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Re: Women-Owned Small Business Federal Contract Program
CFR Parts 121, 127, and 134
RIN 3245-AG06

On behalf of the U.S. Women's Chamber of Commerce, Business and Professional Women's Foundation, and American Association of University Women (AAUW), thank you for this opportunity to comment on the Proposed Rule published by the SMALL BUSINESS ADMINISTRATION relating to 13 CFR Parts 121, 127, and 134; RIN 3245-AG06; Women-Owned Small Business Federal Contract Program.

We applaud President Obama, Administrator Mills and the U.S. Small Business Administration on their efforts to end the decade of delay in the implementation of the Women-Owned Small Business Federal Contract Program through the publishing of this new Proposed Rule and seeking comments from the business community.

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.

BRIEF HISTORY

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.

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. See 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 to 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.

TWO STUDIES: NATIONAL RESOURCE COUNCIL AND RAND CORPORATION

In March 2005, the SBA secured the scholarly recommendations of the National Resource Council of the National Academy of Sciences (NRC) to understand the best methodology to employ in the selection of industries for inclusion in the restricted competition program.

The NRC is a 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 for disparity studies and the legal standards for 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, willing 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 stating, “Industries that appear on two or more of the four tables may be deemed underrepresented.”

The NRC provided a scholarly rationale for the use of multiple views of data:

“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.”

Then the SBA employed the RAND Corporation to leverage the recommendations of the NRC, build 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 and the RAND data that followed, eighty-seven percent of all industries should be included as underrepresented in federal contracting.

DATA SOURCES AND SELECTION OF INDUSTRIES

After the RAND study was complete, the SBA reported that some of the data sets provided by the SBA to the RAND Corporation were flawed and in these Proposed Regulations determined to use only a single set of data (a “narrow view”) to determine firms that are “ready, willing and able” to compete for Federal contracts – excluding a wide view of “ready, willing and able” firms (as recommended by the NRC).

The SBA concluded that the Central Contractor Registration (CCR) database appropriately captures those firms ready, willing and able to compete for Federal contracts. However, it also states, “it is possible that a firm’s inability to bid on Federal contracts, and therefore its reluctance to register on the CCR could itself result from gender discrimination.” This contradiction, and the SBA’s decision to use only one data source when looking at firms, “ready, willing, and able” (even though the federal government

has failed to ever reach the paltry five percent goal for contracting with women) does not appear to adhere to the spirit with which the Women-Owned Small Business Federal Contract Program was established by Congress.

One rationale stated by the SBA as a reason to exclude the use of Survey of Business Owners (SBO) data to provide the wide look at women-owned “ready, willing, and able” small businesses is because the SBO does not distinguish between WOSBs and women-owned businesses in general, large and small. The CCR, in contrast, contains self-reported information on whether a business is small. And the procedures authorized by section 8(m) are specifically targeted towards only small businesses owned by women.

However, the August 2006, “Women in Business: A Demographic Review of Women’s Business Ownership,” published by the Office of Advocacy of the Small Business Administration, reports that only 1.8% of all women-owned firms have receipts of \$1 million or more. Consequently, not only does this SBA Office of Advocacy report display the devastating effects to the revenues of women-owned firms as we have been shut out of fair access to federal contracts, it also makes the case that the SBO data may well be useful in establishing the wider look at “ready, willing, and able” women-owned firms as recommended by the NRC as so few women-owned businesses are large.

We believe the SBA should include a wider look at “ready, willing and able” (using the SBO data) as clearly recommended by the scholarly NRC study and should immediately open the Women-Owned Small Business Federal Contract Program to the additional industries that would qualify for this program if both the narrow and wide view of industries were included in the consideration process. Common sense informs even the most casual observer that viewing only firms registered in CCR as “ready, willing, and able” simply magnifies and extends the discrimination and government failure to provide a fair portion of federal contracts to women-owned small businesses.

However, should the SBA fail to include both the narrow and wide view of “ready, willing and able” women-owned small businesses, SBA should proceed with the selection of industries included in the current Proposed Rule and act expediently to develop and utilize data so as to update the list of eligible businesses in the near future and to update this list periodically.

COMMENTS BY SECTION

SECTION: Subpart B—Eligibility Requirements to Qualify as an EDWOSB or WOSB

- (1) We agree with the definition of “women-owned” and add the following: The Proposed Rule in the section draws a very clear view of a “women-owned” firm that includes not only legal ownership, but active, hands on management rather than remote, passive oversight. We believe this is in the spirit Congress intended for this program.
- (2) While we agree generally with the methodology used to determine an Economically Disadvantaged Women-Owned Small Business (EDWOSB), we do not agree fully with the

simplified \$200,000 maximum personal income cut off. The Proposed Rule States, “When considering a woman’s personal income, if the adjusted gross yearly income averaged over the two years preceding the certification exceeds \$200,000, SBA will presume that she is not economically disadvantaged.”

Given the wide variance of incomes and cost of living across the U.S. and the potential for inflation, we recommend the SBA, (a) establish location specific guidelines based on median regional incomes much like the IRS publication 1542 (<http://www.irs.gov/pub/irs-pdf/p1542.pdf>) which details per diem rates based on local expense averages, (b) peg the location specific guidelines to an automatic inflation adjustment so that the level set to determine an EDWOSB firm will automatically adjust overtime without the need for additional regulations or intervention by Congress.

SECTION: Subpart C—Certification of EDWOSB or WOSB Status

- (1) U.S. Department of Transportation (DOT) Certification. The Proposed Rule states, “At the time of certification in ORCA, the WOSB or EDWOSB that has been certified as a DOT Disadvantaged Business Enterprise must submit a copy of the DBE certification showing that it received such certification because it is owned and controlled by one or more women to the WOSB Program Repository.”

However, it has been brought to our attention that DOT DBE certifications may not specifically state that the firm received the certification because it is owned and controlled by one or more women. It is vitally important that the SBA work to improve this method of confirmation of women-owned status through a joint arrangement with the DOT to provide an authenticated list of such firms, and/or to very quickly initiate an effort to provide such firms with an updated version of their certification (or a letter amending the certification) indicating women-owned status.

- (2) Acceptance of Federal agency and State government certifications. Public Law 106-554, Sec. 811 states (in reference to acceptable certifications) that 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 it “is certified by a Federal agency, a state government, or a national certifying entity approved by the Administrator. . .”

However, §127.303 of the Proposed Regulations states, “SBA may enter into written agreements to accept the EDWOSB or WOSB certification of a Federal agency, State government, or national certifying entity.” Public Law 106-554, Sec. 811 does not include or require the SBA to enter into written agreements with Federal agencies or State governments

for the purpose of acceptance of certifications by a Contracting Officer for the purposes of this program. Further, we believe (per the excerpt above) the acceptance of Federal agency and State government certifications was to be deemed automatic and without question. The assertion within these Proposed Regulations that the SBA enter into dozens of agreements with State governments (including local level State governments) is not in keeping with the legislative intent, will serve to further delay the effective implementation and use of this program, and will cause women-owned firms, who already possess government issued certifications, to unnecessarily waste more time and money.

- (3) State Government Certification. While we are pleased the Proposed Rule spells out clearly the method for women-owned small businesses holding a DOT DBE certification to use to fulfill the certification requirements for this program, we note that similar guidelines have not been spelled out for women-owned small business certifications provided by State governments. Without clearly stating this process, each State government (including potentially more than one government entity within a state) would need to go through the “third-party certifier” process detailed within the Proposed Rule.

We strongly recommend that the section of the Proposed Rule detailing the process for making use of a firm’s DOT certification (§127.300) be reworded to reflect the language of the original legislation so that the process of providing one’s certification from the DOT (or any other federal agency) and a State government (to include local governments) are the same.

While there may be some minor variance in process for women-owned certification within the many State governments (including local governments within the states), the vast majority of these certifications are extraordinarily similar (if not aligned completely) with the rules, process and procedures of the DOT DBE certification. And, as the Women-Owned Small Business Federal Contract Program is finally implemented, these certification programs will continue to be very much in alignment with the federal programs.

We cannot overstate the importance of this point. Women-owned businesses are constantly asked to get more and more certifications, when certifications in the State governments and private sector are virtually identical to the DOT DBE certification. While we understand and underscore the importance of restricting this program to true women-owned firms, we vigorously assert that the Final Rule for the Women-Owned Small Business Federal Contract Program should make the process for using of State government (including local state level governments) certifications identical to the process detailed for use of the DOT DBE certification and should make this point clear for the benefit of the Contracting Officers.

- (4) Dates on Certifications. Some State governments (and potentially DOT DBE certifications) do not have an expiration date on the certification. Often, certifications state that they are valid until revocation. The final rule should provide a clear method for a business owner to provide a document asserting that their certification is valid and that they will provide immediate notification should their certification be revoked.
- (5) Third Party Certifiers. We generally agree with the process detailed in §127.300 for the acceptance of third-party certifiers (with the exception noted above). However, it is important to emphasize the SBA should not restrict third party certifiers to a small number of providers.

There has been an issue (brought to our attention by several U.S. Women's Chamber of Commerce members) in the non-governmental marketplace whereby many of our nation's largest companies (many of which are also government suppliers) have formed a non-profit organization (Women's Business Enterprise National Council) for the stated purpose of providing certifications for their corporate supplier diversity programs.

Several U.S. Women's Chamber of Commerce members have brought concerns to the leadership of the U.S. Women's Chamber of Commerce that the large corporate controlling members of the board of the Women's Business Enterprise National Council may be seeking to control certain elements and opportunities of the supply chain through pushing women-owned firms into large corporate "supplier diversity" channels and requiring a Women's Business Enterprise National Council certification, even though their firms may already possess a reputable DOT, State government, or other reputable third-party certification verifying their women-owned status. Several of these women-owned firms noted that, through this potentially inappropriate control of the diverse supplier marketplace, the large businesses that control the Women's Business Enterprise National Council secure very detailed business and financial information on women-owned firms. This information may be used by the large firms who are competitors of women-owned businesses in the commercial and governmental marketplace to achieve unfair advantage or limit competition, or for marketing purposes.

It is for these reasons, and the prevention of potential fraud, that the U.S. Women's Chamber of Commerce established a strong certification program with high standards. And, it may be for these same reasons that other national and regional organizations or businesses may seek to offer third-party certifications accepted by the SBA thereby allowing choice and protecting confidential business information from falling into the hands of large corporate competitors.

- (6) NAICS Listed on Certification. Some of our members have mentioned that some of their women-owned business certifications include one or more NAICS or industry code on the face of their certificate of women-owned status. Since the purpose of providing a women-owned business certification for the Women-Owned Small Business Federal Contract Program is solely to confirm the women-owned status of the firm, to avoid confusion by Contracting Officers or

women-owned firms, we recommend that the Final Rules clearly state that NAICS codes listed on women-owned business certifications be ignored for the purpose of the Women-Owned Small Business Federal Contract Program. Further, any directions within ORCA or the repository to be created to house certifications and related documents should include clarification on this issue.

- (7) ORCA and the Certification and Document Repository. We agree with the processes described for the assertion of women-owned status and the maintenance of records. However, we believe it is important to spell out in the Final Rules that all existing representations of women-owned status (ORCA statements of women-owned status) will immediately be recognized as invalid. The current data in ORCA on firms asserting women-owned status should be saved and held in case it is needed for historical or legal purposes. But, there should not be two types of ORCA or CCR assertions (those having provided certification or self-certification and those who have used the current system in ORCA to assert their women-owned status) of women-owned small business status – even for the purposes of goaling reports. Given the lack of proper oversight in the past, it is very likely that many firms currently recognized as “women-owned” in ORCA will not seek this status under the new, more properly designed and implemented structure, or will not qualify as women-owned by any of the available certifying bodies.

SECTION: Subpart D—Eligibility Examinations

We agree.

SECTION: Subpart E—Federal Contract Assistance

- (1) We agree with this language from §127.501,(a) “Based upon its analysis, SBA will designate by NAICS Industry Subsector Code those industries in which WOSBs are underrepresented and substantially underrepresented. (b) In determining the extent of disparity of WOSBs, SBA may request that the head of any Federal department or agency provide SBA, data or information necessary to analyze the extent of disparity of WOSBs.” However, as noted previously, we believe the SBA should include a wider look at “ready, willing and able” as recommended by the scholarly NRC study and should immediately open the Women-Owned Small Business Federal Contract Program to the additional industries that would qualify for this program if the SBA followed the clear recommendations of the NRC study.
- (2) We believe the SBA should detail a regular timetable for updates to the list of industries eligible for restricted competition.
- (3) §127.506 – Joint Ventures. We agree.

- (4) A clear and expedient protest process should be provided for businesses within industries not selected by the SBA for inclusion in this restricted competition program so as to enable businesses within any industry to make their case as to why their industry should be placed on the list of eligible NAICS by SBA for inclusion in the program.

SECTION: Subpart F—Protests

We agree. However, we want to emphasize that it is important that anyone be allowed to file a protest as to the women-owned status of a firm. It would not be appropriate to restrict a protest to only a firm who has competed against the offending firm. It is in the best interest of the integrity of this program that anyone finding good cause for protest be allowed to protest.

SECTION: Subpart G—Penalties

We agree.

CONCLUSION

We extend our thanks again to President Obama, Administrator Mills and the U.S. Small Business Administration for their work on this important program. Women-owned firms have never received a “fair proportion” of federal contracts. We appreciate the fine efforts of the many individuals involved in the creation of this Proposed Rule and look forward to a better future for women as federal contractors.

We ask that our recommendations be reflected in the final rule and that the rulemaking and implementation process be expedited. Women-owned firms have waited for over a decade for the laws of the United States to be upheld through the effective implementation of the Women-Owned Small Business Federal Contract Program.



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Comments Submitted by:

U.S. Women's Chamber of Commerce
Business and Professional Women's Foundation
American Association of University Women (AAUW)