Testimony of Anthony W. Robinson, President
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Information Policy, Census & National Archives Subcommittee
Oversight and Government Reform Committee
Wednesday, September 24, 2008
2154 Rayburn HOB
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"How Information Policy Affects the Competitive Viability of Small and Disadvantaged Businesses in Federal Contracting"

Good afternoon Mr. Chairman, Ranking Member Turner and Members of this Subcommittee. My name is Anthony W. Robinson, President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). Our organization was founded by the late Congressman Parren J. Mitchell, to act as a national advocate and legal representative of the minority enterprise community. We promote policies affecting the equitable and full participation of minority businesses in the national and international marketplace. We attempt to provide non partisan opinions on matters affecting these enterprises.

We appreciate the committee providing us this opportunity to represent the class interest of minority entrepreneurs who continue to rely on the federal marketplace as a primary source of opportunity.

Background

The evidence of discrimination against minority contractors is stark. Quantitative studies, as well as anecdotal reports, detail the considerable discrimination based on race and national origin that confronts minority contractors in all parts of the country and in virtually every industry. The discrimination is not limited to one particular minority group; instead disparity studies show conclusively that businesses owned by African-Americans, Hispanics/Latinos, Asians, Pacific Islanders, and Native Americans all confront discrimination in their efforts to form, grow and maintain businesses.

Congress has long been cognizant of the prevalence of discrimination in public and private contracting, and has taken strong steps to address the problem through the enactment and reauthorization of numerous programs to level the playing field in federal contracting for minority contractors. Over the past decade, however, organizations dedicated to ending minority contracting programs (and other forms of affirmative action) have repeatedly challenged the constitutionality of these programs in court. Although these constitutional challenges have been largely unsuccessful, they underscore the need for a clear Congressional record with respect to federal programs that seek to assist minority businesses. In considering the constitutionality of any federal program that seeks to correct discrimination against particular minority groups courts apply what is known as strict constitutional scrutiny, as required by the Supreme Court's 1995 decision in Adarand Constructors v. Pena. This is the most rigorous standard of constitutional review. As part of that process, courts normally look to see what evidence of discrimination Congress has considered in enacting and maintaining the federal minority contracting programs.

Entry-Level Discrimination

Evidence before Congress, detailed in dozens of congressional hearings and reports, independent academic studies, and a voluminous Justice Department survey published in the Federal Register as *The Compelling Interest for Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26,050-26,063 (1996), revealed two fundamental barriers confronting minority entrepreneurs seeking to establish and build successful contracting businesses. First, minorities have faced a long and well-documented history of discriminatory exclusion from trade unions on the basis of race, which has prevented minorities from developing the technical skills and experience necessary to launch a successful business. *Id.* at 26,054. The exclusionary tactics employed by unions have included discriminatory selection criteria, discriminatory application of admissions requirements, and imposition of conditions (such as requiring new members to be related to an existing member) that effectively barred minorities from employment opportunities in the skilled trades. *Id.* at 26,055. The overwhelming evidence of racial discrimination by unions has led this Court to observe that "judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice." *United Steelworkers of*

America v. Weber, 443 U.S. 193, 198 n.1 (1979).[1] A recent study conducted by a Yale University economist concluded that a history of "blocked access to the skilled trades is the most important explanation of the low numbers of minority and women construction contractors today." *The Compelling Interest*, 61 Fed. Reg. at 26,056 (citing Jaynes Associates, *Minority and Women's Participation in the New Haven Construction Industry: A Report to the City of New Haven* 34 (1989)).

The second principal barrier to the formation and development of minority businesses is the discriminatory denial of access to capital, a subject Congress has explored in depth through numerous hearings over the past ten years. *Id*. at 26,057 & n.86 (citing hearings). Academic studies confirm the mountain of anecdotal evidence presented at these hearings documenting the discriminatory treatment minority entrepreneurs have received when applying for loans and credit. For example, a study comparing white-owned businesses with black-owned businesses with the same amount of equity capital found that white-owned businesses typically received loan amounts three times larger than those received by their black-owned counterparts. *Id.* at 26,058 (citing Bates, *Commercial Bank Financing of White and Black Owned Small Business Start-ups*, Quarterly Review of Economics and Business, Vol. 31, No. 1, at 79 (1991)). In the construction industry, the disparity was even more pronounced: white-owned firms received *50 times* as many loan dollars as black-owned firms with the same equity. *Id.* (citing Grown & Bates, *Commercial Bank Lending Practices and the Development of Black-Owned Construction Companies*, Journal of Urban Affairs, Vol. 14, No. 1, at 34 (1992)).

Studies also show that, among firms with the same borrowing credentials, minority-owned firms are approximately 20% less likely to obtain venture-capital financing than comparable non-minority-owned firms, and 15% less likely to receive business loans. *Id.* A 1996 study in the Denver, Colorado, area, from which this case arises, found that African-Americans were three times more likely than whites to be rejected for business loans, and Hispanics were 1.5 times more likely than whites to be rejected for such loans. *Id.* (citing Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver* at v (1996)). Statistically significant disparities remained even after the authors of the study controlled for factors that might legitimately affect lending decisions, such as size, firm age, creditworthiness, and net worth. *Id.* This compelling body of evidence largely explains why the availability of

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[1] *See* Herbert Hill, *Race and Ethnicity in Organized Labor: The Historical Sources of Resistance to Affirmative Action*, Univ. of Wisconsin-Madison Journal of Intergroup Relations, Vol. XII, No. 4, pp. 21-27 (1984) (describing tactics used by unions to exclude black workers, including establishment of state licensing boards controlled by union representatives that discriminatorily denied licenses to black craftsmen).

minority-owned contractors has been artificially depressed by marketplace discrimination.[2]

Ongoing Marketplace Discrimination Confronting Established Minority Contractors

Minority contractors who manage to overcome these obstacles to obtaining the skills and financing necessary to start their own businesses are frequently confronted with discrimination in attempting to bid for, obtain, and perform construction contracts. This ongoing discrimination adversely affects market access and utilization of minority contractors and seriously undermines the ability of minority contractors to compete on an equal basis for contracts. These discriminatory practices have been documented extensively in case law, regional disparity studies, and congressional hearings. *See The Compelling Interest*, 61 Fed. Reg. at 26,059 nn.100-01. Discussed below are a few examples of the forms such discrimination takes in markets throughout the country.

"Good-Old-Boy" Networks: Racial discrimination restricts the opportunities of minority contractors at various points in the bidding and contracting process. For example, much of the information about upcoming job opportunities is spread through informal "old-boy networks" that have deliberately excluded minorities, placing minority-owned businesses at a distinct competitive disadvantage. *The Compelling Interest,* 61 Fed. Reg. at 26,059-26,060 (citing National Economic Research Associates, *Availability and Utilization of Minority and Women Owned Business Enterprises at the Massachusetts Water Resources Authority* 74 (1990) (finding that exclusion from established networks makes it more costly for minorities to compete with non-minority-owned firms)).

Unequal Access to Bonding: Minority contractors also face racial discrimination in obtaining bonding, which is often a prerequisite to participating in public-sector construction contracts. State and local studies, as well as extensive anecdotal evidence presented at congressional hearings, have documented the fact that "minority businesses [are] significantly less able to secure bonding on equal terms with white-owned firms with the same experience and credentials." *Id.* at 26,060 & nn.117-20. Such discrimination can seriously undercut the ability of minority contractors to compete with non-minority-owned firms. Even a one or two percent differential in the bonding premiums charged to minority contractors can increase costs substantially and result in the difference between a winning and losing bid.

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[2] Thus, any attempt at measuring the degree and pervasiveness of marketplace discrimination through a gross comparison of current availability to current utilization necessarily underestimates the true magnitude of disparities caused by such discrimination.

Bid Shopping: The construction industry has been and remains "a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work." *Id*. at 26,058. This system allows prime contractors to discriminate against minority subcontractors by simply refusing to accept low bids submitted by minority-owned firms, or by "shopping" a low bid submitted by a minority-owned firm to non-minority subcontractors willing to beat the bid. *Id.* at 26,059. Such bid shopping is generally considered unethical in the construction industry, but its use is not uncommon when a prime contractor seeks to replace a low-bidding minority contractor with a favored non-minority contractor. In the numerous disparity studies that have been undertaken by state and local governments over the past decade, there are virtually no documented instances in which minority subcontractors were the beneficiaries of bid shopping.

Price Discrimination by Suppliers: Minority contractors are frequently unable to obtain the same prices and discounts that suppliers offer to non-minority contractors, thereby raising the costs incurred (and thus the bids submitted) by minority contractors. *The Compelling Interest*, 61 Fed. Reg. at 26,061. Indeed, one regional study found, in an incident illustrative of many others, that a white and minority contractor who had formed a joint venture were given such disparate quotes from the *same* supplier for the *same* project that the price differential would have added 40% to the final contract price had the minority contractor's price been used. *Id.* at 26,061 & n.125 (citing BBC Research and Consulting, *Regional Disparity Study: City of Las Vegas* IX-20 (1992)).

Unfair Denial of Opportunity to Bid: It is also common for minority subcontractors to bid on private-sector jobs only to be told by a non-minority contractor that no bids from minority-owned firms were needed because no requirements for DBE participation applied to those contracts. To the extent that minority contractors derive a disproportionate share of their contract dollars from the highly competitive and low profit margin public-works arena, it undoubtedly reflects the daunting obstacles posed by such forms of marketplace discrimination on private construction contracts that remain beyond the reach of government affirmative-action programs.[3]

In addition to the direct evidence of racial discrimination discussed above, the legislative record before Congress contained a wealth of disparity studies conducted after this Court's decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The Justice Department commissioned an analysis of 39 such studies from localities across the country, which revealed

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[3] *See Concrete Works of Colorado, Inc. v. City and County of Denver*, 86 F. Supp. 2d 1042, 1074 (D. Colo. 2000) (noting testimony of minority and women contractors in the Denver area who were unable to obtain work on private construction projects due to negative stereotypes held by white male contractors). The city's appeal in the *Concrete Works* case has been held in abeyance by the Tenth Circuit pending the Court's decision in this case.

that, on average, minority-owned businesses received only 59 cents for every dollar these firms would be expected to receive based on the number of qualified and available firms. *The Compelling Interest*, 61 Fed. Reg. at 26,061-26,062. Even in the area of construction subcontracting, which had the smallest disparity by industry sector; minority-owned firms received only 87 cents for every dollar they would be expected to receive. *Id.* at 26,062. Perhaps more significant were the studies documenting the effect on minority participation in public-sector contracting in those localities that abruptly ended their affirmative-action programs in the wake of *Corson*. In Philadelphia, for example, contract awards to minority- and women-owned businesses plummeted by 97% after the city discontinued its program in 1990; in Hillsborough County, Florida, awards to minority-owned businesses fell by 99%; and in Tampa, Florida, contract awards to black-owned businesses also dropped by 99%. *Id.* at 26,062 & nn.131-33. These figures graphically illustrate the extent to which minority-owned contractors remain effectively frozen out of public-sector contracting markets absent affirmative remedial measures designed to counteract the racially discriminatory forces otherwise at play.