

March 31, 2008

Robert C. Taylor
Office of Contract Assistance
Office of Government Contracting
U.S. Small Business Administration
409 3rd Street, SW
Washington, D.C. 20416

Re: Identifier 3245-AF40

Dear Mr. Taylor:

The undersigned respectfully submit these comments in opposition to the Small Business Administration (SBA)'s proposed rule, Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,295 (Dec. 27, 2007) (the "Proposed Rule"). While we represent organizations advocating diverse perspectives and constituencies, we all have a strong, common interest in ensuring that women-owned contractors have a full and fair chance to participate in federal procurement activities and that federal rules and programs are based on a sound understanding of statutory and constitutional law. Unfortunately, after years of avoiding its statutory obligations, the SBA has now issued a proposed rule that appears to be designed specifically to deny most women-owned contractors a fair opportunity to participate in federal contracting. Most seriously, the proposed rule exceeds the SBA's rule-making authority by grafting new requirements onto the program that were neither intended nor desired by Congress – nor are they constitutionally required. Moreover, the justification for the rule contains serious misstatements and misrepresentations of important legal and constitutional principles. For these reasons, we strongly recommend that the SBA withdraw this proposed rule.

I. Introduction

The proposed rule purports to implement the Women's Procurement Program, created by Congress in 2000, which authorizes federal agencies to reserve certain contracts for bidding by women-owned small businesses. The SBA has correctly identified heightened scrutiny as the constitutional standard that the Women's Procurement Program must meet. The program, as Congress enacted it, far exceeds that standard. Despite this, the SBA's proposed rule would impose in addition two completely unnecessary and debilitating requirements before any federal agency could use this program: it would require the agency to conduct its own, additional analysis of its procurement history, and to find that the specific agency itself had discriminated against women-owned small businesses in the relevant industry.

Far from ensuring the constitutionality of government operations, the SBA's proposed rule instead would – without any basis in the Constitution or federal statutes – graft onto this program additional obligations that would virtually guarantee that no woman-owned business would ever benefit from the program. These additional obligations would undermine severely Congress's clearly expressed intent and well-founded interest in ensuring full and fair participation in government procurement by women-owned small businesses. Congress has the power to ensure that federal spending does not

reinforce discrimination where federal dollars are spent. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490-492 (1989) (plurality opinion); *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980) (noting that Congress has constitutional authority to enact affirmative action program under the Spending Clause, Commerce Clause, and Fourteenth Amendment), *overruled in part on other grounds by Adarand Constructors v. Pena*, 515 U.S. 200 (1995); *see also Oregon v. Mitchell*, 400 U.S. 112, 284 (1970) (Stewart, J., concurring). Congress enacted the Women’s Procurement Program precisely because women-owned small businesses had been largely shut out of opportunities in the markets in which federal contracts were let, in addition to their under-representation among federal government contractors. The establishment of a limited goal of awarding five percent of federal contracts to women-owned small businesses is a very modest and permissible response to this problem, and the targeted means provided by the Women’s Procurement Program, as enacted, are an entirely lawful and appropriate means for the federal government to move toward that goal.

II. The Heightened Scrutiny Standard Provides the Correct Constitutional Framework for Assessing the Women’s Procurement Program.

As SBA stated accurately in the Supplementary Information to the Proposed Rule, the Women’s Procurement Program must satisfy the heightened scrutiny standard to be constitutionally sound. Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285, 73,288 (Dec. 27, 2007). As with other gender classifications in the law, gender-conscious programs that enhance opportunities for women-owned businesses must carry an “exceedingly persuasive justification” to satisfy this level of scrutiny. *See, e.g., United States v. Virginia*, 518 U.S. 515, 533 (1996). The gender-conscious program must “at least . . . serve important governmental objectives,” and must use means that are “substantially related to the achievement of those objectives.” *Id.* The justification for such a program “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.* But importantly, “sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people.” *Id.* (citations omitted). Rulings by, for example, the Eleventh Circuit in *Engineering Contractors Association of South Florida, Inc. v. Metropolitan Dade County*, 122 F.3d 895, 907-08 (11th Cir. 1997), and the Third Circuit in *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1000-01 (3d Cir. 1993), confirm the applicability of heightened scrutiny to government affirmative action programs benefiting women. *See also, e.g., Coral Constr. Co. v. King County*, 941 F.2d 910, 930-31 (9th Cir. 1991).

III. The Women’s Procurement Program Is Based On An “Exceedingly Persuasive Justification”

Without question, preventing discrimination against women-owned businesses in the award of tax dollars through the federal government’s procurement processes is an exceedingly persuasive justification for a gender-conscious program. For decades, Congress has collected evidence related to discrimination against women-owned businesses and these businesses’ disproportionately low level of participation in government procurement opportunities. Thirty years ago, for instance, Congress received the 1978 report of the Federal Interagency Task Force on Women Business Owners, *The Bottom Line: Unequal Enterprise in America*. Despite this, actions taken over the years, including executive orders issued by Presidents Carter and Clinton, produced little progress. Responding to the snail’s pace of progress in this area, Congress in 1994 established a goal that five percent of all federal contracts be awarded to businesses controlled by women, *see* 15 U.S.C. § 644(g).

Yet even this extremely modest goal has never been reached. *See, e.g., Trends and Challenges in Contracting With Women-Owned Small Businesses*, GAO-01-346, at 16 (2001) (noting failure to meet the five percent goal in first four years after it was adopted). And meanwhile, Congress has continued to receive evidence of discrimination against women-owned businesses. For example, in 1996, not long before the Women’s Procurement Program was enacted, the Department of Justice issued an extensive report, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (May 23, 1996). While focused on evidence of discriminatory contracting barriers faced by minority business owners, the report also documented extensive discrimination against women-owned businesses. Among the areas discussed were the virtual exclusion of women from all aspects of the construction industry, *id.* at 26,056 & n.62; the persistence of “glass ceiling” employment discrimination that blocks women from reaching the private sector management positions that are most likely to lead to self-employment, *id.* at 26,056-57 & n.75; sex discrimination by lenders, *id.* at 26,057 & n.86; and exclusion from business networks, *id.* at 26,059 & nn.108-109, and bonding, *id.* at 26,060 & n.118.

Another study, commissioned by the U.S. Department of Justice and released in 1997, assessed 58 studies of disparity in government contracting from states and localities across the country, and made a stunning finding: that “[w]omen-owned businesses receive only 29 cents of every dollar expected to be allocated to them based on firm availability.” Maria E. Enchautegui *et al.*, The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?*, at 15 (1997). Indeed, underutilization of women-owned businesses was the most widespread finding among the disparity studies. *Id.* These are only a few of the numerous examples of evidence received by Congress over the past decades which demonstrate the important governmental interest in remedying discrimination against women owned businesses – the very interest intended to be served by the Women’s Procurement Program.

It is important to note that the United States Department of Justice, during the current administration, has taken the position that the U.S. Department of Transportation’s Disadvantaged Business Enterprise Program, a program assisting both women and minority owned businesses, passes constitutional muster based upon the evidence Congress has collected about discrimination in contracting. In fact, the Department of Justice has repeatedly argued that this program meets not just intermediate or heightened scrutiny, but strict scrutiny. For instance, in a brief filed by the Department of Justice in 2001 defending the U.S. DOT program, the government catalogued what it termed the “enormous body of evidence of discrimination and the effects of discrimination” that Congress had received over a period of years concerning these businesses, especially in the construction field. *See Federal Defendant-Intervenors’ Post-Trial Brief in Gross Seed Company v. Nebraska Dep’t of Roads* (Aug. 17, 2001), available at <http://www.usdoj.gov/crt/emp/documents/grossbrief901.htm#Effects>.

More importantly, numerous courts have recognized that government has a “legitimate and important interest in remedying the many disadvantages that confront women business owners.” *See, e.g., Coral Construction*, 941 F.2d at 932; *Contractors Ass’n of Eastern Pa.*, 6 F.3d at 1009-10; *cf. Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003) (federal affirmative action program for minority- and women-owned businesses serves “compelling government interest”). As the United States Supreme Court held in *City of Richmond v. J.A. Croson Company*, “[i]t 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.” *Croson*, 488 U.S. 469, 492 (1989), also quoted in part in *Adarand Constructors, Inc. v. Slater* 228 F.3d 1147, 1164 (10th Cir. 2000) *cert dismissed as improvidently granted sub nom. Adarand v. Mineta* 534 U.S. 103 (2001).

Against this background of persistent discriminatory barriers faced by women-owned small businesses, and amid evidence of the federal government's continuing failure to award even a mere five percent of its contracting procurement dollars to these businesses, Congress clearly had, and continues to have, an "exceedingly persuasive justification" for enacting the Women's Procurement Program to prevent and remedy discrimination against women business owners.

IV. The Women's Procurement Program, as Designed by Congress, Is Substantially Related to the Achievement of the Program's Goals.

There is no doubt that the carefully constructed Women's Procurement Program not only meets, but exceeds, the constitutional requirement that gender-conscious programs be "substantially related" to the achievement of the government's important objectives. Indeed, it is difficult to imagine a program with a closer nexus to its goal – the program was crafted to address the very entities (women-owned small businesses) that Congress justifiably determined were under-represented in government procurement. The record of discrimination against these entities is well documented, *see supra* 2-3; it is indisputable that the Women's Procurement Program is "a product of analysis rather than a stereotyped reaction based on habit." *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 582-83 (1990) (internal citations and quotation marks omitted), *overruled in part on other grounds by Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). And although it is unnecessary to show that an affirmative action program has been implemented "as only a last resort," *see Engineering Contractors Association of South Florida, Inc.*, 122 F.3d at 929, the decades-long record of inadequate progress in the face of continued discrimination, as well as the government's failure to meet even the very modest goal that five percent of contracting dollars be awarded to women-owned businesses, confirms the constitutionality of Congress' approach here.

In enacting the Women's Procurement Program, moreover, Congress exceeded constitutional requirements by directing that the Program be used only in those industries where women-owned businesses are under-utilized in contracting – thereby providing an even tighter fit between its means and its goal of preventing discrimination against women-owned businesses in the federal procurement process. And no court that has ruled on federal programs designed to remedy discrimination in procurement has required Congress or the Executive Branch to conduct a federal-level, government-wide statistical analysis (or any national statistical studies for that matter) for programs evaluated under strict scrutiny, much less for programs evaluated under heightened scrutiny. Despite this, the study conducted by the Kauffman-RAND Institute for Entrepreneurship Public Policy, *The Utilization of Women-Owned Small Businesses in Federal Contracting*, confirms the pervasiveness of the under-utilization that women-owned businesses face. The study produced "disparity ratios" to measure the use of women-owned small businesses in proportion to their availability for various types of procurement opportunities. While the SBA's manipulation of the study produced by the RAND Corporation is extremely problematic, the fact remains that several of the methodological approaches of the SBA's own study result in findings of significant under-representation in the overwhelming majority of industries in which federal contracting occurs. The study thus provides an additional level of assurance that the Women's Procurement Program is substantially related to the goal of remedying inequities in federal procurement practices.

V. The SBA's Proposed Rule Grafts New and Unauthorized Requirements on to the Women's Procurement Program that Thwart Congressional Intent.

The proposed rule issued by the SBA implicitly acknowledges that redressing discrimination against women-owned small businesses is an important governmental interest. Unfortunately, the SBA has exceeded its rule-making authority by seeking to graft additional requirements, not authorized by Congress, on to the Women's Procurement Program. These requirements would, if allowed to become part of the final rule, prevent the program from ever serving the purpose for which it was created: to remove barriers to women-owned small businesses' full and fair participation in federal contracting. These additional requirements directly contradict the legislative intent of the Women's Procurement Program, and are in no way required by any principle of constitutional law.

The most problematic requirement appears in § 127.501(b) of the Proposed Rule, "Agency determination of discrimination." This rule would require each federal agency to conduct its own analysis "of the agency's procurement history and make a determination of whether there is evidence of relevant discrimination *in that industry by that agency*" before it could let a single contract under the Women's Procurement Program. Without authority or precedent, the SBA has declared that only sex discrimination by the particular government agency may be remedied through an affirmative procurement program. The SBA's section by section analysis of the Proposed Rule states this requirement even more clearly: the contracting agency "must . . . make a finding of discrimination by that agency in that particular industry," 72 Fed. Reg. at 73,290, in order to use the procurement program.

The SBA asserts that the Constitution requires such agency-by-agency findings of actual discrimination, but its position is unsupported by any legal citation and is clearly and categorically wrong. First, we have uncovered no legal precedent for requiring agency-by-agency findings in order to implement a federal affirmative action program created by Congress. No court applying any level of scrutiny has made such a demand. Rather, "[w]hen the program is federal, the inquiry is . . . national in scope. If Congress . . . acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide." *Sherbrooke Turf*, 345 F.3d at 970. As outlined above, Congress more than met this standard.

Indeed, the contention that any unit of government may take affirmative measures to address only its own discrimination was flatly rejected by the Supreme Court nearly twenty years ago in the *Croson* decision. In that case, which involved race-conscious affirmative action judged by the strict scrutiny standard, the Supreme Court rejected the argument that government may use such measures only to "eradicate[e] the effects of its own prior discrimination." *Croson*, 488 U.S. at 486. To the contrary, the Court ruled that government 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." *Id.* at 492. This same language was cited with approval by the Tenth Circuit Court of Appeals in the context of examining a federal program designed to assist women and minority contractors in fully and fairly participating in federal procurement opportunities in the case of *Adarand Constructors, Inc. v. Slater* 228 F.3d 1147, 1164 (10th Cir. 2000) *cert dismissed as improvidently granted sub nom. Adarand v. Mineta*, 534 U.S. 103 (2001).

Moreover, under the constitutional standards that apply to gender-conscious affirmative action measures to expand opportunity, some courts have stated that such remedies may be adopted in order to address societal, rather than governmental, discrimination against women. As the Eleventh Circuit wrote in 1994, "One of the distinguishing features of intermediate scrutiny is that . . . the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector." *Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1580 (11th Cir. 1994). The Ninth Circuit agreed in its *Coral Construction Company* decision, writing that "intermediate scrutiny does not require any showing of government involvement . . . in the discrimination it seeks to remedy." *Coral*

Construction Co., 941 F.2d at 932. For all of these reasons, the requirements of the proposed rule are excessive and contrary to the will of Congress.

In addition, the record here includes the RAND Study – which, albeit not constitutionally required, provides powerful confirmation of the under-representation of women in federal procurement. Under these circumstances, when a study of this magnitude has been performed demonstrating widespread under-representation, it defies logic to require that a particular agency undertake its own analysis in addition. Indeed, in many instances an agency’s own contracts may not be sufficiently numerous to identify underutilization with any particularity, and in any event, such analyses would clearly be redundant and a waste of money and would further delay implementation of a program that has already been stalled for more than seven years.

VI. Conclusion

The SBA’s proposed rule appears to be designed to prevent the Women’s Procurement Program from ever being used. While the proposed rule has many serious flaws, it most notably reflects an attempt by the SBA to exceed its rule-making authority by imposing new, inappropriate and unintended requirements on the program originally enacted by Congress. And finally, in its preamble to the proposed rule, the SBA has seriously misstated and misrepresented the relevant constitutional standards governing gender-conscious affirmative action programs. These deficiencies are so serious that the proposed rule collapses under their weight. The SBA must withdraw the proposed rule.

Submitted by Legal Momentum on its own behalf and on behalf of:

Airport Minority Advisory Council
American Association of People with Disabilities
American Civil Liberties Union
Asian American Justice Center
Chicago Women in Trades
Clearinghouse on Women's Issues
Dads & Daughters
Feminist Majority
Lawyers’ Committee for Civil Rights Under Law
Leadership Conference On Civil Rights
Mexican American Legal Defense and Educational Fund (MALDEF)
Minority Business Enterprise Legal Defense and Educational Fund
Minority Business RoundTable
NAACP Legal Defense and Educational Fund, Inc.
National Association of Small Business Federal Contractors
National Association of Women Business Owners
National Organization for Women
National Organization for Women Foundation
National Partnership for Women and Families
National Women’s Conference Committee
National Women’s Law Center
United States Hispanic Chamber of Commerce
Women Work! The National Network for Women's Employment
Women’s Business Enterprise National Council