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FOIA MARKER

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Collection/Record Group: Clinton Presidential Records

Subgroup/Office of Origin: Public Liaison

Series/Staff Member: Alexis Herman

Subseries:

OA/ID Number: 7478

FolderID:

Folder Title:
Affirmative Action

Stack:	Row:	Section:	Shelf:	Position:
S	30	3	5	1

old draft

April 11, 1996

Alexis/Holly:

Attached is a draft of the POTUS cover memo regarding affirmative action for Alexis to review and comment -- I provided Kitty, Kumiki and Dawn with copies to review. In reviewing the memo, she needs to think about: (1) whether there needs to be a face-to-face meeting with the President; (2) should there be some sort of Cabinet meeting to discuss before the President signs off; (3) whether the memo is too long; (4) timing -- are we still planning to go with this next week; and (5) the status of the communications strategy? Call if you have questions or want to discuss. Richard

APR 11 1996

MEMORANDUM FOR THE PRESIDENT AND VICE-PRESIDENT

FROM: ALEXIS HERMAN Close Hold
JACK QUINN

DATE: APRIL 8, 1996 (Draft)

RE: AFFIRMATIVE ACTION PROCUREMENT REFORM

Summary

This memorandum forwards for your consideration the Justice Department's proposal for reforming federal affirmative action procurement to ensure compliance with the constitutional standards established in Adarand Constructors, Inc. V. Pena (June 12, 1995). The proposal will be published in the Federal Register for a 60-day comment period, after which its structure would form a model for setting up the affirmative action provisions of the Federal Acquisition Streamlining Act (FASA) Regulation and the Defense Federal Acquisition Regulation Supplement. The proposal is intended to take effect October 1, 1996.

Background of this Issue

On July 19, 1995, you directed the Justice Department to review federal affirmative action programs to ensure their constitutionality under the Supreme Court's Adarand decision, also their effectiveness, and fairness. The Court ruled, that federal affirmative action programs must serve a compelling government interest and must be narrowly tailored, if race and ethnicity were used as a basis for decision making. Adarand involved government contracting, but the court's decision also extends to federal employment, and health and education 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. Their proposal would change the administration of a wide range of race-conscious means now used in government contracting to promote minority participation, but not eliminate them. It doesn't cover affirmative action in procurement undertaken by states and localities pursuant to programs funded by federal agencies, e.g., Disadvantage Enterprise Program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Act of 1991. These programs are still under review at Justice. 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.

The Department of Justice's proposal incorporates the following elements into a system they believe is consistent with your commitment to ensuring equal opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority:

- Safeguards against fraud and abuse by firms that should not be certified as socially disadvantaged businesses and prosecution of those that intentionally abuse the system.

- System of market-sensitive benchmarks to govern the use of provisions that allow race to be considered in making federal procurement awards.

- Several race-conscious means — SBA's 8(a) program, and price and evaluation credits in subcontracting — would be permitted to promote minority procurement. Various race-neutral outreach and technical assistance activities are permitted as well to enhance contracting opportunities for SDBs.

- Use of price and evaluation credits would be governed by the level to which minority firms are actually receiving federal contracts and dollars in an industry. Where minority participation is below the benchmarks, race-conscious methods of contracting would be authorized. Where minority participation exceeds the benchmark, the use of race may be curtailed.

- Set-asides, such as the "Rule of Two" — that the Defense Department suspended last October on the advice of the Justice Department — would not be permitted, until "lesser" means have been tried for three years — e.g., prices and evaluation credits — and found unsuccessful in ensuring minority contracting opportunities.

- The 8(a) program is unaffected by the proposal, other than counting 8(a) awards to SDBs toward the benchmarks — where minority awards exceed the benchmark in an industry, SBA may cut back on 8(a) awards in that industry. There will be no moratorium on 8(a) awards or structural changes to the program.

<u>Justice's Proposal and Clinton Administration Support for Affirmative Action</u>

These factors are considerations in your decision to accept Justice's proposal for mending affirmative action in federal procurement and publishing it for public comment:

<u>Pros</u>:

-- Justice believes their proposal satisfies the constitutional requirements of <u>Adarand</u>.

-- Justice's proposal "mends, but does not end" affirmative action in federal procurement.

-- Justice's proposal provides further evidence of your commitment to affirmative action programs that are done right. Currently available evidence overwhelmingly supports the continued need for affirmative action in federal procurement.

-- Justice's proposal is generally regarded by Civil Rights Groups and the minority business community as a reasonable approach to Adarand. However, they disagree with Justice's recommendation to wait three-years, before deciding if set-asides are still needed to eliminate any remaining impediments to the development of minority-owned businesses. If not changed, this time frame would cause this issue to be raised in the third year of your second administration.

-- Justice's proposal makes it easier for individuals who do not benefit from a presumption of being socially and economically disadvantaged to qualify for the program by lowering the standard of proof SBA will require.

-- Justice's proposal provides the basis for an alternative to Dole-Canady, which Democrats and moderate Republicans can point to, as proof that your Administration is serious about "mending" affirmative action programs. If enacted, Dole-Canady would effectively overturn decades of Supreme Court decisions regarding affirmative action.

Cons:

-- Justice's proposal is being presented at a time of unprecedented and wholesale attacks on affirmative action programs in the Congress, at the state level, and in the courts. Besides Dole-Canady, which will soon be taken up by the House Judiciary Committee:

▪ The self-titled California Civil Rights Initiative, if enacted this fall, would ban race and gender preferences for minorities and women. Similar efforts will appear on the ballot in several states this fall and is being considered by several state legislatures.

▪ The Governor of Louisiana signed an executive order suspending affirmative action programs. Several states and cities are following suit.

▪ The Hopewood decision, if it stands, would have a sweeping impact on the ability of higher education institutions in this country to achieve the widely-recognized goal of diversity. The Attorney General of Texas is seeking a review of the Fifth Circuit's decision, and it is expected that the Justice Department would take all appropriate action to ensure that diversity in education remains a part of the fabric of our nation's law.

▪ There have been several court cases challenging the use of affirmative action in contracting and the constitutionality of the 8(a) program. While Justice lawyers have prevailed to date, most recently in the tenth circuit, additional challenges are likely to continue.

-- Justice's proposal focuses on the narrow tailoring requirements of Adarand, but says nothing about what the government should be to provide additional opportunities for minorities and women, considering the overwhelming evidence justifying the continued need for such programs. Former Secretary Ron Brown, among others, expressed his concern about this and argued that more should be done.

-- The Defense Department's decision to suspend the "Rule of Two" last October, has caused significant economic hardship on the minority business community. They are working hard to create additional opportunities for minority owned businesses, consistent with Adarand, but the minority business community has been quite critical of their response to date.

-- There will be budget consequences. SBA and Commerce will need additional resources to cover their increased responsibilities and to cover the cost of collecting and processing the data needed to support the new benchmarking system.

-- Justice's proposal will represent a significant departure for federal procurement agencies and will take the full commitment of the Cabinet to oversee its carrying out. Because of the uncertainty generated by Justice's review of affirmative action programs, there has been a significant drop off in government contracting with minority and SDB firms. Part of this drop off can probably be traced to problems surrounding the FY '96 budget and government shutdowns, but not all. We have heard of several instances that agencies no longer feel that they have to be as diligent about contracting with minority firms.

Other Affirmative Action Activities at Justice

-- The Justice Department issued detailed guidance in February setting forth how Adarand will affect the use of race in federal employment. Practically speaking, few changes are expected in the use of race in federal employment, as similar Title VII standards have applied for many years.

-- The Justice Department is working with agencies, primarily Department of Transportation and EPA, which negotiate annual goals for SDBs under grants to states and localities. They expect to have new guidance in place for FY 97 funds.

-- Justice is working to develop means to tie the goals federal agencies set with states and localities to the availability of minority-owned firms, and a factor to account for the effects of discrimination, in a manner similar to the procurement reform proposal. They are also discussing with agencies how much they should be involved in policing state and local use of federal funds, both to insure that Adarand is satisfied and that minority firms receive the full range of race-conscious competitive advantages permissible under the law.

-- Justice is reviewing several programs agencies operate that are intended to place more minorities into academic fields. While these programs are defensible, we will need to develop more information to show the manner in which discrimination has impeded the ability of minorities to enter some academic fields to provide a defense to the challenges likely to come.

-- Justice is closely monitoring the Hopewood decision to decide whether federal participation in the case is warranted. The Federal government is still firmly committed to the notion that diversity in education is an important compelling interest.

Recommendations

On balance, we believe the pros prevail and recommend that you accept Justice's proposal. There has been substantial input from outside groups, in the development of the current proposal, and the 60-day comment period will allow for additional concerns to be raised by the public before the proposal is completed. One change, which we do encourage before the proposal is published, is for the trial period to be reduced from the proposed three to two years. This should be long enough to access the workability of Justice's approach and to decide if set-asides are needed to eradicate discrimination in federal procurement.

Beyond publishing Justice's proposal, we encourage you to undertake several additional steps to reaffirm your support for affirmative action. A misleading, March 8, New York Times article, has done considerable damage to the good will the Administration has enjoyed since your July 19, 1995 "mend it, don't end it" speech and your University of Texas speech on race, which was given to general acclaim. Because of this article, which implied that your Administration was imposing a three-year moratorium on affirmative action programs and was suspending the 8(a) program, we have been flooded with calls and letters protesting this action and questioning whether the Administration is backing off its support for affirmative action. Efforts to contain this criticism by issuing talking points, conducting interviews with women's, Civil Rights Groups, and representatives of the minority business community, and African American newspapers and radio stations, have helped but additional steps are still needed to shore up our base:

-- Issue a formal statement over your signature accepting Justice's proposal and directing that it be published for public comment. In accepting the proposal, you should use this opportunity to reaffirm your support for affirmative action done right and creating legal opportunities for minority and women to pursue in government contracting. You should also note your continued support for the 8(a) program, which SBA is working hard to improve its efficiency.

-- Direct the Department of Justice to issue guidance to the federal departments and agencies as to their continued responsibilities under existing Executive Orders to provide contracting opportunities for minorities and women. You should also emphasize to the Cabinet that you expect them to redouble their efforts to provide contracting opportunities for minorities and women in all aspects of their agencies procurement activities.

-- Use the occasion of your Saturday radio address to reiterate your support for affirmative action.

-- Host a half-day White House session with leaders from academia, business and the Civil Rights community to discuss how best to preserve and strengthen the commitment to affirmative action and diversity in higher education. The session should be chaired by Dick Riley and Janet Reno, and should conclude with a working dinner given by you and/or the Vice President.

-- Use the occasion of your (or the first lady's) speech to the Leadership Conference on Civil Rights Dinner May 14, to discuss the continued need for a "national conversation" on racial and gender justice as a follow-up to your speech last June. Our message might be, the things that affirmative action seeks to address — widespread discrimination and exclusion and their ripple effects continue to exist, and we as a nation must find ways to combat racism and enforce civil rights. Affirmative action is not about preferences, but opportunities. Critics' efforts to denounce minority-targeted scholarships, affirmative action procurement, and diversity in higher education must not be allowed to stop the progress at eliminating the last vestiges of America's legacy of discrimination.

3

Richard
Ben
cc HC

(AMH)

THE WHITE HOUSE

WASHINGTON

April 16, 1996

MEMORANDUM TO SECRETARY CISNEROS

FROM: **KITTY HIGGINS** Kitty

Attached is a draft memo for the President that addresses affirmative action and procurement reform in light of the Adarand decision.

As you know, Secretary Brown was very concerned that the right messages be sent when these proposals are made public. Your thoughts would be very welcome.

CC: Alexis Herman
Jack Quinn

MEMORANDUM FOR THE PRESIDENT AND VICE-PRESIDENT

FROM: ALEXIS HERMAN
JACK QUINN

Close Hold

DATE: APRIL 8, 1996 (Draft)

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Richard
Ben

OMH

THE WHITE HOUSE

WASHINGTON

April 16, 1996

MEMORANDUM TO SECRETARY CISNEROS

FROM: **KITTY HIGGINS** Kitty

The attached was sent to the President to update him on the progress in reforming federal procurement policies in light of the Adarand decision. A briefing with the President will be scheduled after he returns from Russia.

As you know, Secretary Brown was very concerned about how these initiatives are launched. It would be helpful to have your views.

cc: Jack Quinn
Alexis Herman
Kumiki Gibson

Specifically, the proposal is based on the development of a set of guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of Federal procurement. The Department of Commerce (in consultation with GSA and SBA) will establish appropriate limits -- or "benchmarks" -- for each industry. 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.

These benchmarks will then be used to determine when the use of race-conscious measures are appropriate. Where Commerce determines that participation by SDBs in government contracting in an industry is below the relevant benchmark, agencies will be authorized to grant a credit to bidders. When SDB participation rises above the benchmark, the credit will be lowered or suspended entirely.

Justice's plan also reforms the certification process. Currently, firms simply check a box to identify themselves as SDBs when bidding for Federal contracts. Under Justice's proposal, each bid that an SDB submits to an agency will have to be accompanied by a form certifying that the firm qualifies as a small disadvantaged business and that the individual claiming disadvantage actually owns and controls the company. This certification will be valid for a period up to three years, during which time registered firms will have only to complete a portion of the form confirming the continued validity of that certification.

Justice's plan also envisions an enhanced effort by SBA and the Department to identify and pursue individuals who fraudulently misrepresent information in order to obtain contracts through SDB programs.

II. Employment

Last month, Justice issued detailed guidance to Federal agencies on affirmative action in Federal employment. While this guidance should not result in any drastic changes in Federal employment practices, it will require the establishment of a clear justification for affirmative action (*e.g.*, evidence of past discrimination) and the tailoring of programs (*e.g.*, making sure that any numerical goals relate to the relevant labor pool).

III. Other Affirmative Action Programs

The Department of Justice is continuing to work with agencies on reviewing all other Federal affirmative action programs. The most notable are Federal grant and scholarship programs targeted at minorities and programs that require States and localities to meet certain goals for minority business participation in order to receive Federal funding.

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Justice anticipates that most of our Federal grant programs, which are numerous but not large in dollar volume, are defensible because they serve specific congressionally-determined objectives (e.g., the Ronald McNair program to increase minority involvement in the sciences). Some, however, may need to be tailored more narrowly.

For the Federal funding programs, such as DoT-funded mass transit and highway construction and EPA-funded environmental projects, the Department anticipates that agencies will propose revised regulations to make clear that (i) goals must be reasonable in relation to minority business availability and (ii) states or localities must narrowly tailor their methods to achieve such goals.

Finally, Justice recommends that the Federal government commit to a systematic and government-wide focus on encouraging minority participation in contracting through various outreach and technical assistance efforts. It proposes a number of measures to achieve this objective.

The Department anticipates completing the bulk of their work on these issues within the next month or two.

IV. Next Steps

Upon your approval, Justice will publish its procurement proposal in the Federal Register for a 60-day comment period. After this period, its proposal will form the model for establishing the affirmative action provisions of the Federal Acquisition Streamlining Act Regulation Supplement, which will take effect on October 1, 1996.

In the meantime, you may want to reaffirm your commitment to affirmative action. Specifically, the President could discuss affirmative action in an upcoming radio address. In the alternative, the President or the Vice President could make a major speech on the subject. (For example, the President could use the occasion of the speech to the Leadership Conference on Civil Rights (which is scheduled for on May 14, 1996) to discuss the continued need for a "national conversation" on racial and gender justice and for efforts that combat racism and create opportunities.) We will be prepared to discuss these ideas, and others, at the briefing.

Attachment

DRAFT OF 4/12/96

PUBLIC NOTICE REGARDING PROPOSED REFORMS TO AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT

DEPARTMENT OF JUSTICE

48 CFR Pt. 19
Small Business and Small Disadvantaged Business Concerns

48 CFR Pt. 219
Small Business and Small Disadvantaged Business Concerns

13 CFR 124
Minority Small Business and
Capital Ownership Development Assistance

AGENCY: Department of Justice

ACTION: Public notice and invitation for reactions and views.

SUMMARY: 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. Peña 115 S. Ct. 2097 (1995). The proposed structure, which has been developed by the Justice Department, will form a model for amending the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. These guidelines may also form a model for implementing section 7102 of the Federal Acquisition Streamlining Act, Pub. L. 103-355 (1994).

DATES: Comment Date: Reactions and views on the proposed model must be submitted in writing to the address below by [INSERT 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Interested parties should submit written comments to Mark Gross, Office of the Assistant Attorney General for Civil Rights, P.O. Box 65808, Washington, D.C. 20035-5808, telefax (202) 307-2839.

FOR FURTHER INFORMATION CONTACT: Mark Gross, Office of the Assistant Attorney General for Civil Rights, P.O. Box 65808, Washington, D.C. 20035-5808, telefax (202) 307-2839.

INTRODUCTION

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.

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 businesses owned by minorities and other socially disadvantaged individuals. In repeated legislative enactments, Congress has, among other measures, established goals and granted authority to promote the participation of Small Disadvantaged Businesses (SDBs) in procurement for the Department of Defense, NASA and the Coast Guard. It also enacted the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987 and the Intermodal Surface Transportation Efficiency Act of 1991, each of which successively authorized a goal for participation by Disadvantaged Business Enterprises. Congress also included similar provisions in the Airport and Airway Improvement Act of 1982 with respect to procurement regarding airport development and concessions. Under Section 15(g) of the Small Business Act, 15 U.S.C. 644(g), Congress has established goals for SDB participation in agency procurement. Finally, in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which extended generally to federal agencies authority to conduct various race-conscious procurement activities. The purpose of this measure was to facilitate the achievement of goals for SDB participation established for agencies pursuant to Section 15(g) of the Small Business Act.

Based upon these congressional actions, the legislative history supporting them, and the evidence available to Congress, this congressional judgment is credible and constitutionally defensible. Indeed, the 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, leads to the conclusion 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, the Justice Department takes as a constitutionally justified premise 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.[1]

Subject to certain statutory limitations (that are discussed below), Congress has largely 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. Adarand made clear that Congress has the authority to use race-conscious decisionmaking to remedy the effects of past and present discrimination but emphasized that such decisionmaking must be done carefully. This Administration is committed to ensuring that discriminatory barriers to the opportunity of minority-owned firms are eliminated, and the maximum opportunities possible under the law are maintained. Our focus, therefore, has been on creating a structure for race-conscious procurement 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. Not all of these factors are relevant in every circumstance and courts generally consider a strong showing with respect to most of the factors to be sufficient. This proposal, however, responds to all six 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

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[1] Set forth as an appendix to this notice is a preliminary survey of evidence establishing the compelling interest for affirmative action in federal procurement.

authority granted by 10 U.S.C. § 2323,[2] 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 at a price within 10% of fair market price, the officer 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.[3] 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 in October 1995.

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, sec. 7102, 108 Stat. 3243, 15 U.S.C. 644 note.[4] Because of Adarand and the effort to review federal affirmative action programs in light of that decision, regulations to implement the affirmative action authority granted by FASA have been delayed. See 60 Fed. Reg.

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[2] 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."

[3] 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.

[4] 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."

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-conscious 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 by DoD 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. With the exception of direct competitive awards (which do not take race into account), activities pursuant to all of these methods will be affected by the proposed reforms.[5]

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 economically (e.g. the standard for economic disadvantage for entry into 8(a) is an owner's net worth of $250,000 compared to $750,000 for SDB programs). Participants in the program are required to establish business development plans and are eligible for technical, 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. In addition, the SBA is working to strengthen safeguards against fraud and to ensure that the 8(a) program serves its purpose of

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[5] This proposal addresses only affirmative action in the federal government's own direct procurement. It does not address affirmative action in procurement and contracting that is undertaken by states and localities pursuant to programs in which such entities 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, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, et seq.).

assisting the development of businesses owned by individuals who are socially and economically disadvantaged.

Because the proposed reforms are broad and cover a number of different subjects related to affirmative action in federal procurement, the Justice Department is seeking comments on each of the aspects of the proposal. Comments will be taken into account in the formulation of revised procurement regulations.

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 benchmark limitations and mechanisms; and (5) outreach and technical assistance. The proposed structure incorporates these elements into a system that furthers the President's commitment to ensuring equal opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority.

I. 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. Under current practice, firms simply check a box to identify themselves 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) subcontracting 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. 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. That certification will be valid for a period of up to three years during which time 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. A full application will have to be submitted to an agency every three years to maintain eligibility.

A. Social and Economic Disadvantage

Members of designated minority groups seeking to participate in SDB and 8(d) programs will continue to fall within the statutorily mandated presumption of social and economic disadvantage.[6] This presumption is rebuttable as to both forms of disadvantage. The form will ask the applicant to identify the group identification triggering a presumption of social and economic disadvantage.[7] In addition, the form will enumerate the objective criteria constituting economic disadvantage according to SBA standards and advise the applicant that the presumption of such disadvantage is rebuttable and any challenge to the individual's SDB status will be resolved on the basis of these criteria. Challenges would be processed through existing SBA challenge mechanisms.

Individuals who do not fall within the statutory presumption will be required to establish social and economic disadvantage by answering a series of questions demonstrating such disadvantage. Questions regarding social disadvantage will be included in the standard certification form. Pursuant to current practice, individuals who do not fall within a presumption must prove their social disadvantage by clear and convincing evidence. That standard will be changed to permit proof by a preponderance of the evidence.

The SBA currently has criteria for evaluating social disadvantage. SBA will conduct training seminars designed to instruct personnel from other agencies on the procedures for making eligibility determinations. Individuals who do not fall within the statutory presumption will also be required to demonstrate that they are economically disadvantaged according to the criteria established by SBA.

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[6] 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.

[7] Members of minority groups do not have to participate in the SDB program in order to bid on federal contracts.

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.[8] 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 and applicants will have a fair opportunity to compete. 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. In the alternative, an agency may enter into an agreement with SBA to have SBA make all determinations, including the initial determination of eligibility.

B. <u>Ownership and Control</u>

In addition to submitting the form described above, every applicant will be required to submit with each bid 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.[9] Such a certification must 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); (2) the entity's certifications must have been accepted by a state or local government or a major private contractor; and (3) the entity must not have been disqualified by any government authority from making certifications within the past five years. Such entities may include private organizations, the SBA (<u>i.e.</u> 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

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[8] The form that such individuals are to complete will ask whether they previously have applied for SDB certification and been rejected. Rejected firms will not be permitted to immediately apply for certification at another agency.

[9] The standard certification form will accommodate 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.

localities, so long as the certification addresses the standards for ownership and control promulgated by the SBA.

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 periodic audits of certifying organizations. Any entity may submit information to the SBA in an effort to convince the agency to initiate such an audit.

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. Certified firms will be required to recertify their eligibility by submitting a full application, including an updated certification of ownership and control, every three years.

C. <u>Challenges</u>

Where an SDB is the apparent successful offeror on a contract, the name of that firm and of the entity that certified its ownership and control will be a matter of public record. SBA regulations currently allow any concern that submitted an offer to protest the eligibility of an SDB that receives a contract through an SDB program. The procuring agency or SBA may also protest the eligibility of an SDB. Individuals or organizations that did not submit a bid for the contract in question may submit information to the procuring agency in an effort to convince the agency to initiate a protest.[10] The SBA's Division of Program Certification and Eligibility will process any protest that contains specific factual allegations that the concern is not eligible for the program.

Grounds for an eligibility protest may include, but are not limited to, evidence that:

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[10] The protests contemplated in the discussion here relate only to certification and eligibility, The discussion does not relate to protests to other features of the proposed reforms that might be raised through existing bid protest procedures or through actions under the Administrative Procedure Act.

- the owners of the firm are not in fact socially or economically disadvantaged;
- the firm is not owned and controlled by the individuals who meet the definition of social and economic disadvantage;
- the disadvantaged firm has acted, or is acting, as a front company by failing to complete required percentages of the work contracted to the concern.[11]

Upon receiving a protest supported by specific factual information, the SBA will make an eligibility determination by examining documentation from the SDB including, for example, personal and business financial statements, business records, ownership certifications, and other information deemed necessary to permit a determination as to the eligibility of the firm. Current regulations require the SBA to make a determination concerning the eligibility of the firm within 15 days of the filing of the challenge or notify the contracting officer of any delay.

D. **Enforcement**

Finally, there must be a concerted effort to enforce the law against individuals who present fraudulent information to the government. The existence of a meaningful threat of prosecution for falsely claiming SDB status, or for fraudulently using an SDB as a front in order to obtain contracts, 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 misrepresenting information in order to obtain contracts through an SDB program. 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 that emerges through the challenge procedure or otherwise to the Department of Justice. In its enforcement, the Department of Justice will ensure that it pursues to the extent permitted by law all of the parties responsible for fraudulent or sham transactions.

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[11] The basis for such a challenge would be 48 C.F.R. 19.508, which requires completion of a minimum percentage of contract activities by the firm awarded a contract through a small business set aside or the 8(a) program. A clause must be inserted in such contracts that limits the amount of work that can be subcontracted. 48 C.F.R. 52.219-14. These requirements will be expanded to include contracts awarded through the reformed SDB program as well.

Penalties for misrepresentations in this area 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).

Knowing and willful fraudulent statements or representations may subject an individual to criminal penalties, including imprisonment for up to five years, pursuant to 18 U.S.C. 1001. In addition, knowing misrepresentations to obtain payment from the federal government may violate the False Claims Act, 31 U.S.C. 3729, and subject the claimant to civil penalties and treble damages.

II. BENCHMARK LIMITS

Although Congress has made the judgment that affirmative race-conscious measures are needed in federal contracting, the use of race must be narrowly tailored. 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.[12] To the extent that race-conscious measures (going beyond outreach and technical assistance) are utilized to 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 establish appropriate benchmark limitation figures for each

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[12] 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 highway construction projects carried out directly by the Department of Transportation).

industry to the Office of Federal Procurement Policy (OFPP), which will publish and disseminate the final benchmark figures. Each industry benchmark limitation will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects. Benchmark limitations will provide the basis for comparison with actual minority participation in procurement in that industry (and, where appropriate, in a region).

In establishing the benchmark limitations, the first step is to define whether industries operate according to regional or national markets. In general, industries will be defined according to two-digit Standard Industrial Classification (SIC) codes. Based on the evidence, it appears 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. Where data indicate, however, that an industry operates regionally, the benchmark limitations will be established by region.

After identifying the markets, the system will then measure, using primarily census data, the capacity of firms operating in each market that are owned by minorities. In estimating capacity, a number of factors will be examined. Most significant, of course, will be the number of minority SDBs available and qualified to perform government contracts.[13] 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 would be presumed to be unqualified to perform government contracts in that industry. While keeping in mind that capacity is not fixed, it will also be important to look at measures such as the number of employees and amount of revenues.

In addition to calculating the capacity of existing minority firms, the proposed system will examine evidence, if any, demonstrating that minority business formation in a specific industry has been suppressed by discrimination. This evidence may include direct evidence of discrimination in the private and public sectors in such areas as obtaining credit, surety guarantees and licenses. It may also evidence of discrimination in pricing and contract awards. In addition, the evidence may include the results of regression analysis techniques similar to those used in state studies of discrimination in procurement. That form of analysis holds constant a variety of variables that

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[13] For these purposes, the calculation of the number of minority-owned firms will not include corporations owned by federally-recognized Native American tribes and Alaskan Native villages. Bidding credits for such corporations are not subject to the Adarand strict scrutiny standard.

might affect business formation so that the effect of race can be isolated.

The combination of existing minority capacity and the estimated effect of race in suppressing minority business activity in the industry will form the benchmark limitation. Although there is no absolutely precise way to calculate the impact of discrimination in various markets, the benchmark limitations represent a reasonable effort to establish guidelines to limit the use of race-conscious measures and to meet the requirement that such measures be narrowly tailored to accomplish the compelling interest that Congress has identified in this area.

Benchmark limitations will be adjusted every five years, as new data regarding minority firms are made available by the Census Bureau. Census regions will be used in defining the scope of regional markets.

III. **Mechanisms**

Under the reformed structure, the federal government will generally have authority, subject to the limitations discussed in the next section, to use several race-conscious contracting mechanisms: SBA's 8(a) program; a bidding 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 where the benchmark limitations described more fully below warrant adjustments to the SDB program, corresponding adjustments will be made to the 8(a) program to ensure that its operation is subject to those limitations.

A second available race-conscious measure will be a bidding credit in prime contracting for SDBs. 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%.

The use of the term "credit" is not meant to restrict utilization by agencies 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 credit based on demonstrable evidence of a bidder's past performance in using SDB subcontractors. Agencies may also grant bonus awards to prime contractors to encourage the use of SDB subcontractors.[17] This proposal is not intended to limit agencies in developing or using additional mechanisms to increase SDB subcontracting, but any such mechanism will be subject to the limitations on race-conscious mechanisms described herein.

In applying these bidding and evaluation credits, race will simply be one factor that is considered in the decision to award a contract -- in contrast to programs in which race is the sole factor.

IV. Interaction of Benchmark Limits and Mechanisms

In determining how benchmark limitations will be used to measure the appropriateness of various forms of race-conscious contracting, 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. Where the use of all available tools, including direct competition and race-neutral outreach and recruitment efforts, results in minority participation below the benchmark, race-based mechanisms will remain available. Their scope, however, will vary and be recalculated depending on the extent of the disparity between capacity and participation. Where participation exceeds the benchmark, and can be expected to continue to do so with reduced race-conscious efforts, adjustments will be made.

At the close of each fiscal year, the Department of Commerce will review data collected by its GSA's 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 two-digit SIC code. Commerce 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.[18] Data regarding minority participation will be

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[16](...continued) specifically identified in the prime contractor's subcontracting plan.

[17] See e.g., Department of Transportation Incentive Subcontracting Program for Small and Small Disadvantaged Business Concerns, 48 C.F.R. 52 219-10.

[18] In order to measure accurately SDB subcontracting participation, it will be necessary to have information regarding (continued...)

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.

Commerce will analyze the data and, after consultation with SBA, report to OFPP regarding which mechanisms should be available in each industry and the size of the credits that can be applied. OFPP will publish and disseminate the mechanisms that can be used by the agencies in the upcoming year.

Pursuant to 15 U.S.C. 644(g), each agency now negotiates goals for SDB participation with SBA for each year. Commerce would inform SBA and agencies of the appropriate benchmarks for the industries in which the agency contracts and of the mechanisms available.

Where Commerce determines that participation by SDB's in government contracting in an industry is below the relevant benchmark limitation, it may report to OFPP that agencies should be authorized to grant credit to SDB bidders and to prime contractors for SDB subcontracting. Commerce will set a percentage cap of up to ten 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. The size of the credit will depend, in part, on the extent of the disparity between the benchmark limitations and minority SDB participation in federal procurement an industry. It also will depend on an assessment of pricing practices within particular industries to indicate the effect of credits within that industry. Commerce's determinations would be published and disseminated by OFPP.

Where the bidding and evaluation credits have been used in an industry and the percentage of dollars awarded to SDBs in that industry exceeds the benchmark limit, Commerce, in consultation with SBA, must estimate the effect of curtailing the use of race-conscious contracting mechanisms and report to OFPP. If Commerce

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[18](...continued)
SDB subcontracting participation by two-digit SIC code. At the same time, however, it is important to minimize the amount of new record-keeping and reporting that these reforms may require. Prime contractors such as commercial vendors that report SDB participation through company-wide annual subcontracting plans will continue to be able to use this reporting method, with some modification that serves to facilitate SIC code reporting. Under one approach, prime contractors could require all subcontractors to identify their primary SIC code and then track, as most primes do now, the amount of dollars that flows to each subcontractor.

determines that the minority participation rate would fall substantially below the benchmark limit in the absence of race-conscious measures,[19] it need not require agencies to stop using such measures, but may, as described below, require agencies to adjust their use.

Agencies will report the number of contracts that were awarded using a bidding 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, Commerce 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 bidding and evaluation credits, they may be required to adjust their size in order to ensure that the credits do not lead to the award of a disproportionately large numbers of contracts to SDBs. 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 Commerce to analyze the impact of credits by industry category and make adjustments where appropriate, which would then be published and disseminated by OFPP.

In addition, in some circumstances, an agency may use <u>less</u> than the authorized bidding or evaluation credit where necessary to ensure that use of the credits by a specific agency does not unfairly limit the 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, subject to approval by Commerce, depart downward from the authorized credits. The exercise of this

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[19] More than three "standard deviations" will generally be viewed as "substantial" for these purposes. Under applicable Supreme Court decisions, a disparity in the range of two or three standard deviations is strong evidence of 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.

discretion will be particularly important to avoid geographic concentrations of SDB contracting that unduly limit opportunities for non-SDBs.

When Commerce concludes that the use of race-conscious measures is not justified in a particular industry (or region), the use of the bidding 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 also 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. Prime contractors, however, would no longer receive credit in evaluation of their bids for signing up or identifying 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 bidding 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 minority participation in particular industries will reach the benchmark limitations through the available race conscious measures. Minority participation will depend 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 two-year period of the reformed system's operation (and at regular intervals thereafter), however, Commerce, SBA and DoD will evaluate the operation of the system and determine whether this statutory power to authorize set-asides should be invoked. In making that determination, those agencies 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.

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. In addition, the statutory authority upon which the use of bidding and evaluation credits is based expires at the end of fiscal year 2000. Congress will determine whether that authority should be extended. See 10 U.S.C. 2323; FASA, § 7102.

<u>Section 8(a) Program</u>

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.[20] 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 Commerce advises that the use of race-conscious measures must be curtailed in a specific industry on the basis of the benchmarks, the Administrator would take appropriate action to limit the 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 the general SDB program 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. Consistent with its unique nature, the 8(a) program has features that already reflect some of the factors that make up the narrow tailoring requirement. Unlike

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[20] As with calculation of the benchmark limitations, <u>see</u> n. 13, <u>supra</u>, corporations owned by federally-recognized Native American tribes and Alaskan Native villages will not be included in this calculation.

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; the SBA is proposing to clarify the regulations implementing the program to emphasize this fact. In addition, individuals are admitted to the 8(a) program 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 other graduation criteria determined by the SBA.

SBA has under consideration additional program changes designed to ensure that the 8(a) program focuses on its central mission of assisting businesses to develop and concentrates it resources on its intended beneficiaries. These changes would further ensure that the 8(a) program is narrowly tailored to serve the compelling interest for which it was enacted by Congress.

V. 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. As a general proposition, 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 sustained energy and direction to these efforts.

SBA operates several assistance programs that are targeted toward minority firms, but are also available to qualifying nonminority firms. 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 socially and economically disadvantaged 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 that are targeted toward 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 other portions of the program are 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. In addition, SBA should develop a systematic means for publishing upcoming subcontracting opportunities.

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

7. Agencies should target outreach and technical assistance efforts, including mentor-protege initiatives, toward industries

in which SDB participation traditionally has been low. Agencies should continue to pursue strategies in which minority-owned firms are encouraged to become part of joint ventures or form strategic alliances with non-minority enterprises.

8. The SBA should enhance its technical assistance initiatives to enhance the ability of SDBs to use the tools of electronic commerce.

9. Pursuant to Executive Order 12876, which directs agencies to seek to enter into contracts with Historically Black Colleges and Universities, agencies should attempt to increase participation by such institutions in research and development contracts as means of assisting the development of business relationships between the institutions and SDB's.

10. Each agency should review its contracting practices and its solicitations to identify and eliminate any practices that disproportionately affect opportunities for SDBs and do not serve a valid and substantial procurement purpose.

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 on their outreach and technical assistance practices. These reports should present the actual practices and experiences of federal agencies and include recommendations 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 outlined above has been crafted with regard for each of the six factors that courts have identified as relevant in determining whether race-based decisionmaking is narrowly tailored to meet an identified compelling interest. While courts have identified these six factors as relevant in determining whether a measure is narrowly tailored, they have not required that race-conscious enactments satisfy each element or satisfy any particular element to any specific degree. The structure proposed herein for SDB procurement, however, measures up favorably with respect to each of the six factors.

The proposal requires that agencies at all times use race-neutral alternatives to the maximum extent possible. An annual review mechanism is established to ensure maximum use of such race-neutral efforts. Only where those efforts are insufficient to overcome the effects of past and present discrimination can race-conscious efforts be invoked.

The system is flexible in that race will be relied on only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination. Moreover, the extent of any credit awarded will be adjusted annually to ensure that it is closely matched to the need for a race-based remedial effort in a particular industry.

Race will not be relied upon as the sole factor in SDB procurement decisions. The use of credits (instead of set-asides) ensures that all firms have an opportunity to compete and that in order to obtain federal contracts minority firms will have to demonstrate that they are qualified to perform the work.[21]

Application of the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question -- or what their capacity would be in the absence of discrimination.

The duration of the program is inherently limited. As minority firms are more successful in obtaining federal contracts, reliance on race-based mechanisms will decrease automatically. When the effects of discrimination have been eliminated, as demonstrated by minority success in obtaining procurement contracts, reliance on race will terminate automatically. The system as a whole will be reexamined by the executive branch at the end of two years and at regular intervals thereafter. In addition, the principal enactments that this proposal implements, FASA and the Department of Defense Authorization Act, expire at the end of the fiscal year 2000. Congress will have to examine the functioning of this system and make a determination whether to extend the authority to continue its operation.

Finally, the proposal avoids any undue burden on nonbeneficiaries of the program. As a practical matter, the overwhelming percentage of federal procurement money will continue to flow, as it does now, to nonminority businesses. Furthermore, implementation of the benchmark limitations will ensure that race-based decisionmaking cannot result in concentrations of minority contracting in particular industries or regions and will thereby limit the impact on nonminorities.

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[21] The SBA's 8(a) program contains a variety of elements that help to target the program on firms in need of special assistance. One of those elements, a requirement that applicants affirmatively demonstrate economic disadvantage, ensures that race is not the sole factor in determining entry into the program.

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 that are 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.