

February 20, 2008

Via Facsimile and E-mail

Mr. Robert C. Taylor
Office of Contract Assistance
Office of Government Contracting
Small Business Administration
409 3rd Street, SW
Washington, DC 20416

RE: Women-Owned Small Business Federal Contracting Assistance Procedures; 72 Fed. Reg. 73285, December 27, 2007.

Dear Mr. Taylor:

The Office of Advocacy submits this comment letter to the U.S. Small Business Administration (SBA) in response to the above-referenced notice of proposed rulemaking.

I. Advocacy Background

Congress established the Office of Advocacy (Advocacy) under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the SBA, so the views expressed by Advocacy do not necessarily reflect the views of the SBA or of the Administration. Section 612 of the Regulatory Flexibility Act (RFA) requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.¹ The RFA requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities.²

On August 13, 2002, President George W. Bush enhanced Advocacy's RFA mandate when he signed Executive Order 13272, which directs Federal agencies to consider their impact on small entities when writing new rules and regulations.³ Executive Order 13272

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612) amended by Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

² See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003).

³ Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

instructs Advocacy to provide comment on draft rules to the agency that has proposed the rule, as well as to the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget.⁴ Executive Order 13272 also requires agencies to give every appropriate consideration to comments provided by Advocacy. Under the Executive Order, the agency must include, in any explanation or discussion accompanying the final rule's publication in the *Federal Register*, the agency's response to these written comments submitted by Advocacy on the proposed rule, unless the agency certifies that the public interest is not served by doing so.⁵

II. Prior Proposed Women's Contracting Regulation

In June of 2006, SBA published proposed regulations to implement Section 811 of the Small Business Reauthorization Act of 2000. In July 2006, Advocacy submitted formal comments on the proposed rule.⁶ The Reauthorization Act authorized SBA to establish a set-aside program for Women-Owned Small Businesses (WOSBs) and economically Disadvantaged Women-Owned Small Businesses (EDWOSBs) under certain conditions. The law also required SBA to conduct a research study on the industries in which these two groups were underrepresented and substantially underrepresented in the federal marketplace.

In the July 2006 letter, Advocacy recommended several changes to the proposed rule, including removal of the formal certification process and revising and incorporating new underrepresentation data on WOSBs in the Initial Regulatory Flexibility Analysis (IRFA). Advocacy is pleased that SBA accepted these recommendations and removed the formal certification requirement from the proposed rule. Advocacy is also pleased that SBA decided to wait for the completion of the underrepresentation study by RAND and re-propose the rule with the study results.

III. Current Proposed Women's Contracting Regulation

Analysis of the IRFA

1. Self - Certification

Advocacy is pleased that the proposed regulation follows Advocacy's recommendation to allow WOSBs to self-certify. The proposed regulation provides WOSBs with the option to complete a formal certification. The IRFA provides a cost break down of what it may cost for a WOSB to complete a formal certification. The IRFA thus provides the WOSB with clear guidance on the benefits and costs of the certification process.

2. Significant Alternatives

In the significant alternatives section of the IRFA, SBA provides a general discussion on the cost for agencies to conduct studies, perform analysis, and ultimately make a

⁴ E.O. 13272, at § 2(c).

⁵ *Id.* at § 3(c).

⁶ Comment letter from Thomas M. Sullivan, Chief Counsel, Office of Advocacy, Small Business Administration, to the SBA(July 17, 2006) http://www.sba.gov/advo/laws/comments/sba06_0717.html.

determination of discrimination against WOSBs or EDWOSBs in designated industry groups. SBA was not able to provide cost information on this provision because it does not have access to cost estimates from agencies prior to their solicitations for research. The provision could prompt agencies to move forward aggressively towards making a finding of discrimination in order to increase contracting to WOSBs through set-aside mechanisms. However, the requirement that agencies analyze past procurement activities and make a finding of discrimination prior to implementing a set-aside program may actually shift the burden onto the WOSB community for them to compel agency action on research, analysis, and, ultimately, a finding of discrimination by that agency. SBA's final rule would benefit from an explanation of how agencies will be compelled to determine evidence of discrimination.

IV. Recommendation

SBA's IRFA for this proposed regulation is a good first step. Advocacy advises that a Final Regulatory Flexibility Analysis (FRFA), published with the final rule, should provide cost data on the effort required by WOSBs and EDWOSBS if they are reasonably expected to play a role in compelling agencies to determine evidence of discrimination.

V. Conclusion

Taking into consideration the aforementioned comments, SBA may wish to undertake a more comprehensive data gathering process. SBA would benefit from a process that can generate more data and information useful for the analysis required by agencies to find discrimination. This data gathering process may be necessary for SBA to provide a better analysis of the cost burdens on small entities.

You can count on my office to assist you in anyway we can in this data gathering process. If you have any questions regarding this letter, please contact Major L. Clark, III in my office at (202) 205-7150.

Sincerely,

Thomas M. Sullivan
Chief Counsel for Advocacy

Major L. Clark, III
Assistant Chief Counsel for Procurement

cc: The Honorable Susan Dudley, Administrator, Office of Information and Regulatory Affairs

