



Report to Congress

January 2008

Women Business Owners Blocked from Fair Access to Federal Contracts

The Small Business Administration's Seven Year Legacy of Failure and Subterfuge

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The U.S. Women's Chamber of Commerce™ unifies the collective strength of women to leverage our position as the most influential economic force in America. With over 500,000 members, the USWCC advances economic opportunities for women across America.

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Abbreviations

Act	Equity in Contracting for Women Act of 2000
CAWBO	SBA Office of Federal Contract Assistance for Women Business Owners
FASA	Federal Acquisition Streamlining Act of 1994
NAS	National Academies
NRC	National Research Council
SBA	Small Business Administration
USWCC	U.S. Women’s Chamber of Commerce
WOSB	women-owned small business



U.S. Women's Chamber of Commerce

1200 G Street, NW, Suite 800
Washington, DC 20005

January 21, 2008

The Honorable John F. Kerry
Chairman

The Honorable Olympia J. Snowe
Ranking Member
Committee on Small Business
United States Senate

The Honorable Nydia M. Velázquez
Chairwoman

The Honorable Steve Chabot
Ranking Member
Committee on Small Business
House of Representatives

The U.S. Women's Chamber of Commerce delivers this report to Congress with a great sense of urgency. For more than a decade the federal government has not met the paltry five-percent goal for contracting with women-owned small businesses (WOSB).

Even today, as women own nearly thirty percent of all firms in America, the federal government lags behind in doing business with women. Women lose between five and six billion dollars every year as the federal government fails to meet the low five percent mark. And the openly unsupportive attitude that is exhibited by the SBA only serves to continue a sad tradition of failure within the government contracting ranks.

I ask you to intercede on behalf of the millions of women business owners – their families, their employees, and their communities – who are being blocked from fair access to federal contracts. The SBA should withdraw the most recent proposed rule and Congress should pass the legislation completed by H.R. 1873 (Sec. 201) which raises the goal for contracting with WOSB's to a more appropriate eight-percent and H.R. 3867 (Sec. 301) which provides clear language for the implementation of the women's federal procurement program. This action would set the stage for strong advances in the fair access to federal contracts by women-owned small businesses.

Respectfully,

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

Executive Summary

Beginnings

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-owned businesses own twenty-eight percent of American businesses, their representation in federal contracts has historically been in the low single-digits – a significant market failure.

FASA the Federal Acquisition Streamlining Act of 1994

In 1994, Congress established a modest five-percent procurement goal for women-owned small businesses (WOSB) in the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355) (“FASA”). Despite this stated goal, data from the Federal Procurement Data System revealed that the highest utilization of women-owned businesses by federal agencies was just 2.98 percent in 2003, significantly less than the statutory goal.

Additionally, other elements of FASA put great pressure on the acquisition workforce and system creating greater and greater challenges for small businesses seeking access to federal contracts. These pressures included reduced acquisition staffing, increased use of multiple award contracts (MACs), Government-Wide Acquisition Contracts (GWACs) and Federal Supply Schedules. With less staff, larger contracts, and less competition – the result was fewer small businesses competing and winning federal contracts.

Equity in Contracting Act of 2000

In 2000, Congress passed the "Equity in Contracting for Women Act of 2000," (the "Act"). The purpose of the Act is "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 establishes a WOSB 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 .

SBA Delays and Subterfuge Begin

In 2001, the SBA set two deadlines for implementing the Act, both of which the SBA failed to meet. During 2002 the SBA continued to falter - and the SBA's budget request for fiscal years (FY) 2003 and 2004 did not include funding for the women's procurement program.

By September 2004, the SBA still had not completed the required study or the regulations required to implement the program. On Wednesday, September 29, 2004, leaders of the U.S. Women's Chamber of Commerce met with Administrator Barreto to discuss the delay in implementing the Act. **At this meeting, Administrator Barreto indicated that the goals in the Act were meaningless and stated that there were no consequences if the SBA failed to meet the goals. He stated in response to a question about when the Act would be implemented that "the Administration has no intention of implementing this program."**

U.S. Women's Chamber of Commerce Files Claim Against the SBA; the Court Agrees

On October 29, 2004, the U.S. Women's Chamber of Commerce brought a complaint under the Administrative Procedure Act ("APA") for an order requiring the Administrator of the U.S. Small Business Administration to implement Congress' mandate. The SBA filed a Motion to Dismiss which was denied by the court (on December 8, 2005).

Reggie B. Walton (United States District Judge for the District of Columbia) further noted that the SBA ". . . had sabotaged, whether intentional or not, the implementation of a procurement program..." and concluded that "a deadline is in order".

National Research Council Completes Study Detailing How to Determine Industries in which WOSB are Underrepresented

In March 2005, the National Research Council (NRC) of the National Academies, Committee on National Statistics, published, "**Analyzing Information on Women-Owned Small Businesses in Federal Contracting.**" This report provided clear expert recommendations, analytical methods and other methodology to be used to ascertain the utilization of women-owned small businesses in federal contracting.

To identify underrepresentation, the NRC recommended using certain variables to create four tables for the measurements and then identifying industry groups that appear on more than one of the these tables. Their specific recommendation is as follows:

Excerpt from: "Analyzing Information on Women-Owned Small Businesses in Federal Contracting"
(National Research Council)

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.

The NRC says industry groups that appear on more than one of the four recommended tables may be deemed underrepresented.

The SBA ignored this scholarly recommendation.

The RAND Study Uses the NRC Recommendations; Provides the Data Needed to Select Underrepresented Industries

The SBA employed the RAND Corporation to leverage the recommendations of the NRC, pull together the four recommended tables showing disparity ratios by NAICS codes, and finally publish a list of industries in which WOSB are underrepresented in federal contracting. The Rand Study was published on April 27, 2007.

Using the NRC recommendations, the Rand Study (in Chapter Four “Results”) provided the four tables shown below and on the following pages. The NRC states, “For ease of use, ratios that indicate substantial underrepresentation of WOSBs (between 0.0 and 0.5) are highlighted in dark gray, and those that indicate underrepresentation (between 0.5 and 0.8) are highlighted in light gray.”

		RAND Study Results			
Table 4.1 Disparity Ratios Using Number of Contracts and a Broad Definition of Availability		All Contracts		Trimmed Sample	
2-Digit Code	Industry	FPDS	FPDS and DUNS	FPDS	FPDS and DUNS
11	Forestry, fishing	0.92	0.91	0.92	0.90
21	Mining	0.85	0.82	0.86	0.83
22	Utilities	0.47	0.45	0.47	0.45
23	Construction	1.53	1.49	1.53	1.50
31-33	Manufacturing	0.50	0.48	0.51	0.49
42	Wholesale trade	0.90	0.86	0.90	0.87
44-45	Retail trade	0.58	0.55	0.58	0.56
48-49	Transportation and warehousing	0.49	0.48	0.49	0.48
51	Information	0.49	0.47	0.49	0.47
52	Finance and insurance	0.26	0.23	0.28	0.24
53	Real estate	0.19	0.18	0.19	0.18
54	Prof., sci., and tech. services	0.45	0.42	0.45	0.43
56	Admin. and waste management services	0.72	0.69	0.72	0.70
61	Educational services	0.31	0.31	0.31	0.31
62	Health care and social assistance	0.47	0.46	0.47	0.46
71	Arts and recreation	1.66	1.64	1.66	1.64
72	Accom. and food services	0.48	0.46	0.48	0.45
81	Other services (except public administration)	0.27	0.26	0.27	0.26

RAND Study Results

Table 4.2
Disparity Ratios Using Contract Dollars and a Broad Definition of Availability

2-Digit Code	Industry	All Contracts		Trimmed Sample	
		FPDS	FPDS and DUNS	FPDS	FPDS and DUNS
11	Forestry, fishing	0.73	0.72	0.75	0.74
21	Mining	0.99	0.95	0.96	0.92
22	Utilities	6.26	6.14	7.85	7.70
23	Construction	0.96	0.93	1.24	1.20
31-33	Manufacturing	0.67	0.62	1.33	1.22
42	Wholesale trade	0.65	0.57	1.07	0.94
44-45	Retail trade	1.13	1.09	2.73	2.64
48-49	Transportation and warehousing	0.17	0.18	0.42	0.41
51	Information	2.37	2.02	3.30	3.21
52	Finance and insurance	0.18	0.15	1.73	1.50
53	Real estate	0.69	0.68	0.52	0.51
54	Prof., sci., and tech. services	0.48	0.37	0.81	0.69
56	Admin. and waste management services	0.38	0.36	0.74	0.70
61	Educational services	0.71	0.51	1.06	0.76
62	Health care and social assistance	1.49	1.47	1.60	1.58
71	Arts and recreation	0.83	0.83	1.15	1.15
72	Accom. and food services	1.47	1.38	2.48	2.33
81	Other services (except public administration)	0.26	0.25	0.36	0.35

RAND Study Results

Table 4.3
Disparity Ratios Using Number of Contracts and a Narrow Definition of Availability

2-Digit Code	Industry	All Contracts		Trimmed Sample	
		FPDS	FPDS and DUNS	FPDS	FPDS and DUNS
11	Forestry, fishing	0.88	0.88	0.88	0.93
21	Mining	0.63	0.62	0.63	1.15
22	Utilities	0.34	0.33	0.34	0.25
23	Construction	0.79	0.78	0.79	0.65
31	Manufacturing	0.56	0.55	0.56	0.20
32	Manufacturing	1.37	1.36	1.38	0.31
33	Manufacturing	1.10	1.09	1.10	0.47
42	Wholesale trade	0.72	0.71	0.72	0.58
44	Retail trade	0.78	0.77	0.78	0.59
45	Retail trade	0.69	0.68	0.69	0.41
48	Transportation and warehousing	0.48	0.47	0.48	0.28
49	Transportation and warehousing	0.66	0.65	0.66	0.36
51	Information	0.32	0.30	0.32	0.44
52	Finance and insurance	0.31	0.31	0.31	0.31
53	Real estate	0.64	0.63	0.64	0.77
54	Prof., sci., and tech. services	0.54	0.53	0.55	0.37
56	Admin. and waste management services	0.66	0.66	0.67	0.48
61	Educational services	0.46	0.46	0.46	0.29
62	Health care and social assistance	0.79	0.79	0.78	0.75
71	Arts and recreation	0.77	0.77	0.78	0.59
72	Accom. and food services	0.71	0.69	0.70	0.66
81	Other services (except public administration)	0.52	0.51	0.52	0.39

RAND Study Results

Table 4.4
Disparity Ratios Using Contract Dollars and a Narrow Definition of Availability

2-Digit Code	Industry	All Contracts		Trimmed Sample	
		FPDS	FPDS and DUNS	FPDS	FPDS and DUNS
11	Forestry, fishing	43.95	43.95	54.12	54.12
21	Mining	89.81	89.77	101.7	101.7
22	Utilities	8.80	8.78	12.46	12.44
23	Construction	15.22	15.06	25.73	25.39
31	Manufacturing	2.34	2.34	2.83	2.82
32	Manufacturing	34.20	33.78	66.01	65.19
33	Manufacturing	7.53	7.10	33.81	33.10
42	Wholesale trade	29.69	29.39	19.80	19.46
44	Retail trade	52.88	50.10	88.01	83.43
45	Retail trade	41.86	40.63	50.68	49.18
48	Transportation and warehousing	9.30	9.12	18.11	17.66
49	Transportation and warehousing	146.0	145.0	260.7	259.0
51	Information	14.02	13.91	34.61	34.34
52	Finance and insurance	284.4	76.53	156.5	156.5
53	Real estate	73.58	72.53	51.98	49.69
54	Prof., sci., and tech. services	18.52	16.77	48.32	46.49
56	Admin. and waste management services	2.65	2.58	11.51	11.12
61	Educational services	7.27	7.19	21.59	21.36
62	Health care and social assistance	21.88	21.88	36.34	36.34
71	Arts and recreation	93.14	93.05	135.1	135.0
72	Accom. and food services	165.4	158.4	150.8	139.7
81	Other services (except public administration)	6.66	6.43	14.92	14.42

Using the NRC Recommendations and the RAND Study Tables, Eighty-Seven Percent of All Industries are Underrepresented

By following the scholarly recommendation detailed by the NRC, the SBA simply needed to use the RAND Study tables and, "identify industry groups for which more than one disparity measure finds underrepresentation using a disparity ratio of 0.80 or less." Using the NRC methodology to determine underrepresentation, women businesses are underrepresented in eighty-seven percent of all industries. These industries are shown below:

RAND Study Results

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

SBA Ignores the NRC Scholarly Recommendations; Makes Up Arbitrary Method to Calculate Industries That Are Underrepresented

As detailed previously in this report, when Congress 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 participation in a competitive set-aside program.

To this end, the SBA employed the National Research Council of the National Academy of Sciences. The NRC is a prestigious 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 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 indicating, “industries that appear on two or more of the four tables may be deemed underrepresented.” Using the NRC recommendations and the RAND data that followed, eighty-seven percent of all industries should be included as underrepresented in federal contracting.

But, instead of following the the scholarly recommendations of the NRC, the SBA threw their recommendations out. Then the SBA whittled away at possible measurements until they found a narrow selection they liked. Remarkably, after seven years of delay and over a decade of failure to meet contracting goals, the SBA pronounced only four industries as underrepresented.

SBA Files Proposed Rule that Will Not Serve the Intent of Congress

Instead of following the NRC recommendation for identification of industries in which WOSB are underrepresented in federal contracting, the SBA threw out the work NRC and arbitrarily selected only four industries.

NAICS Codes Arbitrarily Selected by the SBA as Underrepresented:

- 9281 National Security and International Affairs
- 3328 Coating, Engraving, Heat Treating, and Allied Activities
- 3371 Household and Institutional Furniture and Kitchen Cabinet Manufacturing
- 4412 Other Motor Vehicle Dealers

SPECIAL NOTE: Within this group of four industries, is included an industry sector (9281) that does not even have small business size standards attributed. Consequently, businesses in this industry sector would not be eligible for the Women's Procurement Program.

The SBA's own website provides the following information:

NAICS Sector 92: Small business size standards are not established for this sector. Establishments 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.

After more than seven years of research, study, delay and subterfuge, the SBA threw out all of the scholarly recommendations and purposely selected a very narrow set of industries guaranteeing that the implementation of the Women's Procurement Program will not secure the results intended by Congress.

After Seven Years of Failure and Subterfuge, the SBA Adds a Poison Pill

For years and years the SBA has hidden behind false pleas for time while women business owners have lost billions of dollars: time to hear from the experts, time to gather the data, and time to understand how to determine women-owned status. But, with this latest action, they can no longer hide their contemptuous position towards securing fair access to federal contracts for women business owners.

The arbitrary and unscientific method they have chosen to select the underrepresentative industries for this program looks more like something pulled out of a hat than the results of seven years of work and a scientific disparity study.

Additionally, when publishing the proposed regulations for the implementation of the Women's Procurement Program, ***the SBA added a poison pill mandating that each agency make a finding of discrimination.*** The SBA 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 Mixes-Up Race-Based vs. Gender-Based Law; Overreaches Constitutional Role; Guarantees Failure of the Women's Procurement Program

The Women's Procurement Program authorizes federal agencies to reserve certain contracts for bidding by women-owned small business enterprises in industries where detailed analysis has demonstrated that such businesses are not getting appropriate opportunities to participate in federal contracting. ***This program was carefully crafted by Congress to meet relevant constitutional standards.***

The SBA has correctly identified intermediate, or heightened, scrutiny as the constitutional standard that the Women's Procurement Program must meet. The program, as Congress created it, meets that standard.

Far from ensuring the constitutionality of government operations, the SBA's Proposed Rule instead would graft onto this program additional agency obligations that would virtually guarantee no women-owned business would ever benefit from the program. These additional obligations are not constitutionally mandated and in practice, they would only undermine Congress's clearly expressed intent and well-founded interest in increasing participation in government procurement by small businesses owned by women.

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.

Administrator Preston Goes On the Record Against the Women's Procurement Program; Stonewalls the Will of Congress

On January 16, 2008 SBA Administrator Preston went on the record against the Women's Procurement Program – again stepping outside of his role as administrator of a federal agency into the role of Congress. In an opinion editorial released by the Administrator he clearly makes statements against the implementation of the program.

Administrator Preston says, "The better way to increase women-owned small business' share of federal contracts is to get more such firms, "ready, willing, and able" to perform federal contracts, and ensure they are registered in the Central Contractor Registration system."

Further displaying the politicization of the SBA, Administrator Preston states that instead of implementing the Women's Procurement Program -- "In this age of partisanship, people want positive solutions. Helping more women-owned small businesses compete for government contracts, and doing it the right way, is a winner for all sides."

Administrator Preston solution is to stonewall the implementation of the Women's Procurement Program and stay with the failed practices of the past. Instead of fulfilling his sworn legal obligation as administrator of a federal agency (implementing the seven year old law as intended by Congress), Administrator Preston recommends, (1) Agency field staff focused on contracting to businesses owned by targeted groups, including women; (2) A government-wide scorecard of federal agencies to rate their small business contracting efforts, including women. And, as he has pointed out on several occasions, the SBA has a website to assist women.

These ineffective activities have been part of the SBA failures for more than a decade. Administrator Preston is clearly engaged in playing politics with the lives of women business owners, their employees, families and communities. Rather than implementing the law as intended by Congress, he is participating in an elaborate charade intended to block fair access to federal contracts by women-owned small businesses.

Recommendations

Withdraw the Proposed Rule

We ask the support of Congress to intercede on behalf of the millions of women business owners who are being blocked from fair access to federal contracts.

To start, the SBA should withdraw the most recent proposed rule in its entirety and work closely with Congress to re-submit a proposed rule that serves rather than subverts the original intent of Congress.

Proceed with H.R. 3867 (Sec. 301); Make the Method of Selection Clear

When Congress first wrote the language for the Women's Procurement Program, it did not have the benefit of the work of the NRC. But now, the NRC has clearly presented a scholarly methodology by which the data should be collected and used to establish a list of underrepresented industries. The NRC prepared their recommendations through the legal lens of gender-based programs.

H.R. 3867 (Sec. 301) leverages this new scholarly and legal information to put into law the exact method the SBA should use to establish the list of underrepresented industries - and even lists these industries. We strongly recommend the Senate act to include this language in upcoming legislation and come together with the House of Representatives on H.R. 3867 for the purpose of clarifying the implementation of the Women's Procurement Program.

Proceed with H.R. 1837 (Sec. 201); Raise the Contracting Goal to Eight Percent

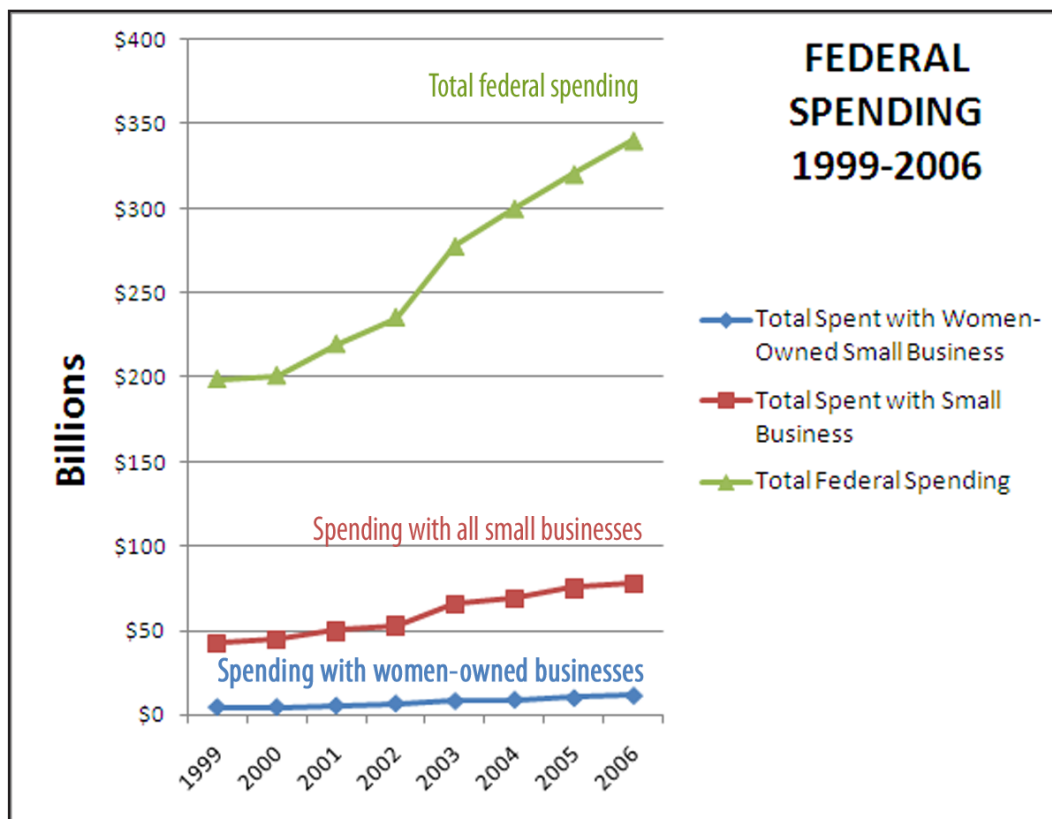
We strongly recommend the Senate act in support of H.R. 1837 (Sec. 201) which raises the goal for contracting with women-owned small businesses to eight percent. Women own nearly thirty percent of all businesses in the U.S. and still only secure 3.4% of all federal contracting dollars. By raising the goal to a more commensurate percentage, the federal government will acknowledge the tremendous growth in the number of women-owned firms and continue to pull the federal goal and outcome higher.

Opportunity Loss

Since 1994, WOSB's Have Lost Billions

We ask the support of Congress to intercede on behalf of the millions of women business owners, their families, employees, and their communities who are being blocked from fair access to federal contracts.

To start, the SBA should withdraw the most recent proposed rule in its entirety and work closely with Congress to re-submit a proposed rule that serves rather than subverts the original intent of Congress.



Women-Owned Small Business Lose Between
\$5-6 Billion Every Year Due to the Federal Government
Failure to Provide Fair Access to Federal Contracts

Administrator Preston Believes Comparing Women-Owned Firms to Male-Owned Firms is Comparing “Apples to Oranges”

Remarkably, in Administrator Preston’s own words, he states that comparing women-owned firms to the market-whole is like comparing “apples-to-oranges.” Through the eyes of Administrator Preston, women should simply get used to experiencing the opportunity loss created by the federal government’s failure to provide fair access to federal contracts for WOSBs.

For several years, the U.S. Women’s Chamber of Commerce has pointed out to the SBA and Congress that women-owned businesses are growing in number but not keeping up with the market-whole in business revenues. This failure to achieve strong revenue growth can be attributed in large part to failure to access large markets (like government contracts) and failure to secure the access to capital that is needed to advance business growth.

The SBA has been at the heart of both these issues through its failure to assure WOSB’s have fair access to federal contracts and through providing fewer and smaller 7(a) loans to women-owned firms.

Using Administrator Preston’s viewpoint, we should accept that women-owned firms are smaller than the market whole, therefore women-owned firms should stay smaller and stop seeking fair access to contracts and business capital to secure revenue growth. Using Administrator Preston’s viewpoint, counting WOSB’s as twenty-eight percent of all businesses in America is misleading – because our businesses should not expect to achieve the size of other firms.

Obviously, one would hope that the leader of the federal agency that is charged with fighting for fair access to federal contracts for small businesses would lead the charge for women-owned businesses rather than work to undermine our market position.

Timeline

A Timeline of Important Steps for Women in Federal Contracting

1994

The Federal Acquisition Streamlining Act of 1994 (FASA) set an overall goal of 5% for women-owned businesses. The Act did not, however, establish a specific procurement mechanism for accomplishing that goal. And between 1994 and 2000, the federal government never even came close to meeting this 5% goal.

2000

To address the ongoing shortfall of contracts with women-owned firms, Congress passed the Equity in Contracting for Women Act of 2000 on December 21, 2000. This Act was to give agencies the ability to limit certain competitions to women-owned small businesses. It required the Small Business Administration (SBA) to (1) "conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting" and (2) establish procedures to verify eligibility to participate in the procurement program.

2004

On October 29, 2004, the U.S. Women's Chamber of Commerce, in support of its 500,000 members, brought suit against the SBA for its failure to conduct the study of underrepresented industries and publish the regulations necessary to implement the women's program.

2005

The SBA filed a Motion to Dismiss which was denied by the court (on December 8, 2005) and who further noted that the SBA "...had sabotaged, whether intentional or not, the implementation of a procurement program..." and concluded that "a deadline is in order".

2005

In March 2005, the National Research Council (NRC) of the National Academies, Committee on National Statistics, published, "***Analyzing Information on Women-Owned Small Businesses in Federal Contracting.***" This report provided clear expert recommendations, analytical methods and other methodology to be used to ascertain the utilization of women-owned small businesses in federal contracting – enabling the SBA to finally proceed with the required disparity study.

2006

On March 6, 2006, the SBA notified the court that it would "complete the disparity study within 9 months" or by November 21, 2006. However, the SBA failed to meet this self-imposed deadline.

2006

The SBA finally publishes a set of proposed regulations for the implementation of PL 106-554, the women's federal contracting program. In several areas, the SBA proposes to change what Congress intended. The U.S. Women's Chamber of Commerce and over five hundred business owners provide comments on the proposed regulations. [The SBA later reports that "over 100" business owners responding - a huge disparity to our records of over 500 respondents.]

2007

The USWCC petitioned the court on February 9, 2007 for a Status Report and that the SBA report on its progress every 45 days.

2007

U.S. House of Representatives Committee on Small Business holds a subcommittee hearing on March 21, 2007 to address shortfall of contracting with women-owned firms. The U.S. Women's Chamber of Commerce CEO Margot Dorfman and three USWCC members testify at this hearing.

The request from the U.S. House of Representatives was for Administrator Preston to attend the hearing. Instead, he sent the new Deputy Administrator (Jovita Carranza) who had only been with the SBA for three months and knew very little about the issue. She testified that the new study would be released mid-April and the regulations would be published by the end of the summer 2007.

2007

The Rand Corporation study, "The Utilization of Women-Owned Small Businesses in Federal Contracting," is finally published on April 27, 2007 --- ***two-thousand-three-hundred-and-twenty-two days after Congress passed the legislation.***

This study finds that women's businesses are underrepresented in federal contracting in eighty-seven percent of all industries.

2007

Summer came and went without the promised publishing of the regulations to implement the program. The U.S. Women's Chamber of Commerce asks the Court to hold a Status Hearing (October 11, 2007).

The Court agrees and holds a Status Hearing on October 23, 2007. At the hearing, the SBA claims it will publish a new proposed rule shortly (rather than publishing the final rule). The Judge Reggie B. Walton remains unsatisfied with the progress of the SBA and schedules another status hearing for January 25, 2008.

2007

On December 27, 2007 the SBA publishes a new proposed rule for the implementation of the Women's Procurement Program ignoring the scholarly recommendations of the NRC and arbitrarily selecting a very small group of industries as underrepresented. The SBA includes in the regulations the

Additionally, within the proposed rule, the SBA adds a poison pill mandating that each agency make a finding of discrimination. The SBA 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.

2008

On January 16, 2008 the House of Representatives Small Business Committee holds a Full Committee Hearing on "SBA's Progress in Implementing the Women's Procurement Program." Committee Chairwoman Nydia M. Velázquez states, "The SBA's proposal should be scrapped because it does not embody the program that Congress envisioned," said Chairwoman Velázquez. "If the rule becomes final, women entrepreneurs would be unjustly kept out of the federal market place. This Committee will not allow that to happen."

Administrator Preston comes out publically in an opinion editorial against the Women's Procurement Program claiming that women are receiving a comensurate number of federal contracts and that comparing women-owned businesses to male-owned businesses is like comparing "apples-to-oranges."

Appendix

The Act Public Law 106-554

December 21, 2000

Small Business Reauthorization Act of 2000

SEC. 811. PROCUREMENT PROGRAM FOR WOMEN-OWNED SMALL BUSINESS CONCERNS.

Section 8 of the Small Business Act (15 U.S.C. 637) is amended by adding at the end the following:

“(m) PROCUREMENT PROGRAM FOR WOMEN-OWNED SMALL BUSINESS CONCERNS-

“(1) DEFINITIONS- In this subsection, the following definitions apply:

“(A) CONTRACTING OFFICER- The term ‘contracting officer’ has the meaning given such term in section 27(f)(5) of the Office of Federal Procurement Policy Act (41 U.S.C. 423(f)(5)). (B) SMALL BUSINESS CONCERN OWNED AND CONTROLLED BY WOMEN- The term ‘small business concern owned and controlled by women’ has the meaning given such term in section 3(n), except that ownership shall be determined without regard to any community property law.

“(2) AUTHORITY TO RESTRICT COMPETITION- In accordance with this subsection, a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if-- (A) each of the concerns is not less than 51 percent owned by one or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law); (B) the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by women will submit offers for the contract; (C) the contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3); (D) the anticipated award price of the contract (including options) does not exceed-- (i) \$5,000,000, in the case of a contract assigned an industrial classification code for manufacturing; or (ii) \$3,000,000, in the case of all other contracts; (E) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price; and (F) each of the concerns-- (i) is certified by a Federal agency, a State government, or a national certifying entity approved by the Administrator, as a small business concern owned and controlled by women; or (ii) certifies to the contracting officer that it is a small business concern owned and controlled by women and provides adequate

documentation, in accordance with standards established by the Administration, to support such certification.

`(3) WAIVER- With respect to a small business concern owned and controlled by women, the Administrator may waive subparagraph (2)(A) if the Administrator determines that the concern is in an industry in which small business concerns owned and controlled by women are substantially underrepresented.

`(4) IDENTIFICATION OF INDUSTRIES- The Administrator shall conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.

`(5) ENFORCEMENT; PENALTIES-

`(A) VERIFICATION OF ELIGIBILITY- In carrying out this subsection, 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 under paragraph (2)(F)); and `(ii) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern under paragraph (2)(F). (B) EXAMINATIONS- The procedures established under subparagraph (A) may provide for program examinations (including random program examinations) by the Administrator of any small business concern making a certification or providing information to the Administrator under paragraph (2)(F). (C) PENALTIES- In addition to the penalties described in section 16(d), any small business concern that is determined by the Administrator to have misrepresented the status of that concern as a small business concern owned and controlled by women for purposes of this subsection, shall be subject to-- `(i) section 1001 of title 18, United States Code; and `(ii) sections 3729 through 3733 of title 31, United States Code.

`(6) PROVISION OF DATA- Upon the request of the Administrator, the head of any Federal department or agency shall promptly provide to the Administrator such information as the Administrator determines to be necessary to carry out this subsection.!

Testimony
January 16, 2008
U.S. Women's
Chamber of
Commerce

Margot Dorfman
CEO

I am here again today on behalf of millions of women business owners from all across America to tell you that the Small Business Administration has once again sabotaged the implementation of the Women's Procurement Program. And, to remind you why this program - as Congress originally intended it to be implemented - is so dearly needed.

Recently the SBA filed a new set of proposed rules for the implementation of the Women's Procurement Program. These new rules ignore the recommendations of scientific and legal experts, and render the program ineffective by limiting its use to a handful of industries, and requiring each and every federal agency to "conduct an analysis of the agency's past procurement activities and make a finding of discrimination by that agency in that particular industry."

For years and years the SBA has hidden behind false pleas for time while women business owners have lost billions of dollars: time to hear from the experts, time to gather the data, and time to understand how to determine women-owned status. But, with this latest action, they can no longer hide their contemptuous position towards securing fair access to federal contracts for women business owners.

The arbitrary and unscientific method they have chosen to select the industries for this program looks more like something pulled out of a hat than the results of seven years of work and a scientific disparity study. And the outrageous requirement that every agency conduct studies of discrimination in all industries, only shows us how far this administration will go to prevent women from gaining fair access to federal contracts.

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. The NRC is a prestigious 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 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 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.

But, nothing is simple, direct and clear in the hands of the SBA! The SBA threw out the NRC's scholarly recommendations and whittled away at possible measurements until they found a narrow selection they liked. Then, they tried to move the emphasis from underrepresentation to discrimination and tagged on the incredible requirement that every agency complete a discrimination study in every industry. Again, the SBA has turned years of time and money into a ridiculous circus treating the lives of thousands and thousands of American citizens as toys in some political game.

Trust me, to women business owners, this is no game. Fair access to federal contracts is serious business. The economic and political rise of women in America is truly something for the history books. But, the economic realities for women business owners remain very troublesome.

Since the paltry five percent goal for contracting with women-owned firms was set in 1994, the federal government has never hit the mark. Even today, as women own thirty percent of all firms in America, the federal government lags behind in doing business with women. Women lose between five and six billion dollars every year as the federal government fails to meet the low five percent mark. And the openly unsupportive attitude that is exhibited by the SBA only serves to continue a sad tradition of failure within the government contracting ranks.

Once again I ask the House Small Business Committee to compel the SBA to implement the Equity in Contracting for Women Act of 2000 as intended by congress seven years ago. It is clear that, without this law in place, women owned firms are losing billions of dollars annually. Women business owners are ready and able to grow their businesses. We ask you to support their growth as they provide for their families and advance the economic growth of their communities.

Testimony January 16, 2008 Legal Momentum

Jennifer K. Brown
Vice President and
Legal Director

Good morning, distinguished Members of the House of Representatives Committee on Small Business. Thank you, Chairwoman Velazquez, for inviting me to testify today, and thank you as well, Ranking Member Chabot.

I am Jennifer Brown, Legal Director of Legal Momentum. Founded in 1970, Legal Momentum is the nation's oldest legal advocacy organization dedicated to advancing the rights of women and girls. With headquarters in New York City and offices in Washington, D.C., Legal Momentum has been a leader in establishing legal, legislative, and educational strategies to secure equality and justice for women across the country. Our public policy and litigation efforts focus on four areas that are of greatest concern to women in the United States: freedom from violence against women, equal work and equal pay; the health of women and girls; and strong families and strong communities.

I very much appreciate the opportunity to contribute today to the Committee's consideration of the Small Business Administration's Proposed Rule for implementing the Women's Procurement Program. As you know, this program was authorized by Congress in 2000 as a tool for promoting contracting opportunities for women-owned business enterprises. It is only the most recent in a series of actions Congress has taken to root out longstanding discrimination against women business owners, and to promote their equal opportunity to compete for federal contracts.

The Women's Procurement Program authorizes federal agencies to reserve certain contracts for bidding by women-owned small business enterprises in industries where detailed analysis has demonstrated that such businesses are not getting appropriate opportunities to participate in federal contracting. This program was carefully crafted by Congress to meet relevant constitutional standards. The SBA's Proposed Rule implementing the program would add on a completely unnecessary and debilitating requirement 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 it had discriminated against women-owned small businesses in the relevant industry.

I can summarize my testimony very briefly. The SBA has correctly identified intermediate, or heightened, scrutiny as the constitutional standard that the Women’s Procurement Program must meet. The program as Congress created it meets that standard. Far from ensuring the constitutionality of government operations, the SBA’s Proposed Rule instead would graft onto this program additional agency obligations that would virtually guarantee no women-owned business would ever benefit from the program. These additional obligations are not constitutionally mandated and in practice, they would only undermine Congress’s clearly expressed intent and well-founded interest in increasing participation in government procurement by small businesses owned by women.

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

As SBA acknowledged 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, affirmative action programs benefiting women 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). A gender-conscious program is constitutional only if it serves “important governmental objectives,” using means that are “substantially related to the achievement of those objectives.” *Id.* And, importantly, the justification for such a program “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.* Rulings by, for example, the Eleventh Circuit in *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994) 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).

II. The Women's Procurement Program Serves "Important Governmental Objectives"

Without question, preventing discrimination against women-owned businesses in the award of tax dollars through the federal government's procurement processes is an important governmental interest. Literally for decades, beginning with the 1978 report of the Federal Interagency Task Force on Women Business Owners, *The Bottom Line: Unequal Enterprise in America*, Congress has been receiving evidence of discrimination against women-owned businesses and these businesses' extremely low level of participation in government procurement opportunities. 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 continued to receive evidence of discrimination and underutilization of women-owned businesses. For example, in 1996, not long before the Women's Procurement Program was created, 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 reported 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?* 15 (1997). Indeed, underutilization of women-owned businesses was the most widespread finding among the disparity studies. *Id.*

Similarly, a brief filed by the Department of Justice in early 2001 in defense of another federal affirmative action program for both minority- and women-owned businesses catalogued what the Government 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*, available at <http://www.usdoj.gov/crt/emp/documents/grossbrief901.htm#Effects>.

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 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. Dep’t of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003) (federal affirmative action program for minority- and women-owned businesses serves “compelling governmental 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).

Against this background of persistent discriminatory barriers faced by womenowned 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, the program

established by Congress to improve their contracting opportunities clearly serves a “substantial governmental interest” in preventing and remedying discrimination against women business owners.

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

Any affirmative action program must be carefully designed to target the discrimination it is intended to redress. Overbroad efforts are constitutionally infirm. For example, in the Croson case, the Supreme Court struck down a program adopted by the City of Richmond, Virginia, that required construction contractors on city-funded jobs to subcontract at least 30% of the dollar amount of the contracts to minority-owned business enterprises, in part because there was no evidence in the case about the number of such companies qualified to perform contracting work. Croson, 488 U.S. at 502.

One way to ensure that a government procurement program targets businesses affected by discrimination is to direct it only to those industries that are demonstrably underutilized in contracting. Croson itself supports just this approach, stating, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 509.

The Women’s Procurement Program is just this type of targeted program. It permits agency contracting officers to designate certain contracts for bidding only by women-owned small businesses.¹ However, these designated contracts can only be for goods or services provided by industries in which the government’s past

¹ The design of the program serves a specific need that was identified in the GAO report, referenced above, *Trends and Challenges in Contracting With Women-Owned Small Businesses*. That report uncovered a “wide consensus” among government contracting officials that “the absence of a specific contracting program targeting [women-owned small businesses]” was an important reason for the government’s continuing failure to meet the five percent contracting goal for such businesses that Congress had set in 1994. *Id.* at 23.

utilization of women-owned small businesses has been below their representation in the industry. The government's underutilization of women-owned small businesses in these industries provides an "exceedingly persuasive justification" for the program, meeting the requirements of heightened scrutiny. See *United States v. Virginia*, 518 U.S. at 533. Likewise, limiting the benefits of the Women's Procurement Program to businesses in industries that actually have been underutilized demonstrates that the program is not founded on "overbroad generalizations about the different talents, capacities, or preferences of males and females," *id.*—for example, assumptions about which types of businesses men or women are more likely to own—but instead on data showing a lack of equal opportunity on the basis of sex.

Pursuant to the statute, the Kauffman-RAND Institute for Entrepreneurship Public Policy (the "RAND Institute") produced a study for the SBA, *The Utilization of Women - Owned Small Businesses in Federal Contracting*, to identify the industries in which women-owned small businesses are being underutilized by the federal government. This study produced "disparity ratios" to measure the use of women-owned small businesses in proportion to their availability for various types of procurement opportunities. Putting aside the very critical issue of how the SBA has decided to use the Rand Institute study, it is important to realize just how credible properly formulated disparity ratios are in supporting anti-discrimination efforts. As the Third Circuit, using the term "disparity indices" in place of "disparity ratios," noted, "[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. As that decision further explained, such evidence is clearly sufficient to support the constitutionality of a program like the one at issue here. *Id.* at 1006-07.

In sum, then, the Women's Procurement Program as created by Congress fully meets relevant constitutional standards.

IV. The SBA's Proposed Rule Imposes Debilitating Requirements on Implementation of 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, but it adds debilitating burdens to implementation of the Women's Procurement Program that would, in all likelihood, prevent it from ever serving the purpose for which it was created: to remove barriers to women-owned small businesses' full participation in federal contracting.

The key requirement appears in § 127.501(3)(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 wrong. First, we have uncovered absolutely no 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.

In this instance, where an underutilization analysis has already been performed for the federal government as a whole, it defies logic to require that a particular agency undertake its own analysis. Indeed, in many instances an agency's own contracts would not be sufficiently numerous to identify underutilization with any particularity, and in any event, such analyses would clearly be a waste of money and would further delay implementation of a program that has already been stalled for more than seven years.

Moreover, the contention that any unit of government may take affirmative measures only to address its own discrimination was flatly rejected by the Supreme Court nearly twenty years ago in the Croson decision. In that case, which involved raceconscious affirmative action judged by the stringent 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.

Under the constitutional standards that apply to sex-conscious measures to enlarge opportunity, courts are explicit that it is perfectly acceptable for such remedies to 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 at 1580. 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.

Against this backdrop, the SBA’s proposed rule is extreme and appears to be designed to prevent the Women’s Procurement Program from ever being used. It is frankly impossible to imagine any federal agency making a formal determination that it had engaged in sex discrimination in awarding government contracts—a determination that would not only embarrass the agency but presumably open it to litigation by past disappointed contractors. Far from finally fulfilling its duty to implement this congressionally authorized program, the SBA’s Proposed Rule would render it a nullity.

Additional Testimony

Links to testimony from all witnesses from the House Committee on Small Business: Full Committee Hearing on “The SBA’s Progress in Implementing the Women’s Procurement Program,” 10:00 a.m., Wednesday, January 16, 2008, Room 2360 Rayburn HOB

<http://www.house.gov/smbiz/hearings/hearing-01-16-08-women-procurement/hearing-01-16-08-women-procurement.htm>

The Studies

National Research Council (2005). *Analyzing Information on Women-Owned Small Businesses in Federal Contracting*. Steering Committee for the Workshop on Women-Owned Small Businesses in Federal Contracting, Committee on National Statistics, Division of Behavioral and Social Sciences and Education. Washington, DC: The National Academies Press.

http://books.nap.edu/openbook.php?record_id=11245&page=R1

Kauffman-RAND Institute for Entrepreneurship Public Policy (2007). *The Utilization of Women-Owned Small Businesses in Federal Contracting*

http://www.rand.org/pubs/technical_reports/2007/RAND_TR442.sum.pdf

SBA Proposed Rule

The following link provides a PDF copy of the SBA Proposed Rule 13 CFR Parts 121, 125, 127, and 134; RIN 3245-AF40 Women-Owned Small Business Federal Contract Assistance Procedures

<http://www.regulations.gov/fdmspublic/ContentViewer?objectId=090000648037edf3&disposition=attachment&contentType=pdf>

U.S. Women's Chamber of Commerce

The U.S. Women's Chamber of Commerce™ unifies the collective strength of women to leverage our position as the most influential economic force in America. With over 500,000 members, the USWCC advances economic opportunities for women across America.



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