

February 21, 2008

Robert C. Taylor  
Office of Contract Assistance  
Office of Government Contracting  
U.S. Small Business Administration  
409 3<sup>rd</sup> Street SW  
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 submitting these comments on behalf of the over 500,000 U.S. Women's Chamber of Commerce members and the millions of women business owners across America who have been underrepresented in federal contracting for more than a decade -- losing five to six billion dollars every year as the federal government fails to meet its own paltry five-percent goal for contracting with women-owned firms.

The U.S. Women's Chamber of Commerce strongly objects to the primary underpinnings of the proposed rule implementing the Women-Owned Small Business Federal Contracting Program and believes that the bulk of this proposed rule should be thrown out entirely. The SBA should start over again writing this rule to conform with the clearly expressed will of Congress, the constitutional requirements for gender-based programs, and following the scholarly guidance that was provided by the National Research Council (NRC) of the National Academies, Committee on National Statistics, in its published report, "*Analyzing Information on Women-Owned Small Businesses in Federal Contracting.*"

### **Background**

Fostering the development of small businesses has been a concern of the federal government since World War II. The charter of the U.S. Small Business Administration (SBA), established in 1953, provides that it will ensure small businesses a "fair proportion" of federal government contracts and sales. Repeatedly, legislation has charged the SBA to oversee efforts by federal contracting agencies to award specified percentages of federal contracting dollars to small businesses, including those owned by women.

Although women own nearly thirty-percent of American businesses, their representation in federal contracts has historically been in the low single-digits -- a significant market failure. This is why, in 1994, Congress established a modest five-percent procurement

goal for contracting with women-owned small businesses in the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355)("FASA). Congress determined there was a strong compelling need to assure that women-owned firms receive their "fair portion" of federal government contracts and sales.

By 2000, federal contracting with women-owned small businesses had still never reached the five percent goal. Once again – Congress stepped forward to address this shortcoming passing the "Equity in Contracting for Women Act of 2000," (the "Act"). The Act detailed a system "to allow contracts, in industries historically underrepresented by women-owned small businesses, to be reserved for competition by women-owned small businesses." The bipartisan bill was signed into law on December 21, 2000. Pub. L. 106-554, 114 Stat. 2763A.

The Act established a women-owned small business procurement program which allows federal contracting officers, under certain conditions, to restrict competition for certain contracts to small businesses owned and controlled by women. The Act requires the Administrator conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.

Further, to verify eligibility to participate in the program, the Act mandates that the Administrator shall establish procedures relating to: (i) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under this subsection (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern . . . ; and (ii) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern .

We provide this historical detail with these comments as it is important to frame the important governmental objective that has been made clear beginning with the 1953 charter of the U.S. Small Business Administration (SBA), continuing with the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355)("FASA) and the "Equity in Contracting for Women Act of 2000." Through all these years Congress has sought to ensure that small businesses receive a "fair proportion" of federal government contracts and sales – including women-owned small businesses.

This history of Congress seeking important governmental objectives relative to assuring women-owned small businesses receive their "fair proportion" of federal government contracts and sales, is what leads to our greatest (and most pervasive) objection with the proposed regulations.

1. **The proposed rule is inappropriately written to comply with strict scrutiny standards rather than intermediate scrutiny pervasively undermining the important governmental objective.**

To meet the equal protection requirements of the Constitution, the Women-Owned Small Business Federal Contracting Program must satisfy intermediate scrutiny. 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.

The history of Congressional action to create the SBA, ensure small businesses a “fair proportion” of federal government contracts and sales, and the repeated legislation aimed at assuring women-owned businesses receive their fair portion of government contracts more than meets the requirement for “exceedingly persuasive justification.”

And, the means Congress has chosen to open the doors to a fair portion of contracts for women-owned businesses, clearly complies with the requirement that the remedy must be substantially related to the achievement of the important governmental objective.

In many ways, the proposed rule steps far beyond intermediate scrutiny actually creating an outcome that undermines the very requirement that the remedy must be substantially related to the achievement of the important governmental objective. Through this perversion of the intent of Congress, the proposed rule establishes a remedy that is not substantially related to the achievement of the important governmental objective – instead it undermines the important governmental objective.

Examples of the perverse elements of the rule that serve to undermine the important governmental objective include: (a) the selection of a grossly narrow interpretation of under-representation and industries (including one industry – NAICS 9281, National Security and International Affairs – which does not even have a small business size standard); (b) the debilitating requirement that each agency review its own procurement history for discrimination, (c) the restrictively narrow view of “ready, willing and able” to only firms registered in the Central Contractor Registration (CCR), (d) the exclusive use of dollars instead of dollars and contract actions for measuring underrepresentation, and (e) the exclusion of data sources and methods recommended by the NRC for determining underrepresented status.

2. **The proposed rule selects the most narrow possible set of industries using a faulty rationale that is not supported by the scholarly recommendations of the NRC.**

When Congress first passed the "Equity in Contracting for Women Act of 2000," the SBA was to prepare a study to determine industries in which women business owners

were underrepresented in federal contracting and establish procedures to verify eligibility and participate in a competitive set-aside program. The SBA first undertook this study in house. After completing their own study, the SBA leadership determined that they needed a study of their study - and that they needed experts to tell them how to do the study correctly and how to interpret this study.

To this end, the SBA employed the National Research Council of the National Academy of Sciences (NRC). The NRC is a celebrated and well-respected institution which regularly is employed to provide expert advice to the federal government. The NRC established a prestigious Steering Committee for the project including the Chair of the School of Public Policy and Social Research at the University of California, Los Angeles, and scholars from the Hass and Marshall Schools of Business, the Department of Sociology at Rutgers University, and the School of Law at the University of Virginia.

These scientific, social and legal experts carefully framed the requirements for the study through the lens of the legal framework of disparity studies and the legal standards of gender preferences. They made a very clear set of recommendations. They recommended using four variables in four tables to show industry groups using a wide view of "ready and able" and a narrow view; and measuring contract actions vs. contract dollars.

The NRC also clearly stated how they recommend this data be interpreted. Industries that appear on two or more of the four recommended disparity tables may be deemed underrepresented. Using the NRC recommendations and the RAND data that followed, 87% of all industries should be included as underrepresented in federal contracting.

The specific NRC recommendation is as follows:

#### **1-6 Clear Cases of Underrepresentation**

Because almost any data source and measure of disparity will be subject to errors and because stakeholder views of appropriate disparity measures may differ according to their views on the usefulness and appropriateness of preferential contracting programs, it is unlikely that a single disparity measure will go unchallenged. *We recommend that CAWBO identify industry groups for which more than one disparity measure finds underrepresentation using a disparity ratio of 0.80 or less. The disparity measures should employ as recent data as possible.*

Four types of measures that could satisfy these criteria are (1) monetary and (2) numeric disparity ratios calculated for categories defined by size of initial contract award, using fiscal year 2002 FPDS contracting data for utilization shares and 2002 SBO data for availability shares; and (3) monetary and (4) numeric ratios calculated for categories defined by size of initial contract award, using fiscal year 2004 FPDS contracting data for utilization and 2004 CCR data for availability.

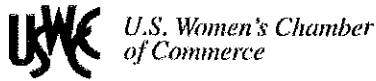
This unequivocally clear recommendation from the NRC was ignored by the SBA in the creation of the proposed rules. After years and years of waiting, studies upon studies upon studies, the SBA ignored the very study it claimed to be the expert recommendation of the appropriate method to establish "clear cases of underrepresentation."

This failure by the SBA to use their own NRC study and the recommendations of the scholars to determine which industries should be designated as "underrepresented" renders the majority of this rule without merit. Using the NRC's clear methodology, 87% of all industries should be included as underrepresented in federal contracting.

These industries are:

**Industry groups for which MORE THAN ONE disparity measure finds underrepresentation (appears in at least two of the four tables)**

2-Digit Code	Industry	<i>"Industry groups for which more than one disparity measure finds underrepresentation."</i>
11	Forestry	
21	Mining	
22	Utilities	Substantially Underrepresented
23	Construction	
31	Manufacturing	Underrepresented
32	Manufacturing	Underrepresented
33	Manufacturing	Underrepresented
42	Wholesale trade	
44	Retail trade	Underrepresented
45	Retail trade	Underrepresented
48	Transportation and warehousing	Substantially Underrepresented
49	Transportation and warehousing	Substantially Underrepresented
51	Information	Substantially Underrepresented
52	Finance and insurance	Substantially Underrepresented
53	Real estate	Underrepresented
54	Prof., sci., and tech. services	Substantially Underrepresented
56	Admin. and waste management services	Substantially Underrepresented
61	Educational services	Substantially Underrepresented
62	Health care and social assistance	Underrepresented
71	Arts and recreation	
72	Accom. and food services	Underrepresented
81	Other services (except public administration)	Substantially Underrepresented



3. **The details of the certification process in the proposed rule do not protect women-owned small businesses from undue large corporate control of contracting opportunities.**

While this proposed rule follows the general provisions of the original legislation enabling a "self certifying" system with agreements to be established with Federal agencies, state governments, or national third-party certifying entities, it does not go far enough to protect women-owned businesses from potential trade issues that may influence the federal contracting competitive process as a result of certification requirements.

In the commercial sector (where third party certifiers are often used to provide the certification that establishes women-owned status), the U.S. Women's Chamber of Commerce regularly receives complaints from members that the market dominating corporate entities (which control some of the third-party certifiers through financial contributions and control of non-profit boards of directors) use undue influence to shut out legitimately women-owned small businesses from receiving certification of their women-owned status impeding their ability to compete in the marketplace.

If the SBA does not provide clarity in the rules that certifications available for use to meet women-owned small business standards must be free from large corporate influence, it will be enabling a system whereby large corporations may reach into this federal contracting process and exert undue control over how women-owned small businesses compete. These potentially market controlling actions by dominating corporate entities (who work together through their control of third-party certifiers) may restrict access to federal contracting opportunities for women-owned small businesses.

The U.S. Women's Chamber of Commerce recommends that these rules be rewritten to clearly prevent large corporate influence over the certification process thereby preventing unintended trade consequences and assuring that a true competitive playing field is sustained.

For the reasons stated above, the U.S. Women's Chamber of Commerce recommends that the bulk of this proposed rule should be thrown out entirely. The SBA should begin over again writing this rule to conform with the clearly expressed will of Congress, the constitutional requirements for gender-based programs, and following the scholarly guidance that was provided by the National Research Council (NRC) of the National Academies, Committee on National Statistics, in its published report, "*Analyzing Information on Women-Owned Small Businesses in Federal Contracting.*"

Sincerely,

A handwritten signature in black ink, appearing to read 'Margot Dorfman', written over a horizontal line.

Margot Dorfman, CEO  
U.S. Women's Chamber of Commerce