FOIA Number: 2011-0582-F

FOIA MARKER

This is not a textual record. This is used as an administrative marker by the William J. Clinton Presidential Library Staff.

Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Chief of Staff

Series/Staff Member: George Stephanopoulos

Subseries:

OA/ID Number: 8032

FolderID:

Folder Title:
Afirmative Action

Stack:	Row:	Section:	Shelf:	Position:
S	22	2	11	1

March 6
1pm
Leon's

LM

MEMORANDUM FOR ALEXIS HERMAN

FROM: Richard Hayes RH

RE: Affirmative Action

DATE: March 5, 1996

You requested that I set-up a meeting on affirmative action to review our next steps. A meeting has been scheduled for Wednesday, March 6, 1996, 1 a.m. in Leon's office. Leon Panetta, Harold Ickes, Jack Quinn, John Hilley, George Stephanopoulos, Marvin Krislov and Kumiki Gibson will be attending the meeting. In the remainder of this memo, I have summarized the issues and the decisions that need to be made and the actions we have taken to date.

<u>Policy/Political Issues to be Addressed</u>:

1. Announcement of the Administration decision on affirmative action procurement;

2. Administration's legislative strategy on affirmative action;

3. Decoupling of 8(a) changes from affirmative action procurement proposal;

4. Issuing Administration's Executive Order on empowerment contracting;

5. Presidential forum to reaffirm support for affirmative action programs.

<u>Affirmative Action Background</u>:

Since the President's July 19, 1995 speech on affirmative action, the Administration, under the general direction of the Attorney General, has:

(i) undertaken a review of affirmative action programs that use race, ethnicity or gender as a consideration to expand opportunity or provide benefits to members or groups that have suffered discrimination;

(ii) conducted an evaluation of programs that use race or ethnicity in decisionmaking to figure out if they comport with the Supreme Court's strict scrutiny standard; and

(iii) suspended the Rule of Two Program at the Defense Department October 23, 1995, for failing to meet the narrow tailoring requirements set out in <u>Adarand Constructors V. Pena</u>.

for failing to meet the narrow tailoring requirements set out in Adarand Constructors V. Pena.

Thus far, the Administration has taken the following actions to "mend, but not end" affirmative action programs that do not meet the President's directive or the standards set by the court:

(i) Defense has developed a set of four proposals that are intended to help offset the negative economic impact on SDBs from suspending the Rule of Two — despite several meetings on this issue, the minority business community remains unhappy with the Defense Department staff and will probably be equally displeased when the proposals are issued as an interim final rule around March 15, 1996;

(ii) Justice issued a memorandum to General Counsels February 29, saying that the strict judicial scrutiny requirements of Adarand will not require major modifications in the way federal agencies have been carrying out affirmative action policies in federal employment — Federal agencies have long been subject to the standards of Title VII of the 1964 Civil Rights Act, which prohibits discrimination based on race or ethnicity in employment and imposes limits on the use of affirmative action in the workplace;

(iii) Justice has developed a framework to reform affirmative action in federal procurement that is designed to ensure compliance with the constitutional standards established by the Supreme Court — The proposal affirms that the continued use of race and sex preferences in federal procurement decisions meets a compelling government interest; several significant technical issues remain outstanding and need to be addressed, but the general reaction from the vetting we have done to date is that the proposal represents a reasonable way to go. [Ann Devroy is writing a story about this that may appear in the Washington Post on Thursday, March 7 -- one of the GCs leaked this information to her after we did a briefing for them last week];

(iv) Justice has defended the constitutionality of the 8(a) program in one of two post-Adarand challenges to affirmative action programs, while SBA continues to improve its efficiency and general effectiveness — the most recent case, Dynalantic v. United States Department of Defense and United States Small Business Administration is being argued March 8, 1996, in the United States District Court for the District of Columbia;

(v) Justice is continuing to review the use of affirmative action in federal grants and the process by which states set goals in affirmative action procurement — there review is expected to continue for another month or two; and

(vi) The Vice President's office has drafted an Executive Order on Empowerment Contracting that would provide price or evaluation preferences to qualified businesses that are located in areas of general economic distress or that hire a significant number of residences from such an area — In the mean time, Senator Bond introduced the "Hub Zone Act of 1996" (S. 1574) February 23, 1996, to provide Federal contracting opportunities for small business concerns located in historically underutilized business zones. Our constituents generally support our proposal, but not that proposed by Senator Bond because his bill requires that a percentage of all prime contracts would be required to be awarded to businesses located in these hub zones.

Over the past few weeks, extensive consultations have been held with representatives of the Civil Rights Community, minority businesses, women's groups, and Hill members and committee staff representing the Congressional Black Caucus, Congressional Hispanic Caucus, Constitution Subcommittee, Small Busienss Committee, Women's Caucus, Asian-Pacific Caucus, Judiciary Commitee, and the Government Operations Committee. These meetings generally focused on Justice's procurement reform proposal, and to a limited degree, SBA's proposals to reform the 8(a) program. We also solicited advice on how we should proceed in light of the following events: (i) Rep. Canady (Florida) is marking up his bill to outlaw affirmative action programs ("Equal Opportunity Act of 1995") Thursday, March 7, 1996 — the bill is expected to pass out of subcommittee and possibly the full committee (but not into April), but its not clear what will happen in the full House. Dole and others have introduced similar bills, but Canady's bill is the only one that is moving at this time; and (2) Rep. Jan Meyers (Kansas) is expected to renew her efforts to suspend use of the 8(a) program — Phil Lader rejected her most recent request to do so, but she is expected to keep on trying.

The consensus between Hill members and staff is the Administration should announce its position on procurement reform. The members are anxious to have something that they can point to in the light of Canady's actions, although our proposal is not an answer to Canady. It was felt that it was better for us to get out in front of Canady's efforts, so we don't look like we are playing catchup. It was also advised that we try to find "blue-dogs" to support our position. Rep. LaFalce is also encouraging us to do something on 8(a) although he would probably be happy with our efforts to improve the efficiency of the program, routing out fraud and abuse, etc.

Members of the Civil Rights Community and minority businesspeople are generally supportive of our actions if they are in response to the Court, but draw the line about going further. They are adamant that we not make any major structural changes to the 8(a) program this year, since the Justice Department has taken the position that the program meets the constitutional test. Their "joint" position is that whatever we do is not going to satisfy Rep. Meyer, so why start down that path. They argue that the Administration should defend the programs and they are willing to help. We met with Ellie Smeal and the Feminist Majority last week group about affirmative action activities in California and seventeen other states (which are also aimed at eliminating preferences for women). They are recruiting women from 100 college campuses to go to California and conduct voter registration and affirmative action campaigns. All of the groups are also quite concern that we not set up a situation where "white women and black men are fighting over a shrinking piece of the pie."

Key Features of Justice's Procurement Reform Proposal

The Justice Department's procurement reform proposal relies on the use of "benchmarks", estimated by regression analysis for each industry for the entire government, that will represent the level of minority contracting that one would expect to find in a market absent discrimination or its effects. Under the reform structure, federal agencies will, subject to the benchmarks, be able to use several race-conscious contracting mechanisms: SBA 8(a) program; a bidding credit for

SDB prime contractors; and an evaluation credit for non-minority rpime contractors that use SDBs in subcontracting. The 8(a) program will continue to provide for sole source contracting and sheltered competition for 8(a) firms subject to the benchmark limits. Agencies will also undertake a variety of information, technical assistance, outreach activities designed to make minority firms aware of contracitng opportunities and to take advantage of those opportunities.

Other information features of the proposal include:

o 8(a) participants will qualify automatically for SDB programs and 8(d) subcontracting — others can establish their eligibility by submitting required statements and documentation and being certified by an SBA approved agency;

o Members of designated minority groups will continue to benefit from the statutorily mandated presumption of social and eonomic disadvantage — others can do so by submitting clear and convincing evidence;

o Every applicant will be required to submit with each bid a certification from an SBA approved organization that the business is owned and controlled by the designated socially and economically disadvantaged individuals;

o Procedures for SBA to make an eligibility determination within 15 days for all protests about an SDB's eligibility; and

o Tough criminal penalties including fines, imprisonment and debarment against individuals who present fraudulent information or use an SDB as a front in order to obtain contracts.

The White House

COUNSEL'S OFFICE

FACSIMILE TRANSMISSION COVER SHEET

DATE: 3/6/96

TO: Ginny Terzano

FACSIMILE NUMBER: 6-6210

TELEPHONE NUMBER: 6-2580

FROM: Marvin Krislov /Kumiki Gibson

TELEPHONE NUMBER: 456 7903

PAGES (WITH COVER): 3

COMMENTS: FYI AS DISCUSSED

PLEASE DELIVER AS SOON AS POSSIBLE

DRAFT
TALKING POINTS FOR MIKE MCCURRY

RE: AFFIRMATIVE ACTION

--In July 1995, the President asked the Justice Department to review federal affirmative action programs to ensure their constitutionality (following the Adarand decision), effectiveness, and fairness.

--The Justice Department has been working hard to ensure that these programs (which includes employment initiatives, procurement efforts, and grant programs) satisfy the Adarand standard--namely, that they are "narrowly tailored" to meet a "compelling need."

--Last week, the Justice Department announced completion of its review of the federal employment program. It defined the parameters for use of race and ethnicity in making personnel decisions and indicated that the use of race-conscious measures should be limited in duration, and targeted to address the specific remedial purpose.

--The Justice Department review of procurement programs is continuing.

--After reviewing complex economic and statistical data, the Justice Department has determined that there still exists a "compelling need" for federal programs to benefit disadvantaged minority businesses.

--The remaining issues involve how to "tailor" their programs to ensure effectiveness and fairness--which businesses should be assisted, how that assistance should be calculated and provided, and when that assistance should cease.

--The Justice Department has been reviewing methods for answering those questions and has been meeting with interested and knowledgeable parties to determine appropriate approaches.

--As part of this process, John Schmidt and Deval Patrick met last week with agency general counsels at the White House to solicit their input.

--At this meeting, the Justice Department discussed with agency general counsels a proposed approach that would tailor certain federal procurement programs.

--While the proposal would change the administration of those programs, it would "mend, not end" them.

--Last week's meeting did not finalize any decisions, and the Justice Department's proposed approach certainly has not been adopted as Administration policy.

--We anticipate that an announcement will occur in the near future regarding this phase of the Justice Department review.

DRAFT

~~Confidential.~~ Close Hold
2/6/96

REFORM OF AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT

The proposal set forth herein to reform affirmative action in federal procurement has been designed to ensure compliance with the constitutional standards established by the Supreme Court in Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995). The proposed structure, which has been developed by the Justice Department with the cooperation of an inter-agency working group, will be set forth as a proposed regulation amending the affirmative action provisions of the Federal Acquisition Regulations and the Defense Federal Acquisition Regulation Supplement.

BACKGROUND

In Adarand, the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling government interest. That standard does not apply to outreach measures that are designed to expand the pool of bidders to include a greater number of minority-owned firms.

Through its initial authorization of the use of section 8(a) of the Small Business Act to expand opportunities for minority-owned firms and through reenactments of this and other programs designed to assist such businesses, Congress has repeatedly made the judgment that race-conscious federal procurement programs are needed to remedy the effects of discrimination that have raised artificial barriers to the formation, development and utilization of minority-owned businesses. Based upon these congressional actions, the legislative history supporting them and the evidence available to Congress, this judgment is credible and defensible under the Constitution. Indeed, the preliminary survey of currently available evidence conducted by the Justice Department since the Adarand decision, including the review of numerous specific studies of discrimination conducted by state and local governments throughout the nation, indicates that, in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period. For purposes of these proposed reforms, therefore, we accept the congressional judgment that affirmative action in federal procurement is necessary and that the federal government has a compelling interest to act on that basis in the award of federal contracts.

Congress has largely, however, and with certain limitations noted below, left to the executive agencies the determination of how to achieve the remedial goals that it has established. The Court in Adarand made clear that, even when there is a constitutionally sustainable compelling interest supporting the use of race in decisionmaking, any such programs must be narrowly tailored to meet that interest. We have focused, therefore, on ensuring that the means of serving the congressionally mandated interest in this area are narrowly tailored to meet that objective. This task must be taken very seriously. While the Court in Adarand did not close the door on race-conscious decisionmaking, it made clear that such decisionmaking must be done carefully. Our focus has been on creating a structure for race-conscious contracting that will meet the congressionally determined objective in a manner that will survive constitutional scrutiny.

In giving content to the narrow tailoring prong of strict scrutiny, courts have identified six principal factors: (1) whether the government considered race neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the program and whether it is flexible; (3) whether race is relied upon as the sole factor in eligibility or whether it is used as one factor in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether it is subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries of the program. This proposal responds to each of these factors.

The Department of Defense (DoD), which conducts a substantial majority of the federal government's procurement, was the focus of initial post-Adarand compliance actions by the federal government. In particular, DoD, acting pursuant to authority granted by 10 U.S.C. § 2323,[1] had developed through regulation a practice known as the "rule of two." Pursuant to the rule of two, whenever a contract officer could identify two or more SDBs that were qualified to bid on a project, the officer

---

[1] Section 2323 establishes a five percent goal for DoD contracting with small disadvantaged businesses ("SDBs") and authorizes DoD to "enter into contracts using less than full and open competitive procedures * * * and partial set asides for [SDBs]." Section 2323 states that the cost of using such measures may not exceed fair market price by more than ten percent. It authorizes the Secretary of Defense to adjust the applicable percentage "for any industry category if available information clearly indicates that nondisadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph."

was required to set the contract aside for bidding exclusively by SDBs. Under section 2323, firms owned by individuals from designated racial minority groups are presumed to be SDBs.[2] Others may enter the program by establishing that they are socially and economically disadvantaged. After consultation with the Department of Justice, DoD suspended use of the rule of two.

Congress in 1994 extended the affirmative action authority granted DoD by section 2323 to all agencies of the federal government through enactment of the Federal Acquisition Streamlining Act (FASA), Pub. L. No. 103-355, 108 Stat. 3243.[3] Because of Adarand and the effort to review federal affirmative action programs following Adarand, regulations to implement the affirmative action authority granted by FASA have been delayed. See 60 Fed. Reg. 448258, 48259 (Sept. 18, 1995). This proposal provides the basis for those regulations.

The proposed structure will necessarily affect a wide range of measures that promote minority participation in government contracting through race-based means. Taking DoD as an example, approximately one-sixth of contracting with minority-owned firms in 1994 resulted from use of the rule of two. The majority of dollars to minority firms was awarded through other means: direct competitive awards, the Small Business Administration's (SBA) section 8(a) program, subcontracting pursuant to section 8(d) of the Small Business Act, and a price credit applied pursuant to section 2323. Activities pursuant to all of these methods, with the exception of direct competitive awards (which do not take race into account), will be affected by the proposed reforms.[4]

---

[2] 10 U.S.C. 2323 incorporates by explicit reference the language of section 8(d) of the Small Business Act, which states that members of designated racial or ethnic groups are presumed to be socially and economically disadvantaged. Participants in the 8(a) program are also presumed to be SDBs.

[3] FASA states that in order to achieve goals for SDB participation in procurement negotiated with the Small Business Administration, an "agency may enter into contracts using -- (A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and (B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation."

[4] This proposal addresses only affirmative action in the federal government's own procurement. It does not address affirmative action in procurement that is undertaken by states and localities pursuant to programs in which such entities

(continued...)

The 8(a) program merits special mention at the outset. This program serves a purpose that is distinct from that served by general SDB programs. The 8(a) program is designed to assist the development of businesses owned by socially and economically disadvantaged individuals. To this end, the program is targeted toward concerns that are more disadvantaged (e.g. the standard for economic disadvantage for entry into 8(a) is an owner's net worth of $200,000 compared to $750,000 for SDB programs). Participants in the program are required to establish business development plans and are eligible for technological, financial, and practical assistance, and may compete in a sheltered market for a limited time. Each of these aspects of the program is designed to assist the business in developing the technical and practical experience necessary to become viable without assistance. By contrast, the general SDB program is a procurement program, designed to assist the government in finding firms capable of providing needed services, while, at the same time, helping to address the traditional exclusion of minority-owned firms from contracting opportunities.

The operation of the 8(a) program will become subject to the overall limitations in the measures described below, but, in addition, the SBA has developed a number of proposed reforms to the 8(a) program that will strengthen safeguards against fraud and ensure that the 8(a) program serves its purpose of assisting the development of businesses owned by socially and economically disadvantaged individuals.

OVERVIEW OF STRUCTURE

The SDB reform outlined herein involves five major topics: (1) certification and eligibility, (2) benchmark limitations, (3) mechanisms, (4) the interaction of benchmarks and mechanisms, and (5) outreach and technical assistance. The proposed structure incorporates these elements into a system that we believe is consistent with the President's commitment to ensuring equal opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority.

Eligibility and Certification

At present, while a concern must have its eligibility certified by the SBA to participate in the 8(a) program, there is no similar certification requirement for participation in SDB programs or subcontracting under section 8(d). Pursuant to current practice, firms simply check a box to identify themselves

---

[4](...continued) receive funds from federal agencies (e.g., the Disadvantaged Business Enterprise Program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, section 1003(b), 105 Stat. 1919-1922).

as SDB's when bidding for federal contracts or 8(d) subcontracts. Reform of this certification process is needed to assure that programs meet constitutional and statutory objectives. While the basic elements of eligibility under these programs are statutorily determined, agencies have discretion to impose significant additional controls and to establish mechanisms to assure that the statutory criteria are in fact met.

The SBA will continue as the sole agency with authority to certify firms for the 8(a) program. The following discussion, therefore, concerns only certification of SDB's that are not participants in the 8(a) program.

Each bid that an SDB submits to an agency or to a prime contractor seeking to fulfill 8(d) obligations will have to be accompanied by a form certifying that the concern qualifies as a small disadvantaged business under eligibility standards that will be published by the SBA. The standards and certification form will allow 8(a) participants to qualify automatically for SDB programs and 8(d) subcontracting. Others will be required to establish their eligibility by submitting required statements and documentation. When a concern has been certified by an agency as eligible for SDB programs, its name will be entered into a central on-line register to be maintained by SBA. Registered firms will have only to complete a portion of the form confirming the continued validity of that certification to participate in SDB programs at any agency.

Social and Economic Disadvantage

Members of designated minority groups seeking to participate in SDB and 8(d) programs will continue to benefit from the statutorily mandated presumption of social and economic disadvantage.[5] This presumption is rebuttable. The form will ask the applicant to identify the group identification triggering a presumption of social and economic disadvantage. In addition, the form will enumerate the objective criteria constituting economic disadvantage according to SBA standards and advise the applicant benefiting from a presumption of such disadvantage that the presumption is rebuttable and a challenge would be resolved on the basis of these criteria. Challenges would be processed through existing SBA challenge mechanisms.

---

[5] Both FASA and 10 U.S.C. §2323 incorporate by explicit reference the definition of social and economic disadvantage contained in section 8(d) of the Small Business Act. Pursuant to section 8(d), members of designated groups are presumed to be both socially and economically disadvantaged. By contrast, for the 8(a) program, members of identified groups are presumed to be socially disadvantaged, but must establish that they are economically disadvantaged.

Concerns that cannot benefit from a presumption will be required to establish social and economic disadvantage by a preponderance of the evidence, instead of by clear and convincing evidence as is now required. Applicants not presumed socially and economically disadvantaged will be required to answer a series of questions demonstrating such disadvantage. These questions will be included in the standard certification form and will be substantially similar to those currently asked by the SBA of individuals whose status as a socially and economically disadvantaged individual has been challenged. Guidelines for analyzing the responses and determining social disadvantage will be published by the SBA. That agency will also conduct training seminars designed to instruct personnel from other agencies on the procedures for making eligibility determinations.

Agencies will have discretion to decide which official within the agency will have authority to determine whether "non-presumed" individuals are socially and economically disadvantaged. In most instances, the contracting officer should not have final authority to make the determination; the procedure must, however, facilitate quick decisions so that the procurement process will not be delayed. An agency may wish to assign this responsibility to its Office of Small and Disadvantaged Business Utilization. The SBA will answer inquiries regarding eligibility determinations and the procuring agency will retain the ability to refer applications to the SBA for final eligibility determinations through the protest procedures now in place.

Ownership and Control

In addition to submitting the form described above, every applicant will be required to submit a certification that the business is owned and controlled by the designated socially and economically disadvantaged individuals as those terms are defined by the SBA's standards for ownership and control at 13 C.F.R. 124.103 and 124.104.[6] The certification will address only ownership and control of the business and not whether individuals are socially or economically disadvantaged. Such a certification will have to come from an SBA approved organization, a list of which will be maintained by the SBA. In order to be approved by the SBA to certify ownership and control, (1) the entity must certify ownership and control according to the standards established by the SBA for the 8(a) program (13 C.F.R. 124.103 and 124.104), and (2) the entity's certifications must have been

---

[6] Note that these standards do not address one eligibility criterion peculiar to the DoD's SDB program under 10 U.S.C. 2323 -- that the majority of earnings must directly accrue to the socially and economically disadvantaged individuals that own and control the concern. The standard certification form will accommodate this criterion by including a DoD-specific section requiring the concern to attest that the majority of the firm's earnings do flow in this manner.

accepted by a state or local government or a major private contractor. Such entities may include private organizations, the SBA (i.e. through the 8(a) program), entities that provide certifications for participation in the Department of Transportation's disadvantaged business enterprise ("DBE") program, or states or localities so long as the certification addresses the standards for ownership and control promulgated by the SBA.

As a means of ensuring that the identified socially and economically disadvantaged individuals retain ownership and control of a firm, a certification of ownership and control will be valid for a maximum of three years from the date it was issued. Therefore, each time an individual bids on a contract, he or she must complete a form addressing social and economic disadvantage and submit a certification of ownership and control that was issued within the past three years.

This procedure is intended to take advantage of the extensive network of certifying entities already in existence. At present, firms may have to obtain several different certifications as they pursue a mix of private and public contracts. While it is clear that a control mechanism is needed to protect against fraud, it makes little sense to create a new federal bureaucracy to perform work that is already being done and to erect another hurdle that an SDB must clear before qualifying for a federal contract. The limited resources of the federal government and of SDB's make creation of such a bureaucracy counterproductive.

To police the quality of certifications, SBA will conduct occasional audits of certifying organizations selected at random or based on information that suggests a problem. Also, the name of the certifying organization will be made public along with the name of the concern submitting a bid on a contract. Any concern that submitted an offer for a requirement, the procuring agency contracting officer, and the SBA will be able to protest a concern's eligibility as an SDB with regard to the owner's social and economic disadvantage as well as the validity of its ownership and control certification. Such protests will be filed with the SBA and processed in accordance with 13 CFR 124.601-124.610. Any entity may submit specific factual information to the procuring agency contracting officer in an effort to persuade the contracting officer to initiate a protest. The procurement process must not be delayed unduly while challenges are resolved. To this end, agencies will have to make expeditious decisions and SBA will have to make a determined effort to comply with its own time limits for resolving challenges. Where the challenge is not resolved within applicable time limits, the procurement process will proceed.

Enforcement

Finally, there must be a concerted effort to enforce the law against individuals who present fraudulent information to the government. Knowledgeable observers indicate that the existence of a meaningful threat of prosecution for falsely claiming SDB status will do much to ensure that the program benefits those for whom it is designed. To this end, there will be an enhanced effort by SBA and the Department of Justice to identify and pursue individuals fraudulently asserting SDB status. Any individual may forward specific factual information suggesting such a misrepresentation to the procuring agency contracting officer or the agency's inspector general. Similarly, the Inspector General of SBA will refer evidence of misrepresentation of SDB status that emerges through the challenge procedure or otherwise to the Department of Justice. Penalties for such misrepresentations were increased by the Business Opportunity Development and Reform Act of 1988 and include:

(1) A fine of up to $500,000, imprisonment of up to 10 years, or both;

(2) Suspension and debarment from Federal contracting (48 C.F.R. pt. 9.4);

(3) Ineligibility to participate in any program or activity conducted under the authority of the Small Business Act of Small Business Investment Act of 1958 for a period of up to three years; and

(4) Administrative remedies prescribed by the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801-3812).

Benchmark Limits

Although Congress has made the judgment that affirmative race-conscious measures are needed as a general matter in federal contracting, the use of race must be narrowly tailored. At present, there are generally no effective limitations on the use of race-conscious measures in federal procurement. The federal government operates under a general statutory mandate to achieve the "maximum practical opportunity" for SDB participation and that overall mandate is translated into specific agency-by-agency goals. Some specific programs operate under statutorily prescribed goals.[7] To the extent that race-conscious measures (going beyond outreach and technical assistance) are utilized to

---

[7] See, e.g., 10 U.S.C. 2323 (5% goal for DoD contracting with SDBs); Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (10% goal for Department of Transportation highway projects administered by states).

obtain these objectives, limitations must be established to comply with narrow tailoring requirements.

To this end, the proposal relies on development of a set of specific guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of federal procurement. The limits, or "benchmarks", will be set for each industry for the entire government. The Department of Commerce, in consultation with the General Services Administration (GSA) and SBA, will recommend appropriate benchmark figures for each industry to the Office of Federal Procurement Policy (OFPP), which will issue the final benchmark figures. Each industry benchmark will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects. Benchmarks will provide the basis for comparison with actual minority participation in procurement in that industry (and, where appropriate, in a region) and, as such, will allow the government to measure its progress toward eradicating discriminatory barriers to the formation and development of disadvantaged businesses.

In establishing the benchmarks, the first step is to define whether industries operate according to regional or national markets. It is our presumption that most federal contracting is conducted on a national basis. We also start from the view, reflected in a variety of federal policies, that federal contracting should encourage the development of national markets wherever feasible.

In general, industries will be defined according to two-digit Standard Industrial Classification (SIC) codes. Where possible, two-digit SIC codes will be combined to require calculations with respect to the smallest possible number of markets. In other instances, the variety of contracting activities contained within two-digit SIC codes may require looking beyond two digits.

After identifying the markets, the system will then measure, using primarily census data, the percentage of firms operating in each market that are owned by minorities. This pool will be limited to firms that are qualified to perform government contracts. In general, it appears appropriate to look at the industry in question and identify the smallest firm that has won a government contract in that industry in the last three years. Firms that are significantly smaller (i.e. less than 80% of that size) would be presumed to be unqualified to perform government contracts in that industry.

In addition to calculating the number of existing minority firms, the proposed system will look at evidence, including the use of regression analysis techniques similar to those employed in various state and local studies of discrimination in procurement, to estimate an amount by which minority business formation in each industry has been suppressed by discrimination.

The combination of these two amounts -- existing minority availability and the estimated effect of race in suppressing minority business activity in the industry -- will form the benchmark. For example, If 25% of the qualified firms available in a given industry are minority-owned and evidence indicates that the effects of race have suppressed minority business formation in that industry by approximately 20%, then 5% (representing 20% of 25%) would be added to 25% for a benchmark of 30%.

It should be emphasized that there is no precise way to calculate the impact of discrimination in various markets. The benchmarks, however, represent a reasonable effort to establish guidelines to limit the use of race-conscious measures. Limitations are necessary to meet the requirement that such measures be narrowly tailored to meet the compelling interest that Congress has identified in this area.

Benchmarks will be adjusted every five years, as new data reporting the availability of minority firms are made available by the Census Bureau.[8] Census regions will be used in defining the scope of regional markets.

Mechanisms

Under the reformed structure, the federal government will generally have authority to continue the use of several race-conscious contracting mechanisms: SBA's 8(a) program; a price credit for SDB prime contractors; and an evaluation credit for non-minority prime contractors that use SDBs in subcontracting. In addition, at all times, agencies must engage in a variety of outreach and technical assistance activities designed to enhance contracting opportunities for SDBs (but that are not subject to strict scrutiny). Those efforts will be expanded as described more fully below.

The 8(a) program will continue to provide for sole source contracting and sheltered competition for 8(a) firms. However, the program will be monitored and periodic adjustments made that correspond to adjustments to the SDB program in order to ensure

---

[8] The Census conducts its survey of small minority-owned business enterprises every five years. One limitation of the survey is that it includes only privately held businesses. It, therefore, does not reach those businesses that are publicly traded. Such firms, however, tend to be larger and it is less likely in current circumstances that minority owners will retain control of 51% of the equity. A second limitation with the survey is the lag between its completion and publication of the results. The initial results of the 1992 survey have recently been released. These data are the best available.

that it remains narrowly tailored in application. In addition, the 8(a) program will be reformed in accordance with proposals developed by the SBA (described below) to assure that it carries out the additional function, noted earlier, of developing the competitive capacity of small disadvantaged firms.

A second available race-conscious measure will be a price or evaluation credit in prime contracting for SDBs.[9] Statutory authority for the use of such a credit exists for DoD in 10 U.S.C. 2323 and for the remainder of the government in FASA. Each statute permits use of such a credit so long as the final price does not exceed a fair market price by more than 10%.

Agencies will also be permitted to use an evaluation credit with respect to the use of SDBs as subcontractors.[10] In evaluating competing bids, agencies may consider the extent of the bidders' commitment to use SDB subcontractors. In order to certify their eligibility as SDBs, subcontractors will submit the same certification form to the prime contractor that is described in the certification section of this proposal. Bidders that secure commitments from SDBs would receive a credit in the evaluation of competing bids.[11]

In applying these price and evaluation credits, race will simply be one factor that is considered in the decision to award

---

[9] The use of the term "credit" is not meant to restrict the use of this mechanism to contracts where price is the primary factor in selecting the successful bidder. Where the successful bidder is selected based on other factors -- such as the ability to produce a contract that provides the "best value" to the agency -- agencies may build the value of increasing the participation of SDB contractors and subcontractors into the evaluation of offers. For some contracts, a numerical credit may be appropriate, in others an adjectival or other assignment may make more sense to the agency. This proposal does not restrict such options, but subjects any race-based credit (regardless how it operates) to the overall limitations described herein.

[10] For certain types of procurements, Section 8(d) of the Small Business Act requires agencies to negotiate an SDB subcontracting plan with the successful bidder for the prime contract. The statute provides that each such plan shall include percentage goals for the utilization of SDB subcontractors. The statute only requires prime contractors to exercise good faith efforts in meeting the goals of the plan.

[11] In some cases, agencies may have authority to utilize other measures, such as bonus awards, to encourage the use of minority subcontractors. See e.g., Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns, 48 C.F.R. 52 219-10. Any such mechanism will be subject to the benchmark limitations described herein.

a contract -- in contrast to programs in which race is the sole factor.

Interaction of Benchmark Limits and Mechanisms

In determining how benchmarks will be used to measure the appropriateness of various race-conscious activities, the objective has been to develop a system that can operate with a sufficient degree of clarity, consistency and simplicity over the range of federal agencies and contracting activities. In general terms, benchmarks will serve as yardsticks for measuring success in providing minority contracting opportunities. Where the use of all available tools results in minority participation below the benchmark, race-based mechanisms will remain available, although their scope will vary depending on the extent of the disparity between availability and participation. Where participation exceeds the benchmark, however, and can be expected to continue to do so without race-conscious efforts, adjustments will be made.

At the close of each fiscal year, the GSA will review data collected by its Federal Procurement Data Center for the three preceding fiscal years to determine the percentage of contracting dollars that has been awarded to minority-owned SDBs in each market. GSA will analyze minority SDB participation for all transactions that exceed $25,000. This review will include minority-owned SDBs participating through direct contracting (including full and open competition), the 8(a) program, and SDB prime and subcontracting programs.[12] Data regarding minority participation will be reviewed annually, but will include the past three fiscal years of experience. Examining experience over three year stretches should produce a more accurate picture of minority participation, given short-term fluctuations and the fact that the process of bidding and awarding a contract may span more than a single fiscal year.

GSA will analyze the data and, after consultation with SBA, make a recommendation to OFPP regarding which mechanisms should be available in each industry and the size of the credits that can be applied. OFPP will make final determinations.

Pursuant to statute, each agency now negotiates goals for SDB participation with SBA for each year. OFPP and GSA would participate in that process and inform SBA and agencies of the appropriate benchmarks for the industries in which the agency contracts and of the mechanisms available.

Where OFPP, acting on GSA's recommendation, determines that participation by SDB's in government contracting in an industry

---

[12] In order to measure accurately SDB subcontracting participation, prime contractors will be required to report SDB subcontracting participation by two-digit SIC code.

is below the relevant benchmark, it may authorize agencies to grant credit for SDB bidders and for prime contractors that commit to subcontract with identified SDBs. OFPP will set a percentage cap between 0 and 10 percent on the amount the credit can allow the price of a contract to deviate from the fair market price. That percentage will represent the maximum credit that each agency may use in the evaluation of bids from SDBs and prime contractors who commit to subcontracting with SDBs.

Where the price and evaluation credits have been used in an industry and the percentage of dollars awarded to SDB's in that industry exceeds the benchmark, GSA, in consultation with SBA, must estimate the effect of curtailing the use of race-conscious contracting mechanisms and report to OFPP. If OFPP determines that the minority participation rate would fall substantially below the benchmark in the absence of race-conscious measures,[13] it need not stop using such measures, but may, as described below, be required to adjust their use.

Agencies will report the number of contracts that were awarded using a price or evaluation credit as well as the amount of those credits. These figures will allow an estimate of the effect on SDB participation of adjusting or removing the credit. In the absence of that objective measure, GSA will have to estimate and report to OFPP how much minority contracting resulted from the application of these race-conscious measures. One indication may be the success of minorities in winning contracts through direct competition in which race is not used in the decision to award a contract. It may also be useful to examine comparable experience in private industries operating without affirmative action programs.

Even when agencies are not required to terminate price and evaluation credits, they may be required to adjust their size. Statutory authority for this adjustment exists in both FASA and section 2323. Because the size of credits will affect industries differently, it is impossible to prescribe a set of specific rules to govern adjustments. Responsibility will rest with GSA to analyze the impact of credits by industry category and propose adjustments to OFPP where appropriate.

In addition, discretion will remain with an agency to use <u>less</u> than the price or evaluation credit authorized by OFPP. This discretion may be exercised to ensure that use of the credits by a specific agency does not unfairly limit the

---

[13] More than three "standard deviations" will generally be viewed as "substantial" for these purposes. Under applicable court decisions, a disparity in the range of three or more standard deviations generally will support a prima facie case of discrimination in the employment context. A standard deviation is a measure of the departure from the level of activity that one would expect in the absence of discrimination.

opportunities of non-SDB contractors seeking contracts from that agency. While the size of the maximum credits will be determined on an industry-wide basis and apply across all agencies, it remains important to maintain flexibility at the agency level to ensure against any undue concentrations of SDB contracting and unnecessary use of race-conscious credits. Thus, for example, where an agency has been particularly successful in reaching out to SDB contractors, it may find its use of the full credits unnecessary to achieve its goals, in which event it could depart downward from the authorized credits.

When OFPP concludes that the use of race-conscious measures is not justified in a particular industry (or region), the use of the price credit and the evaluation credit will cease. Suspending the use of race-conscious means will not affect the continued use of race-neutral contracting measures. The limits imposed by the benchmarks would not affect the applicability of statutorily mandated goals, but would limit the extent to which race-conscious means could be used to achieve those goals. For example, DoD would retain its five percent overall statutory goal and would continue to exhort prime contractors to achieve goals for subcontracting with SDB's -- something that it now does with considerable success. Prime contractors, however, would no longer receive credit in evaluation of their bids for signing up SDB subcontractors. Likewise, outreach and technical assistance efforts would continue and minority bidders on prime contracts would continue to seek and win competitive awards; but there would no longer be any price credit for minority firms.

It should be emphasized that the benchmarks are not a limit on the level of minority contracting in any industry that may be achieved without the use of race-conscious measures. Conversely, there is, of course, no assurance that the benchmarks for minority participation in particular industries will be achieved through the available race conscious measures. The achievement of the benchmarks depends on the availability of qualified minority firms that successfully win contracts through open competition, subcontracting, the 8(a) program or through the application of price or evaluation credits. The system described herein is a good faith effort to remedy the effect of discrimination, but it is not a guarantee of any particular result.

The affirmative action structure described herein does not utilize the statutory authorization under FASA to allow federal agencies (or in the case of DoD its direct authorization under 10 U.S.C. 2323) to set contracts aside for bidding exclusively by SDBs. If federal agencies use race-conscious measures in the manner outlined above, together with concerted race-neutral efforts at outreach and technical assistance as described below, we believe the use of this additional statutory authority should be unnecessary. At the end of the initial three-year period of the reformed system's operation (and at regular intervals thereafter), however, GSA, SBA and DoD will evaluate the operation of the system and recommend to OFPP whether the statutory power to authorize set-asides should be invoked. In deciding how to act on those recommendations, OFPP will take into account whether persistent and substantial underutilization of minority firms in particular industries or in government contracting as a whole is the result of the effects of past or present discriminatory barriers that are not being overcome by this system. OFPP will have authority to implement any statutorily authorized tool that is required to carry out the congressional mandate to eliminate such effects.

Such periodic reviews should also consider whether, based on experience, further limitation of the use of race-conscious measures is appropriate beyond those outlined herein. In that regard, it should be noted that the reformed structure is inherently and progressively self-limiting in the use of race-conscious measures. As barriers to minority contracting are removed and the use of race-neutral means of ensuring opportunity succeeds, operation of the reformed structure will automatically reduce, and eventually should eliminate, the use of race in decisionmaking.

8(a)

Contracts obtained by minority firms through the 8(a) program will count toward the calculation whether minority participation has reached or exceeded the benchmark in any industry. The Administrator of SBA will be under an obligation to monitor the use of the 8(a) program in relation to the benchmarks. Thus, where OFPP advises that the use of race-conscious measures must be curtailed in a specific industry on the basis of the benchmarks, the Administrator would limit use of the program through one or more of the following techniques: (1) limiting entry into the program in that industry; (2) accelerating graduation for firms that do not need the full period of sheltered competition to satisfy the goals of the program; and (3) limiting the number of 8(a) contracts awarded in particular industries or geographic areas.

These same techniques should be used by the Administrator in carrying out existing authority to ensure that 8(a) contracting is not concentrated unduly in certain regions. Even where a market is defined as national in scope, and 8(a) is being used within applicable national benchmarks, efforts should be made to guard against excessive use of 8(a) contracting in a limited region.

As noted earlier, the 8(a) program is distinct from other SDB programs in that it is animated by its own distinct purpose -- to assist socially and economically disadvantaged individuals to overcome barriers that have suppressed business formation and development. The 8(a) program has indicia of narrow tailoring that other SDB programs presently lack. Unlike other SDB's, individuals seeking admission to the 8(a) program must establish economic disadvantage without the benefit of any presumption. The Small Business Act defines economically disadvantaged individuals as "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." Furthermore, SBA employs objective criteria to measure whether an individual is economically disadvantaged. In this sense, the statute and regulations are targeted toward victims of discrimination and the SBA is proposing to clarify the regulations implementing the program to emphasize this fact. In addition, individuals are admitted for a limited period -- nine years -- and their performance is reviewed throughout. An individual may be required to leave the program prior to the nine year graduation period if the review reveals that the individual is no longer economically disadvantaged or the firm meets graduation criteria determined by the SBA.

SBA has drafted several program changes designed to ensure that the 8(a) program concentrates it resources on its intended beneficiaries. The proposal would clarify and tighten the standards for determining economic disadvantage, thereby eliminating the ability of otherwise wealthy individuals to obtain eligibility by sheltering assets in, for example, a personal residence. New requirements would be established limiting compensaton and total assets to qualify for entry into and continued eligibility for the program.

SBA will require that individuals who are not presumed to be socially disadvantaged establish their disadvantage by a preponderance of evidence instead of the current requirement that such showing be made by clear and convincing evidence.

The proposed 8(a) reforms would separate the nine-year program term into two parts. During the first four years, a participant would be eligible for both sole source and competitive awards. In the second term, each participant would be allowed a set number of sole source awards, after which the firm would be limited to awards issued through competitive 8(a) procedures. A new graduation criterion would limit participation in the program to firms that do not exceed 50% of the SBA size standard for small businesses in the relevant industry. SBA will also enforce strictly competitive business mix requirements to assure that the program is working to help firms develop their capacity to contract outside the 8(a) program on a competitive basis.

These changes will further tailor the 8(a) program to ensure that it is focused on the distinct need that Congress has identified; to assist the development of small businesses owned by disadvantaged individuals.

Outreach and Technical Assistance

At present, agencies undertake a variety of activities designed to make minority firms aware of contracting opportunities and to help them take advantage of those opportunities. These activities are not subject to strict scrutiny. The structure outlined above for the use of race-conscious measures assumes that agencies will continue such outreach and technical assistance efforts at all times, so that race-conscious measures will be used only to the minimum extent necessary to achieve legitimate objectives. Our review indicates that, while there are a variety of good programs of this nature operated by various federal agencies, there is a lack of consistency and consistent high level energy and direction to these efforts.

SBA operates several assistance programs. Notably, pursuant to section 7(j) of the Small Business Act, SBA provides financial assistance to public and private organizations to provide technical and management assistance to qualifying individuals. 13 CFR 124.403, 404. SBA also operates a program to provide assistance to minority-owned businesses in preparing loan applications and obtaining pre-qualification from SBA for loans. See 13 CFR 120. SBA also operates a surety bond program pursuant to which it provides up to a 90% guarantee for bonds required of small contractors.

The Department of Commerce, through the Minority Business Development Administration, sponsors several programs to provide information, training and research for minority-owned businesses. These programs include Minority Business Development Centers around the country to provide hands on assistance to minority businesses.

DoD has operated since 1990 the Mentor-Protege Pilot Program, which provides incentive for DoD prime contractors to furnish SDB's with technical assistance. See 10 U.S.C. 2301. Mentor firms provide a variety of assistance, including progress payments, advance subcontract payments, loans, providing technical and management assistance and awards of subcontracts on a noncompetitive basis to the protege. DoD reimburses the mentor firm for its expenses. The award of subcontracts under this program is subject to strict scrutiny, but much of the rest of it is not.

The following are among the efforts that should be actively pursued:

1. A race-neutral version of the mentor-protege program (that does not guarantee the award of subcontracts on a non-competitive basis) should be encouraged at all agencies.

2. DoD has proposed -- and other agencies should follow DoD's lead -- eliminating the impact of surety costs from bids.

Because SDB's generally incur higher bond costs, this race-neutral change would assist SDB's and address one of the most frequently cited barriers to minority success in contracting. In this regard, agencies should also examine the use of irrevocable letters of credit in lieu of surety bonds.

3. Where agencies use mailing lists, a minimum goal should be set for inclusion of SDB's on agency mailing lists of bidders.

4. The Procurement Automated Source System (PASS), maintained by SBA, should be continued. The system provides contracting officers with a continuously updated list of SDB firms, classified by interest and region.

5. A uniform system for publishing agency procurement forecasts on SBA Online should be established.

6. Agencies should ensure that lists of SIC codes are disseminated to potential prime contractors and subcontractors.

The foregoing is merely a partial list of possible measures. What is required -- both as a matter of policy and constitutional necessity -- is a systematic and continuing government-wide focus on encouraging minority participation through outreach and technical assistance. It is proposed in contracting, therefore, that agencies should report annually to the President through OFPP on their outreach and technical assistance practices. These reports should present the actual practices and experiences of federal agencies and include recommendations from OFPP as to approaches that can and should be adopted more broadly. The maximum use of such race-neutral efforts will reduce to a minimum the use of race-conscious measures under the benchmarks described above.

CONCLUSION

The structure of affirmative action in contracting set forth herein will not be simple to implement and will undoubtedly be improved through further refinement. Agencies will have to make judgments and observe limitations in the use of race-conscious measures, and make concentrated race-neutral efforts, not required under current practice. The Supreme Court, however, has changed the rules governing federal affirmative action. This model responds to principles developed by the Supreme Court and lower courts in applying strict scrutiny to race-based decisionmaking. The challenge for the federal government is to satisfy, within these newly-applicable constitutional limitations, the compelling interest in remedying the effects of discrimination that Congress has identified.

REFORM OF AFFIRMATIVE ACTION IN PROCUREMENT

The attached summarizes a proposal for reform of federal procurement programs designed to ensure that such programs will comply with strict judicial scrutiny, as required by Adarand Constructors, Inc. v. Pena.

I. SCOPE OF REFORMS

- The proposal affects direct procurement programs designed to assist small and disadvantaged businesses ("SDBs") including those programs authorized under FASA and Section 1207 of the Defense Authorization Act. SDBs are small firms owned by individuals that are disadvantaged socially (subjected to racial or cultural bias) and economically (that bias has led to decreased economic opportunities compared to others).

- The proposal does not eliminate or suspend the 8(a) program. The Department of Justice is currently defending the 8(a) program against several court challenges.

II. CERTIFICATION AND ELIGIBILITY

- Applicants will be required to submit a form to the procuring agency verifying their eligibility.

- Members of designated racial and national origin groups are presumed (by statute) to be socially and economically disadvantaged. Other applicants will have to establish, by a preponderance of evidence instead of the current clear and convincing standard, that they are socially disadvantaged. This change in standard will open SDB participation to more women and other disadvantaged individuals. Such individuals must certify that their income, assets and net worth fall below thresholds set by SBA.

- Each applicant will be required to submit a certification from an SBA approved organization verifying that the individuals claiming disadvantage own and control the company as defined by SBA regulations.

III. OUTREACH AND TECHNICAL ASSISTANCE AND RACE-NEUTRAL TOOLS

- Agencies will be required to maximize the use of technical assistance, outreach and race-neutral means to increase participation.

IV. BENCHMARK LIMITS

- In order to ensure that race-conscious procurement is not used unnecessarily, benchmarks will be developed for each industry in which government contracts. Benchmarks will measure the level of SDB contracting that would exist absent the effects of discrimination.

- Benchmarks will be calculated by combining the availability of minority firms in the industry (using census figures) with an adjustment for the amount that discrimination has suppressed that availability (which may include evidence from a regression analysis similar to that used in employment discrimination cases).

V. RACE-CONSCIOUS TOOLS

- Where SDB participation falls below the benchmark, a price or evaluation credit will be authorized for the evaluation of bids by SDBs and prime contractors who commit to subcontract with SDBs.

- When SDB participation exceeds the benchmark, the credit will be lowered or suspended. Concurrently, the SBA will limit the use of the 8(a) program in that industry by limiting entry, speeding graduation or limiting the number of 8(a) awards in the industry.

DISADVANTAGED BUSINESS PROGRAMS:

THE COMPELLING INTEREST IN REMEDYING DISCRIMINATION AGAINST MINORITY BUSINESS OWNERS

In Adarand, seven of the nine justices supported the continued use of affirmative action as a tool to remedy the effects of present and past discrimination:

> *"The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."*

Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2117 (1995)

Disadvantaged business programs were enacted in response to specific findings that discrimination has impeded, and continues to impede, the ability of minority-owned and other disadvantaged firms to develop in our economy. That need remains.

DISCRIMINATION BY LENDERS HAS RESTRICTED ACCESS TO CAPITAL

Discrimination by lenders has restricted minority access to the capital needed to form and maintain businesses:

- A white business owner in the construction industry receives over fifty times as many loan dollars per dollar of equity capital as African American owners with identical borrowing characteristics (education level, age, business history, equity, etc.).[1]

- White business owners are 15 percent more likely to get a loan and generate, on average, three times as many loan dollars per dollar of equity capital than African American owners with identical borrowing characteristics.[2]

DISCRIMINATION IN BONDING HAS IMPEDED OPPORTUNITIES

Many contracts and subcontracts require that a company receive bonding before given the opportunity to bid on a contract. Numerous studies have documented the disadvantages that minorities face in obtaining bonding:

- A study commissioned by the state of Louisiana found that compared to minority firms with the same experience level, nonminority firms were nearly twice as likely to obtain bonding, three times as likely to obtain bonding for over $1 million and on average were charged lower rates for the same bonding policies.[3]

- A study of firms in Atlanta found that 19 percent of nonminority firms in Atlanta had unlimited bonding capacity while no minority-owned firms, regardless of size or experience, had obtained a similar arrangement.[4]

DISCRIMINATION IN EMPLOYMENT HAS SUPPRESSED BUSINESS FORMATION

In order to form and operate a business, it is usually necessary to have technical and management experience in the industry in which the business is entering. Discrimination in hiring and promotion has impeded the ability of minorities to gain such experience.

- In testing studies completed by the Urban Institute in 1990 and 1991, White males received 50 percent more job offers than minorities with the same characteristics applying for the same jobs.[5]

- The Federal Glass Ceiling Commission reported that African Americans with professional degrees earn only 79 percent as much as white males with the same degrees in the same job categories.[6]

- 97 percent of senior managers in Fortune 1000 industrial and Fortune 500 companies are White.[7]

DISCRIMINATION BY SUPPLIERS AND CONTRACTORS HAS LIMITED COMPETITION

Discrimination, exclusionary practices and the effect of "old boy" business networks have greatly suppressed contracting opportunities for minority-owned businesses.

- In a survey of minority business owners in Denver, 56 percent of African American business owners, 30 percent of Hispanic owners, and 11 percent of Asian business owners reported experiencing discrimination in the form of higher quotes from suppliers.[8]

- 60 percent of the minority-owned firms responding to a California survey reported that prime contractors seldom or never use their firms for private contracts that do not include goals. In regard to construction, 90 percent of African American owners, 80 percent of Asian owners, and 62 percent of Hispanic owners reported that primes in construction seldom or never use their firms for contracts that do not include goals.[9]

DISCRIMINATION AND EXCLUSION BY STATE AND LOCAL GOVERNMENTS RESTRICTS OPPORTUNITY

- A 1995 analysis of 22 disparity studies from across the nation found that, on average, minority owned businesses received only 68 cents of every dollar that would be expected to be allocated to them based on their availability.[10]

- After the Croson decision, many states suspended minority business programs with the result of severely restricting opportunities for minority-owned firms to participate in state and local contracting:[11]

  - After the first court struck down Richmond's minority business program in 1987, minority participation in construction dropped from 40 percent of all contracts to less than 3 percent.

- In Philadelphia, there was a 97% decline in minority business participation in the first full month after its program was suspended in 1992.

- After Tampa suspended its program, minority-business participation decreased by 99% for African American-owned businesses and 50% for Hispanics.

- San Jose's suspension resulted in minority participation falling from 6 percent to 1 percent in prime construction contracts.

PARTICIPATION IN FEDERAL CONTRACTING REMAINS LOW

- In 1995, only 6.5 percent of the federal government's purchasing was conducted with disadvantaged businesses even with the use of affirmative action programs.[12]

- At DoD, where 67% of contract dollars are spent, only 1.9% of procurement dollars were directed to disadvantaged businesses without the use of an affirmative action program.[13]

<u>THE RESULT</u>: DISCRIMINATION HAS IMPEDED THE DEVELOPMENT OF MINORITY-OWNED BUSINESSES

As a result of the many barriers to opportunity that minority-owned businesses face, such businesses remain disadvantaged relative to the rest of the business population.

- In 1987, minority firms received gross receipts that were 34% of the average earnings of nonminority male-owned firms.[14]

- According to 1992 Census data (only available for African American-owned firms) the number of businesses owned by African Americans increased as a share of all businesses from 3.1% (1987) to 3.6% (1992) but their share of all business revenues remained at just 1% of total revenues (same as in 1987).[15]

- On average, African American-owned firms in 1992 had annual sales totaling just 26.6% of nonminority firms.[16]

1. Grown & Bates. "Commercial Bank Lending Practices and the Development of Black Owned Construction Companies." Journal of Urban Affairs, Vol. 14, No. 1 p.34.

2. Bates, Tim. "Commercial Bank Financing of White and Black Owned Small Business Start-ups." Quarterly Review of Economics and Business, Vol. 31, No. 1 (1991).

3. State of Louisiana Disparity Study. Vol. 2, pp. 35 - 57. (June 1991).

4. Brimmer & Marshall. Public Policy and Promotion of Minority Economic Development: City of Atlanta and Fulton County, Georgia (1990)

5. Cross, Kennedy, Mell & Zimmerman. Employer Hiring Practices: Differential treatment of Hispanic and Anglo Job Seekers. Urban Institute Press (1990) & Turner, Fix & Struyk. Opportunities Denied, Opportunities Diminished: Discrimination in Hiring. Urban Institute Press (1991).

6. Federal Glass Ceiling Commission. Good for Business: Making Full Use of the Nation's Human Capital iv-vi (1995).

7. Id.

8. National Economic Research Associates The Utilization of Minority and Woman-Owned Businesses by the Regional Transportation District (Denver Colorado): Final Report (1992).

9. National Economic Research Associates The Utilization of Minority and Woman-Owned Businesses by Contra Costa County: Final Report at ix, xiii (May, 1992).

10. Analysis conducted by the Urban Institute, commissioned by the U.S. Department of Justice (1996).

11. See The Meaning and Significance for Minority Businesses 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 Comm. on Government Operations, 101st Cong., 2d Sess. 57, 62-90 (1990).

12. Office of Federal Procurement Policy.

13. Department of Defense, Office on Small and Disadvantaged Business Utilization.

14. U.S. Commission on Minority Business Development. Final Report. p.4 (1992).

15. Bureau of the Census. 1992 Survey of Minority-Owned Business Enterprises: Black-Owned Businesses (1995).

16. Id.

AFFIRMATIVE ACTION:

THE COMPELLING INTEREST IN REMEDYING THE EFFECTS OF PRESENT AND PAST DISCRIMINATION

In Adarand, seven of the nine justices supported the continued use of affirmative action as a tool to remedy the effects of past and present discrimination:

> *"The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it."*

Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2097, 2117 (1995)

DISCRIMINATION CONTINUES IN HOUSING, LENDING AND EMPLOYMENT

- In testing studies conducted by the Urban Institute in 1990 and 1991, White males generated 50 percent more job offers than minorities with the same characteristics applying for the same jobs.[1]

- The Urban Institute's Housing Discrimination Study (1991) found that Black and Hispanic testers posing as renters and purchasers experienced discrimination in over 40 percent of their transactions.[2]

- A recent study of mortgage lending by the Federal Reserve Bank of Boston concluded that minority applicants were 60 percent more likely to be rejected for a loan than white males with identical characteristics (age, income, wealth, education, etc.).[3]

- A white business owner in the construction industry receives over fifty times as many loan dollars per dollar of equity capital as Black owners with identical borrowing characteristics (education level, age, business history, equity, etc.).[4]

- Last year, the EEOC received over 90,000 complaints of employment discrimination; 64,423 complaints were filed with state and local commissions.[5]

ANTI-DISCRIMINATION LAWS ALONE HAVE NOT REMOVED BARRIERS TO INTEGRATION

- We declared discrimination illegal in the 1960s but that move alone did not open the many doors to opportunity and integration in our workplaces, schools and neighborhoods.

OUR SOCIETY REMAINS DIVIDED BY INCOME

- On average, women with masters degrees earn the same amount as men with associate degrees.[6]

- The average income for Hispanic women with college degrees is less than the average for white men with high school degrees.[7]

- Asian and Pacific Islander Americans earn less than whites in comparable circumstances when all other circumstances, including occupation, English fluency, age and education are controlled for.[8]

- African Americans with professional degrees earn only 79 percent of the amount White males earn with the same degrees in the same job categories.[9]

OUR SOCIETY REMAINS DIVIDED BY OCCUPATION LEVEL

- 97 percent of senior managers in Fortune 1000 industrial and Fortune 500 companies are White.[10]

- The unemployment rate for African Americans is more than twice that of whites.[11]

- Black and Hispanic men are half as likely as white men to be managers or professionals.[12]

- Women hold 3 to 5 percent of senior level management positions - there are only two women CEOs in Fortune 1000 companies.[13]

OUR SOCIETY REMAINS DIVIDED IN EDUCATION

- 22% of whites have college degrees compared to only 12% of African Americans and 9% of Hispanics.[14]

AFFIRMATIVE ACTION IMPROVES ORGANIZATIONS

- 94 percent of CEOs stated that affirmative action improves their ability to find qualified applicants.[15]

- 89 percent of the country's mayors report that affirmative action aids them in identifying relevant qualifications for jobs and 52 percent state that it has helped improve public perception of the quality of services provided. (U.S. Conference of Mayors).[16]

- Police forces report that an integrated force is essential to serving a diverse community. Diversity helps forces build better trust and relations with all segments of the community, which leads to information being shared with the police and more effective law enforcement.[17]

- Universities use affirmative action because diversity brings a greater range of perspectives to the table, helps foster a more robust exchange of ideas, and prepares our future leaders to interact in a world full of people from different backgrounds.[18]

1. Cross, Kennedy, Mell & Zimmerman. Employer Hiring Practices: Differential treatment of Hispanic and Anglo Job Seekers. Urban Institute Press (1990) & Turner, Fix & Struyk. Opportunities Denied, Opportunities Diminished: Discrimination in Hiring. Urban Institute Press (1991).

2. Turner, Struyk and Yinger. Housing Discrimination Study: Incidence of Discrimination and Variation in Discriminatory Behavior. Urban Institute (1991)

3. Munnell, Brown, McEneaney & Totell. Mortgage Lending In Boston: Interpreting the HMDA Data. Working Paper, Federal Reserve Bank of Boston (1992).

4. Grown & Bates. "Commercial Bank Lending Practices and the Development of Black Owned Construction Companies." Journal of Urban Affairs, Vol. 14, No. 1 p.34.

5. Equal Employment Opportunity Commission.

6. 1990 Census Data as compiled by the Office of Federal Contract Compliance Programs, Department of Labor (1995).

7. EEOC, Office of Communications. The Status of Equal Opportunity in the American Workforce (1995).

8. Glass Ceiling Commission. Good for Business: Making Full Use of Our Nation's Human Capital (1995).

9. Id.

10. Id.

11. Department of Labor, Bureau of Labor Statistics. 1994 Fact Sheet. (1995).

12. Id.

13. Glass Ceiling Commission. Good for Business: Making Full Use of Our Nation's Human Capital (1995).

14. Affirmative Action Review: Report to the President p. 24 (1995).

15. Organization Resources Counselors, Results of the ORC Survey on Corporate Business Practices (1995).

16. U.S. Conference of Mayors. Affirmative Action in City Governments:A 121 City Survey (1986)

17. See "Battleground Chicago" Newsweek, April 3, 1995, p.26.

18. See University of California Regents v. Bakke 438 U.S. 265, 312 (1977) ("The atmosphere of 'speculation, experiment and creation' -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body").

PRESIDENT CLINTON SUPPORTS AFFIRMATIVE ACTION

March 12, 1996

- The President supports affirmative action programs that are fair, effective, and balanced.

Adarand

- In Adarand, the Supreme Court confirmed that the federal government can use affirmative action programs to remedy the effects of racial discrimination. It made clear, however, that such programs must serve a compelling interest and must be narrowly tailored.

- After the Adarand decision, while reaffirming his commitment to affirmative action programs, the President instructed Federal agencies to work with the Department of Justice to ensure that such programs comply with the Supreme Court's test.

Procurement Programs

- After a thorough review of legislative history and economic and statistical data, the Department of Justice concluded that there still exists a compelling need for Federal procurement programs that benefit disadvantaged minority businesses.

- To that end, the Justice Department has been working with agencies to propose government-wide regulatory changes to ensure that Federal procurement programs are narrowly tailored to meet the constitutional standards of Adarand.

- The proposal -- which is not yet final -- would change the administration of these programs, but would not eliminate them.

SBA's 8(a) Program

- The 8(a) program is not being eliminated or suspended.

- The Administration strongly supports the 8(a) program and believes that it significantly increases opportunities for small and disadvantaged businesses. As defined by Congress, the 8(a) program is a business development program that assists firms owned and controlled by socially and economically disadvantaged individuals. Eligibility for the 8(a) program is not limited to members of minority groups.

- The Department of Justice found that the 8(a) program meets the constitutional requirements of Adarand and is currently defending the program against several court challenges.

- The SBA is working to improve the efficiency and overall operation of the 8(a) program.

Rule of Two

- As a result of the Justice Department's review and recommendation, the Department of Defense suspended use of the Rule of Two set-aside in October 1995 after several cases were filed challenging the constitutionality of that program. The Department of Defense is working to create additional opportunities for minority-owned businesses, consistent with Adarand.

- The Justice Department has not recommended the suspension of any other procurement programs -- other than the Rule of Two -- as a result of its review of all federal procurement programs.

Other Affirmative Action Programs

- The Justice Department has already issued guidance for federal employment programs that clarifies the appropriate scope and duration of affirmative action in federal hiring.

- The Justice Department separately will analyze other programs, such as direct federal aid programs and government grants. That analysis is ongoing.

- Consistent with the President's commitment to fair, effective, and balanced affirmative action programs, he has publicly opposed efforts to eliminate longstanding programs designed to provide opportunities for minorities and women. To that end, the Administration has opposed the Dole-Canady anti-affirmative action legislation that would turn back the clock on the federal government's historic, bipartisan commitment to equal opportunity. Additionally, the Administration has opposed the extreme California ballot initiative that would eliminate all affirmative action in California for minorities and women.