

United States Senate

WASHINGTON, DC 20510

January 12, 2005

The Honorable Colin L. Powell, Secretary
Dr. Condoleeza Rice, Secretary-Nominee
U.S. Department of State
2201 C Street, NW
Washington, DC 20520

Dear Secretary Powell and Dr. Rice:

We are writing out of concern for the State Department's apparent intention not to comply with the Small Business Act ("the Act") in the awards and management of the Department's overseas prime contracts and subcontracts, as evidenced by the recent proposed State Department regulation on overseas contracts. Through contractor-supported projects, the State Department plays an important and ever-growing role in democracy-building, relief, security, and reconstruction efforts in Iraq, Afghanistan, Southeast Asia, and other parts of the world. Many American small businesses have successfully done business overseas as federal contractors or subcontractors, and many more have contacted us expressing interest in this work. Numerous State Department contracts and subcontracts are and will be awarded on the ground in foreign countries. These opportunities are vital for economic growth and job creation.

The Small Business Act is intended to ensure the competitiveness of small companies in domestic and international markets and to provide fair and meaningful access to government contracts and subcontracts. To that end, the Act imposes accountability goals for awards of contracts and subcontracts to small businesses and requires that federal agencies compete their procurements to small businesses where responsible small companies are available to perform the work. On its face, the Small Business Act clearly applies to all federal procurements, regardless of whether the awards or the performance on these procurements take place overseas. *See, e.g.* 15 U.S.C. §631(a) ("It is the declared policy of the Congress . . . to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises."); 15 U.S.C. §644(g)(1) ("The Government-wide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year.")

On December 22, 2004, the State Department issued a proposed change to the Department of State Acquisition Regulation (DOSAR) to formalize the Department's policies on the application of the prime contracting and subcontracting provisions of the Act. The proposed DOSAR language states that contracts for performance overseas would be subject to the Act as a matter of policy if they are awarded domestically, notwithstanding a contrary provision in the Federal Acquisition Regulation (FAR). In the regulation, the Department announced that it will follow the Act because of the "policy to provide maximum opportunities for U.S. small businesses in all legislatively specified categories to participate in the acquisition process."

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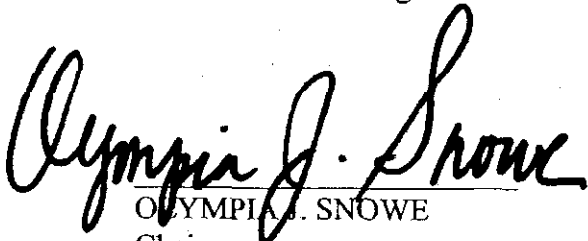
However, in the very same proposed regulation, the Department purported to allow “[c]ontracts awarded overseas” to comply with the Small Business Act “on a voluntary basis, where practicable.”

We commend the State Department for choosing to follow the Congressional statute rather than the contradictory provision in the FAR with regards to contracts awarded in the United States. At the same time, in light of the unambiguous Congressional intent that the Act govern all procurements, the Department has not demonstrated that there is a statutory basis for exempting contracts awarded overseas from the reach of the statute. Executive departments do not have the discretion to interpret the law in a manner inconsistent with its plain language, and the Department’s plan to do so undermines its own stated compliance policy.

We also do not believe that there are practicability barriers to compliance with the Act. State Department contracting personnel are well-qualified to administer the Act, and we are not aware of any relationship between the practical availability of qualified small businesses to perform the work overseas and the place where contract awards are made.

Therefore, we urge the State Department to clearly commit to compliance with the Small Business Act in all procurements regardless of the place of award and to modify its regulations accordingly. We look forward to your response and to continued State Department achievements in small business contracting.

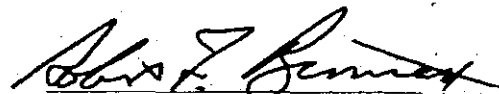
Sincerely,



OLYMPIA J. SNOWE
Chair
Senate Committee on Small Business
and Entrepreneurship



NORM COLEMAN
United States Senator



ROBERT BENNETT
United States Senator

cc: The Honorable David Safavian, Administrator for Federal Procurement Policy
The Honorable Thomas Sullivan, Chief Counsel for Advocacy, U.S. Small Business Administration