

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

U.S. WOMEN’S CHAMBER OF COMMERCE
1201 Pennsylvania Avenue, N.W., Suite 300
Washington, D.C. 20004

Plaintiffs,

v.

U.S. SMALL BUSINESS ADMINISTRATION
409 Third Street, S.W.
Washington, D.C. 20416

and

HECTOR V. BARRETO
Administrator,
U.S. Small Business Administration
409 Third Street, S.W.
Room 7000
Washington, D.C. 20416

Defendants

Civil Action No. _____

COMPLAINT

Plaintiff, U.S. Women’s Chamber of Commerce, for its Complaint herein, alleges
as follows:

Nature of Action

1. The U.S. Women’s Chamber of Commerce (“Women’s Chamber” or “Chamber”) brings this action under the Administrative Procedure Act (“APA”) for an order requiring the

Administrator of the U.S. Small Business Administration (“SBA”) to implement Congress’ mandate, under the “Equity in Contracting for Women Act of 2000,” codified at 15 U.S.C. § 637(m). The Act requires the SBA to conduct a study to identify underrepresented women-owned small businesses (“WOSB”) with respect to Federal procurement contracting. The statute mandates that the SBA perform the study before establishing a procurement program for women-owned small businesses, including procedures to verify the eligibility of such businesses.

2. Congress issued this mandate on December 21, 2000. Nearly four years have passed since this time, and the SBA has unreasonably delayed. The SBA has set, orally and in writing, a series of deadlines for accomplishing these tasks, and all of these deadlines have been missed. Defendant Barreto recently informed the Women’s Chamber that the SBA has no intention of implementing the program. The Women’s Chamber therefore requests that this Court order the Defendants to complete the study identifying industries in which WOSBs are underrepresented with respect to Federal procurement contracting and to establish procedures to verify eligibility to participate in the program, within three months.

Parties

3. Plaintiff Women’s Chamber is a not-for-profit advocacy group, with national headquarters located in Washington, D.C. The Women’s Chamber is the pre-eminent national women’s chamber of commerce network whose mission is to develop leaders, accelerate economic growth and promote economic opportunity for women small business owners in federal contracting. The Chamber’s membership consists of 150,000 individuals, business owners, career professionals, women’s organizations, economic development organizations and leadership organizations. The Women’s Chamber’s individual and small business members have contracted, and continue to seek contracts, with virtually all federal agencies. Several of the

Chamber's members have been denied contracts with federal agencies. An important function of the Women's Chamber is to represent the interests of its members in significant and substantial matters before Congress, the Executive Branch, and independent agencies.

4. Defendant SBA is an independent agency of the United States, with offices at 409 Third Street, S.W., Washington, D.C. Section 8(m) of the Small Business Act, codified at 15 U.S.C. § 637(m), requires the SBA to perform the two nondiscretionary, discrete actions at issue in this complaint.

5. Defendant Hector V. Barreto is the Administrator of the SBA. He is sued in his official capacity. Mr. Barreto maintains offices at 409 Third Street, S.W., Room 7000, Washington, D.C.

Jurisdiction and Venue

6. This action arises under the APA, 5 U.S.C. §§ 551, 706 et seq. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361, and 1651.

7. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

Factual and Legal Background

The "Equity in Contracting for Women Act of 2000"

8. Women entrepreneurs represent the fastest growing segment of small businesses. According to the SBA, there are approximately nine million women-owned businesses -- thirty percent of the businesses in the United States -- which employ over 27 million people. Nearly half of the businesses owned by women provide goods and services to the federal government. H. Rep. No. 106-879 at 1. Although women-owned businesses constitute thirty percent of the businesses in the United States, their representation in federal government contracts has historically been in the low single-digits, a significant market failure.

9. In 1994, Congress established a modest five percent procurement goal for women-owned small businesses (“WOSB”) in the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355) (“FASA”). Despite this stated goal, data from the Federal Procurement Data System revealed that the highest utilization of women-owned businesses by federal agencies was just 2.98 percent in 2003, significantly less than the statutory goal. H. Rep. No. 106-879 at 2. In fact, WOSBs are faring better in the private sector marketplace than in federal contracting, accounting for at least four percent of non-federal contracts.

10. As part of the Small Business Administration reauthorization in 2000, Congress passed the “Equity in Contracting for Women Act of 2000,” (the “Act”) codified at 15 U.S.C. § 637(m). *See* H.R. 4897, 106th Cong. (2000). The purpose of the Act is “to allow contracts, in industries historically underrepresented by women-owned small businesses, to be reserved for competition by women-owned small businesses.” H. Rep. No. 106-879 at 1. The bill was signed into law on December 21, 2000. Pub. L. No. 106-554, 114 Stat. 2763A.

11. The Act establishes a WOSB procurement program which allows federal contracting officers, under certain conditions, to restrict competition for certain contracts to small businesses owned and controlled by women. Specifically, the Act provides:

[A] a contracting officer may restrict competition for any contract for the procurement of goods or services by the Federal Government to small business concerns owned and controlled by women, if—

(A) each of the concerns is not less than 51 percent owned by one or more women who are economically disadvantaged (and such ownership is determined without regard to any community property law);

(B) the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by women will submit offers for the contract;

(C) the contract is for the procurement of goods or services with respect to an industry identified by the Administrator pursuant to paragraph (3);

(D) the anticipated award price of the contract (including options) does not exceed—

(i) \$5,000,000, in the case of a contract assigned an industrial classification code for manufacturing; or

(ii) \$3,000,000, in the case of all other contracts; and

(E) in the estimation of the contracting officer, the contract award can be made at a fair and reasonable price.

15 U.S.C. § 637(m)(2).

12. In the “Equity in Contracting for Women Act of 2000” as introduced, paragraph 3 (to which section (m)(2)(C) refers) mandates that the Administrator conduct a study to identify underrepresented WOSBs. *See* H. Rep. 4897, 106th Congress (2000). As codified, paragraph 3 is a waiver provision, see 15 U.S.C. § 637(m)(3), and paragraph 4 mandates the study be conducted, see 15 U.S.C. § 637(m)(4). The paragraph reference in section (m)(2)(C) was not changed to reflect the addition of the waiver provision. The language in HR 2802, 108th Congress (2003) amends section (m)(2)(C) to reflect the addition of the waiver provision and refers to paragraph 4 instead of paragraph 3. *See also* S. 2821, 108th Congress (2004) (amending the same language). Simply put, Congress subsequently made clear that the reference to paragraph 3 rather than paragraph 4 was a clerical error.

13. The Act further provides that “[t]he Administrator shall conduct a study to identify industries in which small business concerns owned and controlled by women are underrepresented with respect to Federal procurement contracting.” 15 U.S.C. § 637(m)(4). The accompanying House Report indicates that the “study shall evaluate, on an industry-by-industry basis, the specific industries and regions of the United States [in which women] ... are underrepresented.” H. Rep. No. 106-879 at 5. The House Committee on Small Business

envisioned that the Administrator’s study would “mirror the ‘benchmarking’ study performed by the Department of Commerce for small disadvantaged businesses.” *Id.*

14. Further, to verify eligibility to participate in the program, the Act mandates that the Administrator shall establish procedures relating to --

- (i) the filing, investigation, and disposition by the Administration of any challenge to the eligibility of a small business concern to receive assistance under this subsection (including a challenge, filed by an interested party, relating to the veracity of a certification made or information provided to the Administration by a small business concern . . . ; and
- (ii) verification by the Administrator of the accuracy of any certification made or information provided to the Administration by a small business concern

15 U.S.C. § 637(m)(5)(A). The House Committee designed these procedures to resolve efficiently and rapidly “disputes over eligibility without unduly burdening small businesses.”

H. Rep. No. 106-879 at 5.

The SBA’s Failure to Implement its Statutory Mandate

15. In 2001, the SBA set two deadlines for implementing the Act, both of which the SBA failed to meet. In its answers to post-hearing questions posed on May 16, 2001, the SBA stated that it “[was] drafting regulations to enact the provisions of P.L. 106-554, section 811 and plan[ned] to publish proposed regulations in late summer [2001].” The SBA later claimed that it

[was] leading the efforts to complete a study and [would] publish the list of eligible industries when the research [was] completed. As part of the implementation effort, changes to the Federal Acquisition Regulation (“FAR”) and the Code of Federal Regulations (“CFR”) [would] include definitions of ‘economically disadvantaged,’ ‘underrepresented,’ and ‘substantially underrepresented’ WOSBs and [would] specify the process for certification, waivers, etc. CAWBO [the Office of Federal Contract Assistance for Women Business Owners] expect[ed] to complete the implementation by the end of 2001.

Id.

16. Although the SBA completed a study and proposed regulations in September 2001, the SBA failed to formally publish either.

17. The SBA also failed to complete the required Office of Management and Budget (“OMB”) review process for proposed regulations. The SBA sent its proposed regulations to OMB on November 27, 2001. The OMB’s Office of Information and Regulatory Affairs (“OIRA”) must review an agency’s draft regulations before publication within 90 days of submission. The OMB’s 90-day review period expired on February 27, 2002. The SBA agreed to an additional 30 days for OIRA to review the proposed regulations. However, the SBA voluntarily withdrew its regulations from OIRA review before the extension period expired. This withdrawal was noticed on May 13, 2002, in the SBA’s semiannual regulatory agenda published in the Federal Register. 67 Fed. Reg. 34004 (May 13, 2002). The discontinued entries section showed the Women-Owned Small Business Federal Contract Assistance Program as withdrawn on April 24, 2002. *Id.*

18. The Federal Register’s December 3, 2001 “Statement of Regulatory Priorities,” had reported that the SBA “is currently drafting regulations that will implement a ‘restricted competition’ procurement program for [WOSBs]. ... This proposed rule would establish a WOSB Federal Contract Assistance Program to be administered by [CAWBO] within the SBA’s Office of Government Contracting.” 66 Fed. Reg. 61306 (Dec. 3, 2001). The SBA characterized its proposed rulemaking as “economically significant” and stated that the proposed rule “is expected to be published in February 2002.” *Id.* at 61307-08. With the exception of the discontinued entries notice discussed above, no notice of regulatory activity with respect to these regulations specifically or this program more generally has since appeared in the Federal Register.

19. The SBA’s budget request for fiscal year (FY) 2003 did not include funding for the women’s procurement program.

Congressional Concern about the SBA's Failure to Comply

20. On March 19, 2002, the Chairman and the Ranking Member of the House Committee on Small Business sent a letter to Defendant Barreto expressing concern that Defendant SBA was delinquent in issuing the Women's Procurement Program regulations and requesting a detailed written response "as to why these regulations are being held up, and the specific issues of contention between the SBA and OIRA." Defendant Barreto's Chief of Staff did not comply with this request.

21. Once again, in the February 2003 hearing on the SBA's FY 2004 Budget Request, the agency did not request funding for the women's procurement program. Defendant Barreto, in response to a question about the status of the women's procurement program, stated that the SBA was "in the process of outsourcing a contract to an expert that can help us to determine what needs to be in that study, what is a comprehensive study that will pass all constitutional muster. And we are right now in the process of getting that contract, and we will be moving forward with this very expeditiously this year."

22. Frustrated with the lack of progress in implementing the women's procurement program, legislation was introduced in both the House and the Senate to make the program self-executing. The House Report on this legislation stated that the Committee was "extremely frustrated with the pace of the Administrator's study on industries in which women-owned businesses are historically underrepresented." *Id.* The legislation has not been enacted.

Additional Delay with the National Academies of Science Contract

23. In late 2003, the SBA awarded a contract in the amount of \$180,000 to the National Academies of Science (the "NAS") to review the SBA draft report and recommend analytical methods and other methodology to be used to ascertain the utilization of women-

owned small businesses in federal contracting. NAS's Committee on National Statistics is responsible for making these recommendations.

24. The approximate start date for the project was December 1, 2003. The NAS report was originally to be completed by the spring of 2004, but the NAS requested and received a no-cost extension of the period of performance. The NAS Committee's estimated date of completion as reported on its website is late fall 2004. Upon information and belief, the report will not be published prior to the end of 2004.

Continued Failure by Defendant SBA to Implement Congressional Mandate

25. Again, no women's procurement program funding was included in the SBA's budget request for FY 2005. In response to questions posed after the budget hearing, the SBA stated that it was awaiting the completion of NAS's report before it could begin implementing the program.

26. On Wednesday, September 29, 2004, members of the U.S. Women's Chamber of Commerce met with Defendant Barreto to discuss the delay in implementing the Act. In addition to Defendant Barreto, Margot Dorfman, CEO of the U.S. Women's Chamber of Commerce; Terry Williams, President of the U.S. Women's Chamber of Commerce; Michael L. Barrera, National Ombudsman for Defendant SBA; and, Robert J. Blaney, District Director of Defendant SBA's Arizona Office were present at this meeting.

27. At this meeting, Ms. Dorfman and Ms. Williams inquired as to when the Act would be implemented. Defendant Barreto indicated that the goals in the Act were meaningless and stated that there were no consequences if the SBA failed to meet the goals. Defendant Barreto stated that more time was needed to complete the NAS study. He then stated in response

to a question about when the Act would be implemented that “the Administration has no intention of implementing this program.”

COUNT ONE

28. Paragraphs 1-27 are incorporated herein by reference.

29. The APA requires administrative agencies to conclude matters presented to them “within a reasonable time.” 5 U.S.C. § 555(b).

30. The APA empowers reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1).

31. Furthermore, the All Writs Act authorizes this Court to “issue all writs necessary or appropriate in aid of” its jurisdiction. 28 U.S.C. § 1651(a). In that regard, 28 U.S.C. § 1361 provides that the “district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

32. Defendants have failed, and continue to fail, to conduct a Congressionally mandated study to identify underrepresented WOSBs with respect to Federal procurement contracting and to establish procedures to verify the eligibility of a small business to participate in the women’s procurement program within a reasonable time, in violation of 5 U.S.C. § 555(b). Defendants’ unreasonable delay requires judicial intervention under 5 U.S.C. § 706. The Women’s Chamber otherwise has no adequate remedy.

33. Additionally, or alternatively, a writ of mandamus compelling the Defendants to conduct such a study and issue such procedures is necessary in aid of this Court’s jurisdiction to ensure that the Defendants fulfill their duty under the APA to make a determination within a

reasonable time and in a manner that is not arbitrary, capricious or otherwise contrary to law or applicable requirements.

34. Defendants' conduct has harmed members of the Women's Chamber who have failed to gain federal contracts without the implementation of the women's procurement program, and undermined the Chamber's ability to represent its members in pursuing greater economic opportunity for women-owned small businesses in the area of federal contracting.

Relief Requested

WHEREFORE, the Women's Chamber respectfully requests the Court issue judgment in its favor and against defendants and issue the following relief:

- a. An order pursuant to 5 U.S.C. § 706, or alternatively, a writ of mandamus pursuant to 28 U.S.C. § 1651(a), compelling the Defendants within three months to:
 - (1) complete a final study to identify industries in which WOSBs are underrepresented with respect to Federal procurement contracting;
and
 - (2) establish procedures to verify eligibility to participate in the program.
- b. An order retaining the Court's jurisdiction over the case until the SBA has completed its Congressional mandates with respect to the women's procurement program;
- c. An order awarding the Women's Chamber its reasonable attorneys fees and expenses incurred in prosecuting this action; and
- d. Such other relief as is just and proper.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Alan A. Pemberton", is written over a horizontal line.

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Dated: October 29, 2004