

May 3, 2010

Via Facsimile and E-mail

Mr. Dean Koppel
Assistant Director
Office of Policy and Research
Office of Government Contracting
Small Business Administration
409 3rd Street, SW
Washington, DC 20416

**RE: Women-Owned Small Business Federal Contract Program
75 Federal 10030, March 4, 2010**

Dear Assistant Director Koppel:

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 Small Business Administration (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)¹ requires Advocacy to monitor agency compliance with the RFA, as amended by the Small Business Regulatory Enforcement Fairness Act.²

The RFA requires agencies to analyze the economic impact of proposed regulations on small entities, and where there is likely to be a significant economic impact on a substantial number of small entities, to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on these small entities.³

¹ Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612).

² Subtitle II of the Contract with America Advancement Act, Pub. L. No. 104-121, 110 Stat. 857 (1996). 5 U.S.C. § 612(a).

³ See generally, Office of Advocacy, U.S. Small Business Administration, *A Guide for Federal Agencies: How to Comply with the Regulatory Flexibility Act* (2003).

In addition, under Executive Order 13272 agencies are required to give every appropriate consideration to comments provided by Advocacy.⁴ 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. Potentially Positive Aspects of the Proposed 8(a) Contracting Regulation

Section 811 of the Small Business Reauthorization Act of 2000, Public Law 105-554, section 811 addressed the difficulties women-owned small businesses were encountering when competing for federal contracts. Public Law 105-554 created an acquisition tool that would allow agencies to restrict competition to qualified women-owned small businesses. Since 2000, SBA has had a legislative requirement of trying to provide maximum practicable opportunity for women-owned small businesses to participate in the performance of contracts let by any Federal agency. SBA has made tremendous strides to encourage agencies to make awards to women-owned small businesses. The acquisition restrictive competition tool of Public Law 105-554 is necessary to remove years of sex discrimination that have inhibited the ability of women to compete equally for contracts.

The Office of Advocacy commends the recent actions by SBA to provide the necessary regulatory structure for the full implementation of this women-owned small business contracting program. Advocacy is pleased that SBA has agreed to not retain a provision from a previous proposed regulation that would have required each agency to find that it has discriminated against women-owned small businesses before it could implement a restrictive competition program. It is also commendable that SBA, recognizing some of the cost burdens that women-owned businesses encounter with having to comply with certification requirements, is proposing to provide women-owned small businesses with alternative compliance opportunities.

III. Areas of Concern with the Proposed Contracting Regulation

A. Eligible North American Industries Code (NAIC)

The previously proposed regulation identified only three NAIC areas in which women-owned small businesses were underrepresented and substantially underrepresented for which the restrict competition for contracts would be available. The current proposal if implemented would require the agencies to examine eighty three NAICs to determine if a restrictive procurement could be awarded to a woman-owned small business. This current proposed regulation, however, does not appear to take into consideration new areas for women-owned small business participation. For example, since there does not appear to be a specific NAIC for broadband contracting, will contracting officers in the telecommunications area be able to provide restrictive procurements for women-owned small businesses? Perhaps the final regulation should address new market opportunities for women-owned small businesses that may not yet be incorporated in the NAIC system.

⁴ Exec. Order No. 13272 § 1, 67 Fed. Reg. 53461 (Aug. 16, 2002).

⁵ *Id.* at § 3(c).

B. WOSB Program Repository

SBA proposes that women-owned small businesses will submit eligibility certification documents at the time of self-certification. SBA is proposing that women-owned businesses submit the eligibility documents directly to the contracting officer prior to each award. The proposed rule further will require the women-owned business to post the documents to the repository within 30 days of the repository becoming available. The Office of Advocacy is concerned with the potential cost of compliance for women-owned small businesses. There are at least two areas of concern. First, until the repository is operational, the women-owned business who decides to self-certify must not only submit documents to the Online Representations and Certifications Application system (ORCA) but must provide each contracting officer with eligibility documents. For some businesses this may mean multiple packages being provided to the same agency and in some situations to the same contracting officer for multiple procurements. Perhaps SBA can explore a less burdensome alternative for the woman-owned small business that will still provide the agency with the eligibility documents.

Advocacy commends SBA for its effort to address the discrimination against women-owned small businesses by proposing a regulation that would allow for restrictive procurement competition. Advocacy urges SBA to give full consideration to these two areas of concern. If you have any questions regarding this letter, please contact Major L. Clark, III in my Office at (202) 205-7150.

Sincerely,

Susan Walthall
Acting Chief Counsel for Advocacy

Major L. Clark, III

Assistant Chief Counsel for Procurement
cc: The Honorable Cass Sunstein, Administrator, Office of Information and Regulatory Affairs