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United States Senate
COMMITTEE ON SMALL BUSINESS & ENTREPRENEURSHIP
WASHINGTON, DC 20510-6350

February 1, 2008

The Honorable Steven C. Preston
Administrator
U.S. Small Business Administration
409 Third Street, S.W.
Washington, DC 20416

Dear Administrator Preston:

As members of the Senate Committee on Small Business and Entrepreneurship, we would like to express our deep concerns about the proposed rule to implement the long delayed Women's Contracting Set-Aside Program.

The women's set-aside program enacted in December 2000 authorized, on a discretionary basis, contracting officers to "set-aside" competition for federal contracts to women-owned small businesses. The program required SBA to conduct a study determining which industries would be characterized as under-represented. The study was finally completed and made available to the public in April of this year. Regrettably, on the basis of a selective reading of that study you have proposed a rule that severely undermines the intent of Public Law 106-554.

We have a number of objections to the rule as proposed. First, the SBA's use of the narrowest statistical model from the RAND study to implement the program undermines the intent of this Congress to expand opportunities for the broadest number of women-owned small businesses. Amazingly, the SBA has excluded all but four industries from the program. Given that the RAND study can be fairly read to include as many as 87 percent of all industries as underrepresented with respect to women, it is particularly troubling that you have chosen to read the report as narrowly as possible.

We find it hard to believe that cabinetmaking, engraving, other motor vehicles dealers and national security and international affairs are the only industries in which the SBA has determined that women-owned small businesses are under-represented or substantially under-represented in government-wide federal procurement. As a result, contracting officers can only restrict competition under 8(m) to businesses in these industries.

Second, we are concerned about the requirement that each individual agency show discrimination in its procurement practices before even those four categories enumerated by the SBA can have a set-aside program implemented. SBA's proposed rule requires that agencies, in order to restrict competition under subsection 8(m), must determine whether the set-aside is substantially related to remedying sex discrimination

in that industry. This creates a substantial burden for the Agency to meet before women-owned businesses can receive contracts under this program.

This portion of the rule would substantially limit the ability of agencies to make use of the authority granted in subsection 8(m). It would do so by requiring federal agencies to find evidence of direct discrimination against women-owned small businesses in order for them to qualify for the protected status created under 8(m). To show cause, the SBA has proposed that in order for an agency to set aside a new contract, the procuring agency would have to conduct an appropriate analysis of its own procurement history to show that there has been discrimination against women-owned small businesses in the past.

Third, we believe that this proposed rule misinterprets the present state of Constitutional law to such an extent that it may jeopardize a host of other programs designed to open opportunities for other socially or economically disadvantaged persons.

The rule that the SBA has proposed seems to incorrectly apply a strict scrutiny level of review to a gender-based program. As you may know, the Supreme Court held in Craig v. Boren, 429 U.S. 190 (1976), 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 narrower structuring required of race-based programs as laid out by City of Richmond v. J.A. Croson, 488 U.S. 469 (1989) and the three *Adarand* decisions.

The RAND study makes a disturbing reference to what Constitutional standard of review is required in this instance. The study states that "[a]lthough there have been few cases concerning women-owned businesses per se, it appears that Congress **assumes** that a (strict –scrutiny) standard would hold. . ." We strenuously object to RAND interpreting our intent and to the SBA relying on that interpretation in its promulgation of this rule. RAND is a contractor that had one job and one job only --to analyze procurement numbers with respect to women-owned businesses. By attempting to adopt a rule based on an erroneous interpretation of Constitutional law, the SBA is narrowing opportunities for women in business.

We cannot emphasize enough the depth of our disappointment with this rule. We have waited seven years for implementation of a program that we believe has the potential to open up opportunities for women business owners for years to come. To put it simply, this rule is not what we envisioned and does not reflect Congressional intent. We urge you to fix the rule by expanding significantly the number of industries eligible for the program. We also urge you to drop the requirement that each individual agency conduct an analysis of its procurement history before implementing a set-aside program.

If you have any questions or need any additional information, please do not hesitate to contact us or have your staff call Gregory Willis at 202-224-5175.

Sincerely,

JOHN F. KERRY
Chairman
Small Business & Entrepreneurship Committee

CARL LEVIN
Chairman
Armed Services Committee

JOSEPH I. LIEBERMAN
Chairman
Homeland Security &
Governmental Affairs Committee

MARIA CANTWELL
U.S. Senator

BENJAMIN L. CARDIN
U.S. Senator

JON TESTER
U.S. Senator