

**Testimony of Pamela J. Bethel, Esquire**

**The O’Riordan Bethel Law Firm, LLP**

**Subcommittee on Housing and Community Opportunity**

**and**

**Subcommittee on Oversight and Investigations**

**May 12, 2010**

**“Minorities and Women in Financial Regulatory Reform: the Need for Increasing Participation and Opportunities for Qualified Persons and Businesses”.**

**A. Background**

NAMWOLF was established in July, 2001. NAMWOLF promotes true diversity in the legal profession by fostering the development of long-lasting relationships between preeminent minority and women-owned law firms and major corporations and public entities.

NMLG was established in 2005 to bring together a group of certified minority-owned law firms of at least 10 lawyers devoted to delivering legal services to corporate America on a national basis.

Membership of both organizations is comprised solely of Martindale-Hubbell AV Peer Review Rated law firms.

**B. Government's Track Record**

The Government's track record regarding the use of Minority and Women-Owned Vendors is poor.

FY2008 Contracting Misses Goal for Contracting with Women-Owned Businesses by Over Twelve Billion Dollars (\$12,000,000,000.00).

After more than a decade of failure to meet federal contracting goals with women, and nearly nine years of delay in the implementation of the Women's Procurement Program, the recently released FY2008 federal spending report shows that women-owned small businesses suffered the greatest opportunity loss in history. FY2008 federal spending with women missed the 5% goal for spending with women by 22% representing a shortfall of over \$12 Billion in just one year.

"Federal spending increased over \$300 Billion between 2001 and 2008, while the federal contracts secured by women-owned firms have seen shortfall after shortfall," said Margot Dorfman, CEO of the U.S. Women's Chamber of Commerce. "And now, with the release of the FY 2008 data, we find that women-owned businesses lost over \$12 Billion of opportunity in FY2008 as the federal government failed to meet the remarkably low goal of five-percent for contracting with women-owned small businesses. For more than ten years, the federal government has failed to meet their own goal, and for more than nine years, the Small Business Administration has failed to implement the Women's Procurement Program which was established by Congress to assist federal agencies to overcome this tragic shortcoming," added Dorfman.

In 2005, the U.S. Women's Chamber of Commerce won a lawsuit against the U.S. Small Business Administration for failure to implement a law passed in 2000 to provide a targeted set-aside program for women-owned businesses seeking federal contracts. This set-aside was established to help end the disparity in contracting faced by women. Even though women own nearly 30 percent of all businesses in the United States, in 2007, they received only 3.41 % of federal contracts

The ranking Democrat on the House Small Business Committee, Rep. Nydia Velazquez (NY), called SBA's statement "the same story over and over again."

President Clinton signed the Women's Procurement Program into law on Dec. 21, 2000. It allows set-aside contracts "in industries historically underrepresented by women-owned small businesses."

In its May 25 statement SBA said it will "request proposals for undertaking the industry-by-industry study, as recommended by the NAS, needed to determine those industries where women-owned small businesses are underrepresented and substantially underrepresented."

Velazquez remarked, "It took a year to do the study and now, three-and-a-half years later, they are studying the study."

Congress has set a goal of awarding 5% of federal prime contract dollars to woman-owned firms, but their share was less than 3% through fiscal 2003.

"Talk is cheap," the Women's Chamber CEO, Margot Dorfman, said. "We don't need your special SBA women's awards, special SBA women's newsletters and publications with pictures of happy women and endless women's events. What we need is for the Small Business Administration to implement the law."

Federal agencies could set aside contracts for women-owned businesses in up to 31 industries, under a new rule issued by the Small Business Administration.

That's an expansion from the four industries originally proposed for the set asides, but groups representing women-owned businesses contend the rule still falls far short of what is needed to give women their fair share of federal contracts.

The SBA's original proposal not only limited contracting set-asides to four narrow industries, it also required agencies to find that they had discriminated against women-business owners before

implementing the program.

Groups representing women business owners, as well as members of Congress, urged the SBA to withdraw the rule, so a new administration could draw up a more expansive rule next year.

The final rule represents "a vast increase in the number of industries eligible" for the program, Baruah said. The additions range from architectural/ engineering services to waste treatment and disposal. In addition, agencies will no longer have to find they actively discriminated against women-owned businesses in order to set aside contracts for them. Critics said agency officials would be hesitant to admit this out of fear it would open the agencies to discrimination lawsuits.

Under the revised final rule, agencies will have to find only that they spent money in an industry where women were discriminated against. How they go about making that determination is up to each agency, Baruah said.

Dorfman said this kind of determination is not required for any other contracting set-aside program, and she sees no benefit in the SBA's changes to this requirement.

Ann Sullivan, a lobbyist for Women Impacting Public Policy, said the agency discrimination requirement remains "the most onerous part of the rule."

The SBA contends set-aside programs for specific groups must be narrowly tailored to remedy actual discrimination in order to survive constitutional challenges.

"There are folks who just want us to launch a set-aside program, but neither the executive branch nor the legislative branch can just unilaterally launch a set-aside program," Baruah said.

Women-owned businesses received 34% of federal contracting dollars in fiscal 2007, well below Congress' goal of 5%. Contract set-asides are the only way women will ever hit this goal, according to women's business groups. Failure to hit this goal is costing women-owned businesses up to \$6 billion a year, they say .

"Had the SBA chosen to implement a meaningful program, this stimulus could have resulted in positive growth of women's businesses, which is sorely needed at this time," Sullivan said. The program should be open to women in far more than 31 industries, she added.

Sen. John Kerry, D-Mass., agrees. "Interpreting just 31 out of more than 100 industries as underrepresented is insulting and hardly an improvement from the SBA's earlier ruling," said Kerry, who heads the Senate Small Business and Entrepreneurship Committee. He contends the agency "has subjected this program to a level of review that is not required by any constitutional standard."

## **C. Specific Recent Examples**

The Emergency Economic Stabilization Act, October 3, 2008 ("EESA") requires the Treasury Secretary to develop and implement standards and procedures to ensure, to the maximum extent practicable, the inclusion and utilization of women and minority owned businesses.

In practice, that has not happened. To date, such diverse businesses have been excluded from

providing services in any meaningful fashion. Recent history has demonstrated, however, that there is still the compelling need to ensure federal contracting opportunities originally envisioned by the provisions of the Federal Acquisition Regulation.

Both NAMWOLF and NMLG member firms have submitted credentials directly to Treasury and they have offered services directly to law firms already retained by Treasury. While tens of millions of dollars in legal service contracts have been awarded by Treasury under TARP, no significant dollar amount has been allocated to diverse minority and women-owned law firms.

#### **D. Proposed Solutions**

HR 4173 Section 1801 (passed by House and now pending with Senate: Requires Treasury to establish an "Office of Minority and Women Inclusion" that would ensure, to the maximum extent possible, the inclusion and utilization of minorities and women, and minority-and women-owned businesses in all procurements issued by the financial regulatory agencies as well as contracts issued by commercial concerns that relate to any assisted institution.

There are ample opportunities, and historical precedent, for diverse firms to be included in the substantial legal work arising out of the National Credit Crisis. During the Savings and Loan crisis of the 1980s and 1990s, the Resolution Trust Corporation ("RTC") required contractors, including law firms, to partner with diverse firms as a way of achieving inclusion. Like this crisis, the RTC hired many private law firms to assist the government in its work. Those law firms were not simply allowed to staff the projects in their normal fashion, but they were required to joint venture with diverse firms on each assignment. The result was that the work was performed successfully and cost effectively. In addition, many diverse firms gained exposure and expertise that would have been denied them. Many have grown into the NAMWOLF/NMLG members they are today.

Work with existing OSBDU's. Every federal agency has an "Office of Small & Disadvantaged Business Utilization" ("OSBDU"). Every Agency's OSBDU has a Director. This would be "far easier on the Budget" (as stated by Senator Inouye's Legislative Asst):

Treasury's OSDBU assists, counsels, and advises small businesses of all types (small businesses, small disadvantaged business, women-owned small businesses, veteran owned small businesses, service disabled veteran owned small businesses, and small businesses located in historically underutilized business zones) on procedures for contracting with Treasury.

Federal Office of Small and Disadvantaged Business Utilization Directors Interagency Council ("OSDBU Council") is an informal organization of Federal small business program officials that comes together monthly to exchange and discuss information on acquisition methods, issues and strategies; small business program initiatives and processes; and small business related outreach events that permit their respective agencies to increase their utilization of small businesses as prime and subcontractors to meet their annual requirements for services and goods.

The OSDBU Council is led by the Directors of the Federal OSDBUs who individually work closely with the U. S. Small Business Administration in the implementation of the Federal small business contracting programs.

Thus, there is already in place a mechanism to coordinate work from federal agencies (Treasury and Commerce in particular) to diverse businesses. BUT policy is set from the top down!

Small businesses are the largest employers in the U.S. Small business should be supported and nurtured because they will lead the jobs recovery which is desperately lacking as Wall Street leads itself out of the recession!

Appointment of a person in White House responsible for small, minority and women-owned businesses.