

THE WHITE HOUSE
Office of the Press Secretary

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STATEMENT BY THE PRESIDENT

Today I am pleased to announce policies that continue my commitment to expand economic opportunity for all Americans. These new guidelines for federal procurement are designed to remedy discrimination in a carefully targeted way. These reforms, which continue my promise to mend, not end affirmative action, expand opportunities for small disadvantaged businesses.

These new guidelines allow small disadvantaged businesses to receive a price credit of up to 10 percent in bidding for federal contracts. The credits will be available only in industries that show the ongoing effects of discrimination. The Department of Commerce identified these industries through a process called benchmarking, which compares the actual share of federal procurement by small disadvantaged firms to the share that would be expected in the absence of discrimination. Limiting credits to these industries satisfies constitutional requirements while targeting our efforts in areas where disparities still exist.

This program is based on authority given the Administration by Congress in 1994. These credits will help level the playing field for firms that have suffered from discrimination. However, they do not ensure that any firm will win a contract. Small disadvantaged businesses must compete with all other businesses to win federal contracts.

The steps we are taking today comply with legal requirements and preserve competition, while serving to remedy discrimination.

PROCUREMENT REFORMS: SDB CERTIFICATION AND THE PRICE EVALUATION ADJUSTMENT PROGRAM

The Clinton administration is implementing major reforms of federal government procurement programs that assist small disadvantaged businesses ("SDB's"). These reforms include a new process for certifying firms as SDB's and a new price evaluation adjustment program targeted at industries that reflect the ongoing effects of discrimination. Taken together, these reforms will dramatically strengthen our efforts to remedy discrimination against minority business owners. At the same time, they will ensure that our procurement programs meet legal requirements and protect the interest of all Americans. They represent major steps in the President's effort to mend, not end affirmative action.

I. REFORM OF SDB CERTIFICATION

The Small Business Administration will institute a process to certify SDB's to be eligible to participate in one of the federal government's procurement programs. In order to qualify as an SDB, a firm must be owned and controlled by one or more individuals who are socially and economically disadvantaged. Congress has directed that individuals who are members of certain groups are presumed to be disadvantaged. Other persons, including women and persons of any race, can also qualify by establishing their disadvantaged status.

In the past, the government has relied on self-certification for purposes of SDB eligibility, which allowed firms to identify themselves as meeting the requirements for certification. Under the new rule, the SBA will require that, before it can become eligible to receive a benefit as an SDB, each firm must be certified by the SBA. This process may include determinations of ownership and control by contractors selected by the SBA.

In addition, the new rule changes the standard of proof that an individual seeking to establish social and economic disadvantage must meet -- from "clear and convincing" to a "preponderance of the evidence." This rule change will make it easier for persons who are not in groups presumed to be disadvantaged to establish eligibility. These changes will strengthen all programs that rely on SBA certification by ensuring that those persons who meet Congressionally-established requirements qualify for benefits.

II. THE PRICE EVALUATION ADJUSTMENT PROGRAM

A second key component of the Clinton administration's reform of the federal government's procurement programs is its new price evaluation adjustment program. Congress authorized all federal agencies to use this program in 1994 as part of the Federal Acquisition Streamlining Act. Since that time, the administration has worked to develop a methodology for exercising this authority in a way that remedies discrimination, meets legal requirements and preserves competition. This new program provides a way to remedy discrimination in a fair and carefully balanced way without imposing an unfair burden on other businesses.

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

In order to ensure that the use of these credits is fair and meets legal requirements, they will be available only in industries in which minority-owned firms continue to suffer the effects of discrimination. "Benchmarking" provides a methodology for identifying these industries.

Constitutional Requirements

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

A. Compelling Interest

Based on an extensive review of evidence, the Department of Justice has established that discrimination has harmed minority businesses. In addition to commissioning an analysis of dozens of studies of industries throughout the country, DOJ also reviewed a long history of Congressional findings of discrimination. Congress relied on these findings in enacting affirmative action and other remedial legislation. For example, there is substantial evidence that minority-owned businesses have been prevented from obtaining access to capital, from participating in trade associations, and from gaining enough experience to become bonded. Most of the present effects of discrimination stem from discrimination in the private sector, not in the public sector. These limitations have erected substantial barriers to minority-owned firms and have hampered their ability to win contracts. Consistent with Congress's long-standing determinations, the government has a compelling interest in providing targeted assistance to minority-owned businesses.

B. Narrow Tailoring

The use of benchmarks helps satisfy the Supreme Court's "narrow tailoring" requirement by providing a means for determining whether the effects of discrimination still burden small

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

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

Scope and Effective Dates

Three agencies, the Department of Defense, NASA, and the Coast Guard, have had authorization to offer credits since FY 1994. Under the rule announced today, all agencies will be required to implement the price evaluation adjustment program. The changes are being implemented through a revision of the Federal Acquisition Regulation. Currently, data are available to allow application of the program to SDB prime contractors. This phase of the program will go into effect on October 1, 1998. A program authorizing incentives to increase subcontracting with SDB's will go into effect on January 1, 1999. More complete survey data will be available during 1999 and will allow for further refinements in the subcontractor phase of the program.

The price evaluation adjustment program supplements other federal programs that provide assistance to disadvantaged businesses, including the 8(a) program of the Small Business Administration, the new HUBzone Empowerment Contracting Program, and the Department of Transportation's program for Disadvantaged Business Enterprises. While the SBA will not use price credits, it will rely on the benchmarks in administering the 8(a) program. Benchmarks will provide guidance to program administrators, for example, in determining the number and type of firms that will participate in the program and in deciding what contracts will be authorized under the program. These changes will begin to take effect by December 1, 1998. The federal benchmarks will not apply to the Department of Transportation's program for Disadvantaged Business Enterprises, which is administered by grantees, such as state and local governments. However, local grantees may wish to consider benchmarking methodology in designing their own programs.

The Advantages of Benchmarking

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

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

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

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

Industries Where Credits are Available

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