



Testimony of Jennifer K. Brown
Vice President and Legal Director
Legal Momentum

Hearing: SBA's Progress in Implementing the Women's Procurement Program

Committee on Small Business
United States House of Representatives

January 16, 2008

Good morning, distinguished Members of the House of Representatives Committee on Small Business. Thank you, Chairwoman Velazquez, for inviting me to testify today, and thank you as well, Ranking Member Chabot.

I am Jennifer Brown, Legal Director of Legal Momentum. Founded in 1970, Legal Momentum is the nation's oldest legal advocacy organization dedicated to advancing the rights of women and girls. With headquarters in New York City and offices in Washington, D.C., Legal Momentum has been a leader in establishing legal, legislative, and educational strategies to secure equality and justice for women across the country. Our public policy and litigation efforts focus on four areas that are of greatest concern to women in the United States: freedom from violence against women, equal work and equal pay; the health of women and girls; and strong families and strong communities.

I very much appreciate the opportunity to contribute today to the Committee's consideration of the Small Business Administration's Proposed Rule for implementing the Women's Procurement Program. As you know, this program was authorized by Congress in 2000 as a tool for promoting contracting opportunities for women-owned business enterprises. It is only the most recent in a series of actions Congress has taken to root out longstanding discrimination against women business owners, and to promote their equal opportunity to compete for federal contracts.

The Women's Procurement Program authorizes federal agencies to reserve certain contracts for bidding by women-owned small business enterprises in industries where detailed analysis has demonstrated that such businesses are not getting appropriate opportunities to participate in federal contracting. This program was carefully crafted by

Congress to meet relevant constitutional standards. The SBA's Proposed Rule implementing the program would add on a completely unnecessary and debilitating requirement before any federal agency could use this program: it would require the agency to conduct its own, additional analysis of its procurement history, and to find that it had discriminated against women-owned small businesses in the relevant industry.

I can summarize my testimony very briefly. The SBA has correctly identified intermediate, or heightened, scrutiny as the constitutional standard that the Women's Procurement Program must meet. The program as Congress created it meets that standard. Far from ensuring the constitutionality of government operations, the SBA's Proposed Rule instead would graft onto this program additional agency obligations that would virtually guarantee no women-owned business would ever benefit from the program. These additional obligations are not constitutionally mandated and in practice, they would only undermine Congress's clearly expressed intent and well-founded interest in increasing participation in government procurement by small businesses owned by women.

I. The Heightened Scrutiny Standard Provides the Correct Constitutional Framework for Assessing the Women's Procurement Program

As SBA acknowledged in the Supplementary Information to the Proposed Rule, the Women's Procurement Program must satisfy the heightened scrutiny standard to be constitutionally sound. Women-Owned Small Business Federal Contract Assistance Procedures, 72 Fed. Reg. 73,285, 73,288 (Dec. 27, 2007). As with other gender classifications in the law, affirmative action programs benefiting women must carry an "exceedingly persuasive justification" to satisfy this level of scrutiny. *See, e.g., United*

States v. Virginia, 518 U.S. 515, 533 (1996). A gender-conscious program is constitutional only if it serves “important governmental objectives,” using means that are “substantially related to the achievement of those objectives.” *Id.* And, importantly, the justification for such a program “must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.* Rulings by, for example, the Eleventh Circuit in *Ensley Branch NAACP v. Seibels*, 31 F.3d 1548, 1579-80 (11th Cir. 1994) and the Third Circuit in *Contractors Association of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1000-01 (3d Cir. 1993) confirm the applicability of heightened scrutiny to government affirmative action programs benefiting women. *See also, e.g., Coral Constr. Co. v. King County*, 941 F.2d 910, 930-31 (9th Cir. 1991).

II. The Women’s Procurement Program Serves “Important Governmental Objectives”

Without question, preventing discrimination against women-owned businesses in the award of tax dollars through the federal government’s procurement processes is an important governmental interest. Literally for decades, beginning with the 1978 report of the Federal Interagency Task Force on Women Business Owners, *The Bottom Line: Unequal Enterprise in America*, Congress has been receiving evidence of discrimination against women-owned businesses and these businesses’ extremely low level of participation in government procurement opportunities. Actions taken over the years, including executive orders issued by Presidents Carter and Clinton, produced little progress. Responding to the snail’s pace of progress in this area, Congress in 1994 established a goal that five percent of all federal contracts be awarded to businesses controlled by women, *see* 15 U.S.C. § 644(g).

Yet even this extremely modest goal has never been reached. *See, e.g., Trends and Challenges in Contracting With Women-Owned Small Businesses*, GAO-01-346, at 16 (2001) (noting failure to meet the five percent goal in first four years after it was adopted). And meanwhile, Congress continued to receive evidence of discrimination and underutilization of women-owned businesses. For example, in 1996, not long before the Women's Procurement Program was created, the Department of Justice issued an extensive report, *The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,050 (May 23, 1996). While focused on evidence of discriminatory contracting barriers faced by minority business owners, the report also documented extensive discrimination against women-owned businesses. Among the areas discussed were the virtual exclusion of women from all aspects of the construction industry, *id.* at 26,056 & n.62; the persistence of "glass ceiling" employment discrimination that blocks women from reaching the private sector management positions that are most likely to lead to self-employment, *id.* at 26,056-57 & n.75; sex discrimination by lenders, *id.* at 26,057 & n.86; and exclusion from business networks, *id.* at 26,059 & nn.108-109, and bonding, *id.* at 26,060 & n.118.

Another study, commissioned by the U.S. Department of Justice and reported in 1997, assessed 58 studies of disparity in government contracting from states and localities across the country, and made a stunning finding: that "[w]omen-owned businesses receive only 29 cents of every dollar expected to be allocated to them based on firm availability." Maria E. Enchautegui *et al.*, The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?* 15 (1997). Indeed,

underutilization of women-owned businesses was the most widespread finding among the disparity studies. *Id.*

Similarly, a brief filed by the Department of Justice in early 2001 in defense of another federal affirmative action program for both minority- and women-owned businesses catalogued what the Government termed the “enormous body of evidence of discrimination and the effects of discrimination” that Congress had received over a period of years concerning these businesses, especially in the construction field. *See* Federal Defendant-Intervenors’ Post-Trial Brief in *Gross Seed Company v. Nebraska Dep’t of Roads*, available at <http://www.usdoj.gov/crt/emp/documents/grossbrief901.htm#Effects>.

Numerous courts have recognized that government has a “legitimate and important interest in remedying the many disadvantages that confront women business owners.” *See, e.g., Coral Construction Company v. King County*, 941 F.2d 910, 932 (9th Cir. 1991); *Contractors Ass’n of Eastern Pa., Inc. v. City of Philadelphia*, 6 F.3d 990, 1009-10; *cf. Sherbrooke Turf, Inc. v. Minn. Dep’t of Transp.*, 345 F.3d 964, 969 (8th Cir. 2003) (federal affirmative action program for minority- and women-owned businesses serves “compelling governmental interest”). As the United States Supreme Court held in *City of Richmond v. J.A. Croson Company*, “[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” *Croson*, 488 U.S. 469, 492 (1989).

Against this background of persistent discriminatory barriers faced by women-owned small businesses, and amid evidence of the federal government’s continuing failure to award even a mere five percent of its contracting procurement dollars to these

businesses, the program established by Congress to improve their contracting opportunities clearly serves a “substantial governmental interest” in preventing and remedying discrimination against women business owners.

III. The Women’s Procurement Program, as Designed by Congress, Is Substantially Related to the Achievement of the Program’s Goals

Any affirmative action program must be carefully designed to target the discrimination it is intended to redress. Overbroad efforts are constitutionally infirm. For example, in the *Croson* case, the Supreme Court struck down a program adopted by the City of Richmond, Virginia, that required construction contractors on city-funded jobs to subcontract at least 30% of the dollar amount of the contracts to minority-owned business enterprises, in part because there was no evidence in the case about the number of such companies qualified to perform contracting work. *Croson*, 488 U.S. at 502.

One way to ensure that a government procurement program targets businesses affected by discrimination is to direct it only to those industries that are demonstrably underutilized in contracting. *Croson* itself supports just this approach, stating, “[w]here there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of contractors actually engaged by the locality or the locality’s prime contractors, an inference of discriminatory exclusion could arise.” *Id.* at 509.

The Women’s Procurement Program is just this type of targeted program. It permits agency contracting officers to designate certain contracts for bidding only by women-owned small businesses.¹ However, these designated contracts can only be for

¹ The design of the program serves a specific need that was identified in the GAO report, referenced above, *Trends and Challenges in Contracting With Women-Owned Small Businesses*.

goods or services provided by industries in which the government's past utilization of women-owned small businesses has been below their representation in the industry. The government's underutilization of women-owned small businesses in these industries provides an "exceedingly persuasive justification" for the program, meeting the requirements of heightened scrutiny. *See United States v. Virginia*, 518 U.S. at 533. Likewise, limiting the benefits of the Women's Procurement Program to businesses in industries that actually have been underutilized demonstrates that the program is not founded on "overbroad generalizations about the different talents, capacities, or preferences of males and females," *id.*—for example, assumptions about which types of businesses men or women are more likely to own—but instead on data showing a lack of equal opportunity on the basis of sex.

Pursuant to the statute, the Kauffman-RAND Institute for Entrepreneurship Public Policy (the "RAND Institute") produced a study for the SBA, *The Utilization of Women – Owned Small Businesses in Federal Contracting*, to identify the industries in which women-owned small businesses are being underutilized by the federal government. This study produced "disparity ratios" to measure the use of women-owned small businesses in proportion to their availability for various types of procurement opportunities. Putting aside the very critical issue of how the SBA has decided to use the Rand Institute study, it is important to realize just how credible properly formulated disparity ratios are in supporting anti-discrimination efforts. As the Third Circuit, using the term "disparity indices" in place of "disparity ratios," noted, "[d]isparity indices are *highly probative*

That report uncovered a "wide consensus" among government contracting officials that "the absence of a specific contracting program targeting [women-owned small businesses]" was an important reason for the government's continuing failure to meet the five percent contracting goal for such businesses that Congress had set in 1994. *Id.* at 23.

evidence of discrimination because they ensure that the ‘relevant statistical pool’ of contractors is being considered.” *Contractors Ass’n of Eastern Pa.* 6 F.3d at 1005. As that decision further explained, such evidence is clearly sufficient to support the constitutionality of a program like the one at issue here. *Id.* at 1006-07.

In sum, then, the Women’s Procurement Program as created by Congress fully meets relevant constitutional standards.

IV. The SBA’s Proposed Rule Imposes Debilitating Requirements on Implementation of the Women’s Procurement Program that Thwart Congressional Intent

The Proposed Rule issued by the SBA implicitly acknowledges that redressing discrimination against women-owned small businesses is an important governmental interest, but it adds debilitating burdens to implementation of the Women’s Procurement Program that would, in all likelihood, prevent it from ever serving the purpose for which it was created: to remove barriers to women-owned small businesses’ full participation in federal contracting.

The key requirement appears in § 127.501(3)(b) of the Proposed Rule, “Agency determination of discrimination.” This rule would require each federal agency to conduct its own analysis “of the agency’s procurement history and make a determination of whether there is evidence of relevant discrimination *in that industry by that agency*” before it could let a single contract under the Women’s Procurement Program. Without authority or precedent, the SBA has declared that only sex discrimination by the particular government agency may be remedied through an affirmative procurement program. The SBA’s section by section analysis of the Proposed Rule states this requirement even more clearly: the contracting agency “must make a finding of

discrimination by that agency in that particular industry,” 72 Fed. Reg. at 73,290, in order to use the procurement program.

The SBA asserts that the Constitution requires such agency-by-agency findings of actual discrimination, but its position is unsupported by any legal citation and is clearly wrong. First, we have uncovered absolutely no precedent for requiring agency-by-agency findings in order to implement a federal affirmative action program created by Congress. No court applying any level of scrutiny has made such a demand. Rather, “[w]hen the program is federal, the inquiry is . . . national in scope. If Congress . . . acted for a proper purpose and with a strong basis in the evidence, the program has the requisite compelling government interest nationwide.” *Sherbrooke Turf*, 345 F.3d at 970.

In this instance, where an underutilization analysis has already been performed for the federal government as a whole, it defies logic to require that a particular agency undertake its own analysis. Indeed, in many instances an agency’s own contracts would not be sufficiently numerous to identify underutilization with any particularity, and in any event, such analyses would clearly be a waste of money and would further delay implementation of a program that has already been stalled for more than seven years.

Moreover, the contention that any unit of government may take affirmative measures only to address its own discrimination was flatly rejected by the Supreme Court nearly twenty years ago in the *Croson* decision. In that case, which involved race-conscious affirmative action judged by the stringent strict scrutiny standard, the Supreme Court rejected the argument that government may use such measures only to “eradicate[e] the effects of its own prior discrimination.” *Croson*, 488 U.S. at 486. To the contrary, the Court ruled that government has a “compelling interest in assuring that

public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” *Id.* at 492.

Under the constitutional standards that apply to sex-conscious measures to enlarge opportunity, courts are explicit that it is perfectly acceptable for such remedies to be adopted in order to address societal, rather than governmental, discrimination against women. As the Eleventh Circuit wrote in 1994, “One of the distinguishing features of intermediate scrutiny is that . . . the government interest prong of the inquiry can be satisfied by a showing of societal discrimination in the relevant economic sector.” *Ensley Branch NAACP v. Seibels*, 31 F.3d at 1580. The Ninth Circuit agreed in its *Coral Construction Company* decision, writing that “intermediate scrutiny does not require any showing of government involvement . . . in the discrimination it seeks to remedy.” *Coral Construction Co.*, 941 F.2d at 932.

Against this backdrop, the SBA’s proposed rule is extreme and appears to be designed to prevent the Women’s Procurement Program from ever being used. It is frankly impossible to imagine any federal agency making a formal determination that it had engaged in sex discrimination in awarding government contracts—a determination that would not only embarrass the agency but presumably open it to litigation by past disappointed contractors. Far from finally fulfilling its duty to implement this congressionally authorized program, the SBA’s Proposed Rule would render it a nullity.