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Race-Affirmative Action: Procurement [1]

Race - affirmative action - procurement

THE PRICE EVALUATION ADJUSTMENT PROGRAM

A key component of the Clinton administration's reform of the federal government's procurement programs is its new price evaluation adjustment program. Congress authorized all federal agencies to use this program in 1994 as part of the Federal Acquisition Streamlining Act. The first phase of the program, which is being implemented through a revision of the Federal Acquisition Regulation, goes into effect on _____.

Under this new program, small disadvantaged businesses ("SDB's") bidding on competitively awarded federal contracts may qualify for a price evaluation credit of up to 10%. Credits will be available only to businesses that have been certified as SDB's by the Small Business Administration. These credits help level the playing field for minority groups who have encountered discrimination in their efforts to compete. Although they may receive these credits, SDB's must compete with all other businesses to win federal contracts. Price evaluation credits are not set-asides. They do not assure that any firm, or group of firms, will win a contract.Only if price credits fail to remedy discrimination can agencies consider the use of set-asides in awarding contracts to SDB's.

In order to ensure that the use of these credits is fair and meets legal requirements, they will be available only in industries in which minority-owned firms continue to suffer the effects of discrimination. "Benchmarking" provides a methodology for identifying these industries by comparing the actual federal procurement market share of minority-owned businesses with the federal procurement market share that would be expected in the absence of discrimination. Credits will be available only in industries where the actual federal procurement market share ("utilization") falls short of the expected federal procurement market share ("capacity").

Constitutional Requirements

The administration developed this benchmarking methodology to ensure that federal procurement complies with the Supreme Court's decision in Adarand Constructors, Inc. v. Pena. In Adarand, the Court held that it is constitutional to provide targeted assistance to minority-owned businesses as long as two requirements are met. The first is that the assistance must serve a "compelling interest." This requirement is satisfied if there has been discrimination that has harmed minority business owners in the particular industry where assistance is to be provided. The second requirement is that the remedy is "narrowly tailored," that is, any assistance targeted to members of a certain race or ethnic group must be necessary to remedy discrimination and must be carefully designed to address its effects.

A. Compelling Interest

Based on an extensive review of evidence, the Department of Justice has established that discrimination has harmed minority businesses. In addition to commissioning an analysis of dozens of studies of industries throughout the country, DOJ also reviewed a long history of

Congressional findings of discrimination. Congress relied on these findings in enacting affirmative action and other remedial legislation. For example, there is substantial evidence that minority-owned businesses have been prevented from obtaining access to capital, from participating in trade associations, and from gaining enough experience to become bonded. Most of the present effects of discrimination stem from discrimination in the private sector, not in the public sector. These limitations have erected substantial barriers to minority-owned firms and have hampered their ability to win contracts. Consistent with Congress's long-standing determinations, the government has a compelling interest in providing targeted assistance to minority-owned businesses.

B. Narrow Tailoring

The use of benchmarks helps satisfy the Supreme Court's "narrow tailoring" requirement by providing a means for determining whether the effects of discrimination still burden small minority-owned businesses in a particular market. Credits will be available only in those markets where it is still necessary to offset the effects of discrimination. Based on FY 1996 data, the Department of Commerce estimates that industries representing about 74% of federal contract dollars awarded to SDB's will be eligible for price credits. The capacity and utilization of minority-owned businesses in 70 two digit SIC code groups and nine Census divisions for each of the three construction two digit SIC code groups were determined by analyzing data representing the firms in the United States that bid on federal contracts or participated in the 8(a) programs administered by the Small Business Administration. This group of firms represents those that were prepared to perform federal contracts in FY 1996.

The "utilization" of SDB's is simply a measure of the total dollar value of the federal contracts awarded to them in FY 1996. Calculating the "capacity" of these firms is more complex. In order to estimate capacity, the benchmarks take into account various characteristics of firms that bear directly on the value of contracts that they receive, including the age and size of the firm. This approach allows Commerce Department statisticians to estimate the value of contracts an SDB would be expected to receive if its success in winning federal contracts equaled that of all other firms in the industry of equal age and size. An outside panel of statisticians and economists reviewed this methodology and concluded that it was the best approach possible.

The Scope of the Program

Three agencies, the Department of Defense, NASA, and the Coast Guard have had authorization to offer credits since FY 1994. Under the rule announced today, all agencies will be required to implement the price evaluation credit program. Currently, data are available to allow application of the program to SDB prime contractors. The availability of credits will be extended to SDB subcontractors on November 1, 1998. Sometime during the next year, the Small Business Administration will also use benchmarks in administering the 8(a) program. Benchmarks will provide guidance to program administrators, for example, in determining the number and type of firms that will participate in the program and in deciding what contracts will be authorized under

the program. The federal benchmarks will not apply to the Department of Transportation's program for Disadvantaged Business Enterprises, which is administered by grantees, such as state and local governments.

The Advantages of Benchmarking

The benchmarking/price evaluation adjustment program offers several advantages in designing government affirmative action programs to assist SDB's.

Constitutionality -- The program responds to the core concerns about procurement-related affirmative action programs expressed by the Supreme Court. The Court has made clear that government may remedy discrimination by the government itself or by the private sector. However, the Court has also indicated that any affirmative action program should be designed to address the actual effects of past discrimination. Benchmarking provides a means for carefully targeting our efforts to remedy those effects.

Flexibility -- Benchmarks are not quotas. The price evaluation adjustment program includes a series of provisions designed to target assistance carefully, to ensure flexibility and to maintain vigorous competition. Price credits will not be available in all industries, only those where there is evidence of remaining effects of discrimination. Price credits will be available only when the government has concluded that race-neutral efforts are inadequate to address past discrimination. Even in cases when utilization falls short of capacity in a major industry grouping, the relevant agencies retain discretion to adjust or eliminate the credit under some circumstances.

Preserving Competition -- Price and evaluation adjustments are not set-asides. No firm or group of firms is guaranteed any contract. These credits provide a small boost for minority-owned firms when there has been a record of past discrimination. However, these firms must compete with all other firms for contracts. Only if the use of these credits fail to remedy discrimination are set-asides an option. As a result, government can make good faith efforts to remedy prior discrimination, while preserving the incentives for firms to compete vigorously for taxpayer dollars.

Periodic Review -- Federal procurement data will be reviewed periodically to ensure that price credits are available only in those industries where the effects of discrimination persist.

Industries Where Credits are Available

Benchmarking estimates are based on two digit SIC code groups. With the exception of construction, for which regional benchmarks have been developed, the estimates are for the nation as a whole. Based on these benchmarks, the Department of Commerce has identified the industries in which credits will be available. A table showing these industries appears in the Federal Register of June ___, 1998.

Race - affirmative action - procurement

Richard L. Hayes 03/12/98 05:04:00 PM

Record Type: Record

To: Andrew J. Mayock/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: Re: Benchmarking et al

Andrew, thanks for the summary. I talked to Nancy McFadden at DOT and it will be difficult for them to complete their regs in April -- it will be more like mid-late May, but she did commit to trying to get them done before the ISTEA conference. We will call a meeting soon: DOT, Justice and OGC , et al to sit down and discuss the various issues. Also, just to be clear, there are two SBA regulations, both of which will be held until the rollout -- one deals with establishing the SDB program and the other deals with various good government changes to the 8(a) program. Othewise, your meeting summary looks good.

Message Copied To:

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Race-affirm action - procurement

Andrew J. Mayock
03/12/98 08:22:19 AM

Record Type: Record

To: See the distribution list at the bottom of this message

cc: See the distribution list at the bottom of this message
Subject: Benchmarking et al

So that eveyone is on the same page or near it, here's a recap of yesterday's meeting. (Please let me know of any omissions/mistakes.) Thanks.

- DOT/DBE regs will be rolled out possibly sometime in April, but in any event, prior to the Senate ISTEA conference. However, Tracey is to check with members on whether this is the right timing.

  Richard and Tracey will work together on Senate briefings for DOT/DBE roll-out

- After the ISTEA conference and vote, expected in May, we will proceed with the roll-out of the benchmarking regs (i.e., FAR and SBA regs and Commerce numbers) in June/July. Subcontracting regs will be rolled out in October or later.

  Sylvia and Richard will hold a conference call with David Lane to discuss roll-out.

- The Vice President will do the Hubzones announcement on April 3/4.

- The Vice President and Secretary Rubin will do the mentoring announcement in the near term also, probably while the President is in Africa.

- A POTUS affirmative action event (education/business) will be decided at a later date.

Message Sent To:

Race - affirmative action - procurement

AFFIRMATIVE ACTION PROCUREMENT REFORM ROLL-OUT AND AMPLIFICATION

OBJECTIVES

- *Illustrate the President's on-going commitment to affirmative action*
- *Present an accurate and complete portrayal of the what the President has done to "mend affirmative action" procurement programs to the media and public*
- *Ramp up Federal government efforts to implement the reform program*
- *Illustrate other things federal agencies and the private sector are doing to promote diversity*

Week of February 23-27, 1998

Briefings:

• POTUS	Chuck Ruff/Other Staff
• Staff from Senator Kennedy/Daschael/Gephardt/Leahy/Bacus/ DPC offices	WH
• Wade Henderson, Nancy Zirkin, Weldon Latham, Harold McDougall, Tom Henderson, Penda Hair, Elaine Jones, Tony Robinson, Cobbie DeGraft, Joann Payne, and Helen Norton	WH
• Bill Lee hearing	Justice

Materials:

• Verify methodology for benchmarks and price credits	Commerce
• Finalize Federal Acquisition Regulations (FAR) *[Note: There will be two FAR rules published one-day apart: The first one will offer price credits for SDBs, effective May 7, 1998; and the second rule, which will modify the first rule, will offer subcontracting credits for prime contractors, effective September 1, 1998.]*	OIRA
• Finalize SBA regulations *[Note: There will be two SBA rules: The first one will make changes to the 8(a) program; and the second rule will establish the SDB certification program.]*	SBA/OIRA
• Revise benchmarks technical paper, talking points and Q&As	Commerce/Justice/WH
• Draft implementation plan for agency procurement officials	OFPP
• Revise *Federal Register* notice announcing benchmarks and price credits	OFPP/WH
• Revise press plan/message	Ann Lewis
• Finalize SDB Certification talking points	Richard Hayes
• Finalize regulatory analysis and "emergency" paperwork clearance forms	SBA/OIRA
• Develop constituency/outreach lists	OPL/Intergovernmental
• Relevant FY '99 budget materials (e.g., civil rights enforcement)	OMB

- Draft Presidential letter to agencies — Hayes/Weiner/Chirwa

Week of March 2 - 6, 1998

Materials:

- Send FAR rules to *Federal Register* on March 3 for publication, March 9 and 10, 1998 — OFPP/FAR
- Send SBA rules to *Federal Register* on March 3 for publication, March 9, 1998 — OFPP/FAR
- Reproduce all materials (benchmarks technical paper, talking points, Q&As, accomplishments, etc.) — OPL
- Distribute materials to surrogates/validators — Hayes
- Draft/circulate POTUS remarks — Speech writers
- Finalize Presidential letter to agencies — Hayes/Weiner/Chirwa

Briefings:

- Cabinet — Erskine/Ruff
- Aida Alvarez's House and Senate testimony — SBA
- Congressional Black Caucus — Surrogates: TBD
- Congressinal Hispanic Caucus — Surrogates: TBD
- Congressional Asian Pacific American Caucus — Surrogates: TBD
- Native American Caucus — Surrogates: TBD
- Blue Dog Coalition — Surrogates: TBD
- New Democrats — Surrogates: TBD
- Gephardt's Affirmative Action Task Force — Surrogates: TBD
- House and Senate Appropriations Subcomittee on Commerce, Justice, State, the Judiciary and Related Agencies — WH/SBA Leg. Affairs/ Justice
- House and Senate Small Business Committees — WH/SBA Leg. Affairs
- House Judiciary Subcommittee on the Constitution (Minority Staff) — WH/SBA Leg. Affairs
- Senator Carol Mosely Braun — WH/SBA Leg. Affairs
- Senator Kay Bailey Hudtchinson — WH/SBA Leg. Affairs
- Senator Pete Domenici — WH/SBA Leg. Affairs
- Senator Frank Lautenberg — WH/SBA Leg. Affairs

Print:

- Mail materials to minority and speciality press — Communications
- Conduct background interview with Jon Peterson — Surrogates: TBD

Week of March 9-13, 1998

Briefings:

• WH annoucement	Surrogate: TBD
• Agency General Counsels	Justice/Counsel to the President
• Chiefs-of-Staff	Cabinet Affairs
• Agency procurement officials/OSDBUs	OFPP/Justice
• Two briefings in Room 450 for civil rights, minority business and women's community	OPL/Intergovernmental
• One way conference call with key leaders around country	OPL/Intergovernmental
• President's Initiative on Race Advisory Committee and staff	Surrogate: TBD
• WH Press Corps	Surrogate: TBD

Print:

• Conduct interviews with major press outlets (N.Y. Times, Washington Post, Chicago Sun Times, Wall Street Journal)	Surrogate: TBD
• Conduct interviews with press outlets in targeted Cities	Surrogate: TBD
• Conduct interviews with minority and speciality press	Surrogate: TBD
• Mail materials to top 250 editorial boards	Communications

Television:

• BET Public Affairs show	Surrogate: TBD
• Both Sides with Jessie Jackson	Surrogate: TBD
• Univison's Temas y Debates	Surrogate: TBD
• Spanish Language Network	Surrogate: TBD

Radio:

• Urban Radio Network	Surrogate: TBD

Cabinet Travel:

- Tuesday, Wednsday, Thursday or Friday - TBD

People to be active:

• Cabinet members	TBD
• WH Senior Staff	TBD
• Local Elected Officials	TBD
• Surrogates	Constituency Leaders: TBD Validators (Wade Henderson, Deval Patrick, Weldon Latham, Elaine Jones, Nancy Zirkin, Marcia Greenberger, Chris Edley, Joann Payne, Jessie Jackson, Anthony Robinson, Georgina Verdugo, Karen Naraski, more - TBD) Republicans/moderates - TBD Real people - TBD

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ASTARAID CONSTRUCTORS, INC.,

Plaintiff-Appellee,

v.

RODNEY E. SLATER, Secretary of Transportation, et al.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE FEDERAL APPELLANTS

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 97-1304

ADARAND CONSTRUCTORS, INC.,

Plaintiff-Appellee

v.

RODNEY E. SLATER, Secretary of Transportation, et al.,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

REPLY BRIEF FOR THE FEDERAL APPELLANTS

I

CONGRESS HAD A COMPELLING INTEREST IN REMEDYING THE EFFECTS OF DISCRIMINATION ON FEDERAL CONTRACTING

Although it ultimately held the Department of Transportation's Subcontracting Compensation Clause (SCC) and federal aid programs to be unconstitutional on narrow tailoring grounds, the district court found that Congress had a compelling interest in enacting the statutes that support these DOT programs — remedying the effects racial discrimination has had on the ability of minorities to share in the benefits of federal government contracting. In our opening brief, we explained why the district court's holding was wrong with respect to the narrow tailoring portion of its strict scrutiny analysis. Adarand and amici now challenge, on a variety of grounds, the district court's analysis of the government's compelling interest. These challenges are without

basis, however, as they fail to acknowledge the important differences in authority between Congress and a state or local legislative body, and the vast body of evidence supporting the congressional findings.

A. Congress Is A National Legislature With Broad Authority To Remedy Nationwide Problems Of Discrimination.

1. Federal Courts Must Defer To Congress's Authority To Make Findings Concerning National Problems.

Adarand and amici Pacific Legal Foundation (PLF) and Associated General Contractors (AGC) assert that the district court gave undue deference to Congress's finding of a compelling interest in remedying the effects nationwide discrimination has had on federal construction contracting. Adarand mischaracterizes the nature of the district court's analysis, and fails to recognize the significant distinctions in the remedial authority of Congress, as national legislature and coequal branch of government, and that of a state legislature or local city council — distinctions frequently reaffirmed by the Supreme Court and still relevant under strict scrutiny.

The district court properly recognized that strict scrutiny now applies to federal as well as to state and local race-conscious action (App. 202-203).[1/] The district court did not, as Adarand and amici allege, blindly defer to Congress's authority under § 5 of the Fourteenth Amendment. Rather the court found it unnecessary to resolve the question (expressly not addressed by the Supreme Court) of the precise extent of that authority and the deference owed to findings made pursuant to it.[2/] The court rested its analysis instead on Congress's unique authority to legislate

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[1/] References to "App. _" are to pages in the Appellants' Appendix filed with our opening brief.

[2/] Adarand argues that § 5 authorizes Congress to enforce equal protection guarantees only against the states, and therefore cannot provide any basis for deference regarding the SCC, which affects only direct federal contracting (Br. 36). If, as we argue, courts should defer when

nationwide remedies for nationwide problems (App. 205-206).[3] Applying strict scrutiny, the district court therefore concluded that, in order to establish a compelling interest justifying national, race-conscious legislation, Congress must have a strong basis in evidence of discriminatory barriers facing minority-owned businesses in federal construction contracting nationwide (App. 206).[4]

Congress acts to ensure state compliance with equal protection rights, at least equal deference is due to congressional efforts to assure that federal programs do not inadvertently perpetuate discrimination. See Rostker v. Goldberg, 453 U.S. 57, 64 (1981) (noting that "customary deference accorded the judgments of Congress" is based on the fact that members of Congress have taken the same oath as federal judges "to uphold the Constitution of the United States"). Moreover, Adarand fails to note that, even if § 5 does not apply directly to DOT's use of the SCC in its own contracts, it would be directly applicable and would require appropriate judicial deference when the constitutionality of the separate "federal aid" program is considered, since that program does involve regulation of state action. See Fullilove v. Klutznick, 448 U.S. 448, 476 (1980) (plurality). See discussion in Part III, infra, at pp. 24-25. Nothing in the Supreme Court's decision in this case changed existing law in that respect. See Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 230-231 (1995). Finally, AGC's claim that the SCC improperly regulates private parties (Br. 10-11) is simply incorrect; the SCC does not require prime contractors to do anything, but rather serves as one means of implementing the congressional intent that federal government spending not perpetuate the effects of discrimination.

[3] The discussions by Adarand and amici of the nature and scope of Congress's § 5 authority (Adar. Br. 35-36, AGC Br. 7-14, PLF Br. 14-15) are largely beside the point. While the Fourteenth Amendment does contain an express constitutional grant of authority to enforce equal protection rights, and therefore reinforces the unique role played by Congress in enacting national legislation to prevent and remedy racial discrimination (see, e.g., City of Richmond v. J.A. Croson Co., 488 U.S. 469, 490 (1989) (opinion of O'Connor, J.) (noting that Congress has specific constitutional mandate to secure guarantees of Fourteenth Amendment and so may "identify and redress the effects of society-wide discrimination")), that nationwide remedial authority derives from other sources as well, including the Thirteenth and Fifteenth Amendments, the Spending Clause, and the Commerce Clause. Because the challenged legislation is clearly within Congress's Spending Clause power and does not involve the invalidation of any state law, the Supreme Court's decision in City of Boerne v. Flores, 117 S. Ct. 2157 (1997), has no bearing on this case. Finally, AGC's argument that § 5 is inapplicable because it does not authorize federal government discrimination (Br. 13-14) is circular, as it is based on the false assumption that Congress lacked a valid remedial purpose for enacting the challenged legislation. See Fullilove, 448 U.S. at 476-478 (MBE program is proper exercise of § 5 authority).

[4] Contrary to Adarand's suggestion (Br. 30), Congress need not demonstrate a current pattern of "deliberate exclusion of minorities" in the construction industry, but rather that the pervasive and persistent effects of past discrimination on minority participation in federal contracting

The district court's analysis is entirely consistent with the Supreme Court's decisions in Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995), and City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). In Croson, the Court drew an express distinction between the remedial authority of Congress and that of state and local governments. "That Congress may identify and redress the effects of society-wide discrimination does not mean that * * * States and their political subdivisions are free to decide that such remedies are appropriate." 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis added). A state or local government has only "the authority to eradicate the effects of private discrimination within its own legislative jurisdiction." Id. at 491-492 (emphasis added). By contrast, Congress has the jurisdiction and authority to address problems of discrimination that are "society-wide" in scope through legislation with nationwide application.

Nothing in the Supreme Court's Adarand decision eliminates this fundamental distinction. The Court in Adarand merely clarified the standard of review that courts should apply to federal racial classifications; it did not limit Congress's legislative authority. While strict scrutiny mandates that courts examine legislative motives closely to determine which classifications are truly "'benign' or 'remedial'" and "to 'smoke out' illegitimate uses of race," Adarand, 515 U.S. at 226 (quoting

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continue. See Adarand, 515 U.S. at 237 (government may act in response to "both the practice and the lingering effects of racial discrimination against minority groups"); id. at 269 (Souter, J., dissenting) (noting that majority decision does not affect principle that "constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems"). Similarly, Adarand's assertion that the government must provide evidence of discrimination "by the federal government or its employees" (Br. 35 n.31) is simply incorrect. The federal government spends immense sums procuring goods and services, and Congress has a compelling interest in ensuring that its procurement activities do not perpetuate the effects of private discrimination that has tended to exclude minority firms from equal participation in federal contracting. See Croson, 488 U.S. at 492 (opinion of O'Connor, J.) ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.").

Croson, 488 U.S. at 493 (opinion of O'Connor, J.)), it does not reduce Congress to the level of a city council before a federal court. See Croson, 488 U.S. at 489 (opinion of O'Connor, J.) ("other governmental entities might have to show more than Congress before undertaking race-conscious measures: 'The degree of specificity required in the findings of discrimination and the breadth of discretion in the choice of remedies may vary with the nature and authority of the governmental body'") (quoting Fullilove v. Klutznick, 448 U.S. 448, 515-516 n.14 (1980) (Powell, J., concurring)); cf. Adarand, 515 U.S. at 228 (noting that "strict scrutiny does take 'relevant differences' into account"). Under strict scrutiny, while the federal government must narrowly tailor race-conscious action to serve Congress's compelling interest, the judicial inquiry into that interest is different from the inquiry a federal court makes when determining whether a local governmental entity has acted with a compelling interest.

Nor does the application of strict scrutiny, as Adarand contends, require this Court to ignore crucial institutional differences between Congress, a coequal branch of the federal government, and a city council or local school board. See Adarand, 515 U.S. at 230 ("requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a 'compelling interest' does not contravene any principle of appropriate respect for a co-equal branch of the Government"); see also Fullilove, 448 U.S. at 472 (plurality) ("When we are required to pass on the constitutionality of an Act of Congress, we assume 'the gravest and most delicate duty that this Court is called on to perform'") (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927)).[2] As the district court observed, "[t]here is a fundamental difference between the record of

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[2] See generally Walters v. National Ass'n of Radiation Survivors, 473 U.S. 305, 319-320 (1985) ("we begin our analysis here with no less deference than we customarily must pay to the duly enacted and carefully considered decision of a coequal and representative branch of our

congressional hearings * * * and the 'highly conclusionary statement of a proponent' of the plan challenged in Croson" (App. 207). The extensive history of congressional hearings and findings supporting the legislation challenged in this case does not, as Adarand would have this Court believe, amount to "no more than self-serving, conclusory characterizations" (Br. 33), but rather demonstrates that Congress has given careful and repeated consideration over the years both to the problem it sought to address and the means by which it should do so. The congressional statements and findings to which Adarand objects "were made after exercising the significant and well-recognized fact finding authority vested in that body" (App. 207-208). See Turner Broad. Sys., Inc. v. FCC, 117 S. Ct. 1174, 1189 (1997) (noting in context of First Amendment challenge that congressional findings are entitled to deference because Congress is far better equipped than judiciary to "amass and evaluate the vast amounts of data" bearing upon legislative questions) (quoting Walters, 473 U.S. at 331 n.12).

2. Strict Scrutiny Does Not Require Congress To Make Local Findings.

PLF's reliance (Br. 9-10) on Croson for the proposition that the federal government must make specific findings concerning effects of discrimination in each and every state and local market before enacting national legislation affecting those jurisdictions is misplaced. In Croson, the Court rejected the City of Richmond's attempt to justify a "rigid [30%] racial quota" in the awarding of City contracts where the City presented no evidence of discrimination in the Richmond construction

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Government," and "[t]his deference to congressional judgment must be afforded even though the claim is that a statute Congress has enacted effects a denial of the procedural due process guaranteed by the Fifth Amendment"). The Supreme Court's Adarand decision left this principle undisturbed. See City of Boerne, 117 S. Ct. at 2171-2172 (enactments of Congress enjoy "presumption of validity," and "[i]t is for Congress in the first instance to 'determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment'") (quoting Katzenbach v. Morgan, 384 U.S.641, 651 (1966)).

industry. 488 U.S. at 499-500, 504. This does not establish, however, that Congress may not exercise its nationwide jurisdiction to address a national problem at the national level, but rather must make localized, market-by-market findings for each covered local jurisdiction throughout the country. Neither the Supreme Court nor this Court has ever imposed such an impossible burden, and Adarand and amici cite no authority for such a proposition. Indeed, the Supreme Court has firmly established that when Congress acts to combat the effects of racial discrimination that it has found to exist on a nationwide scale, its legislation applies to every state and locality without the necessity of individual findings that circumstances in each locality, if unaffected by the legislation, would violate the Equal Protection Clause. See Oregon v. Mitchell, 400 U.S. 112, 133-134 (1970) (Black, J.); id. at 147 (Douglas, J.); id. at 231-236 (Brennan, White, Marshall, J.J.).[9]

B. Abundant Evidence Supported Congress's Finding That § 8(d)'s Race-Conscious Presumption Was Necessary To Remedy Continuing Effects Of Discrimination On Minority Participation In Federal Contracting.

Congress had more than sufficient evidence to support its conclusion that remedial action was necessary to redress the racially discriminatory exclusion of minority-owned businesses from federal contracting opportunities. Strict scrutiny does not require Congress to make the kind of formal findings of fact that would be required in a district court proceeding. It requires only that Congress have a "strong basis in evidence" for its belief that remedial action is necessary. See

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[9] In addition, more detailed and specific findings may be necessary to support a rigid 30% set-aside in one local market, such as that struck down in Croson, than to support a flexible 5% or 10% national goal. The SCC is quite different from the rigid quota struck down in Croson. Because no federal prime contractor is required by the SCC to use a disadvantaged business enterprise (DBE) subcontractor, actual use of the SCC will likely vary according to the availability of qualified DBEs in each market. Cf. Croson, 488 U.S. at 504 (noting that national program upheld in Fullilove included a waiver procedure in recognition of the varying scope of the problem in different market areas).

Croson, 488 U.S. at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (plurality)). The testimony, reports, and statistics available to Congress more than adequately supply that strong basis. Although the government must bear the initial burden of coming forward with a strong basis in evidence demonstrating Congress's compelling interest in a race-conscious affirmative action program, "[t]he ultimate burden [of proof] remains with [the challenging party] to demonstrate the unconstitutionality of" the program. Concrete Works of Colo. v. Denver, 36 F.3d 1513, 1522 (10th Cir. 1994) (quoting Wygant, 476 U.S. at 277-278), cert. denied, 514 U.S. 1004 (1995). This Adarand has failed to do. Neither Adarand nor amici have presented evidence contradicting the extensive and detailed findings made by successive Congresses over the past two decades concerning the continuing need to remedy the effects of racial discrimination on federal contracting. Indeed, Adarand has failed to make more than "conclusory allegations" concerning the congressional findings relied on by the district court. Concrete Works, 36 F.3d at 1524.

In support of its findings, Congress has primarily considered two types of evidence. During the past two decades Congress has had the benefit of numerous reports and statistics bearing on the question of the continuing need for programs to assist minority-owned and other disadvantaged small businesses to participate fully and equally in federal contracting. In addition, in its many hearings concerning the unique obstacles confronted by minority-owned businesses in federal contracting, Congress has also heard the testimony of hundreds of individual witnesses, complementing the empirical evidence and contributing to the strong basis in evidence supporting the need for assistance to minority-owned firms. See Concrete Works, 36 F.3d at 1520. This combination of extensive empirical and anecdotal evidence, only a fraction of which can be summarized here, more than adequately supports Congress's determination that the effects of

discrimination continue to hinder the ability of minority-owned firms to secure a fair share of federal contracts and subcontracts, as well as federally assisted state and local projects.[7/]

1. Legislative record. Congress enacted the Small Business Act, 15 U.S.C. 631 et seq., in 1953 to provide various forms of assistance to small businesses. By the late 1970s, however, Congress had determined, on the basis of reports, statistical evidence, and its own hearings, that existing programs had done little to help small minority-owned firms. See Small and Minority Business in the Decade of the 80's Pt. 1: Hearings Before the House Comm. on Small Business, 97th Cong., 1st Sess. 4, 118 (1981) (Small and Minority Business). Congress found "that small businesses owned by socially and economically disadvantaged persons have developed slowly and that among such businesses are minority small businesses, which * * * have been unable to overcome negative conditions impacting upon them," and that "it is in the national interest to expeditiously ameliorate these negative conditions faced by many minority and other socially and economically disadvantaged businesses." H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 20-21 (1978), reprinted in 1978 U.S.C.C.A.N. 3879, 3881.[8/] In 1978, therefore, Congress amended §8 (d) of the Small Business Act, 15 U.S.C. 637(d), to establish that it was the policy of the United

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[7/] Contrary to Adarand's suggestion (Br. 34 n.30), the government was not required to make the many thousands of pages of congressional reports, hearing testimony, and statistical studies part of the evidentiary record in this case. Although the government attached to its summary judgment motion a summary of that vast evidentiary record to assist the court (App. 99-111), the legislative history and other documents are themselves a matter of public record. For a more comprehensive overview of the evidence available to Congress, see 61 Fed. Reg. 26,050-26,063 (1996) (U.S. Br. Addendum 4).

[8/] Congress recognized, however, "that other Americans may also suffer from social disadvantagement because of cultural bias," such as "a poor Appalachian white person who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons." 1978 U.S.C.C.A.N. at 3882.

States that small businesses owned by socially and economically disadvantaged individuals should have the "maximum practicable opportunity" to participate in federal contracts and subcontracts. Pub. L. No. 95-507, § 211(d), 92 Stat. 1767. The amended § 8(d) also established a presumption that members of specified minority groups found by Congress to have been excluded from participation in government contracting due to racial discrimination should be regarded as socially and economically disadvantaged.

One year earlier, Congress had sought to address the same problem through § 103(f)(2) of the Public Works Employment Act (PWEA) of 1977, Pub. L. No. 95-28, 91 Stat. 116-117, which provided that state and local recipients of federal grants for public works projects must agree, to the extent possible, to spend 10% of the grant funds with "minority business enterprises" (MBEs). The Supreme Court upheld the constitutionality of the MBE provision in Fullilove v. Klutznick, 448 U.S. 448 (1980), and Chief Justice Burger's plurality opinion cited the "abundant evidence from which [Congress] could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." Id. at 477-478.[2/] That evidence included "evidence of a long

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[2/] Although the plurality did not use the term "strict scrutiny," it recognized "the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal," and therefore conducted "a most searching examination." Fullilove, 448 U.S. at 480, 491. The plurality further stated that the MBE provision would survive judicial review under any of the analyses articulated in the various opinions in Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978). See Fullilove, 448 U.S. at 492. Justice Powell, concurring, agreed that the plurality's analysis substantially accorded with his own adoption in Bakke of a strict scrutiny standard, and that the MBE provision was "a necessary means of advancing a compelling governmental interest." Fullilove, 448 U.S. at 496 (Powell, J., concurring). The Supreme Court in Adarand did not overrule Fullilove, but rather held only that, "to the extent (if any) that Fullilove held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." 515 U.S. at 235 (emphasis added).

history of marked disparity in the percentage of public contracts awarded to minority business enterprises," which Congress had found resulted "not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination."[10/] 448 U.S. at 478; see also id. at 506 (Powell, J., concurring) (in light of evidence before Congress, "court must accept as established the conclusion that purposeful discrimination contributed significantly to the small percentage of federal contracting funds that minority business enterprises have received").

Congress continued to hold hearings and make findings concerning the continuing disadvantages racial discrimination imposed on minority firms in federal contracting. At hearings conducted during the 1980s, witnesses testified about personal experiences of discrimination in obtaining supplies, see, e.g., Small and Minority Business at 26; being excluded from the "good old boy network," id. at 34, 37; and discrimination by financial institutions and others, id. at 106, 277. In 1987, the House Committee on Small Business found that "discrimination and the present effects of past discrimination" continued to hinder minority business development, and that minority businesses continued to "receive a disproportionately small share of Federal purchases," with more than half of that share coming through the sheltered market of the § 8(a) program. H.R. Rep. No.

[10/] The provision's sponsor noted that, in fiscal year 1976, minorities constituted 15-18% of the population, but that less than 1% of federal procurement was with minority business enterprises. Fullilove, 448 U.S. at 459 (citing 123 Cong. Rec. 5,098 (1977) (remarks of Rep. Mitchell)). The Court also cited a 1975 committee report finding that only 3% of the country's businesses were owned by minority individuals. Fullilove, 448 U.S. at 465 (quoting H.R. Rep. No. 94-468 at 1-2 (1975)). The 1977 Report of the House Committee on Small Business found that "[t]he very basic problem disclosed by the testimony is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation * * * . Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities." Fullilove, 448 U.S. at 466 n.48 (quoting H.R. Rep. No. 94-1791 at 182 (1977)).

460, 100th Cong., 1st Sess. 18 (1987). The Committee noted that in fiscal year 1986, only 1.6% of federal subcontract dollars went to small disadvantaged businesses. H.R. Rep. No. 100-460 at 37. According to 1987 census data, however, minority-owned firms constituted 8.9% of all businesses. See The State of Small Business: A Report of the President 334 (1992).[11/] In 1988, Congress amended the Small Business Act to establish a 5% government-wide goal for federal contract participation by small disadvantaged businesses, including minority-owned firms. See Pub. L. No. 100-656, § 502, 102 Stat. 3881; 15 U.S.C. 644(g).

In 1982, Congress first established the 10% goal for disadvantaged business enterprise (DBE) participation in federally assisted highway and mass transit projects. That goal, contained in § 105(f) of the Surface Transportation Assistance Act (STAA), Pub. L. No. 97-424, 96 Stat. 2100, was expressly modeled on the PWEA provision upheld in Fullilove. See S. Rep. No. 4, 100th Cong., 1st Sess. 11 (1987), reprinted in 1987 U.S.C.C.A.N. 66, 76. Congress reauthorized the 10% goal (which now included businesses owned by women) in Section 106(c) of the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Pub. L. No. 100-17, 101 Stat. 145-146, after holding hearings examining the continuing need to remedy the effects discrimination has had on the ability of minority businesses to share in public construction contracting.[12/] On the basis of that "extensive testimony and evidence," Congress concluded that "barriers still remain" to participation by minorities and women in the highway and mass transit construction industry. S. Rep. No. 100-4 at 11, reprinted in 1987 U.S.C.C.A.N. at 76. Four years

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[11/] The State of Small Business is an annual report submitted by the SBA to Congress.

[12/] See, e.g., The Disadvantaged Business Enterprise Program of the Federal-Aid Highway Act: Hearing Before the Subcomm. on Transp. of the Senate Comm. on Environment and Pub. Works, 99th Cong., 1st Sess. (1985) (addressing capacity of minority-owned firms in relation to goal).

later, Congress again reauthorized the program in § 1003(b) of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. No. 102-240, 105 Stat. 1919-1921. Thus Congress has repeatedly reexamined the DBE program and concluded that it is still necessary. Congress has continued throughout the 1990s to oversee and reevaluate both the ISTEA and Small Business Act goals.[13/]

2. Additional evidence. Recent evidence obtained by the government continues to support the constitutionality of the SCC. See Concrete Works, 36 F.3d at 1521 (court may consider post-enactment evidence in support of challenged legislation). In 1992, the U.S. Commission on Minority Business Development concluded that the continuing severe underrepresentation of minorities in business was not due to "choice or chance," but rather was caused by "[d]iscrimination and benign neglect." Final Report 60 (1992). In 1992, minorities owned 9% of all businesses, but received only 4.1% of federal contracting dollars — despite the Small Business Act and STURAA/ISTEA goals. See State of Small Business 362 (1994).

In addition, following Croson, many state and local governments undertook formal disparity

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[13/] See, e.g., City of Richmond v. J.A. Croson: Impact and Response: Hearing Before the Subcomm. on Urban and Minority-Owned Business Development of the Senate Comm. on Small Business, 101st Cong., 2d Sess. 34-35, 39-42, 46-48, 51-53, 57-70 (1990) (testimony on continuing discrimination against minority-owned businesses); The Meaning and Significance for Minority Business of the Supreme Court Decision in the City of Richmond v. J.A. Croson Co.: Hearing Before The Legislation And National Security Subcomm. of the House Comm. on Government Operations, 101st Cong., 2d Sess. 30-39, 94-110, 129-142 (1990) (same); see id. at 111-128 (detailed testimony on discrimination in the construction industry); Problems Facing Minority and Women-Owned Small Businesses In Procuring U.S. Gov't Contracts: Hearing Before the Commerce, Consumer, and Monetary Affairs Subcomm. of the House Comm. on Government Operations, 103d Cong., 1st Sess. 19, 47-48, 57-60 (1993) (negative perceptions of and discrimination against minority business); Discrimination in Surety Bonding: Hearing Before the Subcomm. on Minority Enterprise, Finance, and Urban Development of the House Comm. on Small Business, 103d Cong., 1st Sess. (1993) (continuing discrimination in surety bonding).

studies to determine whether there was evidence of continuing racial discrimination in their contracting markets. An analysis of 39 such studies from around the country found significant underutilization of black, Hispanic, Asian, and Native-American-owned businesses based on their availability in every industry.[14/] See 61 Fed. Reg. at 26,061-26,062 (U.S. Br. Addendum 4). The effects of discrimination account for much of this continuing disparity. In 1994, the House Committee on Government Operations found on the basis of hearing testimony that discrimination has denied minorities "opportunities to develop business skills and attitudes, to obtain necessary resources, and to gain experience" -- all essential to small business success. H.R. Rep. No. 870, 103d Cong., 2d Sess. 5 (1994). The Committee further found that, as a result, "many predominantly minority communities are desperately short of employment opportunities created by small businesses." Ibid. Finally, the Committee found that minority-owned firms face particular difficulties in the construction industry, which is dominated by "old buddy" networks and family firms, and tends to exclude minority firms. Id. at 15 & n.36. Congress has heard extensive testimony regarding the exclusion of minority firms from established networks of prime contractors, suppliers, and others. See generally 61 Fed. Reg. at 26,058-26,061.

[14/] Although Congress may legislate on a national basis without making locality-by-locality findings, the record reflects significant evidence of continuing effects of discrimination in Colorado construction contracting. The district court noted a "serious pattern of discrimination" identified in the Denver disparity study cited by amici below (App. 208). Moreover, in Concrete Works, this Court discussed extensive evidence of discrimination in the construction industry in the Denver Metropolitan Statistical Area, including an uncontested report by the United States General Accounting Office showing an "actual disparity between the utilization of minority contractors and their representation in the local construction industry," as well as DOT findings of underutilization on airport construction contracts and Denver's own disparity studies. 36 F.3d at 1524-1527. Although the Court found that plaintiff had identified material disputes of fact sufficient to preclude summary judgment for the City, 36 F.3d at 1528-1529, it characterized Denver's evidence as "substantial" and "particularized and geographically targeted." Id. at 1530.

Discrimination in commercial lending continues to handicap minority-owned businesses. The Committee heard testimony that, particularly in the construction industry, the "negative perception of minority business" creates reluctance by commercial lenders to take the same risks with a minority-owned business that they would with a nonminority-owned business. H.R. Rep. No. 103-870 at 6-8; see also Availability of Credit to Minority-Owned Small Business: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking, Finance and Urban Affairs, 103d Cong., 2d Sess. 19-20, 22, 27 (1994); see generally 61 Fed. Reg. at 26,057-26,058 (U.S. Br. Addendum 4).[15/] Such disparities create a "cycle of negativity," in which minority firms cannot grow and succeed due to difficulties in obtaining financing, which in turn reinforces prejudicial attitudes that make access to capital even more difficult because of the perceived risk. Final Report at 6. Providing access to federal subcontracting opportunities can help break this cycle by helping minority firms demonstrate to lenders that they will be able to secure contracts and repay loans. Congress has also heard extensive testimony regarding similar problems of discrimination in surety bonding. See Discrimination in Surety Bonding at 2-3, 7-9, 16, 18, 25-26, 41; H.R. Rep. No. 103-870 at 14-16.

In sum, it is beyond dispute that Congress, over the course of two decades, has reviewed the relevant evidence and has consistently found that minority-owned businesses suffer from the effects of racial discrimination, that those effects hinder the ability of minority firms to participate equally in federal contracting, and that remedial legislation is necessary to address these problems. Adarand provides no evidence to the contrary.

[15/] Indeed, a recent study of the Denver, Colorado, area shows significant disparities in the loan denial rate between whites and minorities, even after controlling for other factors. Univ. of Colorado, Survey of Small Business Lending in Denver, p. v (1996).

II

BOTH THE SCC AND THE ISTEA AND SMALL BUSINESS ACT GOALS ARE NARROWLY TAILORED

A. The Rebuttable Presumption Of Disadvantage Is Not Unconstitutionally Overinclusive Or Underinclusive.[16/]

Adarand argues that the § 8(d) presumption of disadvantage used in the SCC (and also applicable to the ISTEA federal aid program) is overinclusive because it applies to all members of the specified groups without an individualized determination whether each beneficiary has suffered discrimination. Like the district court, Adarand mistakes for a constitutional defect an aspect of the SCC that actually makes it far more narrowly tailored than the purely race-based MBE program upheld in Fullilove.

Given the abundant evidence of continuing effects of discrimination on federal subcontracting opportunities for minorities, Congress could have used (as it did in the legislation upheld in Fullilove) a simple race-based classification to assist only minority-owned businesses. Instead, Congress decided to enact a remedy that would take factors other than race into account. It therefore defined eligibility for § 8(d) programs in terms of social and economic disadvantage, so that members of other ethnic and cultural groups that have suffered discrimination (including Caucasians) could also benefit. Under § 8(d), members of the specified minority groups are entitled only to a rebuttable presumption of disadvantage, while all others have the opportunity to qualify for the same benefits by establishing disadvantage on an individual basis. What Adarand and the

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[16/] Adarand alleges that "[t]he Government seeks to eviscerate strict scrutiny as a dual test and to replace it with a unitary requirement of compelling interest, with no requirement of narrow tailoring" (Br. 33 n.28). The government has made no such argument, and indeed devoted a substantial portion of its opening brief to explaining why the SCC program is narrowly tailored.

district court fail to recognize, however, is that the compelling interest supporting the initial race-based presumption is not remedying disadvantage generally, but rather remedying the effects of specifically racial discrimination. The presumption is not overinclusive in a constitutional sense merely because some individuals entitled to the presumption of disadvantage might not be able to make an individualized showing of disadvantage; rather, the statute reflects Congress's judgment that it is more likely than not that a given member of the specified minority groups has suffered some disadvantage due to discrimination. See H.R. Conf. Rep. No. 95-1714 at 21-22, reprinted in 1978 U.S.C.C.A.N. at 3882. The use of a rebuttable presumption, rather than an absolute entitlement, merely refines and narrows the program without placing additional obstacles of proof in the way of the very persons Congress primarily intended to assist.[17/]

As explained in our opening brief (U.S. Br. 26-27), there is no basis for Adarand's contention (Br. 11) that the Constitution limits beneficiaries of race-conscious affirmative remedial measures to individual victims of proven discrimination.[18/] See Wygant, 476 U.S. at 287 (O'Connor, J., concurring). Adarand also argues that DOT's proposed new regulations governing

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[17/] By its very terms, § 8(d)'s rebuttable presumption cannot be underinclusive, since no one is excluded from participating if qualified. The mere fact that individuals who are not members of the specified groups must demonstrate disadvantage does not render the program unconstitutional (Adar. Br. 13, 18). Without such a requirement, it would be impossible to make participation available to members of groups not included in the statutory presumption. Nor would it be possible to specify in advance every possible group that might be able to claim disadvantage from racial, ethnic, or cultural bias.

[18/] Croson is not to the contrary. The Court in Croson held that the City had failed to identify any prior discrimination within its jurisdiction against the racial groups benefited by the set-aside, 488 U.S. at 507, and the Court's statement that the plan's "absolute preference" did not require individualized inquiry into whether a particular MBE had experienced discrimination, 488 U.S. at 508, must be viewed in that context. The optional nature and flexibility of the SCC program, the aspirational nature of the statutory goals it seeks to further, and the fact that the DBE provision is not based solely on race, further distinguish the programs at issue in this case.

certification of DBEs, see 62 Fed. Reg. 29,548, 29,565-29,566 (1997), are irrelevant because the statutory presumption is mandatory (Br. 13 n.9). To the contrary, Congress intended the presumption to be rebuttable, see S. Rep. No. 100-4 at 28, reprinted in 1978 U.S.C.C.A.N. at 92, and DOT has always treated it as such. To the extent, however, that certifying agencies have in practice lacked an official standard for determining when the presumption is rebutted, the new regulations, once finalized, will help to ensure that the ISTEA program and DOT's use of the SCC are as narrowly tailored as possible, and will place the burden on certifying agencies rather than third parties to determine whether a particular individual is economically disadvantaged. Because Adarand seeks only prospective relief, consideration of the current and future implementation of the program is critical to a determination of constitutionality.

B. The § 8(d) Presumption Is Narrowly Tailored To Remedy The Effects Of Discrimination Identified By Congress.

Adarand argues (Br. 15-17) that the use of race in the § 8(d) definition of social and economic disadvantage is not narrowly tailored because Congress failed to identify the discrimination it sought to remedy with sufficient particularity. This argument is essentially identical to Adarand's challenge to the district court's finding that Congress had a compelling interest in remedying discrimination.

The discrimination Congress sought to remedy in the Small Business Act and ISTEA is not "generalized, amorphous, societal discrimination" (Br. 15). Rather, it is the specific and concrete effect past and present racial discrimination by contractors, lending institutions, and others has had on the ability of minority businesses to secure an equitable share of federal contracting and subcontracting dollars. The SCC is precisely tailored to remedy those particular effects of

discrimination by encouraging federal prime contractors to use DBEs as subcontractors.[12/] Adarand is also wrong in stating (Br. 27) that the SCC program is not narrowly tailored because its date of termination has not yet been set. The SCC program, although in a modified form (see U.S. Br. Addendum 3), continues to exist because Congress has identified a continuing need for it. As we explained in our opening brief (U.S. Br. 30-31), the Small Business Act and ISTEA goals that the SCC furthers are subject to regular oversight and review by Congress. Indeed, the ISTEA DBE program will soon expire unless Congress decides to reauthorize it.

C. The Goals For DBE Participation Established By The Small Business Act And ISTEA Are Reasonable And Narrowly Tailored.

As explained in our opening brief, the Small Business Act sets a 5% annual government-wide goal for participation in federal contracting by small businesses owned and controlled by socially and economically disadvantaged individuals (including qualified individuals not belonging to the specified minority groups). 15 U.S.C. 644(g). The statute requires, however, that individual agency goals must "realistically reflect the potential of" small disadvantaged businesses to perform federal contracts and subcontracts. 15 U.S.C. 644(g)(2). The SCC also furthers ISTEA's goal of 10% participation by DBEs, which ISTEA defines as including small businesses owned by women (WBEs). Adarand contends that these relatively modest goals are "irrational" and not based on any reasonable estimate of the availability of minority (and female) contractors (Br. 24). To the contrary, the goals are clearly reasonable in light of the statistical evidence before Congress (see

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[12/] Adarand fails to note that the SCC no longer provides any incentive to prime contractors to use DBEs, but rather merely provides for reimbursement of any actual costs incurred (U.S. Br. 34, Addendum 3).

discussion in Part I, supra, at pp. 12-14).[20/] Moreover, the goals may be waived or modified where appropriate.[21/]

In 1987, a year before it enacted the Small Business Act's 5% goal for participation in federal contracting and subcontracting by small disadvantaged businesses, including (but not limited to) minority-owned businesses, the House Report noted that 6% of all businesses were minority-owned. H.R. Rep. No. 100-460 at 18. More recent figures support the continued validity of that goal. In 1992, minority-owned firms constituted 11.4% of all firms in the United States and 9.1% of construction firms. U.S. Dep't of Commerce, 1992 Economic Census: Survey of Minority-Owned Business Enterprises, Summary 6 (1996). The 10% DBE participation goal set in STURAA and reauthorized in ISTEA is similarly well-founded, as it includes not only minority-owned businesses, but also small businesses owned by other individuals who can demonstrate

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[20/] This Court has held that a municipality may rely on disparity studies and general data reflecting the number of MBEs available in the market in support of a minority business program. Concrete Works, 36 F.3d at 1528. This Court rejected the argument (Adar. Br. 24 n.22) that such data alone are insufficient, at least in the absence of any "credible information" presented by plaintiff as to the actual size or capacity of the MBEs. Ibid. Adarand has supplied no such evidence here. Moreover, because Congress sought to remedy not just ongoing discrimination, but also the effects of past discrimination on the development of minority-owned businesses, one of the express purposes of the SCC is to help smaller minority firms to grow and succeed by encouraging federal prime contractors to provide training and assistance to DBE subcontractors (U.S. Br. Addendum 3).

[21/] As explained in our opening brief (Br. 5, 8), the Small Business Act and ISTEA goals are flexible rather than mandatory, are renegotiated on an annual basis, and may be waived in certain circumstances. Contrary to Adarand's assertion (Br. 26), the goals are tailored both according to geographic region and industry. See, e.g., S. Rep. No. 1140, 95th Cong., 2d Sess. 10 (1978), reprinted in 1978 U.S.C.C.A.N. 3866, 3872 (agency goals should take into account "the availability of small minority owned businesses in relev[a]nt lines of work" and "the location where the work is to be performed"). Thus, the CFLHD's goal is set to reflect the availability of DBEs and WBEs for highway construction contracting in the Central region, and may be very different from the goal set for another federal agency or geographical area.

disadvantage, and in particular, businesses owned by women. In 1992, women owned 32.1% of all firms in the United States, and 183,695 of 1,829,620, or 10%, of all construction firms. State of Small Business 61, 64 (1995); 1992 Economic Census at 97.

Adarand also argues that the Small Business Act and ISTEA goals are unconstitutional because Congress has not set a separate and independent sub-goal for each eligible minority group (Br. 21). Adarand thus seeks to impose on Congress a new and impracticable requirement for which there is no support in the decisions of the Supreme Court or this Court. The Supreme Court in Croson did not strike down the City of Richmond's 30% set-aside because the eligible minority groups were aggregated, but rather because the City provided no evidence of discrimination against any of the groups.[22/] Likewise, in Concrete Works, this Court found no fault with the City of Denver's aggregation of various minority groups in a single annual MBE participation goal, see 36 F.3d at 1515-1516 & n.1, but rather based its decision on factual disputes concerning the overall underutilization of MBEs, see 36 F.3d at 1530-1531.

D. Congress Enacted § 8(d)'s Race-Conscious Presumption Only Because Race-Neutral Remedies Were Inadequate.

The district court correctly rejected Adarand's contention that Congress did not consider

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[22/] In addition, Adarand draws an improper parallel between the inclusion of various ethnic groups in the § 8(d) presumption and the inclusion of similar groups in the plan struck down in Croson (Adar. Br. 20). Again, Adarand fails to recognize Congress's authority to "identify and redress the effects of society-wide discrimination" on minority contracting with the federal government. Croson, 488 U.S. at 490 (opinion of O'Connor, J.) (emphasis added). The Court in Croson objected to Richmond's "random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond," since "[i]t may well be that Richmond has never had an Aleut or Eskimo citizen." 488 U.S. at 506 (emphasis added). By contrast, Congress determined that Native Americans (including Aleuts and Eskimos) in the United States as a whole have experienced social and economic disadvantage affecting their ability to participate in federal contracting, and Adarand again supplies no information or data to the contrary.

and use race-neutral remedies before using a race-based presumption to remedy the effects of discrimination (App. 215-216). Congress had previously enacted both anti-discrimination legislation and legislation to provide assistance to small businesses, but found that small minority-owned businesses continued to face unique obstacles in access to federal contracting opportunities.[23] As explained in Part I, supra, Congress had long provided extensive assistance to small businesses generally under the Small Business Act (and continues to do so), but found that, despite that assistance, minority-owned businesses continued to be disproportionately excluded from participation in government contracting. Similarly, the passage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, and other antidiscrimination laws did not end the exclusion of minority individuals from the craft unions that would have provided them with the skills and experience to form successful small businesses. See, e.g., United Steelworkers of Am. v. Weber, 443 U.S. 193, 198 n.1 (1979) ("[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"). Nor has enactment of the Equal Credit Opportunity Act, 15 U.S.C. 1691 et seq., fully remedied discrimination in access to capital. Based on the continuing record of demonstrable underutilization of minority firms, Congress therefore found it necessary to enact legislation specifically designed to open up federal contracting and subcontracting opportunities to minority-owned businesses.

Nor are the problems Congress sought to remedy merely race-neutral, as Adarand alleges (Br. 28). For example, while many small businesses face difficulty obtaining adequate capital, not all small businesses face racial discrimination by commercial lenders. Similarly, many may lack a

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[23] In asserting that Congress has failed to use race-neutral alternatives, Adarand ignores the extensive race-neutral measures Congress has enacted, and instead relies on a statement by a single federal employee saying that he has not used race-neutral programs (Br. 29 & n.26).

track record, but not all are further handicapped by a tendency of prime contractors to attribute greater risks to using minority-owned firms. Congress found that the obstacles facing minority-owned small businesses were not simply the same obstacles common to all small business, but rather were a direct legacy of racial discrimination. See Small and Minority Business at 4. The race-based presumption in § 8(d), and the ISTEA DBE program, directly address the additional barriers faced by minority-owned firms by encouraging federal prime contractors to consider DBEs as subcontractors and states to open up contracting opportunities to DBEs.

III

THE DISTRICT COURT'S JUDGMENT EXTENDS BEYOND THE SCOPE OF THIS CASE

Our opening brief explained why the district court clearly erred in extending its judgment beyond the SCC to the separate and distinct ISTEA federal aid program, through which DOT provides federal funds to states and localities for state and local transportation projects (Br. 35-47). Specifically, we pointed out (1) that the sole focus of this long-running litigation has always been DOT's use of the SCC in its own direct federal contracts, (2) that the district court's order exceeded the specific terms of the Supreme Court's remand, (3) that the record in this case is inadequate to permit any determination concerning the constitutionality of the federal aid program, which is operated under different terms at a different governmental level, and (4) that Adarand has not established standing to challenge the federal aid program. Adarand has failed to respond to any of these points, and indeed has little to say in support of the district court's judgment beyond reiterating the court's statement that Adarand's challenge to the SCC necessarily implicates the statutes and regulations that provide the legal authority for DOT's use of the SCC (Br. 36-38). But this proposition — that a district court, having found on the basis of specific facts in a particular

case that one means by which the government attempts to achieve a statutory goal is unconstitutional, may, without conducting any further legal or factual analysis, broadly declare unconstitutional all other government programs that in any way seek to further the same goal — is without foundation in logic or case law.[24/]

Indeed, Adarand itself stresses (Br. 24 n.23) that "[t]he program challenged here is the federal program, implemented by federal officials," not the federal aid program implemented by state officials (emphasis added). Moreover, Adarand's argument that the court properly reached the ISTEA program is inconsistent with its argument that § 5 of the Fourteenth Amendment does not apply in this case because the SCC is not directed toward state conduct, since ISTEA clearly is directed toward state conduct (Adar. Br. 9; see also AGC Br. 7-9). Had Adarand challenged the constitutionality of the ISTEA federal aid program, the Supreme Court would have been required to determine the extent to which deference to Congress's exercise of its § 5 authority is appropriate. See Adarand, 515 U.S. at 230-231 (finding it unnecessary to reach this question). Like the program upheld in Fullilove (and unlike the SCC), the federal aid program involves congressional regulation of state action for purposes of remedying discrimination, and thus constitutes a direct exercise of Congress's § 5 powers. See Fullilove, 448 U.S. at 476-478; Metro Broad., Inc. v. FCC, 497 U.S. 547, 605-607 (1990) (O'Connor, J., dissenting) ("Congress has considerable latitude,

---

[24/] We do not argue, as Adarand suggests (Br. 37-38), that the district court should not have analyzed the relevant statutes to determine whether the SCC is constitutional. On the contrary, we believe that these statutes, as well as the subcontracting clause they authorize, are constitutional. We take issue, however, with the district court's failure to recognize that this case did not properly raise a challenge to the federal aid program, that the federal aid program involves entirely different governmental actors and terms of implementation, and that the parties did not have the opportunity to litigate any issues concerning the federal aid program or to develop an appropriate record describing its implementation in practice.

presenting special concerns for judicial review" when it exercises § 5 remedial powers with respect to the states, as it did in the program upheld in Fullilove); see also Croson, 488 U.S. at 490 (opinion of O'Connor, J.) (noting that Congress "has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment"). The fact that neither the Supreme Court nor the district court have even considered this issue with respect to the federal aid program further underscores the fact that the district court's judgment is overly broad.

CONCLUSION

As stated in our opening brief, the judgment of the district court should be reversed, or, alternatively, the case should be remanded to give all parties a full opportunity to present appropriate evidence on the question whether the federal aid program is narrowly tailored.

Respectfully submitted,

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Race - affirmative action - procurement

Richard L. Hayes 02/24/98 01:36:48 PM

Record Type: Record

To: Edward W. Correia/WHO/EOP, Elena Kagan/OPD/EOP, Gene B. Sperling/OPD/EOP, Andrew J. Mayock/WHO/EOP

cc:
Subject: FAR/SBA Affirmative Action Rules

fyi

---------- Forwarded by Richard L. Hayes/WHO/EOP on 02/24/98 01:36 PM ----------

Jefferson B. Hill 02/24/98 01:16:12 PM

Record Type: Record

To: Richard L. Hayes/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: FAR/SBA Affirmative Action Rules

You asked, under the Congressional Review Act, to which committees the SBA and FAR rules go. You also asked the process for Congress voting on them during the 60-day hold-over period.

Under the Congressional Review Act (CRA), the agency is to send the rule to the Speaker of the House, the President of the Senate, and the GAO. The Speaker/President is to send the rule to the "standing committee of jurisdiction", i.e., the authorizing committees.

The SBA rules, I assume but do not know, go to the House and Senate Small Business Committees.

The FAR rules, issued jointly by DOD, NASA, and GSA, would presumably go to the pertinent authorizing committees -- namely, Senate Armed Services (DOD), Senate Commerce, Science, and Transportation (NASA), Senate Governmental Affairs (GSA), House Government Reform and Oversight (GSA), House National Security (DOD), and House Science (NASA).

The OFPP publication of the Commerce Dept. bench marks would also have to go to the Speaker and the President of the Senate, and then to Senate Governmental Affairs and House GRO as well.

The timing of what happens under the CRA is a bit tricky.

First, the 60-day delay in effective date for a "major" rule is calendar days, and has nothing, statutorily, to do with when Congress can vote to disapprove a regulation. (Statutorily, the delay in effective date and the disapproval procedures are not linked. In practical terms, it presumably is easier to disapprove a rule that has not yet taken effect.)

The expedited procedures under which Congress can vote to disapprove a regulation are a bit tricky. (Congress is always able -- under the normal legislative process -- to vote any

disapproval it wants, e.g., the nullification of the long-time-ago FDA saccarine prohibition.)

In summmary, if the applicable deadlines are met, the Senate can move free of a filibuster; the House has no special procedures until the Senate passes a resolution of disapproval..

A Member of either House has 60 days (excluding any days that either House is adjourned for more than 3 days during a session of Congress) to introduce a joint resolution of disapproval. (Joint resolutions are like legislation, in that they are submitted to the President for signing or possible veto.)

((I ignore the special procedures available for regulations submitted to Congress 60 session or legislative days before the end of a Congressional session -- roughly late April to early June, depending on the date of final recess)).

Then, in the Senate, there are expedited procedures which need to be implemented within "60 session days" of the submission of the rule to Congress (or publication of the rule in the Federal Register, whichever is earlier).

In other words, a "major" rule cannot take effect for 60 days of submission of the text to the Senate, the House, and GAO (or publication in the Federal Register) or publication in the Federal Register, which ever is later. For a period somewhat longer than that, a Member is able to introduce a joint resolution of disapproval, which -- to avoid a possible Senate filibuster -- has to move ahead within 60 session days of the submission date (generally earlier than publication date -- because agencies generally send the final rules to the Congress and the Federal Register on the same date). Given current timing, Congress would have to move by relatively late this Session to disapprove these rules under the expedited procedure. ((By June or so, the disapproval process presumably would roll over until next year.))

How, exactly, all this would happen is not clear -- Congress has not yet tried to implement the detailed procedures.

If you have any questions about this, please call (395-3176).

Message Copied To:

Steven L. Schooner/OMB/EOP
Linda G. Williams/OMB/EOP
Victoria Wassmer/OMB/EOP
Peter N. Weiss/OMB/EOP
Donald R. Arbuckle/OMB/EOP

Race - affirmative action - procurement

DRAFT

President Clinton has directed his administration to consider carefully existing federal affirmative action policies, pursuant to his goal of "mend it, don't end it" and recent Supreme Court rulings, such as the Adarand decision.

In accordance with that direction, the following recommendations represent narrowly tailored policies, targeted to areas in which disparities, arising from discrimination, continue to exist:

- Develop and expand mentoring programs, encouraging large businesses across the country to partner with smaller, locally owned businesses located in distressed communities to engage in a range of activities, from advice and guidance to subcontracting;
  As part of this process the President will issue an Executive Order directing the Vice President as chair of the Community Empowerment Board to oversee an administration-wide initiative to develop and promote the federal government's efforts on mentoring.

- Strengthen and improve the SBA 8A process, including permitting two or more firms to jointly venture on particular procurements; establishing a new 8A mentoring program; and streamlining the 8a program to be more effective; clarifying eligibility, including permitting more non-minorities to qualify; and deleting burdensome and obsolete regulations.

- Build on the successful program enacted by Congress and operated by the Department of Defense, which enables minority firms to compete in industries in which the data demonstrate that the procurement playing field is still not even, by expanding DoD's price credits system to government wide us using market driven benchmarks to ensure appropriate targeting.

We believe that these policies, which reflect the information, developed in an extensive two year review, will enable us to meet the President's goals: respecting the affirmative action principles articulated by the Supreme Court, and reaffirming the responsibility of government to ensure that all Americans have a chance to participate in our growing economy by closing the opportunity gap.

Rau - affirmative action - procurement FINAL

AFFIRMATIVE ACTION PROCUREMENT REFORM ROLL-OUT AND AMPLIFICATION

OBJECTIVES:

- *Illustrate the President's on-going commitment to affirmative action*
- *Present an accurate and complete portrayal of the what the President has done to "mend affirmative action" procurement programs to the media and public*
- *Ramp up Federal government efforts to implement the reform program*
- *Illustrate other things federal agencies and the private sector are doing to promote diversity*

Week of February 23-27, 1998

Briefings:

• POTUS	Chuck Ruff/Other Staff
• Staff from Senator Kennedy/Daschael/Gephardt/Leahy/Bacus/ DPC offices	WH
• Wade Henderson, Nancy Zirkin, Weldon Latham, Harold McDougall, Tom Henderson, Penda Hair, Elaine Jones, Tony Robinson, Cobbie DeGraft, Joann Payne, and Helen Norton	WH
• Bill Lee hearing	Justice

Materials:

• Verify methodology for benchmarks and price credits	Commerce
• Finalize Federal Acquisition Regulations (FAR) *[Note: There will be two FAR rules published one-day apart: The first one will offer price credits for SDBs, effective May 7, 1998; and the second rule, which will modify the first rule, will offer subcontracting credits for prime contractors, effective September 1, 1998.]*	OIRA
• Finalize SBA regulations *[Note: There will be two SBA rules: The first one will make changes to the 8(a) program; and the second rule will establish the SDB certification program.]*	SBA/OIRA
• Revise benchmarks technical paper, talking points and Q&As	Commerce/Justice/WH
• Draft implementation plan for agency procurement officials	OFPP
• Revise *Federal Register* notice announcing benchmarks and price credits	OFPP/WH
• Revise press plan/message	Ann Lewis
• Finalize SDB Certification talking points	Richard Hayes
• Finalize regulatory analysis and "emergency" paperwork clearance forms	SBA/OIRA
• Develop constituency/outreach lists	OPL/Intergovernmental
• Relevant FY '99 budget materials (e.g., civil rights enforcement)	OMB

Document #: pro_roll.wpd, Updated February 24, 1998

• Draft Presidential letter to agencies	Hayes/Weiner/Chirwa

Week of March 2 - 6, 1998

Materials:

• Send FAR rules to *Federal Register* on March 3 for publication, March 9 and 10, 1998	OFPP/FAR
• Send SBA rules to *Federal Register* on March 3 for publication, March 9, 1998	OFPP/FAR
• Reproduce all materials (benchmarks technical paper, talking points, Q&As, accomplishments, etc.)	OPL
• Distribute materials to surrogates/validators	Hayes
• Draft/circulate POTUS remarks	Speech writers
• Finalize Presidential letter to agencies	Hayes/Weiner/Chirwa

Briefings:

• Cabinet	Erskine/Ruff
• Aida Alvarez's House and Senate testimony	SBA
• Congressional Black Caucus	Surrogates: TBD
• Congressinal Hispanic Caucus	Surrogates: TBD
• Congressional Asian Pacific American Caucus	Surrogates: TBD
• Native American Caucus	Surrogates: TBD
• Blue Dog Coalition	Surrogates: TBD
• New Democrats	Surrogates: TBD
• Gephardt's Affirmative Action Task Force	Surrogates: TBD
• House and Senate Appropriations Subcomittee on Commerce, Justice, State, the Judiciary and Related Agencies	WH/SBA Leg. Affairs/ Justice
• House and Senate Small Business Committees	WH/SBA Leg. Affairs
• House Judiciary Subcommittee on the Constitution (Minority Staff)	WH/SBA Leg. Affairs
• Senator Carol Mosely Braun	WH/SBA Leg. Affairs
• Senator Kay Bailey Hudtchinson	WH/SBA Leg. Affairs
• Senator Pete Domenici	WH/SBA Leg. Affairs
• Senator Frank Lautenberg	WH/SBA Leg. Affairs

Print:

• Mail materials to minority and speciality press	Communications
• Conduct background interview with Jon Peterson	Surrogates: TBD

Week of March 9-13, 1998

Briefings:

• WH annoucement	Surrogate: TBD
• Agency General Counsels	Justice/Counsel to the President
• Chiefs-of-Staff	Cabinet Affairs
• Agency procurement officials/OSDBUs	OFPP/Justice
• Two briefings in Room 450 for civil rights, minority business and women's community	OPL/Intergovernmental
• One way conference call with key leaders around country	OPL/Intergovernmental
• President's Initiative on Race Advisory Committee and staff	Surrogate: TBD
• WH Press Corps	Surrogate: TBD

Print:

• Conduct interviews with major press outlets (N.Y. Times, Washington Post, Chicago Sun Times, Wall Street Journal)	Surrogate: TBD
• Conduct interviews with press outlets in targeted Cities	Surrogate: TBD
• Conduct interviews with minority and speciality press	Surrogate: TBD
• Mail materials to top 250 editorial boards	Communications

Television:

• BET Public Affairs show	Surrogate: TBD
• Both Sides with Jessie Jackson	Surrogate: TBD
• Univison's Temas y Debates	Surrogate: TBD
• Spanish Language Network	Surrogate: TBD

Radio:

• Urban Radio Network	Surrogate: TBD

Cabinet Travel:

- Tuesday, Wednsday, Thursday or Friday - TBD

People to be active:

• Cabinet members	TBD
• WH Senior Staff	TBD
• Local Elected Officials	TBD
• Surrogates	Constituency Leaders: TBD Validators (Wade Henderson, Deval Patrick, Weldon Latham, Elaine Jones, Nancy Zirkin, Marcia Greenberger, Chris Edley, Joann Payne, Jessie Jackson, Anthony Robinson, Georgina Verdugo, Karen Naraski, more - TBD) Republicans/moderates - TBD Real people - TBD

What does Trump think will happen on NEXTERA (i.e.-DBE) assuming we don't do the benchmarking beforehand?

She thinks McConnell may be enabled/inspired to do more — but it is not clear that she really believes it.

He's apparently trying to get Republican women — what will it take to make them go along.

Race - affirmative action - Procurement

THE WHITE HOUSE

WASHINGTON

February 13, 1998

MEMORANDUM FOR **ERSKINE BOWLES**
SYLVIA MATHEWS

FROM: **CHARLES F.C. RUFF**
ROBERT N. WEINER
DAWN CHIRWA

SUBJECT: **Benchmark Limitations in Procurement Reform**

At our last meeting on procurement reform, we considered the Commerce Department's calculation of benchmark limitations to ensure that affirmative action in procurement satisfies the "narrow tailoring" requirement of Adarand. To develop those benchmarks, Commerce sought:

(1) to determine the readiness, willingness, and ability of minority prime contractors in each industry to contract with the federal government (capacity); and then

(2) to compare that with the amount of contracts they received (utilization).

Where utilization falls below the capacity of minority business in an industry, the disparity suggests that the effects of discrimination continue. With this remedial predicate, we can authorize price credits of up to 10% for minority bidders to help provide equal opportunities.

Commerce calculated benchmarks based on a survey of how many minority and majority firms bid for competitive federal contracts in FY1996. This method of determining capacity has the advantage of focusing on firms that are "ready, willing and able" to contract with the federal government. Previously, Commerce's model did not include 8(a) contracts because it focused only on open competition. Commerce has now recalculated the benchmarks taking the 8(a) program into account.

Specifically, Commerce undertook the following steps:

(1) Started with the survey data on bidders for federal contracts in FY1996.

(2) Added data on firms that won contracts that year, by competition or sole source.

(3) Added firms that were registered in the 8(a) program that year and had thereby indicated a desire and ability to do business with the federal government.

(4) Added data on all these firms from the 1995 Standard Statistical Establish List.

(5) Used this information on the size and other characteristics of firms that won contracts to determine the capacity of all firms, and then assessed whether minority firms won less business than would be predicted by their characteristics.

Commerce's figures show that the capacity of minority firms exceeds utilization -- and it is therefore appropriate to use price credits -- in industries representing 76.2% of current minority contracting. All else being equal, Commerce estimates that the price credit program will provide about $1 billion in new contracting opportunities for minority firms.

In a few industries, this model shows significant concentration of minority firms, but utilization still falls short of capacity. That minority firms choose disproportionately to seek government contracts in certain industries, however, does not suggest that we should refrain from remedying the lingering effects of discrimination there.

Given the difficulty and complexity of the issues presented by this analysis, we asked three outside economists to review the Commerce Department's work. They concluded that the approach is defensible, and indeed, that it advances the state of the art in this area. The Department of Justice likewise believes that the model would be defensible in litigation.

No methodology will be immune from challenge, but this approach takes advantage of new data, advances the previous research, and provides a sound basis for our policy decisions.

Rau - affirmative acti- - procurement

[FAR Baseline = FAC 97-02]

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 14, 15, 19, 33, 52, and 53

[FAR Case 97-004a]

Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA)

ACTION: Interim Rule with request for public comments.

SUMMARY: The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration have agreed to issue Federal Acquisition Circular 97-04, ~~on~~ an interim rule to make amendments to the Federal Acquisition Regulation (FAR) concerning programs for small disadvantaged business (SDB) concerns. These amendments conform to a Department of Justice (DoJ) proposal to reform affirmative action in Federal procurement. DoJ's proposal is designed to ensure compliance with the constitutional standards established by the Supreme Court in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995). This regulatory action was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is a major rule under 5 U.S.C. 804.

EFFECTIVE DATE: April 1, 1998.

FOR FURTHER INFORMATION CONTACT: Ms. Victoria Moss, Procurement Analyst, Federal Acquisition Policy Division, General Services Administration, Telephone: (202) 501-4764 or Mr. Mike Sipple, Procurement Analyst, Office of the Director of Defense Procurement, Department of Defense, Telephone: (703) 695-8567. For general information call the FAR Secretariat at (202) 501-4755.

SUPPLEMENTARY INFORMATION:

A. Background

"Small disadvantaged business concern," as used in this part, means (a) for subcontractors,***

(b) for prime contractors, (except for 52.212-3(c)(2) and 52.219-1(b)(2) for general statistical purposes and 52.212-3(c)(7)(ii), 52.219-22(b)(2), and 52.219-23(a) for joint ventures under the price evaluation adjustment for small disadvantaged business concerns) an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to this acquisition; and either

(1) It has received certification as a small disadvantaged business concern consistent with 13 CFR 124, subpart B; and

(i) No material change in disadvantaged ownership and control has occurred since its certification;

(ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed $750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and

(iii) It is listed, on the date of this representation, on the register of small disadvantaged business concerns maintained by the Small Business Administration; or

(2) It has submitted ~~an~~ completed application to the Small Business Administration or a Private Certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR 124, subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since its application was submitted. In this case, a contractor must receive certification as an SDB by the SBA prior to contract award ~~unless the contracting officer proceeds under 19.304(d)(3)or(4)~~.

*****

9. Subpart 19.201 is amended by redesignating paragraphs (b), (c), and (d) as (c), (d), and (e), respectively; and adding new paragraphs (b) and (f) to read as follows:

19.201 General policy.

*****

(b) The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) manual, and region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms, and their effective dates for new solicitations for the upcoming year. The OFPP publication can be accessed at http://www.arnet.gov/References/References.html#OFPP. The OFPP publication shall only affect solicitations that are issued on or after the effective date cited in the publication. It shall not affect ongoing acquisitions. The OFPP publication shall include

the applicable factors, by SIC Major Group, to be used in the price evaluation adjustment for SDB concerns (see 19.1104). The authorized procurement mechanisms shall be applied consistently with the policies and procedures in this subpart. No SDB procurement mechanisms recommended by the Department of Commerce may be used unless authorized by the Administrator of OFPP. The Department of Commerce, in making its recommendations to the Administrator of OFPP, is not limited to the price evaluation adjustment for SDB concerns where the Department of Commerce has found substantial and persuasive evidence of-

(1) A persistent and significant underutilization of minority firms in a particular industry, attributable to past or present discrimination; and

(2) A demonstrated incapacity to alleviate the problem by using those mechanisms.*****

(f)(1) Each agency shall designate, at levels it determines appropriate, personnel responsible for determining whether use of the SDB mechanism in subpart 19.11 has caused a particular industry category to bear a disproportionate share of the contracts awarded by a contracting activity of the agency to achieve the contracting activity's goal for SDB concerns. Determinations under this subpart are for the purpose of future acquisitions and shall not affect ongoing acquisitions. Requests for a determination, including supporting rationale, may be submitted to the agency designee. If the agency designee makes an affirmative determination of disproportionate impact, the determination shall be forwarded through agency channels for submittal to the Department of Commerce. At a minimum, tThe following information should be included in any submittal—

(i) A determination of disproportionate impact, including proposed corrective action;

(ii) The SIC code(s) affected;

(iii) Supporting information to justify the determination, including dollars and percentages by the contracting activity under the affected SIC code(s) for the previous two fiscal years and current fiscal year to date for--

(A) Total awards;

(B) Total awards to small businesses;

(C) Total awards to SDBs; and

(D) Awards to SDBs categorized as SDB price evaluation adjustment, 8(a), small business set-aside, and awards under other procedures; and

(iv) A discussion of the pertinent findings including any peculiarities related to the industry, regions, or demographics.

(2) If the determination is approved by the Department of Commerce, the contracting activity shall limit the use of the SDB mechanism in subpart 19.11. This limitation shall not apply to solicitations that already have been synopsized.

*****

Race-affirmative actio -
procurement

Ann Lewis draft, February 24, 1998/anmessag.wpd

President Clinton has directed his administration to consider carefully existing federal affirmatio action policies, pursuant to his goal of "mend it, don't end it" and recent Supreme Court rulings, such as the Adarand decsion.

In accordance with that direction, the following recommendations represent narrolwly tailored policies, targeted to areas in which disparities, arising from discrimination, continue to exist:

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- Build on the successful program enacted by the Congress and operated by the Department of Defense, which enables minority firms to compete in industries in which the data demonstrate that the procurement playing field is still not even, by expanding DoD's price credits system to government wide use using market driven benchmarks to ensure appropriate targeting.

Note: What does market driven mean? Need to emphasize more the reform/mend it
aspect of the proposal.

- Help distressed communities by publishing proposed regulations launching the HUBZone program, that will provide federal procurement opportunities for small businesses that do significant business in, hire significant numbers of residents from, or directly generate economic activity in general areas of economic distress. The program will serve as a supplement — and not compete with — existing federal procurement programs, such as the 8(a) program.

Race-affirmative action - procurement

2/13 Benchmarking

Model 2 - survey 1996 bidding data
by industry
showed disparities
Put in 8a.
#s - ~~20%~~ indus req'ing 76% of min Key - have credits turned on.
Best post-Croson study
DOT says defensible model (though prefer Model 1)

Model 1 - data from 1992
measurements of capacity
not ready, willing, able
↓
41% of industries
would get 'turned on' price credits

data stink - bad + sparse
Apply 'but for' analysis - same problems

Model 2 - govt survey - who bid on your Ks?
much better data
But what abt 8a who don't bid?
We took out
Now commerce put them back in on both sides of the equation -
capacity and utilization
implicit but-for
Services ind - gets up to 40% for parity - That's how many are needed.

e.g. ~~100 min cos - r,w, able~~
~~proportional = 20%~~
~~instead - only 10 chosen~~ ~~25 slots [illegible]~~
40% of winners

25 Ks out
100 min firms | 500 win 10 (40%)
that proportion — would have gotten even higher #
up i.e. should have gotten 20%
5

500 total
signal of ka — 200 min min = 40% of bidders
25 slots
should get $10
Pairs 5 get but only get ~~20~~ $5
underutilization may be a function of govt discretion on private discretion.

Race - affirmative action - procurement

THE WHITE HOUSE

WASHINGTON

February 13, 1998

MEMORANDUM FOR **ERSKINE BOWLES**
SYLVIA MATHEWS

FROM: **CHARLES F.C. RUFF**
ROBERT N. WEINER
DAWN CHIRWA

SUBJECT: **Benchmark Limitations in Procurement Reform**

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No methodology will be immune from challenge, but this approach takes advantage of new data, advances the previous research, and provides a sound basis for our policy decisions.

1/13/97 Benchmarking Mtg - Erskine

How to set benchmarks - thg into acct #s, policy, litigatic risk.

Optic 2 - focusing on bidding data.

take into acct 8a contractors? sensible policy rationale, but DOT has real concerns abt liti risk

Theory - 3 part approach

a) nurturing & investment to get them up to compet level - 9yr prog

b) support at comp level

c) free competitic

DOT - from perspective of white contractor, doesn't matter whether slots are filled w/ 8a or not.

If 8a not included - horrific drop in AA.

capacity utilizatic -

Race - affirmative action - procurement

THE WHITE HOUSE

WASHINGTON

January 12, 1998

MEMORANDUM FOR **ERSKINE BOWLES**
SYLVIA MATHEWS

FROM: **CHARLES F.C. RUFF**
DAWN CHIRWA
ROBERT WEINER

SUBJECT: **Benchmark Limitations in Procurement Reform**

In preparation for our meeting tomorrow, we wanted to provide the following background concerning the benchmark limitations project which forms part of our ongoing reform of affirmative action in procurement. We also have outlined the available options for determining the benchmark limitations. In addition, attached to this memorandum is a memorandum from Richard Hayes which provides factual details with regard to the various industries affected by procurement reform.

I. BACKGROUND

As you know, the Justice Department's procurement reform proposal was a means to address the requirements set forth in Adarand. Adarand requires that when the government uses affirmative action, it must be narrowly-tailored to serve a compelling government interest.

The Compelling Interest Requirement

First and foremost, under Adarand the federal government must demonstrate a compelling interest in using a particular affirmative action program. In its May 1996 proposal, Justice detailed the evidence which bolsters the federal government's compelling interest in using affirmative action in federal procurement. The proposal describes the review undertaken by Justice of both the past and present evidence of discrimination in the contracting arena which has depressed minority business formation and continues to present obstacles to full and open competition by existing minority businesses.

According to Justice's review, the evidence of discrimination in this area is "powerful and persuasive." Justice found that

> the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible, lingering effects of prior discriminatory conduct.

In particular, Justice found:

- Extensive Congressional inquiries and reviews have ~~found~~ concluded that widespread discrimination undermined the ability of minority-owned business to develop in the U.S. economy. Congress also recognized that expanding opportunities for minority business in government procurement provides these businesses with access to mainstream public contracting networks that discrimination would otherwise thwart.

- Significant studies on minority business formation, including the U.S. Commission on Minority Business Development formed by President Bush, found that minorities are significantly less likely than whites to start their own business--even after controlling for income level, wealth, education level, work experience, age and marital status.

- Extensive and documented discrimination by labor unions and employers prior to the 1960s prevented minorities from garnering technical skills crucial to business formation and success and barred access to important business networks. Even after civil rights legislation was passed, discriminatory practices -- such as conditioning union membership on a family relationship to the union -- locked minorities out of certain jobs and, therefore, impeded development of certain skills. Until the mid-70s, unions and apprentice programs remained virtually all-white. A comparable situation has existed in managerial ranks at all levels of corporations.

- Severe historical and ongoing discrimination in lending has blocked minority business formation. Numerous studies have shown that a typical white-owned business receives three times as many loan dollars as the typical black-owned business with the same amount of equity capital. In construction, this disparity increases to a ratio of 50 to 1. African-Americans were three times more likely to be rejected for business loans than whites, again controlling for other non-race related factors.

- In contracting, particularly in certain industries such as construction, networks of business relationships are closed to newcomers. Prime contractors prefer to work with subcontractors with whom they have longstanding relationships. This excludes minority firms from crucial networks to which they have not had access historically.

- Bonding practices also disadvantage minority firms since surety companies often require a record of experience before providing necessary bonding for a company. Thus, a history of discrimination against minority firms significantly hinders their ability to obtain bonding.

Justice found that this societal discrimination has had and continues to have a profound impact on minorities' opportunities in the private sector and has affected their ability to participate in government procurement. The federal government, therefore, has a compelling interest in using the tools at its disposal to attempt to remedy this problem.

The Narrow Tailoring Requirement

The second requirement of Adarand is that our affirmative action program be "narrowly-tailored" to meet the compelling interest we have identified. In other words, the affirmative action remedy used by the government should do no more than address the concern identified, balancing the burden imposed on non-beneficiaries of the program and continuing only until the need has been met.

II. THE COMMERCE DEPARTMENT MODELS

capacity - utilization

The benchmark limitations are designed to be measures which enable us to satisfy the narrow tailoring requirement. To determine the benchmarks, Commerce has sought to determine the capacity of minority prime contractors in each industry -- where capacity is the ability and willingness of firms to contract with the federal government. We can then compare the amount of minority prime contracting by the federal government (utilization) to those benchmarks. Where the utilization does not rise to the level of minority business capacity, we may authorize price credits of up to 10% for minority bidders. We will use a similar analysis by October for the 8(a) program and subcontracting.

For prime contracting, the Commerce Department has created the following models to determine the benchmarks, which they have presented them to us as options with varying methodological strengths and varying impacts. The primary goal of tomorrow's meeting should be to discuss these models and decide which one best accomplishes our policy goals.

Option 1

Under the first model, using 1992 census data, the Commerce Department determined the capacity of minority firms in each industry and compared that to the amount of federal contracting dollars they received. Recognizing that discrimination may have suppressed the overall capacity of minority firms, Commerce also attempted to determine what that capacity would have been "but for" discrimination. This model is conceptually strong, but there are substantial problems with the data -- the census data is outdated and Commerce believes that the best "but for" analysis they can do at this point also raises statistical issues. Current projections are that this model would allow use of price credits in industries representing 41% of minority contracting, by dollar volume.

1) how measure capacity -- old census data or just bidding data? ?

2) take account of Ks provided under 8a? (i.e., in measuring utilization?)

why couldn't this be under option 1 too? 4

Option 2

a capacity bldg program -- really meant to do same thing as but for test

The Commerce Department developed the second model because of the data problems with the first. Commerce surveyed federal contracts in 1996 to determine how many minority firms bid and how many received contracts. This model has the advantage of focusing on firms that are ready, willing and able to contract with the government-- as determined by their submission of bids -- and draws upon significantly stronger data. But, it raises several issues. First, because the federal government has been more hospitable to minority contractors than the private sector, government bid data arguably overstate minority contracting capacity for the industry as a whole. On the other hand, the model also does not contain a "but for" analysis which arguably offsets any such overestimation. Furthermore, because the model focuses on the competitive arena, it does not take account of contracts provided under 8(a) to minority contractors in an industry. It could thus trigger price credits in an industry where minority contractors already receive a substantial share of the government contracts.

However, this option has the significant benefit of allowing us to treat the contracting universe as separate parts of a whole. First, there is the full and open competitive environment in which firms still face discrimination that the federal government has an interest in remedying. Second, there is the 8(a) business development environment in which the federal government works to nurture business formation so that people who have faced significant hurdles to starting a business are "mentored" until they are ready to compete in full and open competition.

Current projections are that this model would allow use of price credits in industries representing about 75% of minority contracting, by dollar volume.

Option 3

A third approach would look at all the information Commerce has generated from both methodological approaches and then decide industry by industry, based on factors we would enumerate, whether to use price credits. This approach has the advantage of diluting the weaknesses of each model and allowing the most flexibility. Moreover, in defending our use of price credits, it might enable us to confine any loss to the particular industry involved, since we would make unique judgments for each. But such a "gestalt" approach is not easily explained or reduced to a straightforward statement of policy. And it could delay the actual decision-making as to whether price credits are used in any particular industry until the decision maker is identified -- at this point that entity has not been identified and further study is completed.

Pour who decides in any partic case? who's the decisn maker?

III. CHOOSING AN APPROACH

The President should have an affirmative action program for procurement which is legally defensible, but which, just as importantly, is best suited to accomplish his policy goals. The Administration has emphasized vigorous enforcement of the Civil Rights laws to combat discrimination in employment, housing, and education and have used effective tools to remedy

past and ongoing discrimination in these areas. We should combat discrimination in the contracting world as we do in every other.

To that end, it appears that the best approach is would allow the Administration to both nurture minority businesses which have faced historical and present day barriers to formation so that they can enter the competitive arena and to rectify the effects of discrimination for those firms that have entered it already. Thus, the second model correctly treats 8(a) separately, as a pipeline program that should not be considered in determining whether to use price credits in the competitive arena.

Thus, from a policy standpoint, the second model preserves the program we are litigating for, and permits the President to both stand on a strong policy footing and articulate clearly the goal he is attempting to accomplish. However, as we will discuss further in tomorrow's meeting, Justice is still assessing the litigation risks of the three options, as well as an alternative to Option 2 which includes 8(a) contracts. These risks should also be factored into whatever final decision is reached.

Attachment

January 12, 1998

MEMORANDUM FOR: CHARLES F.C. RUFF
DAWN CHIRWA
ROBERT WEINER

FROM: RICHARD HAYES

SUBJECT: Commerce Department Benchmark Estimates

This memorandum summarizes the major conclusions drawn from the economic analysis conducted by the Commerce Department to: (1) identify industries eligible for price credits intended to increase procurement from minority-owned businesses; and (2) estimate the appropriate level for the credit in each eligible industry. Commerce is currently rechecking their estimates, but they do not expect that the final numbers will changed materially.

Background:

- The overarching goal of our proposal for affirmative action procurement reform is to ensure equal opportunity for entrepreneurs of all races. However, in having the federal government take action to level the playing field to offset the effects of past and ongoing discrimination, we face two problems. The first relates to the fact that "but for discrimination" there would be more minority firms and they would be larger. The second problem concerns the ability of these firms to compete in full and open competition.

- For FY94-96, net federal contract obligations averaged $151.6 billion, of which $10.5 billion, or 6.9 percent went to SDB firms. SDBs account for about 33 percent of all contract dollars going to small businesses. Nearly 70 percent of federal contracting with SDBs is dependent on the 8(a) and 8(d) set-asides. The former is a *capacity building program* and for that reason is different from the other types of affirmative action in federal procurement. The SDB program is geared toward ensuring that disadvantaged firms, even if they have graduated from the 8(a) program, are ensured a fair opportunity to compete for federal contracts. About 27 percent of procurement from non-SDB small businesses occurs in set-aside programs.

- Commerce has proposed two options for isolating those areas where we will offer price credits for correcting disparities. (As of October 1, 1998, we will also offer evaluation credits for large prime contractors.) Both options employed an identical methodology to assess federal procurement in relation to an estimate (i.e., "benchmarks") of the expected minority share of federal contracting that one would expect to find in each major industry group (i.e., 72 two-digit SIC categories) after controlling for relevant firm characteristics (i.e., firm size) and with an adjustment for the effects of discrimination. However, the two options do differ in the *approach* they take and the *data* used to provide a snapshot of the extent to which the federal government has been using SDBs in these industry groupings:

  - Option 1's approach to comparing expected and actual use attempts to assure that the government uses *minority firms in proportion to their representation in the general economy* -- not necessarily those who are "ready, willing and able" to supply the federal government. They derived the resulting estimates from a 1992 survey of Minority-Owned Business Enterprises (SMOBE).

  - Option 2's approach is to limit the analysis to *minority firms that participate in the bidding process*

itself, the same arena where we are contemplating the price credit program for correcting disparities. These estimates are based on a recent survey of winning and losing bidders of federal contracts awarded in open competition in FY 1996, *excluding* awards made in the 8(a) program.

Major Conclusions:

- Seventy-two 2-digit industry groups account for all federal contracting with prime firms. Under the options discussed above, the number of these industries that would qualify for price credits and the share of SDB prime contracting currently accounted for by these industries in FY 94-96 is:

	Number of Industries Eligible for Price Credits	Share of Current SDB Dollars (Percent)
Option 1	37	41.1
Option 2	28	75.0

Though the number of eligible industries varies considerably between the two options, differences in the share of SDB prime contracting covered by Option 1 and 2 are determined chiefly by the fact that five 2-digit industries (the three construction groups: general contractors, SIC 15; heavy construction, SIC 16; special trades, SIC 17; business services, SIC 73; and engineering services; SIC 87), account for about 71 percent of all SDB prime contract awards. These are also some of the key industries for the 8(a) program.

- Use of the proposed price credit system would likely shift *very few* contracts toward SDBs. Under Option 1, a 10 percent price credit system (the most we can offer under current law) will only increase the SDB share of federal prime contracting by $201.3 million. Under Option 2, a more sizable amount of federal contracting would potentially shift to SDBs -- $787.6 million -- because it triggers SIC 15, general construction. These estimates represent an *upper bound* because they assume that price is the only consideration and that SDB bidders would win if their bid came within 10 percent of the low and winning bid. However, this overstates the importance of price since the low bid was not the winning bid in a quarter of competed contracts in FY 1996. Other factors limiting the size of the estimated effect reflect the fact that less than half the contract spending results from multi-bid contracts; SDBs bid on only about a third of these contracts; the range of bid prices was often too broad for a 10 percent credit to affect outcomes; and in many procurement decisions, price is a secondary consideration.

- The estimates above *do not* factor in awards made in the 8(a) program. To do so, would reduce further the share of contracts that the price credit would potentially shift to SDBs. Under Option 2, the estimated share would be reduced from $787.6 million to $82.6 million, owing to SIC 15, general construction; business services, SIC 73; and engineering services, SIC 87 drops off the list of eligible SICs. This step would similarly reduce Option 1's estimates from $201.3 million to $57.1 million.

- In the larger scheme of things, a price credit program is likely to be a fairly weak tool for remedying discrimination and exclusion in the public and private sector. The data suggests that besides price credits, other measures need to be examined to level the playing field between SDB and non-SDB firms in federal procurement (e.g., outreach, enforcement, voluntary private sector efforts, etc.).

- The price credit, which addresses fair use of existing disadvantaged businesses, also needs the 8(a) program to help address the low presence of minority firms.

Other Considerations:

- The set of small. disadvantaged business owners likely to receive a price credit is distinct from the set of firms in the 8(a) program. Fewer than 10 percent of the SDBs who bid on contracts, outside the 8(a) program, are 8(a) firms.

- Within industries, there are significant differences in the bidding patterns among government agencies between SDB and non-SDB firms. There are slightly more SDBs participating in the competitive bid process (estimated to be about 7,000, excluding 8(a) firms that participate in the non-8(a) competitive bid process), than is in the 8(a) program (around 6,200).

- While still small, these non-8(a) SDBs, tend to be larger, slightly older, and appear to have a higher productivity than 8(a) firms. Though we have not, at this time, determined their relationship to the 8(a) program, the data are consistent with these firms being predominantly successful graduates of the 8(a) program and not of firms that were unable to meet 8(a) certification standards.

- Small, disadvantaged businesses play a significant role in making the competitive bid process more competitive:

    - SDBs represent about 16 percent of all firms in the competitive bid process. with higher shares in some industries.

    - In many industries, SDB presence is vital to the competitive process. For instance, in the SIC that includes landscaping services, about 8 percent of the solicitations would have resulted in only one bidder, if SDB firms had not also bid. In the SIC for repair services, almost 10 percent of solicitations would have resulted in only one bidder, if SDB firms had not also bid.

- The gaps between the contracting dollars awarded to SDBs, in the competitive bid process, and the average size of contracts typically won by firms of their size can be large. For instance, in the industrial classification for engineering, accounting, and management related services, SDBs won about 6 percent of contacting dollars, though given their firm size, SDBs might have won about 12 percent of contracting dollars. On a national scale, SDBs won about 11 percent of contract dollars in competitive bids for general construction. while given their firm size they might have won about 15 percent.

- The greatest disparity between small, disadvantaged businesses and other small businesses when bidding on contracts set aside for small business firms. There was a statistically, significant pattern showing small, disadvantaged businesses losing to other small business firms of the same age and size when bidding on the same contracts. This suggests that the gap in contract dollars won by small, disadvantaged businesses compared with other businesses. could not be closed by expanding small business contracting.