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Draft / Test of Carefully Tailored - Minority Programs

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April 29, 1995

George:

1. Attached on top is the proposed "Riley Policy" test to be applied by HHS and DoEd to their various "set-aside"-like grant programs. They have agreed to work with this. They are road-testing it, and will report Tuesday on the results. I want to confirm that you are comfortable with this formulation of **careful tailoring**, although the wording would have to be tweaked for communications purposes.

2. Then, attached are the current versions of sections 4 (procurement) and 6 (Education/HHS), which I hope makes them more balanced per your instructions. I have not given you the several endnotes -- our internal reference footnotes, and reminders to chase down a few odds and ends. (I couldn't figure out how to make them print.)

3. Suggestion:

It think you should convene a very small meeting of the people whose policy/political recommendations would matter to POTUS in making these decisions. I don't know who is included in that group (I hope I am), but it seems to me POTUS would be aided in making a decision if we could tell him that there is a strong consensus on options A, B, C etc.

If you convene such a meeting this Wednesday or later, I can have ready for consideration not only the Tier One issues we've already given POTUS, but also a nifty presentation of the contentious Tier Two issues.

Finally, even if this strategy doesn't work for "encouraging" POTUS to closure on the Tier One issues, I would favor moving ahead with finalizing materials based on whatever the consensus is of this Senior Core group -- i.e., that will give us the basis for the consultations and final writing we need to do while POTUS is abroad.

Edley

(L) Hold for mtg. w/ Edley tdy. .. Mndy.

(61)

revised, 6:30 p.m.

April 27, 1995

DRAFT TEST OF "CAREFULLY TAILORED"

Principle: Even when acting with the beneficent purpose of inclusion, we must not lightly choose to structure a program in a way that makes race, ethnicity or gender a factor (especially a condition of eligibility) in decisionmaking. The use of such factors should be *carefully tailored.*

Test: For any program in which race, ethnicity or gender is an explicit factor in decisionmaking, please consider whether the program is *carefully tailored.*

Definition: With respect to race, for example, a measure has been "carefully tailored" if:

(1) in its design or reconsideration, options for using various race-neutral decision factors were analyzed and reasonably rejected because they were considered unlikely to be acceptably effective in advancing the objective of inclusion, given the available information and experience;

(2) less extensive or intrusive uses of race have been analyzed and rejected based on a conclusion that they would not have been effective enough (for example, race might be one of several factors used in a flexible way, or eligibility might be established based on race but also based on alternative considerations);

(3) the measure is of limited extent and duration, and is applied in a flexible manner;

(4) the Congress or the administering agency periodically reviews the continuing need for the measure; **and**

(5) the effect on nonbeneficiaries is sufficiently small and diffuse so as not to unduly burden their opportunities.

4. Federal Procurement Policies & Practices: Summary Discussion

This Part summarizes the Review Team's examination of affirmative procurement efforts administered by the Department of Defense, the Department of Transportation, and the Small Business Administration. These agencies were surveyed because they administer programs accounting for a large percentage of government procurement.

4.1 Overview

There are several varied programs designed to increase federal procurement and contracting with minority- and women-owned businesses. The largest of these efforts (measured in terms of scope) are government-wide programs administered by the SBA. These efforts are complemented in some agencies by additional programs, which themselves can be quite large. This summary addresses both the government-wide and selected agency-specific efforts; the chart on the following page offers a side-by-side comparison. As the discussion below shows, under these programs, a substantial number of procurement contracts are set aside for women and minority-owned businesses, and these businesses are given preferences in competitive bidding. The implementation of these programs has raised considerable controversy, aspects of which are before the Supreme Court now in the *Adarand* litigation.

4.2 Policies & Practices

4.2.1 Government-wide Efforts

- Goals: Federal law establishes several overall, national goals for the distribution of federal procurement opportunities: 20% for small businesses; **5% for small disadvantaged businesses; and 5% for women-owned businesses.**[10] The SBA consults with each agency to set annual agency-level goals to ensure progress toward the overall goal. (For contracts and firms above certain thresholds, the law requires subcontracting plans in furtherance of these goals.) The goals are themselves flexible, and hence relatively non-controversial. The government-wide SDB goal was met for the first time in 1993.

[10] The goal for women was added in the 1994 procurement reform legislation. Racial minorities are presumed to be "socially disadvantaged" for purposes of the government-wide SDB program, mirroring the statutory presumption in the SBA's 8(a) program described below.

- **<u>Sole-source contracting</u>**: Under the **8(a) program**, which is statutorily mandated, small disadvantaged businesses (SDBs) can secure smaller contracts (usually less than $3 million) without open competition. This <u>"sole sourcing"</u> is accomplished when an agency contracts with SBA, which in turn subcontracts with the SDB.

  For a company to participate in the 8(a) program, SBA must certify that the firm is controlled and operated by **socially *and* economically disadvantaged persons.**[11] [b] By statute, persons from certain racial and ethnic groups -- but not women -- are presumed to be socially disadvantaged; persons are considered economically disadvantaged if they face "diminished capital and credit opportunities" -- measured by asset and net-worth standards.

  Once a firm is certified and brought into the 8(a) program, the 1987 amendments to the statute establish both a "graduation" period of nine years and a requirement that, over time, firms achieve an increasing mix of business from outside the 8(a) program and outside federal contracting.[c] Under the prior Administration, the SBA did not aggressively implement these 1987 statutory changes, but it has now done so.

  In FY 1994, the 8(a) program accounted about 2.7% of all government procurement -- about $4.9 billion. The number of participating 8(a) firms grew from 3,673 in 1990 to 5,833 in 1994, of which 47% received contract actions.[d]

- **<u>Bid preferences</u>**: Procurement reforms enacted by Congress last year authorize government-wide use of the 10% bid preference for SDBs which previously was a tool avilable primarily at DOD (the so-called "§ 1207 program" -- see below). Implementing regulations are scheduled to be finalized this summer.[e] These regulations could have a significant effect on procurement by SDBs in those agencies that do not use an effective set-aside scheme such as DOD's "rule of two," described below.

4.2.2. Agency-Specific Efforts

- **<u>Department of Defense</u>**: In addition to participating in the goal-setting and 8(a) efforts, DOD has two additional efforts; these are significant because DOD executes roughly two-thirds by amount of all federal prime contracts. These additional programs are part of DOD's efforts to meet its share of the overall goals mentioned above.

  - *SDB shelters or set-asides:* Contracting officers are authorized to **limit bidding** on a contract to small disadvantaged businesses (SDBs) if two or more such firms are

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[11] Congress first codified the 8(a) program in 1978. The earlier regulation-based program keyed eligibility to either group status *or* economic disadvantage. Congress and the Carter Administration chose to require that *both* conditions be satisfied in order to focus the program on victims of group-based discrimination.

potential bidders and the officer determines the prevailing bid will likely be within 10 percent of the fair market price.

- *SDB 10% bid preferences:* Whenever there is full and open competition and procurement is based on price factors alone, contracting officers add 10 percent to the price of *non-SDB* bidders, and then award the contract on the basis of the revised bids. (This is the "§ 1207" program. Although the applicable statute merely makes this tool *available* to DOD as a means of achieving its contracting goals, the Department's procurement regulations mandate its use.)

- *Comparative usefulness of preferences:* Over 90% of DOD's contracting with SDBs occurs through either this "rule of two" set-aside or through the 8(a) program; the 10% bid preference has been little-used in recent years because regulations require that the "rule-of-two" be used whenever possible, and it generally is. See the accompanying chart. ***[Add pie chart on DOD, showing SDB activity, with shares attributable to: Rule-of Two; 10% bid preference; 8(a) sole source; 8(a)-restircted competition; the ordinary small business set-aside.]***

- **Department of Transportation**: In addition to participating in the goal-setting and 8(a) efforts, DOT manages an effort to encourage business with minority- and women-owned firms through its grants to state and local entities.$_f$

  - *Subcontracting preferences:* In addition to setting goals for subcontracting with women- and minority-owned firms, DOT requires that grant recipients (usually state or local authorities) provide an additional payment to contractors who attain certain levels of contracting with women- or minority-owned subcontractors and who provide certain technical assistance to those subcontractors. The payment is designed to compensate the prime contractor for additional costs for assisting the subcontractors. The bonus is up to 1.5 to 2.0% of the total contract.$_g$ (This is the provision at issue before the Supreme Court in *Adarand.*$_h$)

- **Graduation from sheltered competition:** Unlike the 8(a) program, the DOD and DOT programs do not require that firms graduate from preferences, or that firms have a mix of federal procurement and other business. There is, of course, the "natural" graduation which occurs if a firm becomes bigger than "small" or the owner's wealth rises above the applicable threshold.[12]

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[12] "Small" varies with the industry, but the maximum number of employees varies between 500 and 1500. See Federal Acquisition Reguations (FAR) Part 19.102. The DOD wealth test is personal assets not more than $750,000, excluding business assets and personal residence.

- **Certification of eligibility** in these programs differs from SBA's certification for partcipation in the government-wide 8(a) program. In the DOD programs, the firms self-certify that they are qualified; in the DOT program, the state/local grant recipient is charged with certifying the subcontractor's status.[i]

4.2.3 Complementary Programs: Technical & Other Assistance

A number of agencies have other programs to assist women- and minority-owned firms seeking procurement opportunities. These include:

- SBA maintains several programs that serve small businesses generally, by providing technical assistance, loan guarantees, and equity capital through Small Business Investment Companies (SBICs).

- The *Minority Business Development Administration* (MBDA) at Commerce provides technical assistance and support for women- and minority-owned firms.

- Several agencies maintain *"Mentor-Protegé"* programs which encourage majority firms to advise and nurture new and growing minority-owned firms by providing managerial and technical assistance.

- *SBA's Surety Bond Program* provides up to a 90% guarantee for bonds required of conractors and subcontractors on many public and private construction contracts, thereby lowering the small firm's cost of doing business. In FY 1994, SBA approved more than 22,000 bid bond guarantees, resulting in 6,591 final bonds, for a total bond guarantee amount of $1.08 billion. Although this program is not specifically targeted, 24% of bonds went to minority firms; nearly half of these were African-American, and one-quarter were Hispanic.[j]

4.3 Performance & Effects

Most of these efforts have been **very successful in expanding federal procurement from women- and minority-owned firms**. Agencies first achieved the 5% SDB goal in 1993 and, government-wide, prime contracts for minority-owned businesses were 6.4% of the total dollar volume,[k] which approaches the proportion of minority-owned businesses among all U.S. firms, but is considerably below minority representation in the nation's population; the appropriate point of comparison can be much debated.

- In 1994, 32 of the largest 100 African-American owned firms and 17 of the top 100 Hispanic-owned firms were or had been in the 8(a) program.

- Between 1982 and 1991, the dollar volume of all federal procurement contracts over $25,000 increased by 24%. At the same time, contracts awarded to women-owned firms increased by more than 200%; contracts awarded to minority-owned firms increased by more than 125%.

- Agency-level data show similar trends: for example, between 1985 and 1994, contracting with small, disadvantaged businesses grew from 2.1% of DOD procurement to 5.5%--an increase of more than $3 billion.

- Discussions with GSA contracting experts revealed that subcontracting with minority- and women-owned firms on large federal construction projects would likely not occur but for federal pressure in order to meet overall goals. This is also the strongly held view of SBA officials and of leadership in the SDB community.

Given the shrinking size of the procurement pie, such increases may mean real decreases for other small firms. For example, while DOD's contracting with SDB's more than doubled, its **contracting with non-disadvantaged small firms fell by almost 20%**. Perhaps relatedly, these programs have also been the source of some controversy. As noted above, DOT's bonus program is currently the subject of constitutional challenge in the *Adarand* case.

- While the overall goals and levels of these programs are relatively small nationwide (less than 10%) it is important to examine their effects in particular *geographic regions* and within *certain industries and subsectors.*, For example, there appears to be a tendency for agencies to concentrate their minority contracting in certain fields -- such as construction -- where there are a significant number of existing minority firms. While this makes operational sense, it also means that, in practice, effective goals, set-asides, and preferences in some fields can be several times the overall goal. Indeed, there have been reports that in a few regions and fields, **set-asides account for more than half of all procurements.**,,, Our research indicates that these types of unintended effects cause considerable resentment among a significant sector of the government contractor community.,, (See below.)

- Some proponents of these procurement initiatives argue that they are valuable not only because they combat discrimination and the lingering effects of discrimination facing minority and women entrepreneurs, but also because they indirectly promote **employment** of socially disadvantaged workers and development of economically **distressed areas.** The very limited evidence on these hypotheses suggests that there is, indeed, a meaningful correlation between minority ownership and minority workforce,,, but the anecdotal evidence is that the relationship varies considerably across sectors. There is no evidence to support the economic development hypothesis; indeed, the effect seems unlikely given the comparatively small amount of contract dollars involved and the observed concentration of 8(a) firms in the Washington D.C. area.

- We do not have data to confirm whether these various programs have triggered formation of minority- and women-owned firms that would otherwise not have developed. We also do not know if firms that successfully bid for and complete federal contracts grow to become successful companies not needing any federal assistance, and whether they branch out and win non-federal contracts also. The limited data, however, is somewhat encouraging: SBA statistics for FY 1993 indicate that of the 710 firms that were graduates in that year or previous years, 56% were still fully operational, 6% had curtailed operations, 3% had been acquired by other companies, and 35% had ceased operations. Comparisons with census data suggest that the failure rates of 8(a) firms are no worse than, and in fact may be better than, those seen in small businesses generally.[13]

4.4 Evaluations & Proposed Reforms

These programs have been the object of a number of studies, including a Congressionally mandated study during the prior Administration which recommended maintaining and strengthening the federal effort to ensure minority- and women-owned business participation in federal procurement.[14] SBA, this past August, proposed a comprehensive reform of the 8(a) program in testimony before Congress. That proposal, summarized in Appendix Volume B, is responsive to the great majority of common criticisms.

More generally, critics and commentators reviewing these programs have made the following points:

- **Reorganization:** Some observers emphasize the need to rationalize and coordinate the web of federal programs serving minority- and women-owned firms. For example, in 1992 the U.S. Commission on Minority Business recommended the creation within the Commerce Department of an Administration for the Development of Historically Underutilized Businesses which would assume SBA's 8(a) responsibilities. A preliminary Commerce Department proposal is reviewed in Appendix Volume B to this Review.

- **Graduation:** The 8(a) program now requires "graduation" after nine years, and has phased requirements of non-8(a) and non-federal business mix designed to wean firms from sheltered competition and dependency on federal contracting. In February 1995, of the 1,038 firms in the fith through ninth year of 8(a) participation, nearly two-thirds met or exceeded the minimum non-8(a) business levels. Some observers have emphasized the

[13] Census data indicate that of all small businesses formed in 1976-78, less than 30% survived 6 to 8 years; data for 1982-87 indicate that only 42% of black-owned firms survive five years. *See*, **The State of Small Business: A Report to the President** 214-15 (1993).

[14] *See*, Final Report of the U.S. Commission on Minority Business Development (Dec. 1992).

need for analogous graduation and business-mix requirements in the DOD and DOT programs.

- **Excessive Regional/Sectoral Concentration:** Our analysis found SDB contracts and limited competition concentrated in certain industries and regions. For example, while DOD's overall goal for SDBs was only 5%, *more than 35% of all DOD construction awards went to SDBs*, and more than *two-thirds* of these were awarded under sheltered competition. Moreover, in ten States, more than 40% of all construction contracts were awarded to SDBs; in New Mexico, 85% of DOD's construction contracts went to SDBs. This concentration occurs at particular sites as well: we uncovered several facilities where *all* of the contracts were set-aside for SDBs. These include: Lowry AFB (Colorado), Norton AFB (California), Fort Monroe (Virginia). This practice has resulted in substantial resentment and criticism.

- **Self-Certification:** Because DOD's program is based on self-certification by SDBs, it may be prone to abuse. While we were not able to uncover comprehensive data on this issue, our research found useful anecdotes, including two criminal convictions:

  What can we do to fix this?

  - DOD's IG investigated Tyco Manufacturing and referred the case to the US Attorney. The company's pled guilty to charges that he falsely represented his firm as Hispanic-owned and controlled.

  - Top officials of Automated Data Management, Inc. were convicted of conspiracy to defraud the government for concealing the firm's ownership structure to participate in the 8(a) program.

  Self-certification has obvious advantages in terms of reduced administrative expense and regulatory intrusion. Nevertheless, this must be balanced with the importance of ensuring that affirmative action measures fair, which means as free of abuses as can reasonably be achieved. Some burden to bureaucracies and beneficiaries is to be expected.

- **Subcontracting:** In FY 1993, the most recent data available, small businesses received about $63 billion of federal contract dollars, out of roughly $180 billion in total. About one-third of that amount was from subcontracting. SDBs, on the other hand, received a little over $13 billion in federal contract dollars, but only *one-sixth* of that was through subcontracting. These figures suggest that SDBs face greater obstacles to subcontracting participation than do other small firms. The SBA and other agencies believe that expanding the use of SDBs in subcontracting is both feasible and desirable as a strategy for creating more SDB opportunities.

- **Other Program Changes:** A recent Los Angeles Times article, gathered criticisms of the 8(a) program, all of which have been raised in earlier analyses by the GAO and the SBA Inspector General, and several of which SBA is moving to address by aggressively implementing recent statutory amendments which had languished under the prior Administration. More specifically:

■■ ***Too much money is awarded without competition.***

The 1988 law reforming the 8(a) program requires that companies in the program compete among themselves for contracts valued at $3 million or more. (There is a higher competition threshold of $5 million for manufactured goods.) Currently, however, many of the larger 8(a) contracts are open-ended agreements that started out as small contracts and grew well beyond the competition threshold when a contracting officer renewed the order. To increase the number of contracts available for competition, SBA has proposed regulations to change this procedure so that an estimated value will be set on these open-ended contracts, which probably will be higher than the initial value. This means more 8(a) contracts will be subject to competitive bidding among participating firms.

■■ ***8(a) firms concentrate too much on federal business.***

New law, which will be in full effect at the beginning of 1996, requires 8(a) companies to maintain a specified percentage of private sector business while participating in the program so that these firms are not totally dependent on government contracts. As a result, 8(a) companies will have to compete in both the private and public sectors. This should improve the survival rate of firms graduating out of the sheltered environment of the 8(a) program.

■■ ***Too many wealthy people are labeled disadvantaged.***

This is a statutory problem. The statute authorizes exclusion of the 8(a) participant's equity in his/her primary residence, business, and, in many states, the spouse's share of the family's wealth.[15] Recent audits of the 8(a) program revealed problematic practices by some firms. These include underreporting of net worth, high salaries and bonuses (more than $1 million per year) for several business owners, and efforts to "shelter" resources in spousal assets and residences.„ SBA staff has been receiving training in order to better determine an applicant's

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[15] SBA measures economic disadvantage in a three-part test: the individual's net worth, the financial condition of the company, and the company's access to credit. For entry into the program, personal adjusted net worth cannot exceed $250,000; during the developmental stage of the program (the first four years), it cannot exceed $500,000; and during the transition stage (the last five years), it cannot exceed $750,000. In a September 1994 audit of 50 larger 8(a) firms, the SBA Inspetor General found that 35 of the 50 owners had a net worth in excess of $1 million; 13 of the owners, for example, had business equity ranging from $1 to $9 million; five owners had personal residences valued at between $800,000 and $1.4 million. See *Audit Report on 8(a) Program Continuing Eligibility Reviews*, Report No. 4-3-H-006-021 ("1994 Audit Report") at 7-9 (Sept. 30, 1994).

net worth. Nevertheless, several of these problems are traceable not to staff expertise, but to provisions in the statute which SBA has already proposed be amended.[v]

▪▪ ***Too much money is concentrated among too few companies.***

Two of the pending SBA regulatory changes will help solve this problem. When the requirement that 8(a) companies maintain a specified mix of government and private sector business is fully implemented, there will be a limit on the dollar value of the 8(a) business one company can control. Secondly, the proposed regulation limiting open-ended contracts will mean some of the larger 8(a) contracts will be open to competition and will change hands more regularly. Another proposed change will eliminate the distinction between a "local buy" and a "national buy" system, thereby allowing firms to market to the government without geographical restrictions (except for construction contracts).

SBA's Office of Government Contracting also has negotiated a Memorandum of Understanding with DOD to use 8(a) participants who have never received a contract. SBA is negotiating similar agreements with other federal agencies.[w]

▪▪ ***Minority workers do not always benefit.***

Research has shown that minority-owned businesses have a tendency to hire more minority employees than other firms.[16][x] SBA believes that in industries such as military base maintenance and construction, a significant number of the employees of 8(a) firms are minorities. In high-technology industries, however, such as computer systems integration and radar development, the number of minority employees of 8(a) firms reflects the representation of minorities within the relevant scientific disciplines. Currently the primary goal of the 8(a) program is business development. SBA thinks that the inclusion of a minority hiring requirement would be burdensome for some companies, but notes that some observers argue that this burden could be justified if it is considered the price a participant must pay for access to set-aside contracts.

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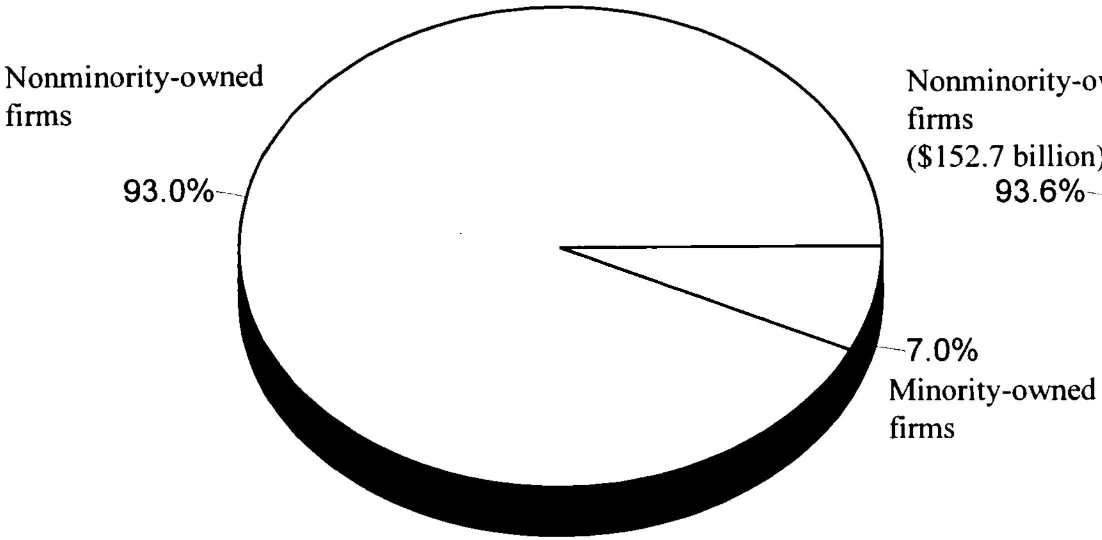
[16] Research by Professor Timothy Bates, Wayne State University, Detroit, MI., based on 1987 census data.

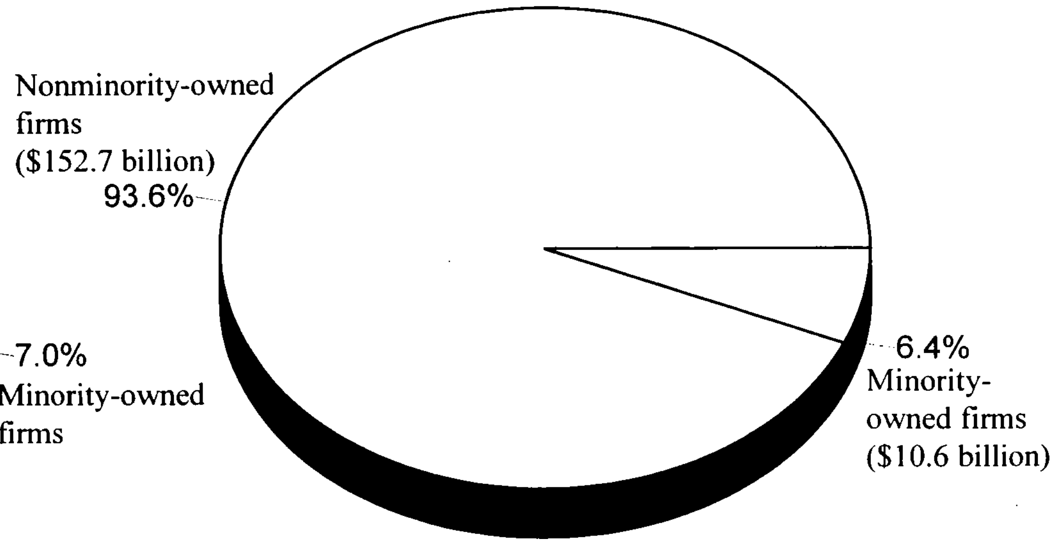
Minority-owned Businesses

Share of All Firms & Share of Federal Procurement

All Businesses with Paid Employees



Federal Procurement from Minority-owned Firms



Targeted Procurement Programs: A Side-by-Side Comparison

	GOVERNMENT-WIDE			DEFENSE			TRANSPORTATION	
	MBE goals	8(a) program	WOB goals	8(a)	SDB set-asides	SDB preferences	8(a)	STAA (grants to states and locals)
ADMINISTERING AGENCY	SBA	SBA	SBA	SBA/DOD	DOD	DOD	SBA/DOT	DOT
ELIGIBILITY CRITERIA								
race/ethnicity	X	X		X	X	X	X	X (creates presumption)
gender			X					X (creates presumption)
socio-economic		X		X	X	X	X	X
CERTIFICATION BY		SBA	self	SBA	self	self	SBA	state hiway & transit depts., etc)
MECHANISMS								
goals & outreach	X		X					
sole source contracting		X		X			X	
set-asides					X			
price advantage						X		
subcontracting incentives								X
VOLUME ($ in FY92)								
prime contracts	3.8 billion	4.9 billion	1.6 billion	2.6 billion	0.80 billion	0.26 billion	0.43 billion	$2.5 billion (incl. sub Ks)
(as % of all prime Ks)	2.1%	2.7%	1.6%	2.1%	0.7%	0.2%	11.9%	
subcontracts	2 5 billion		1.1 billion				.02 billion	
(as % of all sub Ks)	4.3%		1.8%				16%	

Defense data do not include $1.6 billion in prime contracts awarded to SDB in open competition.

Key: MBE = minority business enterprise; WOB = woman-owned business; SDB = small disadvantaged buseiness; STAA = Surface Transportation Assistance Act

6. EDUCATION AND HHS POLICIES & PRACTICES: SUMMARY DISCUSSION

This Part offers a summary based in large part on materials prepared by the Department of Education (DoEd) and the Department of Health and Human Services (HHS).

6.1 Overview

Several DoEd and HHS programs are targeted on the basis of race, gender or disability. Most of these are programs designed to increase the representation of minorities or women in certain professions or fields; others support institutions that have a high enrollment of racial and ethnic minorities. Minority- or gender-targeted scholarships are one strategy for accomplishing this goal. However, most such scholarships are not funded by the federal government and are not, strictly speaking, "federal programs." Federal policy is formally relevant only because such efforts must comply with federal civil rights laws when institutions are recipients of federal financial assistance. Although enforcement policy is generally outside the scope of this review, we include a background discussion in subsection 6.5.

6.2 Policies & Practices.

6.2.1 Programs to Increase Representation in Certain Fields

DoEd, HHS and the National Science Foundation (NSF) operate several dozen programs that have as their primary purpose increasing the representation of un~~derrepresent~~ed groups in certain fields and occupations. Almost all of this support is provided as conditional assistance to institutions, rather than direct assistance to individuals. Many of these programs are **minority-targeted** -- that is, they employ group membership as a condition of eligibility. Illustrative examples include:

- **The Patricia Roberts Harris Fellowship Program:** This DoEd program provides grants to institutions to fund fellowships for master's level, professional, and doctoral education programs. The fellowships are, by statute, limited to minority groups and women who are underrepresented in those programs. Last year, this program supported approximately 1,000 fellowships; however, this program is being de-funded in FY1996.

- **The McNair Program:** This DoEd program provides grants to institutions to support disadvantaged college students in their preparation for doctoral study. By statute, two-thirds of the project participants must be low-income and first-generation college students; the remaining third must be from an underrepresented group. This latter group is defined by regulation to include only: African-Americans, Hispanics, and Native Americans. This program supports approximately 3,000 students.

Is it time, pools or open competition?

- **The Faculty Development Fellowship Program:** This DoEd program provides grants to institutions that have a "demonstrated record of enhancing the access to [graduate education] of individuals from underrepresented groups." The grants support fellowships for the continuing education of minority faculty members, defined by statute to include "African-Americans, Asian Americans, Hispanics, Native Americans, Pacific Islanders, and Native Hawaiians."

- **National Science Foundation Programs:** The NSF administers programs designed to address underrepresentation of women and minorities in the fields of science, engineering, and mathematics. For example, the Research Careers for Minority Scholars Program (RCMS) provides grants to institutions to encourage "underrepresented minority" students to pursue careers in science, engineering, or math. The program focuses on developing mentoring relationships between minority students and faculty.

- **National Institutes of Health Programs**: Pursuant to statutory direction to "increase the number of women and individuals from disadvantaged backgrounds (including racial and ethnic minorities)," NIH (part of HHS) supports underrepresented minorities in research and education programs. Most of these programs are minority-targeted; examples include:

  - NCRR Minority Initiative provides grants to high schools to support underrepresented minorities interested in certain natural sciences. The program leaves to the school to determine which "ethnic or racial group[s are] underrepresented in biomedical or behavioral research." The program description notes that nationally, Black Americans, Hispanic Americans, Native Americans and Pacific Islanders, are underrepresented in these fields.

  - Minority Predoctoral Fellowship Program supports individual PhD and MD/PhD candidates who are members of groups underrepresented in the biomedical sciences. The applicant's institution defines which groups are eligible, but NIH gives "priority consideration" to "African Americans, Hispanics, Native Americans Alaskan Natives, and Pacific Islanders."

HHS also administers programs that target the "disadvantaged" but are **race- and gender-neutral**. These programs disproportionately serve underrepresented groups.

- **Federal Health Professions Education Programs**: HHS currently administers over 40 programs concerning the education of health professionals. Most of these programs are designed to assist "disadvantaged populations" and are race- and gender-neutral.

Nonetheless, these programs disproportionately serve underrepresented minorities. For example:

- **<u>HHS' Scholarships for Disadvantaged Students</u>**: This program provides grants to institutions that serve "disadvantaged students" -- defined as students from low-income families or "from environment[s] that ha[ve] inhibited the individual from obtaining the knowledge, skill or abilities required to enroll in...a health professions school." Under this program, special statutory consideration is directed to institutions with underrepresented minority enrollment in excess of the national average. Of the 7,500 students participated in the Scholarships for Disadvantaged Students (SDS) program, *more than half were underrepresented minorities.*

- Of the 108 participants in the **<u>Disadvantaged Health Professions Faculty Loan Repayment program</u>**, 77% are African-American, 11% Hispanic, and 11% disadvantaged whites.

which programs? all? Why can't we propose that all be clusters, since we already did.

[*Note:* The Administration recently proposed consolidating these programs into five "clusters"; Senators Kassebaum and Kennedy have co-sponsored a ~~similar me~~asure. While one of the clusters addresses "minority and disadvantaged training," no program in that measure requires racial or gender preferences.]

6.2.2 Support for Minority Institutions

A second set of programs provide targeted assistance to institutions that serve (or historically have served) a high proportion of minorities. These efforts include:

- **<u>Support for HBCUs</u>**: Several DoEd programs provide assistance to the 103 historically black colleges and universities ("HBCUs"). Funds for these programs may be used for a variety of purposes -- including programs to establish development offices; strengthen physical, financial, and academic structures and resources; purchase telecommunications equipment; establish outreach programs; and help HBCUs gain access to private-sector financing.

- **<u>Support for Hispanic-Serving nd Minority-Serving Institutions</u>**: DoEd's Hispanic-Serving Institutions Program makes grants to institutions with an enrollment of at least 25% Hispanic students (of which 50% must be low-income + first generation college students and an additional 25% must be low-income or first generation college students) and to institutions with a specified percentage ~~of mi~~nority students to enable these institutions to expand and improve their capacities to serve minority and low-income students.

What's the difference here?

6.2.3 Programs to Serve Special Needs

DoEd also administers a number of major programs for individuals with special needs, including programs for individuals with physical disabilities and for individuals with limited proficiency in English. We mention these by way of comparison, to note the variety of efforts designed to promote inclusion.

- **IDEA**: The Individuals with Disabilities Education Act ensures that all children with disabilities have available to them appropriate public education designed to meet their unique needs. This is accomplished through formula grants to states, 75% of which are to education agencies, and competitive grants for research, training, demonstration, and technical assistance.

- **The Rehab Act**: The primary purposes of the Rehabilitation Act are to (1) provide vocational rehabilitation services to individuals with disabilities to prepare for gainful employment; (2) provide independent living services to individuals with severe disabilities to enhance their independence, productivity, and quality of life; (3) increase the number of qualified personnel who are trained to deliver rehabilitation services; and (4) conduct rehabilitation research.

- **Language-related Programs**: The Department also supports a number of programs targeted to students with a limited proficiency in English. These include the Bilingual Education Act (which is dedicated to expanding the capacity of school districts to educate these students) and the Migrant Education Program (which provides funds for States for supplementary education services for the children of migrant agricultural workers and fishermen.)

6.2.4 Efforts to Ensure Access

Finally, DoEd also undertakes broader activities that further equal opportunity for traditionally underrepresented groups. These efforts include:

- **WEEA**: The Women's Educational Equity Act Program promotes gender equity in education by making grants and awarding contracts to educational agencies for research and development of strategies to support gender equity and for projects that implement effective gender equity policies and programs in schools.

- **Advisory Activities**: Many DoEd programs establish advisory or governing boards, councils, or panels and in many cases, the membership of these entities is specified (or diversity is encouraged) based on race, gender, or disability. For example, Goals 2000 requires that local improvement plans be developed by a panel that is "representative of the diversity of students and the community with regard to race, language, ethnicity, gender, disability, and socioeconomic characteristics."

6.3 Performance & Effects

Relatively few of these programs have been formally studied or reviewed; those that have been reviewed include:

- **HBCUs:** Since their creation in 1965, the programs supporting HBCUs have never been thoroughly evaluated; however, in FY 1995, Congress appropriated $1 million to evaluate support for HBCUs.

- The **IDEA program** has been closely monitored. These evaluations found that over the past five years, the dropout rate for children with disabilities has steadily declined and the graduation rate has shown a general upward trend. The number of children served and the number of teachers serving these children have also increased.

- In 1994, the GAO issued a formal evaluation of the **WEEA**. Its primary finding was that the WEEA program supported direct services to a small number of girls and women; the GAO recommended that program resources be devoted to eliminating systematic inequitable policies and practices in schools.

- In 1994, the GAO also reviewed the various HHS programs intended to increase the representation of underrepresented groups in the health professions. Emphasizing that data in this area are inadequate, the study found, in relevant part, that:

  - The representation of African-Americans, Hispanics, and Native Americans in health education and practice is increasing.
  - Evidence that this increase will improve access to care in underserved areas is "inconclusive."
  - "Evaluations ... have not conclusively linked these programs to changes in the supply, distribution, and minority representation of health professionals."

- As regards the importance of remedying the problems of underrepresentation in the health professions and various research fields, HHS puts far more weight than does GAO in several other studies. Those studies indicate, for example, that: minority health professionals are considerably more likely to work in underserved communities; that non-minority professionals are more likely to demonstrate "bedside bias" in the nature and quality of treatment provided to minority patients; that minority researchers are more likely to be interested in clinical and basic research problems of particular concern to minority populations; and minority professionals are more likely to play training and mentoring roles for members of minority groups.

- As regards the patterns of underrepresentation over time, and the contribution of the HHS programs in shifting the numbers, HHS figures should that . . .

6.4 Concerns & Complaints

A number of individuals have complained about several of these programs:

- An East Indian student filed a Title VI complaint against Marquette University regarding its Minority Engineering Scholars Program, which was funded through NSF's Research Careers for Minority Students (RCMS) program. The student charged he was discriminated against on the basis of his national origin. NSF had earlier determined that Asians were <u>not</u> underrepresented in sciences and engineering (but that "American Indians, Blacks, Hispanics, and Native Pacific Islanders" were). Accordingly, the Department of Education's Office of Civil Rights (OCR) found insufficient evidence of a Title VI violation. OCR reasoned that the NSF was authorized by Congress to devise programs to increase minority participation in science and engineering, and thus that the RCMS program was not in violation of Title VI. From a broader perspective, the Department's view reflects the understanding that tying benefits to group membership is not an end in itself, but must reflect the central policy purpose of opening opportunity to groups by virtue of their underrepresentation.

- The HHS Scholarships for Disadvantaged Students (SDS) program provides grants to institutions to support the recruitment and training of disadvantaged nursing students (and does so without a preference for race or gender). SDS regulations published in 1992 require that, in order to qualify for SDS assistance, an institution must have at least one minority faculty member. Wichita State University's application for an SDS grant was denied because it did not have any minority faculty. A faculty member from the University wrote to Senator Dole, who forwarded the letter to HHS.

  What would happen to these complaints if Riley principles applied?

  The Department replied that the minority-faculty requirement is implicit in the authorizing legislation, which requires that a qualifying institution have a program "for recruiting and retaining minority faculty." It is HHS' view that an institution cannot "retain" minority faculty unless it has minority faculty; that in a competitive application program, it is reasonable to take success at recruiting minority faculty as evidence of commitment to serving minority students effectively; and that 181 institutions were able to satisfy this eligibility condition. The faculty member argued that institutions that are interested in serving disadvantaged students sometimes lack the financial resources to compete for "qualified" minority faculty.

- A white student who was denied admission to an NSF summer camp because she is not a member of an underrepresented group has sued the Department. Her complaint is current pending in federal district court. (?)

- In 1989, an applicant challenged the University of Colorado's Patricia Roberts Harris Fellowship program. Having found that white women were not underrepresented in its relevant programs, the University limited the scholarship to minority men and minority women. The Department reviewed and upheld the University's practices.

- During a subcommittee hearing, one Representative asked the Assistant Secretary for Postsecondary Education why the Department supports HBCUs, which the Representative characterized as segregated institutions. The witness responded that (i) these institutions are open to all students; (ii) Congress chose to strengthen these institutions because of their unique role in serving students who were denied access to postsecondary education because of their race; and (iii) the statutory definition of HBCU makes clear that a school is not required to have a predominantly African-American student body in order to qualify as an HBCU.

6.5 A Note on Minority-Targeted Scholarships

Minority-targeted scholarships have been controversial; a summary of existing federal policies and practices follows.

6.5.1 Definitions

In a 1994 study, GAO usefully distinguished among three types of scholarships that consider race, ethnicity, or gender:

- **Minority-exclusive** aid includes scholarships for which minority status is the *only* requirement for eligibility (i.e., where minority status is a necessary and sufficient condition).
- **Minority-designated** aid includes scholarships for which minority status is one of several requirements for eligibility (i.e., where minority status is a necessary but not sufficient condition).
- **Minority-considered** aid includes scholarships for which minority status is one of several alternative considerations (i.e., where minority status is neither a necessary nor sufficient condition).

The term used in this report ("**minority-targeted**" scholarships) includes only the first two of these three categories. (Also, while GAO used a broad definition of "minority" -- including age, religion, and disability -- the remainder of this report addresses distinctions based on race, ethnicity, or gender.)

6.5.2 Current Use of Minority-targeted Scholarships

The GAO study found that, at the undergraduate level, **minority-exclusive** scholarships are rare, accounting for less than 0.25% of all scholarship monies; that **minority-designated** scholarships represent less than 5% of scholarship monies; and that **minority-considered** scholarships were somewhat more common.

A few GAO case studies illustrate the use of minority-exclusive and minority-designated scholarships:

- School A is a small public college; less than one percent of the student body is minority. The school initiated minority-targeted scholarships in 1972, paying the difference between in-state and out-of-state tuition (about $3900). The school believes these scholarships useful, particularly for recruiting minorities from out-of-state (the State population is 95% white). Reacting to the Bush Administration's 1991 policy, the school suspended its program; as a result in 1992 only one minority student received assistance (compared to the usual 5 or so students).

- School B is a private law school; its student body is 8% minority. Nearly half of the minority students receive minority-targeted aid. The school initiated minority-targeted scholarships in 1984 as part of a broader minority-recruitment strategy; the effort has had significant effects: the minority representation has risen from 2% to 8%. School officials consider the scholarships "vital" because (i) it signals the school's seriousness about diversity, and (ii) it allows school B to compete with other schools in order to achieve diversity benefitting that institution.

- School D is the undergraduate school of a private university; its student body is 14% minority. Half of these students receive minority-targeted assistance. School D's program (established in 1970) serves students from "disadvantaged" backgrounds based on financial need. Each year the program serves a few needy white students -- officials offered the example of a student with two blind parents. The program has been successful at recruiting minority students: in 1969, minorities accounted for 2 percent of the student body; in 1989, they accounted for 16%. When financing for the scholarships declined briefly in 1972, the number of African-American students dropped by more than 50%.

Why can't they all be like them?

6.5.3 Federal Policy

In late 1990, two universities scheduled to play in college football's Fiesta Bowl pledged to set aside the proceeds from the game to establish minority-targeted scholarships. The Bush Administration's Department of Education announced that such scholarships might be illegal under Title VI. In 1994, the Department promulgated new policy guidelines regarding how Title VI would be applied to minority-targeted aid. Those rules permits the use of race as a condition of eligibility for financial aid in order (a) to remedy past discrimination or (b) to promote diversity, provided the measure is narrowly tailored. A measure is "narrowly tailored" if (1) race-neutral means would have been ineffective; (2) a less extensive or intrusive use of race would have been ineffective; (3) the measure is of limited extent and duration, and is applied in a flexible manner; (4) the institution periodically reviews the continuing need for the measure; and (5) the effect on nonbeneficiaries is sufficiently small and diffuse so as not to unduly burden their opportunity to receive financial aid.

6.5.4 Additional Observations

In general, the Department of Education believes that there is a virtual consensus within the higher-education community that minority-targeted scholarships are essential to meeting schools' diversity needs and that race-neutral approaches will not be effective.

Doesn't example D call the conclusion into question?

To redress the lingering effects of past discrimination, the University of Maryland has established a merit-based scholarship program (the Banneker scholarship program) for which only African-Americans are eligible. A Hispanic student challenged the constitutionality of this program and a district court rejected the challenge, emphasizing that exclusive program was a narrowly-tailored remedy for past discrimination. However, in *Podberesky* v. *Kirwan*,[18] the Fourth Circuit overturned that decision; the University has petitioned for review by the Supreme Court.

Responding to the controversial nature of race-targeted scholarships, some institutions have modified their efforts. Reform efforts include:

- **Use of need-based, race-neutral scholarships**: Ten years ago, Colorado State University started a "First Generation Scholarship" for students whose parents did not attend or complete college. While this program is needs-based and colorblind, *84 percent* of the recipients are minorities. (Two more universities started similar programs last year.)

- **Use of private funds**: The University of Florida was concerned about using *public* money for race-based scholarships, so it worked to raise *private* money. The outreach effort helped raise student interest as well: minority representation increased from 4 to 17 percent over 10 years.

Finally, some observers have expressed skepticism about whether minority-targeted scholarships actually expand opportunity by "growing the pool." These observers believe that universities are simply bidding for a finite number of qualified minorities and that real growth in the pool will require far more investment in secondary and primary education, rather than simply financial aid at the university level. Defenders of these programs agree that continued efforts are needed on the investment front, but argue that post-secondary education as a whole is far more inclusive than it would be without these affirmative efforts. The number of minority and women students prepared for and interested in further education may be influenced by the degree to which genuine opportunity is available and outreach is effective.

[18] 38 F.3d 147 (1994).