial condition of a woman's spouse to establish her ability to access credit and capital. 13 C.F.R. § 127.203(c)(2) (2015). A married woman who seeks to establish economic disadvantage must also submit her husband's financial information, unless they are legally separated. *Id.* Moreover, the SBA will take into consideration the spouse's financial condition if he is an officer, employee, director of the business, or he has provided financial support to the business, including loans or loan guarantees. *Id.*

<sup>181</sup> 13 C.F.R. § 127.203(c)(3) (2015).

<sup>182</sup> *Id.*

<sup>183</sup> 13 C.F.R. § 127.303(c)(4) (2015). Funds invested in qualified IRA accounts or certain other retirement accounts are not included in the calculation of the fair market value of assets for the purpose of determining economic disadvantage of a woman. *Id.*

<sup>184</sup> Claire Cain Miller, *The Search for the Best Estimate of the Transgender Population*, N.Y. TIMES (June 8, 2015), [http://www.nytimes.com/2015/06/09/upshot/the-search-for-the-best-estimate-of-the-transgender-population.html?\\_r=0](http://www.nytimes.com/2015/06/09/upshot/the-search-for-the-best-estimate-of-the-transgender-population.html?_r=0).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> GRANT ET AL., *supra* note 9, at 22.

Congressional representatives and women's advocacy groups long argued for bringing the WOSB Program in parity with other small business set-aside programs. In January 2013, the President signed into law the National Defense Authorization Act for Fiscal Year 2013,<sup>188</sup> which removed the statutory ceiling on a single contract dollar amount that can be awarded under the WOSB Program: \$5 million for manufacturing contracts and \$3 million for other set-aside contracts.<sup>189</sup> As a result, the contracting officers may set-aside contracts under the WOSB Program regardless of the contract amount if all other applicable requirements for a particular EDWOSB or WOSB procurement can be met.<sup>190</sup> In December 2014, Congress enacted the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015 (the "NDAA FY 2015"), which also authorized the contracting officers to award sole source contracts to EDWOSBs and WOSBs for the total contract dollar amount of a single contract up to \$6.5 million for manufacturing and \$4 million for other contracts.<sup>191</sup>

Although EDWOSB and WOSB certified firms are eligible for a number of different types of procurement contracts, including task or delivery orders and set-aside or Multiple Award Contracts,<sup>192</sup> Congress did not create a requirement for federal agencies to award procurement contracts under the WOSB Program.<sup>193</sup> For example, the Small Business Act states that an agency "may" award procurement contracts under the WOSB Program.<sup>194</sup> Furthermore, there are no established quotas for contract actions under the WOSB Program or penalties for failure to award them. Lastly, an admission into the program does not guarantee that an EDWOSB or a WOSB will receive a contract obligation under the WOSB Program. In 2015, there were approximately 34,000 firms identified as either EDWOSBs or WOSBs in the WOSB Program.<sup>195</sup>

#### IV. LAGGING BEHIND EQUALITY AND THE LEGAL MANDATE

##### *A. Federal Agencies Have Never Fully Complied with the 5% Goaling Requirement for Prime Contract Awards to WOSBs*

Congress has set a federal government-wide goal that each year at least 23% of prime contract dollars must be awarded to small businesses and not less than 5%

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<sup>188</sup> National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 12-239, 126 Stat. 1632 (codified as amended in scattered sections of the U.S. Code).

<sup>189</sup> Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61,114, 61,127 (Oct. 2, 2013) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, and 127).

<sup>190</sup> See 15 U.S.C. § 637(m) (2012).

<sup>191</sup> NDAA FY 2015, *supra* note 23, § 825, at 146-47.

<sup>192</sup> See 15 U.S.C. § 637(m); 13 C.F.R. § 127.102 (2015).

<sup>193</sup> 15 U.S.C. § 637(m)(2) (2012).

<sup>194</sup> *Id.*

<sup>195</sup> Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 24,846, 24,848 (proposed May 1, 2015) (to be codified at 13 C.F.R. pt. 127).

of the federal prime and subcontracting dollars<sup>196</sup> must be awarded to women-owned small businesses.<sup>197</sup> Since the inception of the WOSB Program in 2011, the percentage of contracting obligations awarded to WOSBs through all federal small business set-aside programs and open competition has stayed below the statutory goal of 5%.<sup>198</sup> In FY 2014, the federal government spent \$440 billion on federal procurement obligations, including approximately \$98 billion on contracts with small businesses.<sup>199</sup> The prime contracting achievement Government-wide for 2014 reached 4.68% for women-owned businesses, whereas the subcontracting achievement was 6.40%.<sup>200</sup> In 2013, EDWOSBs and WOSBs received \$101.1 million, or approximately 0.7% of all dollar amounts awarded to women-owned small businesses that were not in the WOSB Program.<sup>201</sup> However, these figures are likely overstated because they include contract amounts awarded to ineligible businesses.<sup>202</sup> In addition, errors of classification as a small business can occur because of the quality of the reported data or differences between the statutory definition of a small business and the definition used in the data sources.<sup>203</sup> Moreover, errors may result from misapplication of the small size standards for each NAICS industry code,<sup>204</sup> which are designated by the SBA, because the definition of a “small business” will vary by the industry codes.<sup>205</sup> Reporting and data errors contribute to the fact that executive agencies receive undue credit towards their small business goaling requirements.<sup>206</sup> Further, a mistaken belief

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<sup>196</sup> 15 U.S.C. § 644(g)(1) (2012). In 2014, U.S. Rep. Graves proposed the Greater Opportunities for Small Business Act of 2014, which would increase the prime contracting goal to 25% and the subcontracting goal to 40%. H.R. 4093, 113th Cong. (2014). The federal government reached the Government-wide prime contracting goal, and actually awarded more than 23% of the prime contract dollars to all small businesses, only two times: in 2013—23.39%, and in 2014—24.99%. U.S. SMALL BUS. ADMIN., GOVERNMENT-WIDE PERFORMANCE: FY2014 SMALL BUSINESS PROCUREMENT SCORECARD (2015), <https://www.sba.gov/content/small-business-procurement-scorecards-0> [hereinafter SBA’S SCORECARD FOR 2014].

<sup>197</sup> 15 U.S.C. § 644(g)(1).

<sup>198</sup> GAO’S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 22.

<sup>199</sup> *Contracting and Industrial Base II*, *supra* note 7, at 20-21.

<sup>200</sup> SBA’S SCORECARD FOR 2014, *supra* note 196. In 2013, the prime contracting achievement for the women-owned small businesses was 4.32%. U.S. SMALL BUS. ADMIN., GOVERNMENT-WIDE PERFORMANCE: FY2013 SMALL BUSINESS PROCUREMENT SCORECARD (2014); <https://www.sba.gov/content/small-business-procurement-scorecards-0>. In 2012, the achievement dropped to 4% from 4.04% in 2011. U.S. SMALL BUS. ADMIN., GOVERNMENT-WIDE PERFORMANCE: FY2012 SMALL BUSINESS PROCUREMENT SCORECARD (2013), <https://www.sba.gov/content/small-business-procurement-scorecards-0>.

<sup>201</sup> OFFICE OF INSPECTOR GEN., U.S. SMALL BUS. ADMIN., REPORT NUMBER 15-10, EVALUATION REPORT, IMPROVEMENTS NEEDED IN SBA’S MANAGEMENT OF THE WOMEN OWNED SMALL BUSINESS FEDERAL CONTRACTING PROGRAM 1 (2015) [hereinafter 2015 SBA’S REPORT ON THE WOSB PROGRAM]. Other women-owned small businesses received 99.3% of the procurement obligations. *Id.*

<sup>202</sup> See discussion *infra* Part IV.C.

<sup>203</sup> NRC REPORT ON WOSBS, *supra* note 79, at 41.

<sup>204</sup> See 13 C.F.R. § 121.101(a) (2015).

<sup>205</sup> NRC REPORT ON WOSBS, *supra* note 79, at 41. The variables used for measuring the size of the business are the number of employees and the amount of annual gross receipts. 13 C.F.R. § 121.201 (2015).

<sup>206</sup> See, e.g., OFFICE OF INSPECTOR GEN., U.S. SMALL BUS. ADMIN., REPORT NUMBER 11-18,

that an agency fulfilled its goaling obligation may lead the agency to issue fewer contract actions to qualified small businesses.<sup>207</sup>

The distribution of contract awards to WOSBs by dollar value may also be highly inaccurate.<sup>208</sup> For example, from 2011 through 2014, the number of contracts awarded to small business declined by 60% while the average size of a contract increased by 230%.<sup>209</sup> As a result, fewer small businesses received contracts but the monetary value of the contracts was on the rise.<sup>210</sup> This may indicate that an increasing number of small businesses were unable to compete for federal procurements.<sup>211</sup>

According to the SBA's scorecard report, which lists twenty-four federal agencies for the purpose of tracking the Government-wide performance in relation to the 23% goal for prime contract awards to small businesses, in FY 2014, twenty-two agencies met their 5% goal for prime contract awards to WOSBs.<sup>212</sup> Historically, the Department of Defense ("DOD") has been the largest buyer in the executive branch.<sup>213</sup> However, new data showed that the DOD decreased the number of contract awards to all small businesses by 70% while the value of its contract actions rose by 290%.<sup>214</sup> This data may also support the finding that contract bundling is taking place more frequently—as a result, small disadvantaged businesses will have fewer opportunities to compete for contract awards under the preferential procurement programs.<sup>215</sup>

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AGENCIES ARE OVERSTATING SMALL DISADVANTAGED BUSINESS AND HUBZONE GOALING CREDIT BY INCLUDING CONTRACTS PERFORMED BY INELIGIBLE FIRMS 10 (2014).

<sup>207</sup> *Id.*

<sup>208</sup> *See, e.g., Contracting and Industrial Base II, supra* note 7, at 24-25.

<sup>209</sup> *Id.* at 21. In 2014, the average value of a small business contract was \$71,100.59. *Id.*

<sup>210</sup> Statement of Robert A. Burton Before the Committee on Small Business, Small Business Subcommittee on Contracting and Workforce 7 (Mar. 17, 2015) [hereinafter SBS-CW Hearing].

<sup>211</sup> *See Contracting and Industrial Base II, supra* note 7, at 21.

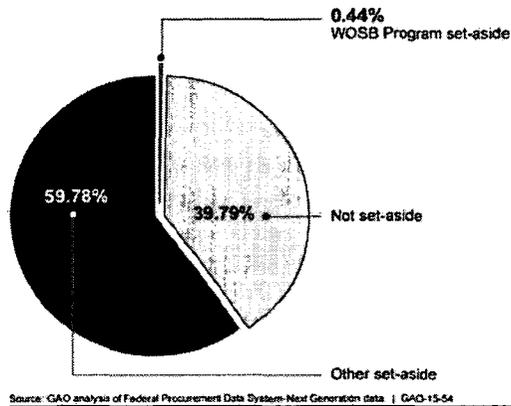
<sup>212</sup> SBA'S SCORECARD FOR 2014, *supra* note 196.

<sup>213</sup> *See, e.g., id.*

<sup>214</sup> *Contracting and Industrial Base II, supra* note 7, at 21. According to a survey conducted in 2009, 60% of the contracting personnel in federal government were females and 40% were males. DAVID V. LAMM & TIM REED, DEMOGRAPHICS OF THE CONTRACTING WORKFORCE WITHIN THE ARMY CONTRACTING COMMAND 28 (2009). The researchers also expected that female contracting personnel would continue to outnumber their male counterparts. *Id.*

<sup>215</sup> *See Contracting and Industrial Base II, supra* note 7, at 1.

**Figure 1.** Percentage of Contract Obligations Awarded to WOSBs through set-aside programs and open competition from 2011 to 2014.<sup>216</sup>



From April 2011 to May 2014, contract awards under the WOSB Program alone added up to only 0.44%, or \$228.9 million out of \$52.6 billion, of all contract obligations awarded to WOSBs.<sup>217</sup> Thus, “[s]et-asides under the WOSB Program to date have had a minimal effect on overall contracting obligations to WOSBs and attainment of WOSB contracting goals” because they represented less than 1% of the total value of federal awards to WOSBs.<sup>218</sup>

#### *B. The Delay in Leveling the Playing Field: The Sole Source Authority*

For several years until the enactment of the NDAA FY 2015, the contracting officers could award sole source contracts up to certain dollar amounts to the SDVO SB, HUBZone, and 8(a) DB firms—yet, EDWOSBs and WOSBs were excluded from this group.<sup>219</sup> The sole source contracts also may be awarded to small and other qualified businesses under authorities other than the Small Business Act.<sup>220</sup> Moreover, the sole source contracts are available in the open competition market for federal procurements and they threaten viability of small business contracting programs, such as the WOSB Program. In FY 2012, the federal government awarded approximately 23% of the total contracting dollars in sole source contracts.<sup>221</sup> In the same year, the Pentagon spent about \$100 billion

<sup>216</sup> GAO’S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 21 fig. 1.

<sup>217</sup> *Id.* at 22.

<sup>218</sup> *Id.* at 18.

<sup>219</sup> See sources cited *infra* note 234.

<sup>220</sup> See, e.g., 10 U.S.C. § 2304(c)(1) (2012); 41 U.S.C. § 3304(a)(1) (2012); 48 C.F.R. § 6.302-1 (2015).

<sup>221</sup> Danielle Ivory, *No-Bid U.S. Government Contracts Jump 9 Percent, Despite Push for Competition*, WASH. POST (Mar. 17, 2013), <http://www.washingtonpost.com/business/economy/no-bid-us-government-contracts-jump-9-percent-despite-push-for-competition/2013/03/17/9f6708fc-8da0->

on sole source contracts.<sup>222</sup> Lockheed Martin has been the leading federal government contractor since its formation in 1995.<sup>223</sup> In 2012, Lockheed Martin was the number one contractor with about \$17.4 billion in sole source contracts, and was closely followed by Boeing with \$17.1 billion, and then by Raytheon with about \$7.04 billion.<sup>224</sup> In 2013, Lockheed Martin received over \$32 billion in all federal contract actions, Boeing received over \$18 billion, and General Dynamics received over \$15 billion in procurement obligations.<sup>225</sup> These three contractors alone obtained nearly 14% of all contracting obligations awarded by the federal government that year.<sup>226</sup>

Proponents of the WOSB Program introduced several bills over the past years authorizing the procuring officers to award sole source contracts under the program, but Congress refused to pass any of them until December 2014. In 2012, Senator Olympia Snowe introduced the Fairness in Women-Owned Small Business Contracting Act of 2012 authorizing sole source contract awards to WOSBs under the same conditions as for the HUBZone firms.<sup>227</sup> On March 5, 2014, Congresswoman Nydia Velázquez introduced to the Senate the Women's Procurement Program Equalization Act of 2013, which authorized the contracting officers to award sole source contracts up to \$6.5 million in manufacturing and up to \$4 million for other contracts.<sup>228</sup> Congresswoman Velázquez argued that:

Unfortunately, too often [women-owned enterprises] are locked out of the federal marketplace as the 'old boys' network' games the procurement system to win lucrative federal contracts. By helping women compete in this area, we can bring greater equality to the system and generate new opportunities for female entrepreneurs.<sup>229</sup>

On June 17, 2014, Senator Jeanne Shaheen introduced the Women's Small Business Procurement Parity Act authorizing sole source awards under the same conditions as the Women's Procurement Program Equalization Act of 2013.<sup>230</sup> Even in her speech on June 10, 2014, Maria Contreras-Sweet, the SBA Administrator, stated: "Another important tool for federal agencies is sole-source authority. I'm encouraging Congress to give federal agencies this tool to level the

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11e2-b63f-f53fb9f2fcb4\_story.html. Federal procuring agencies may consider only one company when they seek to fulfill an urgent procurement for goods or services, or when they need a vendor with specialized expertise, or when they simply prefer working with a certain proven supplier. 10 U.S.C. § 2304(c) (2015); see also Ivory, *supra*.

<sup>222</sup> Ivory, *supra* note 221.

<sup>223</sup> BLOOMBERG GOV'T, ANNUAL REVIEW OF GOVERNMENT CONTRACTING 28 (2015).

<sup>224</sup> Ivory, *supra* note 221.

<sup>225</sup> BLOOMBERG GOV'T, *supra* note 223, at 28.

<sup>226</sup> See *id.* at 4-5.

<sup>227</sup> Fairness in Women-Owned Small Business Contracting Act of 2012, S. 2172, 112th Cong. (2012).

<sup>228</sup> Women's Procurement Program Equalization Act of 2013, H.R. 2452, 113th Cong. (2014).

<sup>229</sup> Nydia M. Velázquez, *House Committee Clears Velázquez Small Business Bills* (Mar. 6, 2014), <http://velazquez.house.gov/newsroom/2014/pr-03-06-16-SBCBills.html>.

<sup>230</sup> Women's Small Business Procurement Parity Act, S. 2481, 113th Cong. (2014).

playing field for women-owned businesses.”<sup>231</sup> Subsequently, on July 30, 2014, Senator Maria Cantwell introduced, in the Senate, yet another sole source contracting authorization bill—the Women’s Small Business Ownership Act of 2014.<sup>232</sup> After a long battle to bring the WOSB Program in parity with the SDVO SB, HUBZone, and 8(a) DB Programs, Congress finally amended the Small Business Act to allow contract awards on a sole source basis under the WOSB Program in the NDAA FY 2015.<sup>233</sup>

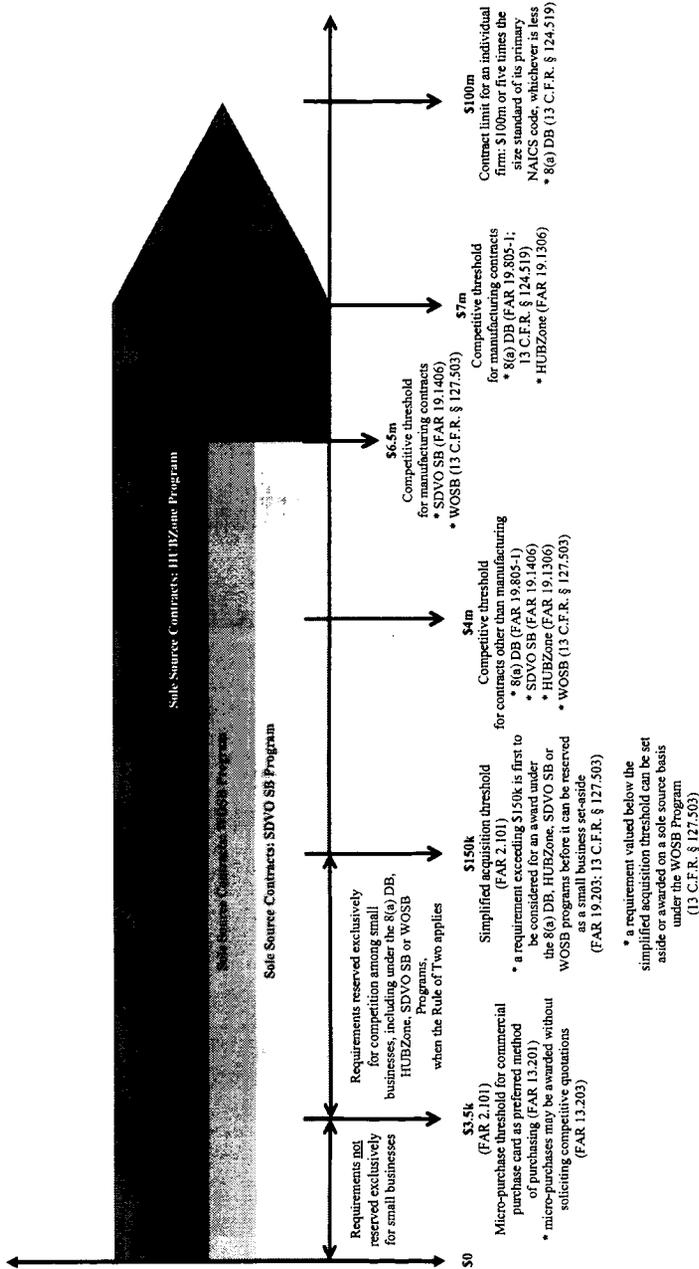
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<sup>231</sup> Maria Contreras-Sweet, *Entrepreneurial Equality: New Tools for a More Inclusive SBA*, U.S. SMALL BUS. ADMIN. (June 10, 2010), <https://www.sba.gov/content/entrepreneurial-equality-new-tools-more-inclusive-sba>.

<sup>232</sup> Women’s Small Business Ownership Act of 2014, S. 2693, 113th Cong. (2014).

<sup>233</sup> NDAA FY 2015, *supra* note 23, § 825, at 146–47.

**Figure 2.** Sole Source Contracts under the 8(a) DB, HUBZone, SDVO SB, and WOSB Programs.<sup>234</sup>



<sup>234</sup> See FAR 2.101 (2015); FAR 13.201 (2015); FAR 13.203 (2015); FAR 19.203 (2015); FAR 19.805-1 (2015); FAR 19.1306 (2015); FAR 19.1406 (2015); 13 C.F.R. § 124.519 (2015); 13 C.F.R. § 127.503 (2015).

For the first time since implementation of the WOSB Program in 2011, federal agencies can award to EDWOSBs and WOSBs sole source contracts valued up to the competitive threshold of \$4 million (\$6.5 million for manufacturing) under the WOSB Program.<sup>235</sup> This means that, after performing a market search, a contracting officer who identifies only one qualified WOSB or EDWOSB, in the industry meeting the applicable underrepresentation characteristic, can award a procurement contract to that firm.<sup>236</sup>

In 2013, only 388 WOSBs and 131 EDWOSBs received money from task or delivery orders, and existing or new contracts, awarded under the WOSB Program.<sup>237</sup> Despite these low numbers, the SBA expressed belief that the sole source authority will improve access to the federal procurement market for the firms participating in the WOSB Program and “may have a significant positive economic impact” on the EDWOSBs and WOSBs competing for procurement opportunities issued under the program.<sup>238</sup> The SBA acknowledged that without the sole sourcing authority, the WOSB Program would not be “on a level playing field” with the SDVO SB, HUBZone, and 8(a) DB Programs.<sup>239</sup> The SBA also recognized that the sole source authority needed to be implemented “as quickly as possible” under the existing rules and procedures.<sup>240</sup>

### *C. The Self-Certification Regime and Lack of Sufficient Eligibility Controls*

Following the long tradition of serving as the advocate for small businesses, the SBA announced that one of its overreaching goals for fiscal years 2014-2018 has been “[s]erving as the voice for small business.”<sup>241</sup> Recently, however, the House of Representatives Committee on Small Business expressed a concern that the SBA “undervalues the importance of its mission to ensure that small businesses have a fair shot at winning government contracts.”<sup>242</sup>

Firms often pose as disadvantaged businesses or use disadvantaged firms to gain contracting obligations under the preferential programs for the WOSB, SDVO SB, HUBZone, and 8(a) BD businesses, thereby severely limiting the opportunities for small businesses that are actually disadvantaged to obtain a fair share of federal

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<sup>235</sup> 13 C.F.R. § 127.503 (2015); Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 24,846, 24,848 (proposed May 1, 2015) (to be codified at 13 C.F.R. pt. 127).

<sup>236</sup> See 13 C.F.R. § 127.503 (2015).

<sup>237</sup> Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 24,846, 24,848 (proposed May 1, 2015) (to be codified at 13 C.F.R. pt. 127).

<sup>238</sup> *Id.*; Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 55,019, 55,021 (Sept. 14, 2015) (to be codified as 13 C.F.R. pt. 127).

<sup>239</sup> Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 24,846, 24,848 (proposed May 1, 2015) (to be codified at 13 C.F.R. pt. 127).

<sup>240</sup> *Id.*

<sup>241</sup> OFFICE OF INSPECTOR GEN., U.S. SMALL BUS. ADMIN., APRIL 1, 2014-SEPTEMBER 30, 2014, SEMIANNUAL REPORT TO CONGRESS I (2014).

<sup>242</sup> STAFF OF H.R. COMM. ON THE BUDGET, *supra* note 68, at 281.

procurements.<sup>243</sup> For example, the SBA identified procurement obligations valued over \$400 million in FY 2013 that federal agencies might have awarded to ineligible businesses.<sup>244</sup> The SBA also found over \$1.5 billion obligated to firms that were in the 8(a) BD and HUBZone Programs at the time they received the contract awards, but in FY 2013 they were no longer in the two programs.<sup>245</sup> In 2012 and 2013, after performing the annual eligibility examination of businesses that obtained contracts under the WOSB Program, the SBA found that 42% of 113 firms in 2012, and 43% of 119 firms in 2013, were actually ineligible for the awarded WOSB procurements.<sup>246</sup> The outcomes of these examinations are still unknown.<sup>247</sup> In 2015, the Office of Inspector General of the SBA reviewed a sample of thirty-four contracts that the federal agencies awarded under the WOSB Program in 2013 and 2014 and found that fifteen of them were awarded to ineligible firms.<sup>248</sup>

The contracting officers may restrict competition for the procurement of goods and services under the WOSB Program only if the bidders and offerors are certified as eligible EDWOSBs or WOSBs.<sup>249</sup> However, in reviewing the offer documents, a contracting officer is not required to determine whether the documents provided by the business prove the firm's eligibility based on the status and size corresponding to the NAICS code assigned to the EDWOSB or WOSB procurement.<sup>250</sup> The contracting officer may award the contract if the firm submits all required documents, or she or he may file a protest if any of the documents are missing.<sup>251</sup>

Generally, a business that qualifies as an EDWOSB or a WOSB at the time of the initial offer retains its status throughout the term of the contract.<sup>252</sup> For example, if a business qualifies as an EDWOSB or a WOSB at the time the firm submits its initial offer for a multiple award contract,<sup>253</sup> the business concern will

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<sup>243</sup> See, e.g., OFFICE OF INSPECTOR GEN., U.S. SMALL BUS. ADMIN., SPRING 2015, OCTOBER 1, 2014-MARCH 31, 2015, SEMI-ANNUAL REPORT TO CONGRESS 14-20 (2015).

<sup>244</sup> U.S. SMALL BUS. ADMIN., REPORT NO. 15-01, REPORT ON THE MOST SERIOUS MANAGEMENT AND PERFORMANCE CHALLENGES FACING THE SMALL BUSINESS ADMINISTRATION IN FISCAL YEAR 2015, at 1 (2014).

<sup>245</sup> U.S. SMALL BUS. ADMIN., REPORT NO. 15-01, *supra* note 244, at 1.

<sup>246</sup> GAO'S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 16.

<sup>247</sup> 2015 SBA'S REPORT ON THE WOSB PROGRAM, *supra* note 201, at 9.

<sup>248</sup> *Id.* at 4.

<sup>249</sup> 15 U.S.C. § 637(m)(2)(E) (2012).

<sup>250</sup> 2015 SBA'S REPORT ON THE WOSB PROGRAM, *supra* note 201, at 7.

<sup>251</sup> *Id.* at 2.

<sup>252</sup> 13 C.F.R. § 127.503(h) (2015).

<sup>253</sup> *Id.* Pursuant to section 1331 of the Small Business Jobs Act of 2010, federal agencies are authorized to issue multiple awards contracts ("MACs"); that is, they can issue several awards to different offerors who responded to the same solicitation for an IDIQ contract. Small Business Jobs Act of 2010, 15 U.S.C. § 644 (2012); 13 C.F.R. § 125.1 (2015). An IDIQ contract is an agency-specific indefinite-delivery and indefinite-quantity contract that can be used by a federal agency to procure a broad range of products and services. See, e.g., Acquisition Process: Task and Delivery Order Contracts, Bundling, Consolidation, 78 Fed. Reg. 61,114, 61,131 (Oct. 2, 2013) (to be codified at 13 C.F.R. pts. 121, 124, 125, 126, and 127).

retain this status for each order issued under the contract unless the contracting officer requests a new certification for a particular order.<sup>254</sup>

At this time, EDWOSBs and WOSBs may continue to self-certify their status as an EDWOSB or a WOSB via SAM,<sup>255</sup> or use fee-based services of one of the SBA-approved third-party certifiers.<sup>256</sup> Both the self-certifications and third-party certifications are treated equally.<sup>257</sup> The SBA approved four commercial third-party certifiers: El Paso Hispanic Chamber of Commerce, National Women Business Owners Corporation, U.S. Women's Chamber of Commerce, and Women's Business Enterprise National Council.<sup>258</sup>

Self-certifications are presumed to be "affirmative, willful and intentional" representations of the EDWOSB or WOSB status and firms or persons can be subject to civil and criminal penalties for misrepresenting the EDWOSB or WOSB status in connection with the WOSB Program.<sup>259</sup> The mere act of submitting a bid or an offer, or registering in any federal database for the purpose of being considered for award of an EDWOSB or a WOSB procurement is considered to be a deemed certification of status as an EDWOSB or a WOSB.<sup>260</sup> Moreover, each offer, proposal, or bid submitted by a women-owned small business must contain a certification of status, and be signed by an officer of the firm on the same page as the page containing the claimed status.<sup>261</sup> For this reason, the SBA may consider all WOSB Program participants as self-certified.<sup>262</sup>

However, the SBA does not track self-certifications and cannot provide the number of businesses that self-certified their status as an EDWOSB or a WOSB.<sup>263</sup> As a result, the SBA also cannot provide data about how many of the self-certified businesses received contract awards under the WOSB Program.<sup>264</sup> In addition, if a

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<sup>254</sup> 13 C.F.R. § 127.503(h) (2015); *but see* 13 C.F.R. § 127.701 (2015) (providing that a firm must certify its EDWOSB or WOSB status at least annually).

<sup>255</sup> "SAM" means System for Award Management database. 13 C.F.R. § 121.110 (2015). It is the primary database of the federal government for the government contractors' information and centralized government system for contracts, grants, or other assistance-related processes for businesses participating in federal procurement. *See* Federal Acquisition Regulation; System for Award Management Name Change, Phase 1 Implementation, 78 Fed. Reg. 37,676, 37,676, 37,677-78 (June 21, 2013) (to be codified at 48 C.F.R. pts. 2, 4, 8, 9, 12, 13, 16, 17, 18, 19, 22, 25, 26, 28, 32, 44, and 52). SAM replaced Central Contractor Registration database, Online Representations and Certification Application database, and Excluded Parties List System. SAM, <https://www.sam.gov/index.html#111> (last visited Nov. 15, 2015).

<sup>256</sup> 13 C.F.R. § 127.301 (2015); 13 C.F.R. § 121.109 (2015). A third-party certifier can be a federal agency, state government, or national certifying entity that the SBA authorizes to issue certifications of the EDWOSBs and WOSBs status. 13 C.F.R. § 127.303 (2015).

<sup>257</sup> GAO'S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 7.

<sup>258</sup> *Id.* at 5.

<sup>259</sup> 13 C.F.R. § 127.700 (2015).

<sup>260</sup> 13 C.F.R. § 127.700(b) (2015).

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*; GAO'S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 8.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

business does not upload in SAM a status certificate from one of the third-party certifiers, the SBA cannot determine whether the firm was self-certified.<sup>265</sup>

In a report issued after an audit of the WOSB Program in 2014, the GAO concluded that “[the] SBA’s oversight of certifiers has been minimal and [the] SBA lacks reasonable assurance that only eligible businesses receive WOSB set-aside contracts.”<sup>266</sup> Furthermore, the GAO found that between August 2011 through May 2014, Women’s Business Enterprise National Council (“WBNNC”) issued approximately 76% of all WOSB third-party certifications but the standards and procedures employed by all third-party certifiers were not properly scrutinized.<sup>267</sup> In fact, WBNNC delegated the majority of the WOSB certification responsibilities to fourteen regional partner organizations, which the SBA did not review.<sup>268</sup> The SBA also failed to develop written procedures to perform adequately its oversight function over the third-party certifiers or to review their monthly reports, which sometimes included information about fraud.<sup>269</sup> For example, one certifier identified a pattern of fraud occurring on a regular basis—in about one or two applications per month for sixteen of the thirty-four sampled months included in the GAO’s review—among the businesses that had been denied certification.<sup>270</sup> The GAO found that the SBA generally did not follow up on the issues reported by the third-party certifiers.<sup>271</sup>

In reaction to the GAO’s report, in December 2014, Congress passed section 825 of the NDAA FY2015 that struck down the provisions of the Small Business Act allowing women-owned small businesses self-certify their status as EDWOSBs or WOSBs under the WOSB Program.<sup>272</sup> As a result, only the SBA, a federal agency, a state government, or a national entity approved by the SBA can certify women-owned small business concerns as EDWOSBs or WOSBs.<sup>273</sup> However, the SBA interpreted the intent of Congress to mean that the WOSB Program should continue to operate under the existing rules until the SBA establishes a new infrastructure and issues separate rules.<sup>274</sup> This will be a prolonged process that may require outlay of substantial resources.<sup>275</sup> It is also rather likely that changes to the existing certification system will take years before the SBA fully implements

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<sup>265</sup> *Id.* The SBA cannot generate reports by the certification type because none of the electronic systems used in the WOSB Program has data fields to enter a certification type. *Id.*

<sup>266</sup> *Id.* at 9.

<sup>267</sup> *Id.* at 5, 10.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 11-12.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 12.

<sup>272</sup> Compare NDAA FY 2015, *supra* note 23, § 825, at 146-47, with 15 U.S.C. § 637(m) (2012).

<sup>273</sup> *Id.*; Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 24,846, 24,848 (proposed May 1, 2015) (to be codified at 13 C.F.R. pt. 127).

<sup>274</sup> *Id.* at 24,847-48

<sup>275</sup> *Id.* at 24,847.

them.<sup>276</sup> At this time, the SBA is seeking public feedback as to whether the agency should: (1) create a certification program the SBA itself would manage; (2) rely on third-party certifiers; (3) rely on certification systems created by federal agencies, or establish a hybrid system; and, (4) rely on State certification programs.<sup>277</sup> However, any certification system that the SBA establishes should be simple to follow, not overly burdensome, and affordable to EDWOSBs and WOSBs.

#### V. RETHINKING THE ROLE OF EDWOSBs AND WOSBs IN REDUCING ELIGIBILITY FRAUD IN THE WOSB PROGRAM

Given the lack of eligibility controls in the WOSB Program, women-owned businesses should exercise their rights under the Small Business Act and the False Claims Act to police participation of small size firms in the program, thereby ascertaining that only intended beneficiaries compete in the federal marketplace for prime procurement contacts reserved for EDWOSBs and WOSBs under the WOSB Program. Furthermore, pursuant to *Macy v. Holder*,<sup>278</sup> discrimination based on transgender status constitutes discrimination based on sex, and especially transgender and gender non-confirming persons experience discrimination and harassment because of their gender status.<sup>279</sup> Therefore, in support of the policy of the federal government against discrimination based on sexual orientation and gender identity, Congress should take affirmative actions to ensure that transgender women do not face barriers to federal procurement and can fully participate in the WOSB Program. For example, Congress should amend section 8(a)(5) and section 8(d)(3) of the Small Business Act to include transgender women as members of a presumptively “socially disadvantaged” group, particularly for the purpose of the WOSB Program.<sup>280</sup> The amended section 8(a)(5) of the Small Business Act could read as follows:

(5) Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice, or prejudice based on sex or gender identity, or cultural bias because of their identity as a member of a group without regard to their individual qualities.

Similarly, section 8(d)(3) of the Act could be revised to read as follows:

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<sup>276</sup> 2015 SBA’S REPORT ON THE WOSB PROGRAM, *supra* note 201, at 3.

<sup>277</sup> Small Business Administration: Semiannual Regulatory Agenda, 80 Fed. Reg. 78,040, 78,041 (Dec. 15, 2015); Women-Owned Small Business and Economically Disadvantaged Women-Owned Small Business—Certification, 80 Fed. Reg. 78,984, 78,984-86 (proposed Dec. 18, 2015) (to be codified at 13 C.F.R. pt. 127).

<sup>278</sup> *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012); U.S. Dep’t of Labor, *supra* note 12.

<sup>279</sup> *Macy*, 2012 WL 1435995, at \*1; C. Kenneth Meyer & Kory Schnoor, *From Dan to Danita: LGBT Based Discrimination and Issues of Religious Freedom*, 10 J. DIVERSITY MGMT. 1, 18 (2015); see also GRANT ET AL., *supra* note 9, at 2-8.

<sup>280</sup> 15 U.S.C. § 637(a)(5) (2012); 15 U.S.C. § 637(d) (2012); 13 C.F.R. § 124.103(a)-(b) (2015).

(3) The clause required by paragraph (2) shall be as follows:

“The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, transgender individuals, or any other individual found to be disadvantaged by the Administration pursuant to section 8(a) of the Small Business Act [15 U.S.C.A. 637(a)].”

As a result, section 124.103(a)-(b) of the Code of Federal Regulations would need to be revised to read as follows:

- (a) General. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice, or prejudice based on sex or gender identity, or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control.
- (b) Members of designated groups.

(1) There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); transgender individuals; and members of other groups designated from time to time by SBA according to procedures set forth at paragraph (d) of this section. Being born in a country does not, by itself, suffice to make the birth country an individual’s country of origin for purposes of being included within a designated group.<sup>281</sup>

Section 124.103(b)(3) of the Code of Federal Regulations provides the tools for the SBA to investigate allegations of misrepresentation of social disadvantage by allowing any person “possessing or knowing” about credible evidence of fraud to submit the evidence to the SBA.<sup>282</sup>

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<sup>281</sup> 13 C.F.R. § 124.103(a)-(b).

<sup>282</sup> 13 C.F.R. § 124.103(b)(3) (2015).

*A. Policing Eligibility Fraud Through Qui Tam Actions*

Misrepresentations of business status as an EDWOSB or a WOSB can be actionable under the False Claims Act (“FCA”).<sup>283</sup> The FCA allows a private person—a “relator” or a whistleblower—to bring a *qui tam* lawsuit on its own behalf and on behalf of the federal government.<sup>284</sup> In *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court held that *qui tam* relators have Article III standing under the FCA.<sup>285</sup> While the basis for the relator’s suit is the “bounty,” or a fee “out of the United States’ recovery,” the standing is supported by “the doctrine that [as] the assignee of a claim [the relator] has standing to assert the injury in fact suffered by the assignor [the United States].”<sup>286</sup> In *Stevens*, Justice Scalia noted that although the Court has “never expressly recognized ‘representational standing’ on the part of assignees, [the Court has] routinely entertained their suits.”<sup>287</sup> Nonetheless, the Court ruled that the injury in fact of the United States is sufficient to confer standing on a relator.<sup>288</sup>

A *qui tam* plaintiff’s complaint is filed *in camera* and remains sealed for at least sixty days.<sup>289</sup> An EDWOSB or a WOSB bringing the action would have to serve the complaint with a “written disclosure of substantially all material evidence and information [the firm] possesses” on the federal government.<sup>290</sup> Furthermore, according to the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure, in alleging misrepresentation as an EDWOSB or a WOSB under the WOSB Program, the relator would have to state at a minimum “the who, what, when, where, and how of the alleged fraud.”<sup>291</sup> During the period of sixty days from the receipt of the complaint, the federal government may decide to intervene and take over the lawsuit.<sup>292</sup> If the federal government declines to take

<sup>283</sup> False Claims Act, 31 U.S.C. §§ 3729-3733 (2012); 31 U.S.C. § 637(m)(5)(C) (2012); 13 C.F.R. § 127.700(d)-(e) (2015).

<sup>284</sup> 31 U.S.C. § 3730(b)(1) (2012).

<sup>285</sup> *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771-74 (2000) (holding that a private person has standing to bring an action in federal court on behalf of the United States under the FCA, except for lawsuits against a State or a state agency because neither one can be subject to liability under the FCA).

<sup>286</sup> *Id.* at 772-75.

<sup>287</sup> *Id.* at 773-74.

<sup>288</sup> *Id.* at 774 (finding confirmation for the Court’s conclusion in “the long tradition of *qui tam* actions in England and the American Colonies”).

<sup>289</sup> 31 U.S.C. § 3730(b)(2) (2012); *Carter v. G & S Food Shop*, No. 13-14017, 2013 WL 6421833, at \*3 (E.D. Mich. Oct. 10, 2013) (finding that the relator’s failure to file a *qui tam* complaint under seal constitutes a bar to recovery under the FCA and the complaint should be dismissed with prejudice).

<sup>290</sup> 31 U.S.C. § 3730(b)(2); *see also United States ex rel. Surdovel v. Digirad Imaging Sol.*, No. 07-0458, 2013 WL 6178987, at \*4-6 (E.D. Pa. Nov. 25, 2013) (holding that the relator’s failure to serve the complaint and all material evidence on the federal government resulted in dismissal of the lawsuit).

<sup>291</sup> *See, e.g., United States ex rel. Steury v. Cardinal Health, Inc.*, 735 F.3d 262, 266 (5th Cir. 2010); *but see United States ex rel. Health Mgmt. Assocs., Inc.*, No. 13-11859, 2014 WL 5471925, at \*11 (11th Cir. Oct. 30, 2014) (“A relator can also provide the required indicia of reliability by showing that he personally was in a position to know that actual false claims were submitted to the government and had a factual basis for his alleged personal knowledge.”).

<sup>292</sup> 31 U.S.C. § 3730(b)(2).

over the action, the EDWOSB or WOSB may continue the lawsuit on its own.<sup>293</sup> A default rule is that if the federal government maintains the action, the *qui tam* EDWOSB or WOSB may receive 15% to 25% of the proceeds from the lawsuit or a settlement of the case; however, if the EDWOSB or WOSB decides to continue the action or settle the lawsuit on its own, the firm is eligible to receive a judgment award for a civil penalty and damages, including reasonable expenses.<sup>294</sup>

The FCA contains a public disclosure bar that is designed to prevent “parasitic” litigation,<sup>295</sup> as in a case where an EDWOSB or a WOSB would file a *qui tam* complaint containing baseless or inflated claims. Moreover, an EDWOSB or a WOSB plaintiff has to be an “original source” of information for which the firm brings the action against the defendant,<sup>296</sup> or a claim,<sup>297</sup> and cannot raise substantially the same allegations of certification fraud based on information already publically disclosed.<sup>298</sup>

According to the FCA, in order to establish a successful claim, a showing of “actual knowledge,” “deliberate ignorance,” or “reckless disregard” of the truth of the information on part of the defendant that the status certification as an EDWOSB or a WOSB was false would be required.<sup>299</sup> An innocent mistake or even negligence is not enough to trigger liability under the FCA.<sup>300</sup> However, as

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<sup>293</sup> *Id.*

<sup>294</sup> 31 U.S.C. § 3730(d) (2012).

<sup>295</sup> *Schindler El. Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885, 1894 (2011).

<sup>296</sup> 31 U.S.C. § 3730(e)(4) (2012); *United States ex rel. Kraxberger v. Kansas City Power & Light Co.*, No. 11-CV-0590-W-FJG, 2013 WL 4400434, at \*6 (W.D. Mo. July 19, 2013).

<sup>297</sup> 31 U.S.C. § 3730(c)(4); *Leveski v. ITT Educ. Servs., Inc.*, 719 F.3d 818 (7th Cir. 2013).

<sup>298</sup> Information is publically disclosed if it is contained in a federal criminal, civil, or administrative hearing; congressional, the GAO, or other federal report, hearing, audit, or investigation; and in the news media. 31 U.S.C. § 3730(e) (2012). In addition, in *Schindler Elevator Corp. v. United States ex rel. Kirk*, 131 S. Ct. 1885 (2011), the Supreme Court found that a response by a federal agency to a Freedom of Information Act request constituted a “report” subject to the public disclosure bar under the FCA. Furthermore, administrative reports, audits, and investigations under the FCA encompass the “state and local administrative reports, hearings, audits or investigations as well.” *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 280 (2010); *but see United States ex rel. Health Dimensions Rehab., Inc. v. Rehab Care Grp., Inc.*, No. 4:12 CV00848 AGF, 2013 WL 2181242 (E.D. Mo. May 20, 2013) (holding that the public disclosure bar did not apply because “without [the relator’s] analysis, the alleged fraud would not have been understood by the government based on the public disclosures [the defendant] relies on”).

<sup>299</sup> 31 U.S.C. § 3729(b) provides that “[f]or purposes of this section (1) the terms ‘knowing’ and ‘knowingly’ -- (A) mean that a person, with respect to information (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and (B) require no proof of specific intent to defraud.” 31 U.S.C. § 3729(b) (2012). *See also United States v. King-Vassel*, 728 F.3d 707, 712 (7th Cir. 2013); *Gulf Grp. Gen. Enters. Co. W.L.L. v. United States*, 114 Fed. Cl. 258 (2013) (“Congress rejected requiring a specific intent to defraud under the False Claims Act. . . . Instead, Congress adopted a knowing standard, defined as ‘actual knowledge of the falsity,’ acting in ‘deliberate ignorance of the truth or falsity,’ or ‘acting in reckless disregard of the truth or falsity.’ . . . The standard was designed to address ‘the problem of the ‘ostrich-like’ refusal to learn of information which an individual, in the exercise of prudent judgment, had reason to know.’ . . . Thus, the False Claims Act covers not just those who set out to defraud the government, but also those who ignore obvious deficiencies in a claim.” (internal citations omitted)).

<sup>300</sup> *See Thulin v. Shopko Stores Operating Co.*, No. 10-CV-196-WMC, 2013 WL 5946503, at \*5

the law stands, offers, bids, and certain other actions are deemed intentional and willful certifications of the EDWOSB or WOSB status.<sup>301</sup> Thus, courts may find that the “deemed certification” assumption eliminates the requirement to prove the defendant’s knowledge for the purpose of a *qui tam* lawsuit.<sup>302</sup> In addition, pursuant to the judicially created doctrine of implied certification, a business concern can make a materially false representation as to its EDWOSB or WOSB status by merely requesting a payment on a contract awarded under the WOSB Program.<sup>303</sup> Such claim for payment would violate the FCA because it might constitute fraud-in-the-inducement<sup>304</sup> and liability under this theory is not predicated on the claim for payment under a contract, which claim need not be fraudulent, but it would be enough that a claim for payment was submitted under a contract initially induced by misrepresentation in the EDWOSB or WOSB status certification.<sup>305</sup>

The presumption of loss to the United States for the entire amount of the procurement award is embedded in every procurement under the WOSB Program whenever an ineligible business willfully seeks and obtains the award by misrepresentation.<sup>306</sup> The presumption of loss rule may also change the calculation of damages in a *qui tam* lawsuit because the defendant can be liable for civil penalties in the amount of \$5,000 to \$10,000, plus three times the amount of the awarded damages (known as “treble damages”) for knowing status misrepresentations.<sup>307</sup>

Recently, on October 5, 2015, the Department of Justice (“DOJ”) intervened in a *qui tam* action brought by the relator on April 4, 2012 against UFC Aerospace, United Fastener Co. (“UFC”).<sup>308</sup> The DOJ filed a civil fraud lawsuit under the FCA against UFC for misrepresentations of UFC as a WOSB to large prime

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(W.D. Wis. Nov. 5, 2013); *King-Vassel*, 728 F.3d at 712; *United States ex rel. Folliard v. Govplace*, 930 F. Supp. 2d 123, 130 (D.D.C. 2013).

<sup>301</sup> See 13 C.F.R. § 127.700 (2015).

<sup>302</sup> See 31 U.S.C. § 3729(b)(1)(B) (stating that knowledge does not require proof of specific intent to defraud the federal government).

<sup>303</sup> See Gregory Klass & Michael Holt, *Implied Certification Under the False Claims Act*, 41 PUB. CONT. L.J. 1, 2 (2011). Courts recognize that the FCA allows lawsuits for claims of fraud in the inducement under a contract that was awarded based on collusive bidding. *Id.* at 17-18.

<sup>304</sup> See *id.*

<sup>305</sup> See *In re Baycol Prods. Litig.*, 732 F.3d 869, 876 (8th Cir. 2013) (“The legislative history of the FCA also supports the conclusion that fraud-in-the-inducement is a recognized theory of liability under the Act. ‘Specifically, [in amending the FCA in 1986,] Congress noted that, under FCA case law, ‘each and every claim submitted under a contract, loan guarantee, or other agreement which was originally obtained by means of false statements or other corrupt or fraudulent conduct, or in violation of any statute or applicable regulation, constitutes a false claim.’” (citing *United States ex rel. Bettis v. Odebrecht Contractors of Cal., Inc.*, 393 F.3d 1321, 1326 (D.C. Cir. 2005)).

<sup>306</sup> 31 U.S.C. § 3729(a) (2012); see *United States v. King-Vassel*, 728 F.3d 707, 711 (7th Cir. 2013); 13 C.F.R. § 127.700(a) (2015).

<sup>307</sup> 31 U.S.C. § 3729(a); see Klass & Holt, *supra* note 303, at 2, 21.

<sup>308</sup> Stipulation and Order of Settlement and Release Between the United States and Relator at 2, *United States ex rel. Shadic v. UFC Aerospace, United Fastener Co.*, 12 Civ. 2594 (WHP), 2015 WL 9921169 (S.D.N.Y. Oct. 8, 2015) [hereinafter Stipulation and Order].

contractors to obtain federal subcontracts.<sup>309</sup> The complaint alleged that while no woman ever owned 51% of the equity interest in UFC, the company began claiming the WOSB status in 2001, and continued to make *ad hoc* WOSB status misrepresentations, or failed to correct them, until 2011.<sup>310</sup> During this period, UFC earned millions of dollars, including \$48 million from only two larger prime contractors.<sup>311</sup> The DOJ and UFC settled the lawsuit and UFC agreed to pay over \$20 million in settlement with the federal government and over \$3 million in settlement with the relator.<sup>312</sup> Since the lawsuit settled, this *qui tam* action has limited precedential value, however, the lawsuit exemplifies how eligibility fraud in the EDWOSB and WOSB status certifications could be effectively addressed. In addition, the UFC *quit tam* action has deterrence value because of the size of the settlement.

Absent strategic considerations, however, the federal government will be more likely to take over *qui tam* lawsuits where the “bounty” amount is large enough, rather than lawsuits filed for smaller claims. In these cases, the WOSB-plaintiffs would need to pursue the action without the involvement of the DOJ. In addition, small businesses such as EDWOSBs and WOSBs may encounter difficulties with obtaining evidentiary proof of the status misrepresentation of another business concern in the WOSB Program, including private equity ownership information or financial information, and experience difficulties with paying litigation expenses and legal fees related to filing a *qui tam* lawsuit in federal court. In these instances, clinical programs in law schools that could be set up to assist EDWOSBs and WOSBs in litigating these cases might become a valuable resource for them.

Some of the EDWOSB or WOSB status misrepresentations may also stem from innocent mistakes or errors in interpretation of the complex and frequently changing laws and regulations governing the WOSB Program and federal procurement. Therefore, unintentional errors, technical malfunctions, and other similar situations where misrepresentations of the EDWOSB or WOSB status were not affirmative, intentional, or willful may be exempted from liability for deemed certifications and under the FCA.<sup>313</sup> For example, the SBA determined that in FY 2010 most of approximately 150 firms that had represented themselves as small businesses did so because of error, or misunderstanding of the size regulations.<sup>314</sup> Regardless, to aid businesses in complying with the requirements for the small

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<sup>309</sup> *Id.*

<sup>310</sup> Complaint ¶¶ 23-24, *UFC Aerospace, United Fastener Co.*, 2015 WL 5818000.

<sup>311</sup> *Id.* ¶¶ 51-52.

<sup>312</sup> Stipulation and Order, *supra* note 308, at 3.

<sup>313</sup> 13 C.F.R. § 127.700(d) (2015).

<sup>314</sup> Advisory Small Business Size Decisions, 79 Fed. Reg. 35,963, 35,965 (proposed June 25, 2014) (to be codified at 13 C.F.R. pt. 121). At the same time, the SBA did not anticipate that the safe harbor provision would affect many businesses because the agency was unaware of any firms being punished by imprisonment or who paid fines for misrepresentations or making false statements. *Id.*

business status certification, including for contracting opportunities for WOSBs other than EDWOSB or WOSB procurements under the WOSB Program, Congress established a safe harbor against the criminal liability and monetary penalties for misrepresentations of small business status.<sup>315</sup> Accordingly, the safe harbor would apply only where the person or a women-owned firm making a misrepresentation as to the small business status acted in good faith reliance on a written advisory opinion received from a small business development center or procurement technical assistance center that stated the firm did not exceed the applicable size standards and can represent itself as a small business for the purposes of federal procurement.<sup>316</sup>

*B. The Need for Reforms of the EDWOSB and WOSB Status Protest Proceedings*

The SBA has the authority to designate size criteria for each NAICS code.<sup>317</sup> To be eligible for a contract under the WOSB Program, a small business must qualify as a women-owned or economically disadvantaged women-owned business and cannot exceed the small size corresponding to the NAICS code assigned by the contracting officer to a particular EDWOSB or WOSB procurement.<sup>318</sup> As the law stands, to facilitate the eligibility size and status certifications from EDWOSBs or WOSBs, including the self-certifications, the contracting officer must determine and state in the solicitation—i.e., the request for quotations or offers—the appropriate NAICS code applicable to the EDWOSB or WOSB requirement.<sup>319</sup> Size designations corresponding to the NAICS codes and status certifications are normally accepted unless they are being challenged.<sup>320</sup> Eligible parties may appeal the size determinations, the designation of a NAICS code for the procurement, and the SBA's eligibility determinations for EDWOSBs and WOSBs to the SBA's Office of Hearings and Appeals ("OHA") by filing a "protest."<sup>321</sup> Protests that are filed with the contracting agency and determined by the SBA, and appeals from the protests decided by the OHA, who has non-exclusive jurisdiction to decide EDWOSB or WOSB status protests, are in theory one of the most efficient venues

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<sup>315</sup> See 13 C.F.R. § 121.109 (2015).

<sup>316</sup> See *id.*

<sup>317</sup> 15 U.S.C. § 632(a) (2012); 48 C.F.R. § 19.102 (2015).

<sup>318</sup> See 13 C.F.R. § 121.101 (2015).

<sup>319</sup> See 48 C.F.R. § 19.102; 48 C.F.R. § 19.303 (2015).

<sup>320</sup> The NAICS code determination in a procurement solicitation can be appealed to the SBA, and both the contracting officer and the GAO are bound by the SBA's decision on the correct NAICS code, which is final. CIBINIC, JR. ET AL., *supra* note 26, at 1573 (citing FAR 19.303(c); Eagle Home Med. Corp., B-402387, CPD ¶ 82 (Comp. Gen. Mar. 29, 2010); DynaLantic Corp., B-4022326, CPD ¶ 103 (Comp. Gen. Mar. 15, 2010)); 13 C.F.R. § 127.301 (2015).

<sup>321</sup> 13 C.F.R. § 134.102 (2015). The Congressional Committee on Small Business also found that many contracting officers make errors in designating NAICS codes with "very large size standards" in the solicitations for federal procurements. *Contracting and Industrial Base II*, *supra* note 7, at 24. As a result, small business concerns that could not meet the larger size standards were excluded from competition for prime contract awards with wrong size designations. *Id.* In addition, the contracting agencies ended up counting the erroneous contract obligations towards meeting the agencies' annual goals for prime contracts awarded to small businesses. *Id.*

to bring actions challenging the status of firms representing themselves as EDWOSBs or WOSBs.<sup>322</sup>

In 2015, the Congressional Committee on Small Business pointed out that the impartiality of the OHA could be questioned because the SBA established the OHA and its jurisdiction in regulations.<sup>323</sup> The Committee argued that the SBA could further encroach on the OHA's independence since the SBA might promulgate regulations that limit the OHA's jurisdiction, therefore, the OHA could become disinclined to reverse the SBA's decisions.<sup>324</sup> For these reasons, the Committee recommended that Congress create the OHA in a statute as a body completely independent from the SBA.<sup>325</sup> In addressing these concerns, on November 25, 2015, Congress passed the National Defense Authorization Act for Fiscal Year 2016 ("NDAA FY 2016"),<sup>326</sup> which established the Office of Hearings and Appeals in the SBA, with jurisdiction to hear appeals from the EDWOSB and WOSB status protests decided by the SBA.<sup>327</sup> However, neither the Committee's recommendations nor the changes in the NDAA FY 2016 concerning the OHA go far enough.

Before an appeal can be filed with the OHA regarding the status of a business as an EDWOSB or a WOSB, "an interested party," who is an unsuccessful offeror, must file an EDWOSB or a WOSB status protest against an apparent successful offeror representing itself as an EDWOSB or a WOSB for determination by the SBA, except for EDWOSB or WOSB procurements awarded on the sole source basis.<sup>328</sup> Only the SBA or the contracting officer may protest the EDWOSB or WOSB status of the proposed awardee for a sole source procurement issued under the WOSB Program.<sup>329</sup> The protestor is required to file the protest with the

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<sup>322</sup> See, e.g., 48 C.F.R. § 134.709 (2015).

<sup>323</sup> *Id.* at 11.

<sup>324</sup> *Id.*

<sup>325</sup> SBS-CW Hearing, *supra* note 210, at 11, 13.

<sup>326</sup> National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, 129 Stat. 726 (codified as amended in scattered sections of the U.S. Code) [hereinafter NDAA FY 2016].

<sup>327</sup> NDAA FY 2016, *supra* note 326, § 869, at 211-13. The amended section 5 of the Small Business Act provides: "(i) OFFICE OF HEARINGS AND APPEALS.—“(1) ESTABLISHMENT.—“(A) OFFICE.—There is established in the Administration an Office of Hearings and Appeals—“(i) to impartially decide matters relating to program decisions of the Administrator—“(I) for which Congress requires a hearing on the record; or “(II) that the Administrator designates for hearing by regulation; and “(ii) which shall contain the office of the Administration that handles requests submitted pursuant to sections 552 of title 5, United States Code (commonly referred to as the ‘Freedom of Information Act’) and maintains records pursuant to section 552a of title 5, United States Code (commonly referred to as the ‘Privacy Act of 1974’). “(B) JURISDICTION.—The Office of Hearings and Appeals shall only hear appeals of matters as described in this Act, the Small Business Investment Act of 1958 (15 U.S.C. 661 et seq.), and title 13 of the Code of Federal Regulations.” *Id.* at 211-12. Pursuant to the NDAA FY 2016, the OHA has jurisdiction to decide appeals from the EDWOSB and WOSB status determinations and NAIC code designations. *Id.*

<sup>328</sup> 13 C.F.R. § 127.600 (2015); Women-Owned Small Business Federal Contract Program, 80 Fed. Reg. 55,019, 55,022 (Sept. 14, 2015) (to be codified as 13 C.F.R. pt. 127).

<sup>329</sup> *Id.*

contracting officer who will forward the protest to the SBA for review.<sup>330</sup> The protest must specify the grounds on which it is based, including facts and allegations.<sup>331</sup> The SBA will decide if the protest is timely, and issue an eligibility determination letter, which is final and immediately effective.<sup>332</sup> On appeal, however, the OHA can overrule the SBA's determination of the protested business concern's status.<sup>333</sup>

Additionally, the current rules of procedure before the OHA do not allow discovery in the protest appeals from the EDWOSB or WOSB status: “[d]iscovery will not be permitted, and oral hearings will not be held.”<sup>334</sup> Even if a protestor files a motion showing good cause, the judge cannot admit new evidence that is not already included in the written file for the case, or “permit any form of discovery.”<sup>335</sup> However, the protested firm's failure to produce all necessary documentation in response to the protest creates an “adverse inference” that the missing information would indeed show that the business is not an eligible EDWOSB or WOSB.<sup>336</sup> In the procedure governing cases before the OHA, the Federal Rules of Evidence are used merely as a guide, and a judge presiding over the case may admit hearsay evidence.<sup>337</sup> Furthermore, the standard of review of the SBA's status determination on appeal with the OHA is clear error of fact or law<sup>338</sup>—“in making a key finding”—and the protest is decided solely based upon the evidence in the record that the SBA had at the time of making the determination,<sup>339</sup> which may include hearsay evidence. This standard is rigorous and “not as deferential as review under the arbitrary and capricious standard.”<sup>340</sup> However, without the right to discovery, contesting a business' status can be difficult. For example, discovery could be the most potent mechanism to develop evidence to establish whether a WOSB is in fact controlled by one or more women.

In the protest actions brought before the U.S. Court of Federal Claims under the Tucker Act, an EDWOSB or a WOSB plaintiff will have standing if the

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<sup>330</sup> 13 C.F.R. §§ 127.603-127.604 (2015).

<sup>331</sup> 13 C.F.R. § 127.603.

<sup>332</sup> 13 C.F.R. § 127.604.

<sup>333</sup> *Id.* EDWOSBs or WOSBs adversely affected by a size determination or a NAICS code designation may file separate appeal petitions with the OHA. 13 C.F.R. § 134.302 (2015).

<sup>334</sup> 13 C.F.R. § 134.711 (2015).

<sup>335</sup> 13 C.F.R. § 134.712 (2015); *cf.* 13 C.F.R. § 134.213 (2015) (allowing a protestor to obtain discovery only if the party files a motion and can show good cause); 13 C.F.R. § 134.701 (2015). Two separate protests must be filed to contest the size determination and NAICS code designation. 13 C.F.R. § 127.601 (2015).

<sup>336</sup> *See, e.g.,* Handan Container Servs., Inc., SBA No. EDWOSB-10, 2012 WL 1962740, at \*1, 3 (May 24, 2012).

<sup>337</sup> 13 C.F.R. § 134.223 (2015).

<sup>338</sup> 13 C.F.R. § 134.708 (2015); Potomacwave Consulting, Inc., SBA No. EDWOSB-104, 2014 WL 3746541, at \*6 (July 8, 2014).

<sup>339</sup> Taylor Consultants, SBA No. SIZ-4775, 2006 WL 1484895, at \*9 (Apr. 1, 2006); *Potomacwave Consulting, Inc.*, 2014 WL 3746541, at \*6.

<sup>340</sup> *Taylor Consultants*, 2006 WL 1484895, at \*9 (discussing “the definite and firm conviction” test that is used in review of a lower court's key findings for clear error).

business concern: (1) is an “interested party” because it was an actual or prospective bidder or offeror, and (2) has a direct economic interest that would be affected by the award or failure to award the contract.<sup>341</sup> The protestor filing a lawsuit in the Court of Federal Claims that meets these standing requirements will presumably also satisfy the constitutional standing requirements.<sup>342</sup> For the pre-award bid protests, “a plaintiff can show ‘direct economic interest’ by simply demonstrating that he or she has suffered ‘a non-trivial competitive injury which can be addressed by judicial relief.’”<sup>343</sup> This type of competitive injury is referred to as “prejudice,” and is a necessary element of standing.<sup>344</sup> However, in bid protest actions filed with the Court of Federal Claims, the applicable and highly deferential standard of review is whether the federal agency acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>345</sup> Thus, a plaintiff could prevail only by demonstrating that a federal agency “committed a ‘clear and prejudicial’ violation of applicable statutes or regulations” or by demonstrating that the agency’s decision in fact “had no rational basis.”<sup>346</sup> Moreover, the court will rule on the administrative record filed by the SBA, which will often contain hearsay, and the parties may supplement the record only in the circumstances where the existing record does not allow for meaningful judicial review of the protest.<sup>347</sup> Furthermore, “the existence of genuine issues of material fact does not necessarily preclude a judgment on the administrative record, because the resolutions [on] cross-motions are ‘akin to an expedited trial on the paper record.’”<sup>348</sup>

Congress should grant to “any person,” or a whistleblower, a private right to file a *post-award* protest challenging the EDWOSB and WOSB status of a business with the OHA directly.<sup>349</sup> In addition, protestors should have the authority to initiate *pre-award* status protest proceedings directly with the OHA against

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<sup>341</sup> *Mgmt. & Training Corp. v. United States*, 115 Fed Cl. 26, 35 (2014) (internal citations omitted). Pursuant to the Tucker Act, as amended by the Administrative Disputes Resolution Act, Pub. L. No. 104–320, § 12, 110 Stat. 3870, 3874–76 (codified as amended at 5 U.S.C. §§ 570a, 584 (2012)), the U.S. Court of Federal Claims has “jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.” 28 U.S.C. § 1491(b)(1) (2012); *Mgmt. & Training Corp.*, 115 Fed Cl. at 34.

<sup>342</sup> *See Mgmt. & Training Corp.*, 115 Fed Cl. at 35.

<sup>343</sup> *Id.* at 34.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 39.

<sup>346</sup> *See id.*

<sup>347</sup> *See Axiom Resource Mgmt. Inc. v. United States*, 564 F.3d 1374, 1379 (Fed. Cir. 2009); 13 C.F.R. § 134.712 (2015).

<sup>348</sup> *Mgmt. & Training Corp.*, 115 Fed Cl. at 40 (citing *L-3 Global Commc’ns Solutions, Inc. v. United States*, 82 Fed. Cl. 604, 608 (2008)).

<sup>349</sup> Any “interested person” may intervene. 13 C.F.R. § 134.210 (2015). However, an “interested person” must show that the individual, business entity, or federal agency “has a direct stake in the outcome of the appeal.” *Id.*

proposed awardees for sole source procurements issued under the WOSB Program. At this time, only the SBA or the contracting officer may initiate a pre-award protest for an EDWOSB or a WOSB sole source procurement.<sup>350</sup> Moreover, by allowing whistleblowers to bring the EDWOSB or WOSB status protest actions, Congress would enable all EDWOSBs and WOSBs to police participation of eligible firms in the WOSB Program. As a result, the federal government would benefit from lessening its own injury caused by fraud in eligibility certifications because maximizing competition in the federal procurement market among eligible business concerns enables the federal government to purchase goods and services at prices that are actually fair and reasonable, and even drive them down. Furthermore, Congress should ensure that protestors have the right to request oral hearings and conduct discovery in the proceedings before the OHA in order to aid the parties in obtaining credible evidence of eligibility fraud and to allow them to test credibility of the evidence presented in the case.

While extending the standing to whistleblowers may increase the number of protest actions filed with the OHA, one of the deterrents preventing parties from filing frivolous protests, or protests aimed at “fishing for information,” is the cost of bringing the action, which the protestors would have to bear. Moreover, unlike in *qui tam* actions, there is no “bounty”—the financial benefit that could motivate protestors to make frivolous claims. In addition, multiple protests against the same protested firm can be consolidated. As for the limited staff and budgetary resources of the SBA and OHA, law students and recent law graduates could qualitatively and quantitatively contribute to processing and deciding the EDWOSB and WOSB status protests if the OHA decides to establish internship and fellowship programs for them.

Lastly, for the purpose of adjudication by the OHA, the benefits of having specialized judges presiding over the EDWOSB and WOSB status protests cannot be overlooked because the judges within the OHA have the professional training and distinct expertise in the complex statutory and regulatory framework of federal procurement.

#### CONCLUSION

During the five years since implementation of the WOSB Program in 2011, Congress continued to enact amendments to the Small Business Act and other statutes to create a legal framework that would allow EDWOSBs and WOSBs to compete for federal procurement contracts in a meaningful way. Still, during the same five years, the executive branch agencies awarded less than 1% of the contact obligations under the WOSB Program.<sup>351</sup> Since an eligibility certification is the gateway to the preferential small business programs in federal procurement,

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<sup>350</sup> 13. C.F.R. § 127.600 (2015).

<sup>351</sup> GAO'S CERTIFIER OVERSIGHT REPORT, *supra* note 16, at 21.

weaknesses in oversight of the eligibility certification process and verification procedures of the size and status representations create a systemic problem where ineligible firms continue to obtain the U.S. taxpayers' money through procurement contracts reserved for small businesses, including EDWOSBs and WOSBs. If the eligibility fraud persists on a large scale, and the number or total value of the contract awards under the WOSB Program remains low, this program will continue to have little impact on improving access for qualified disadvantaged women entrepreneurs, including transgender women, to the federal prime contracts. Therefore, EDWOSBs and WOSBs should play an active role in policing eligibility for the WOSB Program through protests and *qui tam* actions to ensure that they receive "maximum practicable opportunity" and a "fair proportion" of contract opportunities in the lucrative market of federal procurement.