

# Defense procurement case cited in delay of women's contracting program

By Elizabeth Newell [enewell@govexec.com](mailto:enewell@govexec.com) January 13, 2009

The Small Business Administration has become one of the first agencies to explore whether a recent court ruling striking down the legality of the Defense Department's small disadvantaged business program has broader ramifications.

SBA announced on Monday that it was [reopening the comment period](#) for the long-delayed women's contracting program and extending it for 60 days, partially in light of the ruling. The extension will allow stakeholders additional time to submit formal comments on a September 2008 revised plan to declare women-owned small businesses under-represented in 31 industries and allow set-aside contracts for women-owned firms in those industries.

SBA said that by granting the extension it was acquiescing to requests from Congress and members of the public, and noted that agency officials were assessing the November U.S. Court of Appeals for the Federal Circuit's *Rothe Development Corp. v. Department of Defense* [decision](#) and its potential relevance to the women's program.

"SBA is reviewing -- with the Department of Justice -- the relevance of the disparity study standard discussed in the recent [decision]," SBA acting Administrator Sandy Baruah said. "The *Rothe* decision, issued on Nov. 4, 2008, addressed the standards necessary to support the constitutional validity of certain contracting preference programs."

The *Rothe* case specifically dealt with Defense's small disadvantaged business program, which allowed for price adjustments to achieve the goal of awarding 5 percent of the department's contracting dollars to small businesses owned by certain minority groups.

Legal experts disagree on the potential significance *Rothe* could have for other preference programs, particularly those that are not race-based. In the past, the Supreme Court has applied different levels of legal scrutiny to affirmative action programs that are race-based than to those that are gender-based. But that doesn't mean the ruling won't set a broader precedent.

"The rationale the court used to strike down [the Defense small disadvantaged business program] as unconstitutional could certainly be used for other small business preference categories that Congress has carved out," said Robert Burton, former deputy administrator of the Office of Management and Budget's procurement policy unit and now a partner at the Washington law firm Venable. "Women-owned would certainly be one that could be reviewed under the strict scrutiny rationale the court used in this case."

In the decision, the circuit court judge stated, "Congress did not have a 'strong basis of evidence' upon which to conclude that DoD was a passive participant in pervasive, nationwide racial discrimination -- at least not on the evidence produced by DoD -- and relied on by the district court in this case." It was the lack of evidence that caused the program to fail strict scrutiny.

Joe Hornyak, a partner in Holland & Knight's government contracts group, said the type of disparity study SBA used to determine the industries in which women-owned business were underrepresented was significantly more detailed than what Defense presented to justify its small disadvantaged business program.

For the women's program, "they did look at disparity on an industry by industry, [North American Industry Classification System] code by NAICS code basis," Horynak said. "I think one of the problems the court had in the *Rothe* case was that they said you've looked at one state, two counties and three cities and assumed on a nationwide basis all minority groups are underrepresented. There wasn't that narrow tailoring of what industries, what geographic areas are affected."

While the extensive disparity studies might ensure the women's program, when implemented, could withstand constitutional challenges, women's business advocates said such studies err too far on the side of caution.

"Our position on the SBA's regulation is that it went well beyond what would be required to justify either a race-based program or a gender-based program," said Jocelyn Samuels, vice president for education and employment at the National Women's Law Center. "There is a difference in legal standards applied by the Supreme Court to evaluate the lawfulness of each of these types of program and the SBA's regulation went beyond what the Supreme Court has described as strict scrutiny, which applies to race-based programs."

Gender-based programs currently are subject to a slightly less intensive level of constitutional examination called heightened scrutiny.

"There may be circumstances in which gender programs are lawful [and] in which race-based programs might not be under these standards," Samuels said. "To suggest that women's programs can only be justified under the terms of strict scrutiny is a mischaracterization of the law and indicative of the current administration's hostility toward affirmative action."

Any major changes to small business programs as a result of the ruling are likely to be implemented by the next administration. Samuels said she is optimistic the Obama team will free the women's program from regulatory gridlock.

The president-elect sent a letter to SBA in the spring, Samuels said, stating that the regulations limiting the number of industries in which the set-aside could be applied "went far beyond what was necessary to ensure it complied with constitutional standards to the detriment of the program and women-owned businesses."