

Commentary

Long wait, little change

SBA's proposal to set aside contracts for Women-owned Small Businesses is narrow in scope

In the last week of 2007, the Small Business Administration (SBA) finally presented its long-awaited proposal to create a preference program for federal Government contracting by women-owned small businesses. Even though it's seen as a step in

the right direction, women's advocates are disappointed at the limited scope of the proposed program.



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As long ago as 1994, Congress established a government-wide goal of

awarding 5 percent of all prime contract and subcontract dollars to women-owned small businesses.

In 2000, Congress amended the Small Business Act to create a preference for them and directed the SBA to implement it by regulations. Fast-forward six more years and in 2006 small businesses owned by women were still awarded only 3.41 percent of federal prime contract award dollars, according to the SBA.

The 2000 law required the SBA to conduct a study to determine the industries in which women-owned small businesses were unrepresented in federal procurement awards.

After the National Academy of Sciences deemed the SBA's first study to be "fatally flawed," SBA contracted with the Rand Institute to conduct a new study, the results of which were published in April 2007.

Limitations

Surprisingly, the Rand study found only four industry classifications (using North American Industry Classification System codes) in which women-owned small businesses were under-represented:

- national security and international affairs;
- coating, engraving, heat treating and allied activities;
- household and institutional furniture and kitchen cabinet manufacturing; and
- "other motor vehicle dealers."

As a result of these findings, the SBA's proposal will only apply to women-owned small businesses (WOSBs) in those four isolated and limited industries.

Furthermore, SBA's proposal states that to satisfy equal protection requirements under the Fifth Amendment to the Constitution, the federal courts will not uphold a gender-based preference for federal contracting, *unless the Government can also show evidence of gender-based discrimination in past contract awards.*

What that means is that each government agency will have to first separately determine that set-aside procurements would rectify past discrimination, even in those four industries.

In addition, under the proposal, assuming an agency determines there is evidence of discrimination in the relevant industry, a contracting officer would be authorized to set aside contracts only up to \$3 million

(\$5 million for manufacturing industries).

The set-aside would ordinarily be for "economically disadvantaged" WOSBs, but if market research showed that there would likely not be at least two economically disadvantaged WOSBs competing for the award, the contracting officer could open competition to all WOSBs.

The standard for "economically disadvantaged" WOSBs would be the same as exists under the § 8(a) procurement preference program for minorities: the net worth of any qualifying owner must not exceed \$750,000, exclusive of principal residence and interest in the business. However, unlike the 8(a) program, the WOSB owner's net worth would be computed without applying state community property laws.

To qualify as a WOSB, 51 percent of a company would have to be directly owned by one or more women who are U.S. citizens, function as the highest ranking managers, possess managerial experience and do not hold other jobs that preclude actual day-to-day management and control of the business. The proposed regulations have numerous other provisions pertaining to how WOSBs can self-certify or be certified by the SBA or by private contractors authorized by the SBA to conduct certification reviews. They also outline how the SBA would handle challenges to WOSB status along with many other conditions.

Comments sought

At a Congressional hearing in mid-January, advocates for women-owned small businesses, who have criticized the SBA for its delays in starting this program, attacked the proposal as excessively narrow.

The Justice Department's interpretation of constitutional requirements, the required agency-by-agency findings of discrimination and the methodology of the study that limits the program to the four industries all came under heavy criticism. And maximum awards of only \$3 million or \$5 million, in just four industries, cannot possibly achieve any appreciable progress toward the Congressional goal of awarding 5 percent of federal prime contract awards – which exceeded \$340 billion in 2006 – to WOSBs.

There is one important omission in the SBA proposal. It does not state an effective date, since the SBA is soliciting written comments on the rule through Feb. 25.

Stay tuned and rest assured there will be more to this story.

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