



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

RE: Women-Owned Small Business Federal Contract Assistance Procedures;
72 Fed. Reg. 73285, December 27, 2007

Dear Mr. Taylor,

The National Association of Women Business Owners (NAWBO) submits the following comments in response to the proposed final rule published on December 27, 2007 for the 8(m) Women-Owned Small Business (WOSB) Program. In addition, NAWBO joins in and supports comments filed by Women Impacting Public Policy and Women Owners and Executives in Construction.

Founded in 1975, NAWBO is the largest and only dues-based association that represents the interest of women entrepreneurs in all industries. With 80 NAWBO chapters across the United States and more than 9,000 members, NAWBO is the voice of women business entrepreneurs in America.

After careful review of the proposed final rule for the WOSB 8(m) program, NAWBO requests that the SBA withdraw the rule. The effect of the rule as now proposed is to render the WOSB program meaningless and ineffective as a tool to address the gross disparities that now exist between availability and utilization in federal contracting for women-owned businesses. The proposed rule has three significant and substantial flaws that warrant its withdrawal: 1) the program parameters are not supported by the data in the RAND study of utilization and availability of women-owned businesses; 2) the SBA's proposal ignores the earlier public comments submitted through the rule making process; and 3) the proposed rule fails utterly to implement the intent of Congress.

In 2000, Congress recognized that the federal government had not made meaningful progress toward meeting the goal, established in 1994, of awarding five percent of all federal contracts to women-owned businesses. Congress recognized that, either the government was not doing an adequate job of reaching out to women-owned businesses, or there remained active and discriminatory barriers preventing women-owned businesses from competing successfully for federal contracts. To remedy the continuing discrimination and to ensure that women-owned businesses could compete for their fair share of the federal government's business, Congress authorized a special set aside program for women-owned businesses. Seven years later, the program remains unimplemented by the SBA, and women-owned businesses continue to lose \$5 billion annually in the difference between the percentage of contracts awarded to women-owned businesses and the five percent that has been Congress' goal since 1994.

The Proposed Rule Is Not Supported by the RAND Study

The most significant issue raised by the proposed final rule is that it is not supported by the RAND study of availability and utilization of women-owned businesses. After years of delay in completing the study of the availability and utilization of women-owned businesses in federal contracting that Congress mandated as the first step in implementing the WOSB set-aside program, the RAND Study finally concluded that, depending on how the SBA wanted to interpret the data, women-owned businesses in 87 percent of industries would be considered underrepresented among federal contractors, or 0 percent of industries would be considered underrepresented. Considering that just over three percent of federal contracts are going to women-owned businesses which make up more than 30 percent of all U.S. businesses, the logical conclusion is to adopt the findings that women-owned businesses are underrepresented among federal contractors in 87 percent of the industries.



Instead, the SBA chose the narrowest interpretation of the data, choosing to identify only four NAICS codes in which it found under representation sufficient to warrant utilization of the restricted competition program authorized by Congress: cabinetmaking, engraving, other motor vehicle dealers, and national security and international affairs. If the SBA were to look at the contracting opportunities available in the various federal agencies and then at the businesses actually securing contracts, the SBA would soon realize that women-owned businesses are substantially underrepresented among federal contractors in more than these four narrow categories.

A second serious flaw in the proposed final rule is the additional requirement imposed by SBA that each federal agency must essentially indict itself for past discrimination in these industry categories before it can utilize the restricted competition program even in these limited industries. This self incrimination analysis is NOT required for any other contracting program...even for those programs subject to "strict scrutiny"¹. The proposed rule advocated by the SBA imposes greater barriers for the WOSB program than for any other existing federal set-aside program, including the programs administered by the SBA and by the federal, state and local Departments of Transportation. Moreover, each agency is required to make these additional findings of discrimination even though they may only do so with respect to the four NAICS codes in which the SBA has already made the finding of substantial under representation.

This mandatory self analysis provides yet another opportunity for delay of implementation of the program. In essence, the SBA has created a self defeating program where no contracts would be set aside...or the few that are will impact such a small percentage of women-owned businesses as to be inconsequential. This self auditing procedure MUST be eliminated.

The Proposed Rule Conflicts with Public Comments Regarding Certification

The proposed regulations spend more time discussing appeal procedures and verification of certification challenges than creating a program that can assist women. The self certifying program proposed by the SBA for women-owned businesses seeking to participate in the WOSB program is not responsive to the public comments submitted by many individuals and associations.

While NAWBO and many other organizations do not want to add yet another layer of certification in order for women to participate in the 8(m) program, we also are opposed to the self certification program as set forth by the SBA rule. Instead of "self-certification", NAWBO (and many others) want a strong certification process, that recognizes existing certifications held by women-owned business pursuant to legitimate federal, state, local and private certification programs (i.e., DOT's DBE program, SBA's 8a or DVBE program, and other legitimate agencies or private certification companies such as Women's Business Enterprise National Council and/or the California PUC Clearinghouse). There must be no self-certification nor should there be any newly created certification process exclusively for this program for already certified businesses. Recognizing existing certifications would streamline the certification process and meet regulatory flexibility requirements while assuring the necessary level of accountability for women-owned businesses seeking to take advantage of restricted competition programs.

The Proposed Rule Does Not Implement the Intent of Congress

The decision of Congress in 2000 to authorize the 8(m) program reflected legislative frustration with the lack of progress of federal agencies in achieving the five percent procurement goal for women-owned businesses first established in 1994. Now, seven years later, the SBA has proposed a rule to implement this program that effectively renders the Congressional action meaningless.

¹ Raced based program are subject to a strict scrutiny standard, but gender based programs are only subject to intermediate scrutiny. See testimony (and legal citations) of Denise Farris on behalf of Women Impacting Public Policy (WIPP).

Rather than establishing an effective set-aside program that will assist federal agencies in ensuring that women-owned small businesses get their fair share of federal contract dollars, this proposed rule establishes new barriers to participation, and focuses significantly more attention on procedures to address protests of self-certification than measures to assure meaningful progress toward meeting the five percent contracting goal.

Commentary by the SBA included with the proposed rule demonstrates its fundamental and institutional lack of support for the WOSB program as envisioned by Congress.

First, the SBA's comment that the 8(m) program may increase the costs of goods or services to the taxpayer is disingenuous, at best, given its longstanding support for the small business set aside program, its support for the 8(a) set aside program, and its aggressive implementation of the set-aside program for disabled veterans, all of which focus procurement efforts on a smaller subset of the market as the WOSB program would. There is no credible evidence to support the SBA's off-hand contention.

Research on existing local, federal and state set-aside programs demonstrates conclusively that a small business set aside program (even one restricted to WOSBs) will not result automatically in higher prices for goods and services but will, in fact, enhance competition.

For example, analysis by the Department of Defense (the federal government's largest contractor) of the price impact of the federal small business set aside program (which includes both a 10 percent price adjustment and sheltered competition in the form of set asides for all federal procurements greater than \$2,500 and less than \$100,000 plus certain procurements over \$100,000) shows that, even with price credits, the federal small business set aside program did not result in increased costs to the government.

In fact, the finding was that having a viable, small disadvantaged business community helps to keep costs down. <http://www.admin.rpi.edu/SBPS/FAQ.html>:

Q: Won't this price credit mean the cost to the Federal government will be higher?

A: The price evaluation adjustment is designed to make the bids submitted by small disadvantaged businesses more competitive. DOD's experience with its price credit authority revealed that the price credits did not increase costs in contracts won by small disadvantaged businesses. Almost all small disadvantaged businesses that won contracts were the low offer.

The Government's interest has been in maintaining a competitive process. Small Disadvantaged firms have proven themselves important to keeping the process competitive. So, in the end, a viable, small disadvantaged business community helps keep costs down.

Similarly, a July 2002 report of the Sacramento Procurement Opportunities Program, http://www.saccounty bids.com/pdf/pop_faqs.pdf, which includes a five percent price preference, found that competition was enhanced and prices reduced by a small business set aside program, even with price preferences.

Second, the SBA's comment that the provisions of 8(m) are unclear and conflicting (and, thus, the SBA is unable to fully implement the program) is also disingenuous. The language of the statute is clear. Congress recognized that, in industries where women are substantially underrepresented, the requirement of being economically and socially disadvantaged should not apply at all because of the disparity between utilization and availability. The language of the statute clearly reflects the intent of Congress to authorize a two-tiered system that would allow restricted competition for economically disadvantaged WOSBs in underrepresented industries and for all WOSBs in industries where women-owned businesses are substantially underrepresented.



It should not take seven years and an army of lawyers at the SBA to implement the simple language of the statute that clearly authorizes a restrictive set aside (within a specific dollar amount) for those WOSB's who are underrepresented and broader outreach for WOSB's who are substantially underrepresented. Only an agency reaching to find reasons not to implement the expressed will of Congress could mistake the clear import of the statutory authorization.

The success of any new regulation or program designed to increase federal contracting opportunities for women-owned businesses requires the strong and visible commitment from the President and the Administrator of the SBA to obtain full commitment from all government agencies to taking all reasonable steps necessary to remedy the documented under-representation of women-owned businesses among federal contractors that the WOSB program was enacted by Congress to address. Success also demands annual auditing through the SBA's existing goaling program and corrective measures for failure to achieve compliance.

NAWBO urges the SBA to develop rules that mandate federal agencies that continue to fall below the WOSB five percent goal to participate in the 8(m) set-aside program or provide other commitments or expanded opportunities for WOSB's to secure contracts with their agencies. Stringent success measurement criteria should be set and each agency's program should be evaluated annually as to whether WOSB goals were met.

We ask that the SBA withdraw and reissue the proposed final rule to include the widest possible group of underutilized women-owned businesses and to mandate more effective means for monitoring and remedying the failure of federal agencies to achieve the five percent procurement goal. Until the real-world disparity in contracting for women-owned businesses is eliminated, restricted competition contracts are an appropriate remedy for ALL industries in which women are under-represented.

The National Association of Women Business Owners appreciates the opportunity to submit these comments and urges the SBA to take swift action to correct and reissue the final rule to implement the Women Owned Small Business Program as Congress intended.

Sincerely,

A handwritten signature in black ink that reads "Lisa Kaiser Hickey".

Lisa Kaiser Hickey
President
National Association of Women Business Owners

A handwritten signature in black ink that reads "Erin M. Fuller".

Erin M. Fuller, CAE
Executive Director
National Association of Women Business Owners

cc: The Honorable John Kerry, Chair, Senate Committee on Small Business and Entrepreneurship
The Honorable Olympia Snowe, Ranking Member, Senate Committee on Small Business and Entrepreneurship
The Honorable Nydia Velázquez, Chair, House Committee on Small Business
The Honorable Steve Chabot, Ranking Member, House Committee on Small Business