

BNA Insights

Small Business

Setting Aside the Glass Ceiling: The Women-Owned Small Business Program Should Have the Same Advantages as the Other Set-Aside Programs



BY JON WILLIAMS AND MEGAN CONNOR

Small businesses are often touted as the engine of our economy, and rightly so. According to the U.S. Census Bureau, small businesses comprise 99.7 percent of U.S. employers, are responsible for 64 percent of net new private-sector jobs, and roughly 50 percent of private-sector employment.¹ Recognizing that small businesses are the key to “maintain and strengthen the overall [U.S.] economy,” Congress has set goals for how much the federal government will spend on small businesses each year.² Congress has

¹ SBA Office of Advocacy, *Frequently Asked Questions* (Mar. 10, 2014), http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf.

² The Small Business Act (15 U.S.C. §§ 631 *et seq.*) established contracting goals as a measure of the federal contracts awarded to small businesses each fiscal year. See 15 U.S.C. § 644(g)(1). The current government-wide goals for prime contract awards are 23 percent for small businesses; 5 percent for small disadvantaged businesses (SDBs), which includes firms certified through the U.S. Small Business Administration's

Jon Williams is a partner and Megan Connor is an associate in the Government Contracts Group at PiliroMazza PLLC, a woman-owned law firm located in Washington, DC. Jon can be reached at jwilliams@piliromazza.com, and Megan can be reached at mconnor@piliromazza.com.

also created special contracting programs to ensure the federal government provides “maximum practicable opportunit[ies]” for small businesses.³ These so-called “set-aside programs” give federal agencies several contracting tools to facilitate spending on small businesses.⁴

Although the set-aside programs have come under attack in recent years,⁵ courts recognize “[t]he federal government has a compelling interest in ensuring that its funding is not distributed in a manner that perpetuates the effects of either public or private discrimination.”⁶ Moreover, the programs have achieved positive results: the federal government spends close to its goal of 23 percent on small businesses, and it currently exceeds its spending goals for SDBs⁷ and SDVOSBs.⁸ It is not by accident that the creation of the set-aside programs has coincided with growth in government spending on small businesses.⁹

(SBA) Section 8(a) Business Development Program (8(a) Program); 5 percent for women-owned small businesses (WOSBs); 3 percent for firms located in historically-underutilized business zones (HUBZones); and 3 percent for service-disabled veteran-owned small businesses (SDVOSBs). See *id.* The recently-introduced Greater Opportunities for Small Business Act of 2014 would increase the overall small business goal from 23 percent to 25 percent. See H.R. 4093, 113th Cong. § 2 (2014).

³ 15 U.S.C. § 637(d)(1); see also 48 C.F.R. § 19.201(a).

⁴ 15 U.S.C. § 637(d)(1); see also 15 U.S.C. §§ 637(a), 657a, 657f.

⁵ See, e.g., *DynaLantic Corp. v. U.S. Dep't of Def.*, 885 F. Supp. 2d 237 (D.D.C. 2012); *Rothe Dev. Corp. v. Dep't of Def.*, 545 F.3d 1023 (Fed. Cir. 2008).

⁶ *Western States Paving Co., Inc. v. Washington State Dep't of Transp.*, 407 F.3d 983, 991 (9th Cir. 2005); see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality) (“It 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.”).

⁷ Small Business Dashboard, *Small Business Contracts FY 2013* (Mar. 11, 2014), http://smallbusiness.data.gov/explore?carryfilters=on&fromfiscal=yes&tab=By+Performance+Goal&fiscal_year=2014&tab=By+Performance+Goal&fiscal_year=2013&fromfiscal=yes&carryfilters=on&Submit=Go.

⁸ See *id.*

⁹ See, e.g., *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 985 (10th Cir. 2003) (discussing statistics showing that minority participation in construc-

Practice Tips

The following are practice tips to help firms best utilize the WOSB set-aside program as it is currently constituted, with an eye toward future changes to achieve greater parity with the other set-aside programs:

- Familiarize yourself with the SBA regulations applicable to the WOSB set-aside program found at 13 C.F.R. Part 127, and note the several unique eligibility, certification, and contracting provisions.
- Check the list of available NAICS codes before advising a firm about participating in the WOSB set-aside program.
- Help your clients to advocate with agencies by showing at least two WOSBs are capable of performing the work.
- Monitor legislative developments for sole source authority, hopefully passed later this year, and other changes to the WOSB program.
- An SBA mentor-protégé program is in the works for the WOSB program, and proposed rules may be issued later this year.

And yet, more work remains to be done to fully realize Congress' goal of maximizing small business participation in federal contracting. This is especially true for women. The federal government has had a 5 percent spending goal for WOSBs¹⁰ since 1994.¹¹ But unlike other set-aside programs, the government has never reached the WOSB goal.

In 2000, Congress realized it needed to give contracting officers the means to reverse a troubling decline in spending on WOSBs; at that time, spending on WOSBs was less than half of the 5 percent goal.¹² Recognizing that women-owned firms are a "vital element" of the American economy and should have increased opportunities in federal contracting, Congress created the WOSB set-aside program.¹³ Unfortunately, it took more than 10 years for the SBA rules implementing the program to go into effect in early 2011.¹⁴ During this lost decade, the SBA struggled with how to implement the law, which led it to propose and withdraw WOSB regu-

tion projects with the City of Denver declined significantly after the city had relaxed its affirmative action efforts).

¹⁰ Unless otherwise stated, references to WOSBs herein encompass WOSBs and economically-disadvantaged WOSBs (EDWOSBs).

¹¹ Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, § 7106, 108 Stat. 3243, 3374 (1994) (codified at 15 U.S.C. § 644(g)(1)(A)(v)).

¹² H.R. Rep. No. 106-879, at 2 (2000).

¹³ *Id.* at 1, 3 (expressing doubt that the 5 percent spending goal for WOSBs reaffirmed in a May 23, 2000 Executive Order by President Clinton would be achieved without a "mandatory tool").

¹⁴ See *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 62,258 (Oct. 7, 2010).

lations on numerous occasions,¹⁵ and the U.S. Women's Chamber of Commerce sued the SBA for not moving quickly enough.¹⁶

Three years after the WOSB regulations finally went into effect, the WOSB program is starting to deliver on its promise. Government-wide spending on WOSBs is over 4 percent and has steadily increased in recent years.¹⁷ Nevertheless, the 5 percent WOSB goal remains unmet, now 20 years running. It is fair to question whether the WOSB program, as currently constituted, will ever reach its full potential.

There should be parity between the set-aside programs,¹⁸ but the WOSB program lacks several of the advantages found in the other programs. For example, the 8(a), HUBZone, and SDVOSB programs allow firms to participate regardless of their industry, while the WOSB program is only available to firms that operate in certain designated North American Industry Classification System (NAICS) codes. Additionally, the 8(a), HUBZone, and SDVOSB programs empower contracting officers to issue both competitive set-aside and sole source acquisitions, but the WOSB program only permits competitive acquisitions. And while there have never been any restrictions on the value of competitive set-aside contracts that may be awarded through the 8(a), HUBZone, and SDVOSB programs, Congress initially capped the value of contracts that could be reserved for WOSBs.¹⁹

¹⁵ See *Improving Government Regulations; Semiannual Regulatory Agenda*, 67 Fed. Reg. 34,004 (May 13, 2002); *The Women-Owned Small Business Federal Contract Assistance Program*, 71 Fed. Reg. 34,550 (June 15, 2006); *Women-Owned Small Business Federal Contract Assistance Procedures*, 72 Fed. Reg. 73,285 (Dec. 27, 2007).

¹⁶ *U.S. Women's Chamber of Commerce v. U.S. Small Business Admin.*, No. 1:04-CV-01889, 2005 WL 3244182 (Nov. 30, 2005).

¹⁷ According to an American Express OPEN survey released last fall, WOSBs won \$16.2 billion in federal contracts in fiscal year 2012, up from \$15.7 billion in 2009, despite a 6 percent downturn in federal spending during the same period. See American Express OPEN, *Women-Owned Small Businesses in Federal Procurement: Building Momentum, Reaping Rewards*, 1 (2013), available at http://www.womenable.com/userfiles/downloads/Amex_percent20OGC_percent202013-women_percent20trend_percent20report_percent20final.pdf. WOSBs accounted for 4 percent of all small business federal contracts in fiscal year 2012, a noticeable increase from fiscal year 2009. See *id.* And in data recently released for fiscal year 2013, spending on WOSBs was up again, to 4.33 percent. See *supra* note 8.

¹⁸ See Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1347, 124 Stat. 2504, 2546 (2010). As a result of the Small Business Jobs Act of 2010, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration amended the Federal Acquisition Regulation (FAR) to provide for no order of precedence between the 8(a), HUBZone, SDVOSB, and WOSB set-aside programs. See *Federal Acquisition Regulation; Socioeconomic Program Parity*, 76 Fed. Reg. 14,566 (Mar. 16, 2011); see also 48 C.F.R. § 19.203(a).

¹⁹ The dollar caps, which were either \$3 million or \$5 million depending on the type of contract, appear to have come from the belief that the WOSB program should be patterned after "[c]urrent procurement practices [that] enable contracting officers to reserve competition among small businesses for contracts in value between \$2,500 and \$100,000." See *supra* note 13 at 2.

Last year, Congress removed the dollar caps on WOSB set-aside contracts.²⁰ This was a step in the right direction to put the WOSB program on equal footing with the other set-aside programs. But more must be done to give women a fairer opportunity to maximize their participation in federal acquisitions, as Congress intended. This article discusses why and how to eliminate two significant disparities in the WOSB program: the industry limitations and the lack of sole source authority.

Make More Industries Available to the WOSB Program.

The WOSB program is the only set-aside program that is not available for all 1,000+ NAICS codes. Instead, the WOSB program is limited to firms that participate in 300+ NAICS codes designated by the SBA.

The industry limitations for the WOSB program are rooted in the statute that created the program. In 2000, Congress directed the SBA to conduct a study to determine the industries in which women are underrepresented in federal contracting.²¹ The law required the SBA to use the results of the study to determine which industries would be available for the WOSB program.²² Congress also directed the SBA to perform the study in accordance with the U.S. Supreme Court's then-recent decision in *Adarand Constructors v. Peña*, 515 U.S. 200 (1995).²³

After one failed study,²⁴ the SBA contracted with the Kauffman-RAND Institute for Entrepreneurship Public Policy (RAND) to conduct the study. The RAND study, completed in 2007, was not perfect.²⁵ One issue with the study was its use of several methodologies and data sets. Depending on the methodology selected, the

²⁰ Following direction from Congress in the National Defense Authorization Act for Fiscal Year 2013, the SBA issued an interim final rule to eliminate the dollar caps from the WOSB regulations. *Women-Owned Small Business Federal Contract Program*, 78 Fed. Reg. 26,504 (May 7, 2013).

²¹ *Seesupra* note 13 at 4-5 (explaining that the SBA's study should "focus on those industries in which [WOSBs] are underrepresented at the prime contractor level. The study shall evaluate, on an industry-by-industry basis the specific industries and regions of the United States that are underrepresented").

²² See Consolidated Appropriations Act, 2001, Pub. L. No. 106-554, § 811, 114 Stat. 2763, 2763A-708 (codified at 15 U.S.C. § 637(m)(4)).

²³ See *supra* note 13 at 4-5.

²⁴ The first disparity study was "fatally flawed." *Women-Owned Small Business Federal Contract Assistance Procedures*, 72 Fed. Reg. 73,285, 73,287 (Dec. 27, 2007).

²⁵ See Elaine Reardon, Nancy Nicosia, Nancy Y. Moore, *The Utilization of Women-Owned Small Businesses in Federal Contracting*, Kauffman-RAND Institute for Entrepreneurship Public Policy (2007), available at <http://www.RAND.org/pubs/technical-reports/TR442>. The RAND study acknowledged that the results varied significantly depending on which methodologies and data sets RAND used. See, e.g., *id.* at x. In addition, RAND acknowledged limitations with its primary sources, which were the Federal Procurement Data System (FPDS) and the Central Contractor Registry (CCR). See *id.* at 7-9, 13-14. The RAND study also looked only at women's representation in federal prime contracts. See *id.* at 7, 17 n.10. The focus on prime contracts was too narrow because Congress directed the SBA's study to focus on prime contracts, but not exclusively. See *supra* note 13 at 4-5. The WOSB spending goals apply to both prime contracts and subcontracts, and the goal of the program is to increase WOSB participation in federal contracting, not simply with prime contracts. See 15 U.S.C. § 644(g)(1)(A)(v).

RAND study showed widespread underrepresentation by women in federal contracting, or no underrepresentation at all.²⁶

The SBA then spent several years trying to determine which of RAND's methodologies to use as the basis for the list of NAICS codes that would be available for the WOSB program.²⁷ In particular, RAND used two methodologies to measure firms that are ready, willing, and able to perform federal contracts, which established the baseline against which RAND then assessed whether women-owned firms are underrepresented.²⁸ The SBA ultimately chose the methodology that used firms listed in the CCR as the measure of ready, willing, and able contractors. In doing so, the SBA acknowledged that it had selected the more "conservative approach" that could understate the availability of women-owned firms, "since a firm's inability to bid on federal contracts, and therefore its reluctance to register in the CCR could itself result from gender discrimination."²⁹

The SBA's conservative approach to the RAND study made 300+ NAICS codes available to the WOSB program.³⁰ However, if the SBA had chosen the other, less conservative methodology, approximately three times as many industries – 948 NAICS codes – would be available to the WOSB program.³¹

Perhaps the SBA believed it needed to adopt a more conservative approach to the RAND study because of Congress' direction to conduct the study in accordance with *Adarand*. In *Adarand*, the Supreme Court held that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.³² *Adarand* did not deal with gender-based classifications, which are

²⁶ See RAND study at x ("Depending on the measure used, underrepresentation of WOSBs in government contracting occurs either in no industries or up to 87 percent of industries.").

²⁷ Initially, the SBA selected data from the RAND study that made only four industries available for the WOSB program. *Seesupra* note 25 at 73,288. Not surprisingly, the SBA was flooded with negative comments in response to this proposal. See *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 10,030, 10,033 (Mar. 4, 2010).

²⁸ See RAND study at ix ("[U]nderrepresentation in government contracting has come to mean that the share of contracts awarded to a particular type of firm is small relative to the prevalence of such firms in the pool of firms that are 'ready, willing, and able' to perform government contracts," and "[t]his measure of underrepresentation is typically referred to as a disparity ratio."); see also *Croson*, 488 U.S. at 509 ("Where 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 such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise.").

²⁹ *Seesupra* note 15 at 62,260-61.

³⁰ See *id.* at 62,262. The SBA designated 83 four-digit NAICS codes in its final rule. *Id.* Of these 83 industries, 45 four-digit NAICS codes are for industries in which WOSBs are underrepresented and, therefore, available for EDWOSB set-aside procurements and the other 38 four-digit NAICS codes are those where WOSBs are substantially underrepresented and, thus, available for WOSB set-asides.

³¹ See *supra* note 27 at 22-23 (identifying 15 out of 18 two-digit NAICS codes as industries in which WOSBs are either underrepresented or substantially underrepresented).

³² *Adarand*, 515 U.S. at 227.

given intermediate scrutiny.³³ Though not as clearly settled as the test for race-based affirmative action programs,³⁴ the intermediate scrutiny standard is considered to present a lower bar for gender-based preferences, which must serve “important” rather than “compelling” government interests, and must be “substantially related” rather than “narrowly tailored” to meeting those objectives.³⁵

Given the lower level of scrutiny applicable to gender-based classifications, Congress could have allowed the SBA more flexibility in performing the study for the WOSB program. In addition, the SBA could have interpreted the study less conservatively to include as many industries (and therefore women) as possible. This would have brought the program closer in line with the other set-aside programs, none of which have industry limitations.

Last year, Congress directed the SBA to update the RAND study within five years.³⁶ The SBA had proposed to update the RAND study within three years,³⁷ but this has not happened. While the congressional directive is welcome, a new study in five years is not soon enough. If the SBA waits the full five years, the RAND study will be more than 10 years old by the time the industries available to the WOSB program are adjusted again to reflect the new study. WOSBs previously had to wait more than 10 years for regulations to implement the law that created the WOSB program. Women should not have to wait another decade for an improved study. Moreover, if the SBA does not change its conservative approach to the study, a new study in 2018 is unlikely to close the gap between women and the other set-aside programs created by the industry limitations on WOSBs.

Rather than wait five years to re-do the RAND study, more immediate steps can be taken to strengthen the WOSB program while also making it available to more women. First, the SBA should adopt a more inclusive approach to interpreting the existing RAND study. The SBA can take this step now, without a change in the legislation. In fact, the SBA has previously indicated that it might interpret the study differently in the future and

use the less conservative measure of available firms.³⁸ Doing so now would immediately allow many more women to benefit from the program. This, in turn, would increase the likelihood that the WOSB program will finally surpass the WOSB spending goal.

After broadening its interpretation of the existing data, the SBA’s next step should be to direct each federal agency to perform their own analysis of WOSB representation. The SBA should then use the agency-specific data to supplement the RAND study and develop a list of industries available for WOSB set-asides at each agency.

Adjusting the list of available industries on an agency-by-agency basis would maximize each agency’s ability to meet their WOSB goal. Under the current system, some agencies will have difficulty ever meeting the WOSB goal because their predominant procurements do not fall within the 300+ available NAICS codes. For example, the Department of Energy (DOE) does a significant amount of spending in the remediation services and environmental remediation services industries under NAICS code 562910, which is not one of the available industries for the WOSB program. Not surprisingly, in fiscal year 2013, DOE fell well short of the WOSB goal.³⁹ Presumably, a DOE study would find underrepresentation of WOSBs in remediation services. The SBA could then use such a study to make NAICS code 562910 available to DOE for WOSB set-asides.

Requiring input from each agency would also further buttress the WOSB program against a constitutional challenge, especially under the intermediate scrutiny standard, because such an analysis is beyond what intermediate scrutiny demands.⁴⁰ Even if the Supreme Court eventually decides that gender-based preferences should be subject to strict scrutiny, the WOSB program would be well-positioned to survive because the government-wide RAND study, supplemented by agency-specific analysis of underrepresentation in particular industries at each agency, would even more narrowly tailor the program to further the government’s compelling interest of remedying past discrimination of women in federal contracting.⁴¹

The good news is the SBA does not need a legislative fix to involve agencies in supplementing the RAND study. Both the existing law and the implementing regulations permit the SBA to determine underrepresentation of WOSBs based on input from each federal department and agency.⁴² The SBA’s early WOSB rulemak-

³³ See Amjel Quereshi, *The Forgotten Remedy: A Legal and Theoretical Defense of Intermediate Scrutiny for Gender-Based Affirmative Action Programs*, 21 Am. U. J. Gender Soc. Pol’y & L. 797 (2013) (discussing Supreme Court decisions *Craig v. Boren*, 429 U.S. 190 (1976), *United States v. Virginia*, 518 U.S. 515 (1996), and others).

³⁴ See Rosalie Levinson, *Gender-Based Affirmative Action and Reverse Gender Bias: Beyond Gratz, Parents Involved, and Ricci*, 34 Harv. J. L. & Gender 1, 13-18 (2011) (discussing differences in how circuits approach race and gender affirmative action programs).

³⁵ Compare *United States v. Virginia*, 518 U.S. at 524 (discussing intermediate scrutiny for gender-based preferences), with *Adarand*, 515 U.S. at 227 (“[W]e hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.”).

³⁶ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 1697, 126 Stat. 1632, 2091 (2013) (codified at 15 U.S.C. § 656(o)(2)).

³⁷ *The Women-Owned Small Business Federal Contract Assistance Program*, 71 Fed. Reg. 34,550, 34,552 (June 15, 2006).

³⁸ See *supra* note 15 at 62,261 (“SBA does not suggest that use of [Survey of Business Owners] data would never be appropriate to calculate availability.”).

³⁹ See *supra* note 8 (indicating DOE’s FY 2013 spending on WOSBs represented 1.48 percent of its overall procurement dollars).

⁴⁰ See *supra* note 15 at 62,263-64 (“SBA believes that the RAND Report is sufficient to satisfy the intermediate scrutiny standard that applies to the WOSB Program.”).

⁴¹ Cf. *DynaLantic*, 885 F. Supp. 2d at 280-283 (reviewing constitutionality of 8(a) Program as applied in a particular procurement based on the procuring agency’s evidence of discrimination in the relevant industry).

⁴² See 15 U.S.C. § 637(m)(6) (giving the SBA the ability to request each agency to provide “such information as the [SBA] determines to be necessary to carry out the [WOSB program]”); see also 13 C.F.R. § 127.501(b) (“In determining the extent of disparity of WOSBs, SBA may request that the head of any Federal department or agency provide SBA, data or in-

ings would have required agencies to do their own analysis, but the SBA ultimately decided to use only the RAND study.⁴³ The SBA should revisit this now and use its authority under the law to require each agency to supplement the RAND study with its own analysis, which the SBA could then use to develop a list of NAICS codes available for WOSBs at each agency. This would best serve the intent of the WOSB program by increasing the tools each agency can use to maximize WOSB participation in their procurements.

In sum, the SBA should not wait five more years to conduct another government-wide disparity study for WOSBs. The time would be better spent if the SBA immediately adopts a less conservative interpretation of the RAND study and then directs federal agencies and departments to supplement that study with their own analysis of WOSB representation. This approach will bring more immediate results, make the WOSB program available to more women, give each agency a better opportunity to satisfy their own WOSB goals, and provide more protection for the WOSB program against a constitutional challenge.

Add Sole Source Authority to the WOSB Program. The WOSB program is the only set-aside program without sole source authority.⁴⁴ Congress apparently left out sole source authority because it wanted to balance helping agencies meet the 5 percent WOSB spending goal with the benefits the government obtains from competitive bidding.⁴⁵ The lawmakers also believed, perhaps too optimistically, “that the process for identifying these [WOSBs] will lead to greater utilization of small business concerns owned and controlled by women throughout the federal government and not just in contracts designated in this Act.”⁴⁶

Maximizing competition is not a fair reason to deny the sole source tool to women because sole source contracts would only be issued when competition is not possible. The sole source provisions for the HUBZone and SDVOSB programs are instructive. For those programs, a sole source contract is not allowed if there are enough eligible firms for a competitive set-aside acquisition.⁴⁷ Moreover, the value of sole source contracts in these programs is capped.⁴⁸ Thus, sole source authority does not undermine the benefits of competition because sole source authority is limited and arises only when an agency is unable to do a competitive set-aside procurement.

Fortunately, Congress is starting to recognize the inherent limits—and unfairness—of the WOSB program

formation necessary to analyze the extent of disparity of WOSBs.”)

⁴³ *Seesupra* note 25 at 73,288; *Women-Owned Small Business Federal Contract Program*, 75 Fed. Reg. 10,030, 10,042 (Mar. 4, 2010).

⁴⁴ *See supra* note 13 at 4 (“The Committee does not intend that [the WOSB set-aside program] provide a basis for contracting officers to award contracts on a sole-source basis to [WOSBs].”).

⁴⁵ *Id.* at 2.

⁴⁶ *Id.* at 4.

⁴⁷ *See* 48 C.F.R. §§ 19.1306(a)(1), 19.1406(a)(1).

⁴⁸ *See* 48 C.F.R. §§ 19.1306(a)(2), 19.1406(a)(2).

without a sole source tool. Lawmakers have recently introduced several bills that would add sole source authority to the WOSB program.⁴⁹ And on March 5, 2014, the House Small Business Committee passed the Women’s Procurement Program Equalization Act of 2013, which would allow contracting officers to sole source awards to WOSBs so long as the contracting officer does not have a reasonable expectation that two or more WOSBs will submit offers and the anticipated award price will not exceed \$6.5 million for manufacturing contracts or \$4 million for all other contracts.⁵⁰ This proposed sole source authority for WOSBs parallels the tools contracting officers can already use for HUBZone firms and SDVOSBs.⁵¹

There is optimism that a WOSB sole source measure will become law this year, and it should. The foundational purpose of the WOSB program—increasing the participation of WOSBs in federal contracting—would be best served if procuring agencies have as many tools as possible to contract with WOSBs, including sole source contracts. Moreover, there is no good reason why the WOSB program is the only set-aside program without sole source authority. The lack of sole source authority is keeping the WOSB program from being in true parity with the other set-aside programs,⁵² and it may be the missing piece holding the WOSB program back from finally exceeding its goal.⁵³

Conclusion. Ironically, the program created to promote equal treatment of women in government contracting is, in some senses, perpetuating inequality. Though government spending on WOSBs is increasing, the unique limits on the WOSB program not found in the other set-aside programs create a glass ceiling for women in federal procurement. That the government may eventually meet the 5 percent spending goal on WOSBs is a testament to the many capable WOSBs, not an indication that the program is fine as it is. Indeed, 5 percent is a goal, not a destination. To ensure women have the maximum practicable opportunities in federal acquisitions, the WOSB program must offer the same advantages as the other set-aside programs. For these reasons, the WOSB program should have more available industries and sole source authority.

⁴⁹ *See* Women’s Procurement Program Improvement Act of 2012, H.R. 4203, 112th Cong. § 2 (2012); Women’s Procurement Program Equalization Act of 2013, H.R. 2452, 113th Cong. § 2 (2013).

⁵⁰ Women’s Procurement Program Equalization Act of 2013, H.R. 2452, 113th Cong. § 2 (2013).

⁵¹ *Seesupra* notes 48-49.

⁵² In a letter to the House Small Business Committee last July, Women Impacting Public Policy (WIPP) cited parity with the other set-aside programs as a key reason for giving sole source authority to the WOSB program. WIPP (www.wipp.org) has been at the forefront of bringing this issue to the attention of House and Senate leaders.

⁵³ In a similar amount of time, the SDVOSB program, which has sole source authority, has grown at a faster pace than the WOSB program and currently exceeds the government-wide goal for SDVOSBs. *Seesupra* note 8.