NYDIA M. VELAZQUEZ, NEW YORK
CHAIRWOMAN

STEVE CHABOT, OHIO

Congress of the United States

U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515–6315

February 22, 2008

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

RE: Comments on Proposed Rule Implementing Women-Owned Small Business Federal Contract Assistance Procedures. 72 Fed. Reg. 73285, December 27, 2007

Dear Mr. Taylor:

I am writing to you in my capacity as Chairwoman of the House Committee on Small Business. The Committee has jurisdiction over federal procurement matters that impact small companies, including woman-owned concerns.

I am writing specifically to comment on the Small Business Administration's (SBA) proposed rule of December 27, 2007. The rule implements the federal contract assistance procedures for women-owned businesses (women's procurement program) enacted in Section 811 of the Small Business Reauthorization Act of 2000. This legislation passed over seven years ago. Women-owned businesses have been waiting all this time to see this program implemented and it did not happen until two months ago. As the author of the original legislation creating this program, I have to say that the proposed result is beyond disappointing.

The rule takes a narrow approach toward the implementation of the women's procurement program and largely ignores Congressional intent. The implementation as outlined in the rule is unacceptable for several reasons, including, but not limited to, the following primary concerns:

1. The RAND methodology selected by SBA is too limited and is inconsistent with the National Academy of Sciences (NAS) recommendation

The number of women-owned businesses has been growing at a faster rate than any other sector in the business community. Their share in federal contracting dollars, however, has not experienced equivalent growth. To address this, Congress passed the Small Business Reauthorization Act of 2000, which contained a provision to allow for set-asides for women-owned small businesses (WOSBs) in industries where there is under-representation. SBA was also charged with conducting a study to determine the industries where WOSBs have been under-represented and, at the Administrator's discretion, substantially under-represented.

In September 2001, SBA completed its study of under-represented industries. The study found that women were under-represented in 66 of the 71 industries reviewed. Despite this, the program was never implemented, and, in 2003, SBA requested that NAS review the results of its study. Nearly two years later, NAS concluded its review, finding that the original study was "fatally flawed." Additionally, NAS gathered legal, economic, and social scholars to develop guidelines for how to fix these flaws and correctly interpret the data. In February 2006, the SBA contracted with the Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND) to conduct a revised study using the new guidelines.

RAND released its report in 2007, and identified 28 different approaches for determining under-representation and substantial under-representation. The mean average of the 28 approaches would find 43.1 percent of industries to be under-represented. The median is 55.6 percent. Using the approach recommended by NAS, the RAND data would have provided that WOSBs were under-represented in 87 percent of all industries. SBA, however, did not follow the NAS-recommended approach, and selected an approach that identified only four industries as being under-represented: National Security and International Affairs (9281)[1]; Coating, Engraving, Heat Treating and Allied Activities (3328); Household and Institutional Furniture and Kitchen Cabinet Manufacturing (3371); and Other Motor Vehicle Dealers (4412). Although the 28 approaches ranged from indicating under-representation in zero percent of industries to 87 percent, the four-industry approach selected by SBA represents only 2.9 percent of industries – an approach firmly at the narrow end of the spectrum.

[1] This industry sector does not contract with private companies, including small businesses. According to the SBA's regulations at 13 CFR § 121, "[e]stablishments in the Public Administration sector are Federal, State, and local government agencies which administer and oversee government programs and activities that are not performed by private establishments."

By using dollar amount as its sole metric for determining volume, SBA has excluded nearly 75 percent of the industries determined as under-represented by other viable measures. By using both dollar amount and 4-digit NAICS codes as metrics for volume and industry, respectively, SBA has selected the most limited methodology possible of the 28 available choices and ignored the scholarly recommendations made in the NAS study.

This program was intended to help increase the participation of women in federal contracting. It would make sense, then, to look at contract numbers rather than just dollars when calculating under-representation. Using only dollars, the program would succeed if one women-owned business received a large contract and the remainder were left with nothing. This is not the intent of the program. Clearly, both dollars and actions should be taken into account. The SBA has failed to do this in its proposed rule.

2. The program, as outlined by SBA, is too narrow and frustrates Congressional intent

The women's procurement program must satisfy intermediate scrutiny to meet the equal protection requirements of the Constitution. As established in *United States v. Virginia*, gender-based programs must have an "exceedingly persuasive justification" and their means must be substantially related to the achievement of important governmental objectives. 518 U.S. 515, 533 (1996).

The challenges faced by woman business owners have been documented for years. Numerous government agencies have recognized the problem, including the Government Accountability Office and the Department of Justice. Surely, trying to mitigate the disparity between men- and women-owned businesses is an important objective. Circuit courts have held that the government has a "legitimate and important interest in remedying the many disadvantages that confront women business owners." *See, e.g., Coral Construction Company v. King County*, 941 F.2d 910, 932 (9th Cir. 1991); *Contractors Ass'n of Eastern Pa., Inc., v. City of Philadelphia*, 6 F.3d 990, 1009-10; *cf. Sherbrooke Turf, Inc. v. Minn. Dept of Transp*., 345 F.3d 964,969 (8th Cir. 2003) (federal affirmative action program for minority- and women-owned businesses serves "compelling government interest").

It is important that disadvantages be remedied, but it is also important that any program designed for this purpose is tailored to ensure fairness. Requiring agencies to review their own procurement history is unnecessary. Moreover, it functions as a "poison pill" and will effectively prevent the few set-asides possible under this program from actually taking place.

The RAND study, using disparity ratios, and measuring under-representation by including only women-owned businesses that are "ready, willing, and able" to compete for federal work is hardly amorphous or generalized. In fact, the Third Circuit has commented that "[d]isparity indices are highly probative evidence of discrimination because they ensure that the 'relevant statistical pool' of contractors is being considered." *Contractors Ass'n of Eastern Pa*. 6 F.3d at 1005.

Additionally, the Eleventh Circuit has held that the discrimination offered to satisfy the evidence requirement need not be governmental discrimination. The Eleventh Circuit found in the case of *Ensley Branch NAACP v. Seibels*, that "[o]ne of the distinguishing features of intermediate scrutiny is that, unlike strict scrutiny, the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector." 31 F. 3d 1548, 1580 (11th Cir. 1990). Again, this indicates that a disparity ratio, such as the one used in the RAND study, is sufficient evidence to meet intermediate scrutiny standards.

Not only is the disparity ratio sufficient as evidence of discrimination to justify having industry set-asides, but requiring anything more would be harmful to the program. The requirement outlined in the rule that each agency review its own procurement history for discrimination would be fatal. It is unclear what penalties an agency may open itself up to for admitting past discrimination, but no agency is going to take that risk. By not accepting the disparity ratio, agencies are left with finding internal discrimination as their only means of proving discrimination and meeting the constitutional standard. This is an unrealistic and unappealing choice. Agencies have few incentives to compete these contracts as set-asides and will not place themselves in positions that are so legally precarious to gain additional women-owned business achievements in a small handful of industries. This is not what Congress intended when it passed this legislation seven years ago.

By choosing a narrow interpretation of under-representation, SBA initially limited the women's procurement program. Rather than correcting the widespread disparity between men- and women-owned businesses, the program, implemented as currently written, would allow set-asides in only three restricted industries. Moreover, these industries were selected after being held to an unnecessarily high standard for demonstrating under-representation, and the SBA is still asking for further evidence, requiring each agency contemplating a set-aside to review its own history. This ensures that the already inadequate number of potential set-asides will turn to zero in reality.

SBA's implementation of the women's procurement program is unacceptable, and I ask that the agency withdraw its rule and rewrite it to be consistent with the intent of Congress.

Sincerely,

V

Nydia M. Velázquez
Chairwoman
House Committee on Small Business