



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

October 23, 2007  
(House Rules)

## STATEMENT OF ADMINISTRATION POLICY

### H.R. 3867 – Small Business Contracting Program Improvements Act

(Rep. Velazquez (D) NY and 3 cosponsors)

The Administration strongly opposes H.R. 3867, which would modify the small business procurement programs of the Small Business Administration. The Administration appreciates the intent of H.R. 3867 to improve these programs and reduce the potential for fraud and abuse. However, the Administration believes that a number of the bill's elements would be burdensome or undesirable. In addition, some provisions of the bill raise significant constitutional concerns. The Administration looks forward to working with Congress to remedy the issues identified below.

The bill also eliminates the upper asset limit on economic disadvantage for continued participation in the program, essentially allowing an individual regardless of their wealth or income to continue participating in the program for a full 10 years. The bill would raise the asset-test bar for eligibility of individuals for the 8(a) program from \$250,000 to \$550,000, excluding equity in their home or their business. As the 8(a) program is designed to reach economically disadvantaged small business owners who have diminished credit opportunities, the Administration believes opening the program to small business owners with higher net worth will divert 8(a) contracting opportunities well beyond the original intent of the program.

H.R. 3867 would place a number of burdensome requirements on the HUB Zone contracting program. The bill would prohibit rural and Native American HUB Zone firms from obtaining construction contracts more than 150 miles from their HUB Zone principal office. The bill would also require on-site evaluation of all HUB Zone firms prior to the award of their second program-related contract. This provision would create a large burden on the Small Business Administration, as these firms are widely distributed and often located in rural areas. The firms are already required to certify their status prior to award of a contract, and false certification is a felony with significant penalties. Also, the Small Business Administration currently has a protest mechanism in place to ensure the eligibility of firms for HUB Zone contracts.

The Administration is supportive of sections of H.R. 3867 that punish false representation of a firm as being owned by service-disabled veterans and provisions that attempt to assist such firms in the Federal contracting process. However, the Administration is concerned about provisions that would require that certain small business preference programs take priority over other small business preference programs.

H.R. 3867 would also increase dollar thresholds for setting-aside non-competitive contracts in several of these programs. Competition is a proven way of obtaining the best performance and value for the government. Accordingly, any non-competitive thresholds increase should be

based on the actual rate of inflation as reflected in regulatory changes instituted by the SBA.

While the Administration supports opportunities for women-owned small businesses (WOSBs) to compete for Federal contracts, it opposes the bill's constitutionally suspect creation of gender-based set-asides. In order to withstand applicable equal protection standards, determinations of under-representation that form the basis of set-asides must be carefully controlled to assure that the pool of WOSBs deemed available for the contracting opportunities in question is limited to businesses that are eligible to perform those contracts. The bill's provisions for the identification of industries in which WOSBs are under represented does not appear to satisfy that standard. Additionally, authorizing individual agencies to make determinations of under representation that will result in contract set-asides based on sex will exacerbate such constitutional concerns, since it is unlikely that such determinations will be based upon the kind of thorough statistical analysis required by the courts to justify such set-asides under applicable case law.

Additionally, the bill's apparent expansion of the business categories that will be eligible for race- or ethnicity-based preferences in Federal contracting programs is subject to strict scrutiny under governing equal protection standards. Unless these provisions are supported by a sufficiently current legislative record demonstrating that they are narrowly tailored to further a compelling government interest, such provisions may be vulnerable to constitutional challenge.

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