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United States Senate

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

March 31, 2008

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

Dear Administrator Preston:

In the intervening weeks since our initial comments regarding the proposed rule to implement the long delayed Women's Contracting Set-Aside Program many women have voiced their concerns about the direction the SBA has taken with respect to the Program. The intensity that this issue has engendered in the women's business community leads us to submit this substitute letter in order to clarify and amplify our objections to the SBA's Proposed Rule entitled Women-Owned Small Business Federal Contract Assistance Procedures published December 27, 2007 (72 Fed. Reg. 73285). Our previous letter of February 1, 2008 letter is hereby withdrawn with the submission of this new letter.

First, we must emphasize that by proposing a rule that requires agency-by-agency findings of discrimination you have greatly exceeded your rulemaking authority. It is within Congress' prerogative alone to legislate the parameters of the Women's Procurement Program. And in Public Law 106-554 Congress has spoken and we neither require nor contemplate findings of discrimination for implementation of the Women's Contracting Program. We believe that requiring findings of discrimination agency-by-agency is impermissible and clearly exceeds your rulemaking authority.

Secondly, we reiterate our concern that you have applied an incorrect standard of review to a gender based program. We are deeply concerned that the proposed rule requires gender based programs to satisfy a standard of constitutional scrutiny that exceeds the strict scrutiny standard that has been applied to race-conscious contracting programs. While there have been fewer cases examining the question of what standard of constitutional scrutiny applies to gender-conscious contracting programs, the law is absolutely clear that the constitutional standard that applies to women's programs does not exceed the strict scrutiny standard that applies to race-conscious contracting programs. Courts have variously referred to the appropriate standard for gender-conscious programs as "heightened scrutiny" or "intermediate scrutiny."

While the Court in *United States v. Virginia*, 518 U.S. 515, 533 (1996) ruled that an "exceedingly persuasive justification" is necessary to meet this standard, there is no doubt that the evidentiary requirements do not exceed the strict scrutiny standard applied in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995). Both in its treatment of the RAND study and in its requirement that there be specific findings of discrimination by each government agency desiring to operate the women's procurement program, this rule

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imposes a standard that clearly exceeds the strict scrutiny standard that has been applied to race-conscious affirmative action programs. In the numerous court cases upholding race-conscious contracting programs, neither national, federal government-wide studies, nor agency-specific findings of discrimination are currently required.

Furthermore, we also believe that 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.

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. As this Committee has consistently urged for the last seven years, any rule implementing the Women's Procurement Program must include a significant number of industries and must not require any agency to find itself guilty of discrimination.

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



Carl Levin
US Senator



Joseph I. Lieberman
US Senator



Maria Cantwell
US Senator



Jon Tester
US Senator