



February 19, 2008

Mr. 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,
Fed. Reg. Volume 72, Number 247 (December 27, 2007)
13 CFR Parts 121, 125, 127, and 134, RIN 3245-AF40
SBA-2008-0001-0001**

Dear Mr. Taylor:

Women Impacting Public Policy (“WIPP”) submits these comments to the Small Business Administration’s (“SBA”) proposed rule on women-owned small business federal contract assistance procedures. Women Impacting Public Policy (WIPP) is a national bi-partisan public policy organization representing well over a half million women and minorities in business including 45 associations that partner with us.

WIPP believes that the practical effect of this rule is that virtually no contracts will ever be successfully set aside under this program as structured in the proposed rule. The proposed SBA rule also carries a significant impact because it incorrectly suggests to state and local authorities that gender-based programs are subject to a new and more stringent legal standard of review, thus making it more difficult for gender-based programs to survive at the state and local level, as well as at the federal level.

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 2

BACKGROUND

Public Law 106-554 {Section 8(m) of the Small Business Act, 15 U.S.C. Section 637(m)} was passed in the year 2000. The law sought to address and remedy discrimination against women business owners in federal contracting by creating a women's procurement program which gives contracting officers the ability to restrict competition to women-owned businesses for up to five percent of all federal contracts. The law defined women-owned small businesses (WOSBs) that qualify for restricted competition as small according to the SBA size standards, majority-owned by women, and certified as economically disadvantaged. The law further states that WOSBs need not be economically disadvantaged to qualify for procurement preferences in contracts up to \$3 million (\$5 million in manufacturing) in industries where they are found to be "substantially underrepresented." The law gave the Small Business Administration (SBA) the responsibility to determine which industries were underrepresented by women, requiring a study of the data to determine which industries were "substantially underrepresented."

The proposed program relies on the disparity study prepared by the RAND Corporation. RAND computed the disparity ratios in four different ways: (1) number of contracts using total WOSB numbers; (2) number of contracts using WOSBs registered in the Central Contractor Registration (CCR); (3) contract dollars using all WOSBs; and (4) contract dollars using WOSBs registered in the CCR. The method used to define industries was the North American Industry Classification System (NAICS) codes.

The RAND Study concluded that, depending on how SBA wanted to interpret the data, 87 percent of industries would be considered underrepresented, or 0 percent of industries would be considered underrepresented depending on whether contract dollars or number of contracts were used and whether the total number of women-owned firms or only those registered in the CCR were used. Even the impact of whether the SBA used a 2 digit (broad category), 3 digit, or 4 digit (narrow industry category) NAICS code affected the outcome.

SCOPE OF PROGRAM

The SBA, in this proposed rule, chose to use the disparity ratio that analyzed the number of WOSBs registered in the CCR by contract dollars awarded, and the 4 digit NAICS code as the industry definition, thus choosing the narrowest method of data analysis. The proposed rule identifies only four NAICS codes that will be subject to restricted competition: 3371-Household and Institutional Furniture and Kitchen Cabinet Manufacturing; 3328- Coating, Engraving, Heat Treating, and Allied Activities; 4412- Other Motor Vehicle Dealers; and 9281- National Security and International Affairs. As pointed out in subsequent Congressional hearings, the national

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 3

intelligence category is classified, so standard contracting procedures do not apply—which effectively leaves three categories available under the proposed program.

LEGAL SCRUTINY STANDARD

WIPP believes that the SBA proposed rule applies a new legal standard which, despite its claim of using "intermediate scrutiny," is in fact more narrow and more restrictive than "strict scrutiny." In effect, this rule creates a new "strict, strict scrutiny" standard.

On page one of the RAND Study, which forms the statistical underpinning for the SBA's current rule as described above, a detailed analysis of the Supreme Court decisions in *Croson*¹ and *Adarand*² makes the leap of applying the *Croson* and *Adarand* cases to gender-based studies. But in fact, each of these cases dealt specifically with legal challenge to a race-based, not gender-based program. The Study then makes the following statement: "Although there have been few cases concerning women-owned businesses per se, it appears that Congress **assumes** that a similar standard would hold – hence its stipulation that before the SBA can restrict bidding to WOSBs [women-owned small businesses], it must first show that there are disparities that adversely affect them." No citations or other references are listed to back up this "assumption," and the conclusory statement ignores nearly forty years of Supreme Court precedent on this exact issue.

In fact, this issue was squarely addressed by the U.S. Attorney General's office. In its June 28, 1995, report to the Department of Justice General Counsels, the Assistant Attorney General, Walter Dillinger, concluded that the *Adarand* decisions, which applied a "strict scrutiny" review, did not apply to gender-based affirmative action programs. Specifically, the report concluded:

"*Adarand* did not address the appropriate constitutional standard of review for affirmative action programs that use gender classifications as a basis for decision making. Indeed, the Supreme Court has never resolved the matter. (Footnote omitted). However, both before and after *Croson*, nearly all circuit court decisions have applied "intermediate scrutiny" to affirmative action measures that benefit women. (Footnote omitted). The Sixth Circuit is the only court that has equated racial and gender classifications: purporting to rely on *Croson*, it held that gender-based affirmative action measures are subject to "strict scrutiny." (Footnote omitted). That holding has been criticized by other courts of appeals, which have correctly pointed out that *Croson* does not speak to the appropriate standard

¹ *City of Richmond v. J. A. Croson*, 488 U.S. 469 (1989).

² The "*Adarand*" decision was issued in three separate Supreme Court decisions: *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000); and *Adarand Constructors, Inc. v. Mineta*, 532 U.S. 967 (2001).

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 4

of review for such measures." (Walter Dillinger, Assistant Attorney General, "Memorandum to General Counsels", U.S. Department of Justice, Office of Legal Counsel, Washington DC. June 28, 1995)

Accordingly, if Public Law 106-554 were subject to "strict scrutiny," it would require a disparity study and a "narrowly tailored program" per the above. However, as a gender-based program, it is our belief that Public Law 106-554 does not require a disparity study and could be immediately implemented with no further statistics or additional agency-by-agency investigations.

We would argue that "strict scrutiny" is not the proper test for the SBA or the Department of Justice to assume. We believe, based on legal history, that a gender-based program should use "intermediate scrutiny" as the proper legal standard of review.

A long line of legal cases, but most importantly the 1989 decision of *City of Richmond v. J. A. Croson*, indicated that all programs based on race were inherently suspect and would only be implemented following proof of a compelling government interest, coupled with a program "narrowly tailored" to address that interest. This standard first applied only to local and state programs, but following the line of *Adarand* Supreme Court cases in the late 1990's, extended the standard to federal programs as well. Thus all race-based programs required a statistical disparity study to justify affirmative action programs and goals, and additionally required "narrowly tailored" programs to meet those goals, "narrowly tailored" being defined as flexible, regional, and ethnic group specific, containing waiver processes; and also containing race-neutral measures such as small business programs for access to capital and bonding.

Although this standard applied only to race-based programs, for years gender-based programs have incorrectly been subjected to the same legal standard. In fact, under *Craig v. Boren*, a 1976 case argued by then attorney Ruth Bader Ginsburg³, the Supreme Court has long held that gender-based programs are subject to "intermediate scrutiny" standards, meaning that to justify the program, the government need only prove an important governmental interest, and a program substantially related to achievement of that interest or purpose. Simply put, "intermediate scrutiny" does not require disparity studies to implement the program, nor does it require the narrow structuring required in race-based programs.

³ See e.g., *Reed v. Reed*, 404 U.S. 71 (1971); First gender classification case measured under "rational basis" review; *Frontiero v. Richardson*, 411 U.S. 677 (1973); acknowledging "Our country has had a long and unfortunate history of sex discrimination"; *Craig v. Boren*, 429 U.S. 190 (1976), argued by then attorney and current Supreme Court Justice Ruth Bader Ginsburg in decision which created "intermediate scrutiny" for gender based classifications.

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 5

In this instance, under “intermediate scrutiny” the SBA easily possesses the legal ability to recognize the following and act accordingly:

1. As of 2007, 7.7 million businesses are 51% owned and controlled by women; employing 7.1 million people and generating revenues of \$1.1 trillion.⁴
2. Despite this fact, women-owned businesses receive only a mere 3.4% of federal procurement contracts.⁵

This differential, standing on its own, immediately implies that either the government is not doing an adequate job of reaching out to WOSBs to integrate them into the procurement system, or alternatively that there remain active barriers preventing women-owned businesses from open competition in federal procurement.

Couple this with evidence of the overall importance of women-owned businesses to the economy (again, 7.7 million women-owned businesses employing more than 7.1 million people, and generating \$1.1 trillion in sales), and the “intermediate scrutiny” standards are met. This is proof of an important government interest --support of women-owned businesses in the national economy and all of the flow down positive effects of same - along with a program substantially related to achievement of that interest – five percent restricted set-aside to encourage procurement officers to more aggressively recruit and move WOSBs into the system, and a percent that is extremely modest given the fact that WOSBs represent 50 percent of the total businesses in the United States.

The proposed rule not only misapplied the legal standard, in our opinion, but took it a step further and created a new “strict, strict scrutiny” standard for gender-based programs for women. The proposed rule has acknowledged disparity in only four narrow areas: 3371-Household and Institutional Furniture and Kitchen Cabinet Manufacturing; 3328- Coating, Engraving, Heat Treating, and Allied Activities; 4412- Other Motor Vehicle Dealers; and 9281- National Security and International Affairs. But instead of authorizing restricted competition immediately in these four areas, as should be allowed through the statistical study just completed, the SBA placed an additional requirement on any agency wishing to restrict competition to WOSBs to conduct its own internal study proving that it has actively discriminated against women business owners. Not only is this additional layer of study not required or even applicable for gender-based programs, but it represents an additional layer of review even if “strict scrutiny” were the correct standard to apply in the first place.

⁴ Center for Women’s Business Research. <http://www.cfwbr.org/facts/index.php> (2007).

⁵ “The Utilization of Women owned Small Businesses in Federal Contracting”, Kauffman-Rand Institute for Entrepreneurship Public Policy, Ch. 1, p. 1; (2007).

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 6

This additional investigation poses another delay in program implementation and additionally requires the agency to go a step further in making express findings of discrimination against itself. We do not believe that any other groups who are recipients of restricted competition under the Small Business Act, such as 8(a) or service-disabled veterans, are subject to this new “strict, strict scrutiny” as proposed in the rule.

In addition, the creation of this artificial standard at the federal level will have chilling and highly detrimental consequences at the state and local level. The federal government sets the tone for WOSBs as well. If the federal government, by actions such as this proposed rule, indicates that WOSBs are not “underrepresented” in federal contracting, the message flows down that WOSBs are not “underrepresented” at any level. We believe that if this rule is implemented, WOSBs will throw up their hands and decline to participate in their state and local programs as well.

REVIEW OF RAND STUDY DATA

WIPP believes there are some fundamental flaws in the data on which this proposed rule is based. Although the RAND Study did its best to analyze what SBA directed it to do, WIPP finds the Study insufficient. We believe the Study relies on flawed NAICS codes, does not analyze the large disparity variance between all WOSB awards by contracts versus WOSB CCR awards by contract dollars, and additionally, relies on outdated size standards.

Although the RAND Study concludes that only four NAICS industry codes had been discriminated against, it also expressly admits that collection of accurate data by NAICS code was a problem where: the codes were substantially changed during the study's time frame, thus having some companies listed as one NAICS code at one time, and then transferring to another NAICS code later in the time frame. In other words, the NAICS code segregation was a constantly moving target during the time frame chosen by the SBA for the study parameters. In addition, the RAND Study also admits that in the NAICS code review, the SBA did not conduct any independent verification of size standards within that code.

The RAND Study indicates that it followed four primary data gathering processes, each one directed by the SBA and each one predicated solely on attention to WOSBs as prime contractors. Thus, by its control, the SBA prevented the RAND Study from analyzing and recommending its own independent data gathering mechanism which might have ensured a more neutral, and thus more statistically reliable, report. The Study admits: “Discrimination in the awarding of contracts, however, might result from women business owners being less likely to bid on [federal] contracts. This would not be detected if the pool of available firms consists of only

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 7

firms that have demonstrated their interest by bidding on contracts. Again, the disparity ratio can only measure the difference; it cannot explain it.”⁶

We note that in 2006, the SBA amended its size standards to raise the threshold for commercial construction to \$13 million for specialty subcontractors and \$31 million for general contractors. Despite this fact, the report uses pre-2006 size standards. The correct size standards could easily be located per applicable NAICS codes at: <http://ecfr.gpoaccess.gov/cgi/t/text/text-idx?c=ecfr&sid=b6e780955530049be4cc0d0a0e391115&rgn=div5&view=text&node=13:1.0.1.1.15&idno=13>. See also CFR Section 121.201.

The RAND Study admits it had to rely on outdated NAICS codes. In its footnote (page 8), it states that the Army did not begin reporting transactions above \$2500 until FY 2003; the Marine Corps in FY 2004; and most other services and agencies in FY 2005. It is difficult to see how a credible contracting history can be compiled with the absence of the Department of Defense numbers- the largest buyer of federal goods and services in the federal government.

Finally, the Study in Chapter 3, pg. 9, par. 3, noted the difficulty it encountered in gathering data where federal contracts {many using Indefinite Delivery Indefinite Quality (IDIQ) style delivery systems covering both goods and services over several NAICS codes in a single procurement over a 3 year period} makes it difficult or impossible to “parse out” specific NAICS code for actual goods and services purchased, resulting in “generalized” reporting.

These issues may account for why the disparity methodology using CCR registrations to total contract dollars awarded shows limited disparity. We do not believe the SBA should promulgate a rule which is reliant on insufficient data. Although WIPP believes the rule is seriously flawed and does not need a disparity study, at the very least, we believe the SBA should correct the flaws in the data on which it is basing the proposed program.

SUMMARY

In summary, WIPP believes that the SBA proposed rule erroneously relies on a disparity study applying "strict scrutiny" instead of "intermediate scrutiny" and that the creation of a new “strict, strict scrutiny” standard is unnecessary and lacks parity with other preference programs under the Small Business Act. Furthermore, we believe the proposed rule is based on a study which contains flawed data.

⁶ RAND Study, p. 4.

Mr. Robert C. Taylor
Office of Contract Assistance
February 19, 2008
Page 8

We urge the SBA to withdraw the proposed rule. Given the narrow parameters and legal requirements of the proposed program, we do not believe the rule can be amended to address our concerns. We believe the only responsible action is to rescind the proposed rule. The women's business community stands united against promulgation of the rule in its current form. We believe implementation of the program, as proposed, would harm the ability of the federal government to meet its five percent contracting goal with women.

Sincerely,

A handwritten signature in cursive script that reads "Barbara Kasoff".

Barbara Kasoff
President