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FEDERAL PROCUREMENT AFTER *ADARAND*

September 2005

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Letter of Transmittal

The President
The President of the Senate
The Speaker of the House

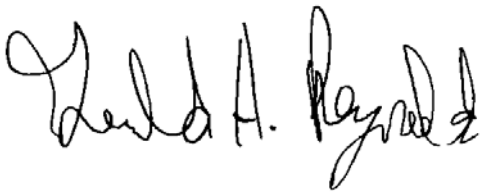
Sirs:

The United States Commission on Civil Rights transmits this report, *Federal Procurement After Adarand*, pursuant to Public Law 103-419. The Supreme Court's 1995 decision in *Adarand Contractor, Inc. v. Pena (Adarand),* held that federal programs using racial and ethnic bases in decisionmaking must serve a compelling government interest and be narrowly tailored to meet that interest. Under this standard, federal agencies must seriously consider race-neutral alternatives to race-conscious procurement programs. This report considers federal agencies' compliance with this constitutional requirement. The Commission reviewed relevant aspects of seven agencies' procurement programs: the Departments of Defense, Transportation, Education, Energy, Housing and Urban Development, and State, and the Small Business Administration.

Ten years after the *Adarand* decision, the Commission has found that federal agencies still largely fail to consider race-neutral alternatives as the Constitution requires. Although the Commission identified some race-neutral programming efforts, agencies do not engage in the activities that constitute serious consideration, such as program evaluation, outcomes measurement, empirical research and data collection, and periodic review. Significantly, the agencies under review neither provide clear recourse for contractors who are the victim of discrimination nor guidelines for enforcement.

Among recommendations, the Commission urges the Department of Justice to offer clear and specific guidance on the governmentwide obligation to consider race-neutral alternatives. The Commission also asks the White House to assemble a task force to determine what data are required to measure the effectiveness of race-neutral alternatives. Finally, the Commission asks Congress to enact legislation expressly prohibiting race discrimination in federal contracting and establishing effective remedies and enforcement procedures. The report includes a dissenting statement from one commissioner.

For the Commissioners,



Gerald A. Reynolds
Chairman

Contents

EXECUTIVE SUMMARY IX

CHAPTER 1: FEDERAL CONTRACTING PRACTICES BEFORE AND AFTER *ADARAND* 1
- Scope and Methodology 2
- Federal Contracting with Small and Disadvantaged Businesses: An Historical Perspective 5
- The *Adarand* Decision: Establishing Strict Scrutiny 9
- Applying *Adarand* to Federal Contracting Programs 13
  - Eligibility and Certification 15
  - Benchmark Limits 16
  - Additional Mechanisms 17
- Defining and Evaluating Race-Neutral Strategies 18

CHAPTER 2: ELEMENTS AND EXAMPLES OF RACE-NEUTRAL CONTRACTING 21
- Elements of a Race-Neutral Contracting System 23
  - Element 1: Develop Standards and Policies Based on Sound Benchmark Data 24
  - Element 2: Identify and Develop a Wide Range of Race-Neutral Alternatives 27
  - Element 3: Routinely Evaluate the Impact of Race-Neutral and -Conscious Strategies 27
  - Element 4: Communication and Coordination: Sharing Information and Best Practices 29
- Race-Neutral Contracting Strategies 31
  - Strategy 1: Antidiscrimination Policy and Enforcement 32
    - Enforcement of Nondiscrimination in Contracting 32
    - Subcontractor Compliance Enforcement 36
  - Strategy 2: Outreach 38
    - Internet Postings and Searchable Databases 39
    - Conferences, Meetings, Forums, Media, and Printed Materials 40
    - Ensuring the Inclusiveness of Outreach 42
  - Strategy 3: Capacity Building 43
    - Technical Assistance 43
    - Mentor-Protégé Programs 46
    - Teaming Efforts 48
    - Certificates of Competency 48
  - Strategy 4: Financial Assistance 49
    - Advance Payments/Short-Term Lending Programs 50
    - Bonding Guarantees 51
  - Strategy 5: Expanding Opportunities 54
    - Contract Unbundling 54
    - The HUBZone Program 59
- Conclusion 66

CHAPTER 3: FINDINGS AND RECOMMENDATIONS 69
- Serious Consideration 71
- Antidiscrimination Policy and Enforcement 72
- Ongoing Review 73
- Data and Measurement 73
- Communication and Collaboration 75
- Outreach 76
- Conclusion 76

DISSENTING STATEMENT OF COMMISSIONER MICHAEL YAKI 79

DISSENT APPENDIX A: SMALL BUSINESSES AND FEDERAL CONTRACTING 95
Trends in Minority-Owned Businesses and Federal Procurement 95
The Growth in Minority-Owned Businesses, 2002 and 1997 Census Figures 95
2002 Census Survey 95
Comparison between 2002 and 1997—General Observations 97
1997 Survey 97
Summary 104
Trends in Federal Contracting 104
Amounts of Federal Procurement 105
Proportion of Procurement with Disadvantaged Businesses 106
New Contracts with Disadvantaged Businesses 109
Procurement by Race/Ethnicity of Firm's Owner 110
Persistent Disparities in Federal Procurement 112
Individual Financial Circumstances 113
Access to Capital and Credit 114
Insurance and Bonding 115
Size and Administrative Capacity 115
Technology and Expertise 116
Interpersonal and Business Networks 116
Design Discretion 117
Discrimination 117
The Federal Procurement Process: How Agencies Make Purchases 118
Summary 123

DISSENT APPENDIX B: FEDERAL PROGRAMS TO PROMOTE SMALL AND MINORITY BUSINESS CONTRACTING 125
The Priority of Civil Rights in Contracting 125
Offices of Small and Disadvantaged Business Utilization 126
HUD's Policy Statement 128
Programs to Promote Contracting with SDBs 130
The Section 8(a) Program 130
SBA's 8(a) Mentor-Protégé Program 133
Small Disadvantaged Business Certification and Programs 134
Benchmarks for SDB Utilization 136
SDB Assistance Mechanisms 138
SBA's Procurement Goaling Program 142
Agency Goal Achievements 143
U.S. Small Business Administration 144
U.S. Department of Defense 144
U.S. Department of Transportation 145
U.S. Department of Energy 145
U.S. Department of Housing and Urban Development 147
U.S. Department of Education 148
U.S. Department of State 148
Achievement Summary 153
Conclusion 153

DISSENT APPENDIX C: SAMPLE INTERROGATORY 155

DISSENT APPENDIX D: SOURCES OF DATA ON MINORITY-OWNED BUSINESSES AND FEDERAL CONTRACTING 163
Census Bureau's Surveys of Minority-Owned Businesses 163
The Federal Procurement Data System 164

DISSENT APPENDIX E: SELECTED AGENCIES' SMALL AND DISADVANTAGED BUSINESS GOALS AND ACHIEVEMENTS 167

FIGURES

2.1 Small Business Administration's Certifications of HUBZone Firms, Fiscal Years 2000 to 2004 61
2.2 Selected Federal Agencies' Contracting Goals and Achievements for Businesses Located in HUBZones, Fiscal Years 2000 to 2005 64
A.1 The Number of Minority-Owned Businesses, 1992 and 1997 99
A.2 Percent Growth in Numbers and Revenue of Minority-Owned Businesses, 1992 to 1997 100
A.3 Revenue of Minority-Owned Businesses, 1992 to 1997 101
A.4 Survival Rates of Firms with Paid Employees by Race/Ethnicity of Owner 103
A.5 Trends in the Amount of Federal Procurement, 1992 to 2004 107
A.6 Trends in the Proportions of Federal Procurement, 1992 to 2004 108
A.7 Number of New Small Disadvantaged Business Contracts the Federal Government Awarded by Fiscal Year (1992 to 2003) 109
A.8 Number of New Small Disadvantaged Business Contracts the Department of Defense Awarded by Race/Ethnicity and Fiscal Year (1992 to 2003) 111
B.1 Small Business Administration's Certifications of 8(a) Businesses, Fiscal Years 2000 to 2004 132
B.2 Small Business Administration's Certifications of SDBs, Fiscal Years 2000 to 2004 136
B.3 Selected Federal Agencies' Contracting Goals and Achievements for Small Businesses 150
B.4 Selected Federal Agencies' Contracting Goals and Achievements for Small Disadvantaged Businesses 151
B.5 Selected Federal Agencies' Prime Contracting Goals and Achievements for 8(a) and Non-8(a) SDBs 152

TABLES

1.1 Significant Legislative and Regulatory Actions in Federal Contracting for Minority-Owned Businesses 7
1.2 *Adarand* Judicial Chronology 11
2.1 Selected Federal Agencies' Contracting Goals and Achievements for Businesses Located in HUBZones, Fiscal Years 2000 to 2005 63
A.1 Summary Statistics for Changes in the Number of U.S. Businesses and Their Receipts, 1997–2002 96
A.2 General Purchasing Policy for Non-Exempt Items and Services 121
B.1 Industries in Which Benchmarks Demonstrate Minority Firm Underrepresentation 138
B.2 Summary of Selected Agencies' Performance Against Prime and Subcontracting Goals for Small Disadvantaged Businesses, Fiscal Years 2000 to 2004 149
E.1 Small Business Administration's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 167
E.2 Department of Defense's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 168
E.3 Department of Transportation's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 168

E.4 Department of Energy's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 169
E.5 Department of Housing and Urban Development's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 169
E.6 Department of Education's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 170
E.7 Department of State's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005 170

Executive Summary

> The structure of affirmative action in contracting. . .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 affirmative action. . . . 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.[1]

Thirty years after the Civil Rights Act of 1964 and subsequent executive orders prohibiting hiring discrimination by federal contractors and requiring businesses to provide affirmative action plans with large bids, the Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Peña* (*Adarand*) clarified the constitutional standard for evaluating race-conscious programs in federal contracting.[2] The Court held that all racial classifications imposed by federal, state, or local governments must be subjected to "strict scrutiny,"[3] a standard used by the courts in deciding whether a law or policy is constitutional. The burden of proof is on the government to demonstrate that the classification is the least restrictive way to serve a "compelling public interest." Government programs must be narrowly tailored to meet that interest.[4] In determining whether the subcontractor compensation clause in question was narrowly tailored, the Court stated that the Court of Appeals did not review it using strict scrutiny "by asking, for example, whether there was 'any consideration of the use of race-neutral means to increase minority business participation'."[5]

Thus, among other requirements, agencies must consider race-neutral strategies before adopting any that allow eligibility based, even in part, on race. In general, this report finds that federal agencies have not complied with their constitutional obligation, according to the Supreme Court, to narrowly tailor programs that use racial classifications by considering race-neutral alternatives to redress discrimination. Nor have they made the "concentrated race-neutral efforts" that the Clinton administration's Department of Justice (DOJ) urged, based on the *Adarand* decision.[6]

The report highlights government initiatives to expand small and minority-owned firms' access to federal contracts through race-neutral means, such as civil rights enforcement efforts, expanded contracting opportunities, financial assistance, and outreach. The last chapter presents

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[1] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,050 (May 23, 1996) (hereafter cited as DOJ, Proposed Reforms to Affirmative Action in Federal Procurement).

[2] Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (hereafter cited as *Adarand*).

[3] *Id.* at 224.

[4] *Id.* at 227.

[5] *Id.* at 237–38.

[6] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,050.

recommendations for implementing these strategies and others as part of a comprehensive, inclusive federal contracting system.

Commission staff reviewed government documents, federal procurement data, literature on federal contracting, and pertinent statutes, regulations, and court decisions in the completion of this report. Staff submitted interrogatories to seven agencies selected for detailed review based on their levels of procurement or acquisition policies: the Small Business Administration (SBA) and the Departments of Defense, Transportation, Education (DOEd), Energy, Housing and Urban Development, and State. Interrogatory responses and analysis thereof form the basis of the report.

The federal government procures more than $300 billion in goods and services each year. Legislation obligates agencies to contract with small business when sufficient numbers of such firms bid and the purchase is valued between $2,500 and $100,000. Many agencies promote such contracting with small disadvantaged businesses (SDBs) through race-conscious SBA vehicles, for example:

- SBA's 8(a) Business Development Program helps socially and economically disadvantaged business owners through assistance to increase firms' viability and federal contracts agencies award under restricted competition. The program presumes that designated minority groups are socially disadvantaged. However, if an individual business owner who is a member of another race or ethnic group produces documentation that demonstrates he or she is disadvantaged, that person's firm also may participate.

- SBA's 8(a) Mentor-Protégé Program pairs certified firms with successful large businesses (mentors), with the objective of helping the SDB become more viable. The mentor and protégé cooperate in competing for federal procurement and accessing capital.

- SDB certification, obtained from SBA, is designed to increase firms' chances of subcontracting with government contractors. SDB owners must demonstrate social and economic disadvantage. Regulations limit agencies' use of SDB procurement mechanisms to acquisitions in industries in which Department of Commerce data have demonstrated government underutilization of qualified SDBs.

- Legislation also sets procurement goals for government to award, for example, 5 percent of contracting to small and disadvantaged firms, divided among 8(a) participants and certified SDB businesses.

Elements of a Race-Neutral Contracting System

Despite the Supreme Court's requirement that agencies seriously consider race-neutral strategies before implementing race-conscious ones, neither the Supreme Court nor DOJ have offered guidance on what agency actions demonstrate such consideration. Thus, agencies remain on their own to determine both the extent of their obligations under *Adarand* and the specific approaches

that will help them exhibit serious consideration. Moreover, agencies disagree about what factors render a program race-conscious or -neutral. One agency, DOEd, offered grantees six practices as a guide to demonstrating appropriate actions: identifying and evaluating a wide range of policies; articulating underlying facts that will prove whether a race-neutral plan works; collecting empirical research to demonstrate success; ensuring such assessments are based on current, competent, and comprehensive data; reviewing race-conscious plans periodically to determine the need for continuing them; and analyzing data to establish causal relationships before concluding that a race-neutral plan is ineffective.[7]

The Commission found that agencies do not demonstrate these actions. Nor do they systematically collect data or conduct benchmark studies, implement a wide range of race-neutral alternatives, periodically evaluate the effectiveness of various strategies, or engage in interagency communication. As a result, their ability to assess whether their procurement efforts extend equal opportunity to all firms is compromised. Recognizing this failure, the Commission drew upon DOEd's helpful framework and its own research to identify four elements that underlie serious consideration, ensure an inclusive and fair race-neutral system, and tailor race-conscious programs to meet a documented need.

Element 1: Standards—Agencies must develop policy, procedures, and statistical standards for evaluating race-neutral alternatives. No agency reported having mechanisms for assessing the viability of race-neutral alternatives or for determining when to discard race-conscious ones. Agencies rely on congressional findings and outdated benchmark data rather than their own studies, which should be tailored to their individual acquisition needs.

Element 2: Implementation—Agencies must develop or identify a wide range of race-neutral approaches, rather than relying on only one or two generic governmentwide programs. No agency demonstrated efforts to implement innovative alternative tools and strategies.

Element 3: Evaluation—Agencies must measure the effectiveness of their chosen procurement strategies based on established empirical standards and benchmarks. The end goal should be to eliminate reliance on race-conscious programs. Most agencies have not established a policy for periodic review, and instead rely on Congress, DOJ, and SBA to determine the success of their strategies. Furthermore, agencies generally do not isolate the outcomes of specific race-neutral approaches, rendering it difficult to assess their effectiveness.

Element 4: Communication—Agencies should communicate and coordinate race-neutral practices to ensure maximum efficiency and consistency governmentwide. Although infrastructure for interagency collaboration exists in the form of councils and committees, participation varies. Agencies fail to exploit available channels of communication, hindering their ability to implement sound race-neutral strategies.

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[7] U.S. Department of Education, Office for Civil Rights, *Inclusive Campuses: Diversity Strategies for Private Colleges*, report no. 3, Race-Neutral Alternatives Series, 2005, pp. 11–12.

Race-Neutral Contracting Strategies

The Commission further identified strategies that agencies employ to varying degrees in their effort to achieve contracting equity through race-neutral programs. No agencies do so comprehensively. The first strategy ensures that all firms have equal opportunities by eliminating discrimination and ensuring good faith efforts to include SDBs in procurement. Others enable disadvantaged firms to compete without altering the terms of competition, either by providing necessary resources, opening previously unattainable opportunities, or expanding economic potential in underutilized and distressed geographic regions.

Strategy 1: Antidiscrimination Policies and Enforcement—The Commission looked for enforcement of nondiscrimination. This study did not reveal any enforcement system to identify and eliminate discrimination in contracting. Agencies do not develop or apply comprehensive nondiscrimination policies, uniform sanctions to redress discrimination, or complaint-processing procedures.

Strategy 2: Outreach—In its post-*Adarand* guidance, DOJ encouraged agencies to use outreach to limit the need for and use of race-conscious measures. Agencies use Internet postings, searchable databases, conferences, workshops, printed materials, and the media to disseminate information about contracting opportunities, but few departments incorporate outreach in budget and planning documents or take other steps to ensure the strategy's effectiveness.

Strategy 3: Capacity Building—Agencies vary in their use of technical assistance, mentor-protégé programs and similar teaming efforts, and other approaches to increase small business owners' ability to bid or qualify for awards. Technical assistance can include counseling, training, and aid with marketing or other business development; additionally, mentor-protégé programs and teaming efforts enable agencies to foster partnerships between large and small firms, and among small businesses, to strengthen their ability to compete. Few agencies pursue the full range of available capacity-building techniques. Although most have established some form of partnering, they do not measure the strategy's success.

Strategy 4: Financial Assistance—Assistance to help small businesses overcome monetary barriers to competing for contracts has long been an important component of federal procurement programs. SBA offers loan and venture capital programs, and along with several other agencies has instituted surety bond-guarantee programs. Other financial strategies include advance payments and short-term lending programs to help small firms purchase equipment or supplies. There is scant evidence that agencies consistently offer a wide array of financial assistance programs.

Strategy 5: Expanding Contracting Opportunities—Agencies can increase the number of contracts available to small businesses, for example, by breaking apart large contracts or promoting business development in underutilized geographic regions. Although the Bush administration has prioritized the need to disaggregate large contracts, few agencies conduct the requisite reviews for doing so. Second, despite widespread participation in the Historically Underutilized Business Zone (HUBZone) program, which favors bids of contractors located in

economically distressed communities, most agencies have failed to attain the statutorily established 3 percent contracting and subcontracting goals for these firms. Agencies do not measure the effects of breaking apart large contracts, the HUBZone program, or other race-neutral strategies on SDB procurement opportunities.

Conclusion

This study finds that, despite the requirements that Adarand imposed, federal agencies fail to consider race-neutral alternatives in the manner required by the Supreme Court's decision.[8] Many draw upon SBA-run programs designed to promote procurement with small and minority-owned businesses, rather than developing new programs and conducting their own analysis. Agencies rely on Congress, DOJ, and SBA to create and justify inclusive programs; however, these entities have not provided the requisite tools. Agencies engage in a few race-neutral strategies designed to make federal contracting more inclusive, but do not exert the effort associated with serious consideration that the Equal Protection Clause requires. Moreover, they do not integrate race-neutral strategies into a comprehensive procurement approach for small and disadvantaged businesses. Doing so will best enable agencies to ensure equal access to and fair competition for federal contracts. As a result of this study, the Commission urges federal agencies and Congress to act to enhance the inclusiveness of federal contracting and compliance with the Adarand decision. Critical recommendations include the following:

- The Commission asks Congress to enact legislation expressly prohibiting discrimination based on race, color, religion, sex, national origin, age, and disability in federal contracting and procurement. Legislation should include protections for subcontractors and establish clear sanctions, remedies, and compliance standards.

- The Commission recommends that DOJ and SBA facilitate agency development and implementation of prominent civil rights enforcement policies for contracting, including a means for victims of discrimination to file and resolve complaints. Agencies also should adopt clear compliance review standards and delegate authority for these functions to a specific, high-level component.

- Agencies should adopt and follow guidelines to ensure serious consideration of race-neutral alternatives. The Commission recommends that DOJ coordinate the development of these guidelines, and effectuate legally compliant agency policies, explaining carefully the circumstances under which agencies must seriously consider race-neutral alternatives, and establishing a solid framework for how agencies must comport with the Supreme Court's instructions.

- The Commission recommends that the White House convene a task force to determine what data Congress, DOJ, and agencies need to properly implement narrow tailoring in contracting and assess (1) whether race-conscious programs are still necessary, and (2)

[8] *Adarand*, at 237–38.

the extent to which race-neutral alternatives are effective. To demonstrate serious consideration of race-neutral alternatives, data should be reliable, current, complete, and comprehensive. Data should facilitate analyses of causal relationships and relate to the effectiveness of agencies' race-conscious or -neutral programs. The task force's recommendations and data collection advocacy must be grounded in standards emerging from widespread practice in social science and case law.

- The task force should present its recommendations to Congress in a report by March 2007, and urge the passage of legislation to provide support for the necessary data collection, with a schedule for requirements and accountability measures.

- Agencies must engage in regular, systematic reviews of race-conscious programs, including those that presume race-based disadvantage. They should develop and document clear policies, standards, and justifications for when race-conscious programs are in effect. Agencies should develop and implement standards for the quality of data they collect and use to analyze race-conscious and -neutral programs and apply these criteria when deciding effectiveness. Agencies should also evaluate whether race-neutral alternatives could reasonably generate the same or similar outcomes. Where the answer is yes, agencies should implement such alternatives.

- Agencies should measure the success of race-neutral strategies independently so that they can determine these policies' viability as alternatives to race-conscious measures. For example, agencies could track (1) the number and dollar value of contracts broken apart, (2) firms to which the smaller contracts are awarded, and (3) the effect of such efforts on traditionally excluded firms.

Chapter 1: Federal Contracting Practices Before and After *Adarand*

For more than 40 years, the federal government has employed various programs designed to expand opportunities for minority- and women-owned businesses. In 1965, President Lyndon Johnson signed Executive Order 11,246, requiring federal contractors to take affirmative measures to recruit, employ, and promote job applicants "without regard to their race, color, religion, sex, or national origin."[1] Except for certain exemptions, the order still applies to all government contractors and subcontractors, and federally assisted construction contracts and subcontracts in excess of $10,000.[2] The Nixon administration later issued regulations requiring federal contractors to develop written affirmative action plans with goals and timetables.[3]

In an attempt to implement these orders, the federal government adopted a variety of mechanisms, including: developing affirmative action plans with contracting goals and timetables; encouraging prime contractors to establish relationships with small disadvantaged businesses (SDBs); providing market advantages through reduced competition, for example, designating a proportion of contracts as open only to small and minority-owned business participation; and supplementing bids from small disadvantaged firms to enable them to compete with larger firms.[4]

The Supreme Court's 1995 decision in *Adarand Constructors, Inc. v. Peña* (*Adarand*) clarified the constitutional standard for evaluating many such policies.[5] The Court held that all racial classifications imposed by federal, state, or local governments must be subjected to "strict scrutiny."[6] Strict scrutiny is a standard used by the courts in deciding whether a law or policy is constitutional. Any law or regulation that categorizes individuals on the basis of a "suspect

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[1] *See* Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *amended by* Exec. Order No. 11,375, 3 C.F.R. § 684 (1966–1970); Exec. Order No. 11,749, 3 C.F.R. § 803 (1966–1970); Exec. Order No. 12,086, 3 C.F.R. § 230 (1978); Exec. Order No. 13,279, 3 C.F.R § 258 (2002).

[2] *See* Exec. Order No. 11,375, 3 C.F.R. § 684 (1966–1970) (adding gender to protected categories).

[3] *See* Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (July 2, 1969) *reprinted as amended in* 42 U.S.C. § 2000e (2000); Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971) (upholding the Nixon proposal, which was also known as the Philadelphia Plan); *see also* U.S. Department of Labor, Office of the Assistant Secretary of Policy, "Brief History of DOL: Nixon and Ford Administrations, 1969–1977," no date, <http://www.dol.gov/asp/programs/history/dolchp07.htm> (last accessed July 15, 2005); and Andorra Bruno, analyst in American national government, Government Division, Congressional Research Service, U.S. Library of Congress, "Affirmative Action: Recent Congressional and Presidential Activity," updated May 27, 1998.

[4] George Stephanopoulos, senior adviser to the President for policy and strategy, and Christopher Edley, Jr., special counsel to the President, The White House, *Affirmative Action Review: Report to the President,* July 19, 1995, pp. 26–27.

[5] Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995) (hereafter cited as *Adarand*).

[6] *Id.* at 224.

classification" is subject to strict scrutiny, which places the burden of proof on the government that the classification is the least restrictive way to serve a "compelling public interest." Government programs must be narrowly tailored to meet that interest.[7] Under the narrow tailoring requirement, agencies must first consider race-neutral alternatives before using race-conscious measures.[8]

To implement post-*Adarand* requirements, the Clinton administration's Department of Justice (DOJ) recommended that agencies pursue race-neutral alternatives and limit the use of racial preferences to the "minimum extent necessary to achieve legitimate objectives."[9] DOJ endorsed statutorily established governmentwide goals of 23 percent contracting with small businesses, 5 percent contracting with business interests owned and controlled by socially and economically disadvantaged individuals, and 3 percent contracting with small firms in qualified Historically Underutilized Business Zones (HUBZones).[10] This report examines federal compliance with *Adarand* in light of the Clinton Administration's DOJ guidance and subsequent legal developments.

SCOPE AND METHODOLOGY

This report asks:

- Do agencies seriously consider workable race-neutral alternatives, as required by *Adarand*?
- Do agencies sufficiently promote and participate in race-neutral practices such as mentor-protégé programs, outreach, and financial and technical assistance?
- Do agencies employ and disclose to each other specific best practices for consideration of race-neutral alternatives?
- How do agencies measure the effects of race-neutral programs on federal contracting?
- What race-neutral mechanisms exist to ensure government contracting is not discriminatory?

This report does not evaluate existing disparity studies or assess the validity of data suggesting the persistence of discrimination. It does not seek to identify whether, or which, aspects of the contracting process disparately affect minority-owned firms. Rather, the purpose of this study is

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[7] *Id.* at 227.

[8] *Id.* at 237–38.

[9] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,048 (May 23, 1996) (hereafter cited as DOJ, Proposed Reforms to Affirmative Action in Federal Procurement).

[10] *Id.*, p. 26,042 (citing Small Business Act § 15(g), 15 U.S.C. § 644(g) (2000)). Federal agencies also adopted goals for contracting with women-owned businesses and firms owned by service-disabled veterans. Different statutory provisions and regulations apply to these programs, which are outside the scope of this report.

to examine the race-neutral programs and strategies agencies implement to meet the requirements established by the Supreme Court in the *Adarand* decision. Moreover, the Commission examined whether agencies themselves measure the need for race-conscious contracting programs by conducting the requisite disparity studies and other research, and offers recommendations for what such studies should accomplish.

Staff conducted intensive background research, reviewing government documents; federal procurement and economic data; federal contracting literature; and pertinent statutes, regulations, and court decisions. They selected seven agencies to study in depth and submitted interrogatories to assess these agencies' procurement methods. Agency responses are the bases for much of the detail in this report.

The Commission studied agencies that procure relatively large amounts of goods and services, have high numbers of contracts with small businesses, SDBs, or HUBZone firms, or play a significant support or enforcement role. As a result, the agencies that are subjects of this study are the Small Business Administration (SBA) because of its role in program administration, and the Departments of Defense (DOD), Transportation (DOT), Education (DOEd), Energy (DOEn), Housing and Urban Development (HUD), and State (DOS). In brief, each agency was selected for the following reasons:

- The SBA plays a unique support role: it administers many federal procurement programs that other agencies must use, and offers direct assistance to a key subject of this report, small enterprises. SBA fulfills a governmentwide mandate to promote SDB contracting and establish agency procurement goals, and provides financial and technical assistance to small businesses. Relative to the support it provides to other federal agencies and small businesses, however, SBA's own procurement is miniscule. For instance, in fiscal year (FY) 2003, SBA made about 1,100 awards, about one ten-thousandth of federal contracts and dollars spent overall.[11]

- DOD is the government's largest procurer by far, both in the numbers of contract actions and dollars awarded. In FY 2003, DOD's $191.5 billion represented 69 percent of all federal procurement, and its 5.7 million contract awards constituted about half of all federal contracts.[12]

- DOT's Disadvantaged Business Enterprise (DBE) program was the focus of the 1995 *Adarand* case, and as such has been carefully scrutinized and refined to comply with the Court's ruling. DOT awards more than $20 billion each year, through direct contracts with private firms and grants to state and local agencies, to finance transportation projects

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[11] Federal Procurement Data System, "Report on Annual Procurement Preference Goaling Achievements," fiscal year 2003 through fourth quarter.

[12] U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report*, 2003, <http://www.fpdc.gov/fpdc/fpr2003.htm> (last accessed Sept. 21, 2004) (hereafter cited as GSA, *Federal Procurement Report*, 2003).

nationwide. Approximately 85 percent of its procurement funds are for construction; highway construction comprises the largest share.[13]

- With more than $21 billion in total procurement dollars, DOEn ranks second for spending among federal agencies. However, DOEn has struggled to award contracts to small businesses and ranks last among 15 Cabinet-level departments in the percentage of SDB procurement. In an effort to increase small business contracting, DOEn developed a 20-year plan and an agencywide small business strategy.[14]

- Although HUD spends relatively little in procurement dollars (slightly more than $1 billion in 2003), a high proportion of its contracts are with small, disadvantaged, and minority-owned enterprises. Former HUD Secretary Mel Martinez expressed strong support for procurement with SDBs and HUBZone firms, as evidenced by a detailed policy statement and internal directives.[15]

- DOEd also spends about $1 billion annually on approximately 6,000 contract actions, constituting a very small portion of overall federal procurement (less than 0.5 percent of dollars and less than .001 percent of contract actions in FY 2003).[16] The agency largely relies on SBA-operated programs to fulfill its contracting obligations to SDBs, rather than internal procedures.[17]

- DOS procured approximately $2.4 billion in 2003 and ranks second only to HUD in the percentage of procurement dollars awarded to SDBs. DOS uses SBA-offered programs in addition to its own initiatives, such as an internal mentor-protégé program. In 2000 and 2003, DOS received the SBA's Gold Star Award. This award recognizes outstanding performance in awarding contracts to small businesses.[18]

Commission staff determined that most federal contracting programs use similar tools, including race-conscious and race-neutral combinations. However, the Commission also found that agencies do not seriously consider ways in which they might expand their use of race-neutral alternatives to replace race-conscious programs. Additionally, the success of existing efforts varies across agencies. Thus, the report also identifies best practices for federal contracting

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[13] U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization, Marketing Information Package, "Federal Financial Assistance for State and Local Transportation Agencies," no date, <http://osdbuweb.dot.gov/osdbu_services/mip/mipOnlineDoc.cfm?seqn=7#TOC31> (last accessed June 28, 2005).

[14] *See* U.S. Department of Energy, Office of Economic Impact and Diversity, Office of Small and Disadvantaged Business Utilization, "Strategic Plan for Small Businesses," May 2003.

[15] Mel Martinez, secretary, U.S. Department of Housing and Urban Development, "HUD Small Business Policy Statement," May 16, 2001, <http://www.hud.gov/offices/osdbu/policy/statement.cfm> (last accessed Jan. 26, 2005).

[16] *See* U.S. Department of Education, "Doing Business with the Department of Education," November 2004, <http://www.ed.gov/fund/contract/about/booklet1.html> (last accessed Feb. 10, 2005).

[17] U.S. Department of Education's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 11, 2005, p. 2.

[18] U.S. Department of State, "Department of State Wins SBA Gold Star Award," press release, Sept. 17, 2003, <http://www.state.gov/m/a/sdbu/rls/2003/24142.htm> (last accessed Mar. 2, 2005).

programs relating to race-neutral measures. Race-neutral approaches that federal agencies have adopted, and related implementation efforts, form the content of the report. A final chapter offering findings and recommendations will help federal agencies and Congress bring about additional change necessary to ensure all enterprises fair opportunity to participate in government contracting.

FEDERAL CONTRACTING WITH SMALL AND DISADVANTAGED BUSINESSES: AN HISTORICAL PERSPECTIVE

Vast spending on federal procurement—approximately $300 million in FY 2003 alone—makes government contracts a potentially important source of revenue for all businesses, whether large, small, or owned by socially and economically disadvantaged individuals.[19] The government's interest in promoting small businesses initially emerged in response to the nation's economic pressures during the Great Depression and World War II. In 1932 President Herbert Hoover created the Reconstruction Finance Corporation (RFC), a lending program for large and small businesses hurt by the depression. During World War II, small businesses suffered as large businesses stepped up production to accommodate wartime demands. In response, Congress created the Smaller War Plans Corporation in 1942 to provide direct loans to private entrepreneurs and promote small businesses to federal procurement agencies.[20] The Corporation dissolved after the war, and its responsibilities were turned over to RFC and the Office of Small Business in the Department of Commerce, which primarily provided educational services and conducted management counseling for entrepreneurs.[21]

In 1952, in response to efforts to abolish RFC, President Dwight D. Eisenhower proposed the creation of the Small Business Administration (SBA) to consolidate the government's fragmented small business programs. Congress codified the proposal by passing the Small Business Act of 1953, directing SBA to "aid, counsel, assist and protect" small business concerns.[22] SBA immediately began making direct loans and guaranteeing bank loans to small businesses, working to open federal procurement to such firms, and providing technical assistance and training.[23]

The Small Business Act of 1958 authorized SBA to enter into agreements with other federal agencies for the purpose of granting subcontracts to small businesses.[24] In 1969, SBA modified

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[19] In FY 2003, procurement of $305 billion constituted about 14 percent of government outlays reported in the President's budget. *See* GSA, *Federal Procurement Report,* 2003, p. 2; and Office of Management and Budget, Executive Office of the President, *Budget of the United States Government, Fiscal Year 2004*, "Summary Tables," no date, <http://www.whitehouse.gov/omb/budget/fy2004/tables.html> (last accessed Feb. 17, 2005).

[20] U.S. Small Business Administration, "Overview and History of the SBA," no date, <http://www.sba.gov/aboutsba/history.html> (last accessed Apr. 19, 2005) (hereafter cited as SBA, "Overview and History").

[21] Ibid.

[22] Small Business Act of 1953, Pub. L. No. 83-163, 67 Stat. 232, Title II, § 202, 15 U.S.C. § 631 (2000).

[23] SBA, "Overview and History."

[24] *See* Small Business Act of 1958, Pub. L. No. 85-536, 72 Stat. 384 (codified as amended at 15 U.S.C. § 661 (2000)) (stating that contracts granted under this authority are subsequently referred to 8(a) subcontracts).

its regulations to direct federal procurement contracts specifically to minority-owned small businesses.[25] Congress statutorily authorized this change with the 1978 amendments to the Small Business Act and Small Business Investment Act of 1958.[26] The 1978 act required federal agencies to ensure that small businesses owned and controlled by socially and economically disadvantaged individuals (known as small disadvantaged businesses, or SDBs) have maximum opportunity to participate in federal contracts.[27]

The Small Business Act defines socially disadvantaged individuals as those who belong to groups that have been subject to racial or ethnic discrimination or cultural bias.[28] It defines economically disadvantaged individuals as those whose ability to compete has been compromised by diminished credit and capital opportunities compared to those who are not disadvantaged.[29] To improve opportunities, Congress later established an annual goal for participation of small disadvantaged businesses at 5 percent of the total value of all prime contract and subcontract awards. Each federal agency is also required to establish its own goals.[30]

To participate as an SBA-certified SDB, a business must be "small" as defined in SBA regulations, and individuals who qualify as economically disadvantaged must own 51 percent.[31] The SBA presumes that blacks, Hispanics, Asian Pacific Americans, Subcontinent Asians, and Native Americans, as well as members of other groups designated from time to time, are socially disadvantaged.[32] It also allows individuals who are not members of these groups to assert social disadvantage based on evidence. In addition, all program participants must prove economic disadvantage according to criteria established in agency regulations.[33]

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[25] Michael K. Fauntroy, analyst in American national government, Government and Finance Division, Congressional Research Service, U.S. Library of Congress, "Disadvantaged Businesses: A Review of Federal Assistance," updated Jan. 14, 2002, p. CRS-3.

[26] *See* Amendments to the Small Business Act and Small Business Investment Act of 1978, Pub. L. No. 95-507, 92 Stat. 175 (codified as amended by 15 U.S.C. §§ 631–633, 636–637, 644 (2000)) (hereafter cited as Small Business Act of 1978).

[27] *Id*.

[28] *See id.* § 637(a)(5).

[29] *Id.* § 637(a)(6)(A).

[30] *Id*. § 644(g)(1).

[31] *See* 13 C.F.R. § 124.105 (2005).

[32] *See id.* § 124.103.

[33] *See id.* § 124.104.

TABLE 1.1
Significant Legislative and Regulatory Actions in Federal Contracting for Minority-Owned Businesses

1953	Congress first granted authority for a program to help small businesses obtain federal contracts..
1958	Congress authorized SBA to enter into agreements with other agencies to grant subcontracts to small businesses.
1969	SBA began operating an 8(a) program to direct federal contracts specifically to small disadvantaged businesses. The goal of the program was to develop self-sufficient firms that could eventually compete in the marketplace without support.
1969	Executive Order 11,458 established the U.S. Office of Minority Business Enterprise (MBE) within the Department of Commerce to mobilize federal resources to aid minority business owners.
1971	Executive Order 11,625 authorized the Secretary of Commerce to implement federal policy to aid MBEs; provide technical assistance to SDBs; and coordinate federal activities to increase minority business development.
1977	The Federal Works Employment Act required that 10 percent of federal construction grants be awarded to minority-owned firms.
1978	The Small Business Act and Small Business Investment Act Amendments endorsed SBA's 8(a) program to specifically target socially and economically disadvantaged businesses. The act required, governmentwide, bidders of contracts in excess of $500,000 for goods and services and $1 million for construction to submit a plan with percentage goals for minority business utilization.
1982	The Surface Transportation Assistance Act established a 10 percent set-aside for SDBs with respect to transportation funds appropriated over a four-year period (1982–1986). This was the first statutory DBE provision for federal highway and transit programs.
1983	Executive Order 12,432 directed all federal agencies to develop specific goal-oriented plans for expanding minority business opportunities.
1987	The National Defense Authorization Act required affirmative action efforts by all defense contractors toward a three-year goal of 5 percent minority business participation.
1994	The Federal Acquisition Streamlining Act gave federal agencies authority to conduct race-conscious procurement activities to meet SDB participation goals.
1997	The HUBZone Act created the HUBZone Empowerment Contracting Program and established contracting goals for small businesses in economically distressed communities.
1998	The Transportation Equity Act for the 21st Century extended DOT's DBE program, maintaining the flexible 10 percent goal for disadvantaged business participation in federal highway and transit contracts. An added provision assured recipients that if a federal court were to find the program unconstitutional in the future, their eligibility for funding would not be affected.
1999	Congress amended the Defense Authorization Act for Fiscal Year 1999 to condition the use of price evaluation adjustments on DOD's failure to achieve its SDB contracting goals. Since DOD has met or exceeded its goals each year since, the agency has discontinued use of this tool.

Caption: As early as 1969, Congress and the executive branch expressed an interest in promoting federal contracting opportunities for small and disadvantaged businesses. Numerous legislative and administrative measures established contracting goals, created avenues for business development, and prioritized opening opportunities for minority-owned firms.

Source: Compiled from numerous sources, including: National Minority Supplier Development Council, Inc., "Legislation Affecting Minority Purchasing," no date, <http://www.nmsdcus.org/infocenter/Legislation%20Affecting%20Minority%20Purchasing.htm> (last accessed Apr. 25, 2005); U.S. Small Business Administration, "Laws and Regulations," no date, <http://www.sba.gov/library/lawroom.html> (last accessed Apr. 26, 2005); U.S. General Accounting Office, *The SBA 8(a) Procurement Program—A Promise Unfulfilled*, Apr. 8, 1981.

The 1978 Small Business Act also established Offices of Small and Disadvantaged Business Utilization (OSDBUs) and gave them procurement powers at each federal agency.[34] The Act charges each agency's OSDBU director with promoting the interests of small and disadvantaged businesses pursuing federal contracts. The legislation assigns several specific responsibilities to OSDBUs, including overseeing contracts to ensure that small businesses have the maximum practicable opportunity to participate as prime and subcontractors, providing assistance and information for firms preparing contract bids, and ensuring timely payment of contractors. OSDBU staff consult with SBA to implement these responsibilities.[35]

In subsequent years, other legislative and regulatory actions established programs that similarly enabled small disadvantaged businesses to better compete with larger and non-disadvantaged enterprises (see table 1.1). The Federal Acquisition Streamlining Act of 1994 (FASA) authorized all federal agencies to offer race-conscious procurement to meet SDB participation goals pursuant to the Small Business Act, and reemphasized the flexible 5 percent target.[36] Legislation also mandates the use of small businesses, when such bids are competitive, for purchases between $2,500 and $100,000.[37]

Between 1968 and 1998, federal agencies and Congress repeatedly recognized the need for measures to make contracting opportunities more accessible to minority-owned firms and economically disadvantaged businesses. Significant within the resulting statutory framework are the following programs:

- SBA's 8(a) Business Development Program, named for the section of law that implemented it, acknowledges that certain businesses lack key resources to successfully compete for contracts, and offers SDBs assistance. The program promotes development through a wide range of mechanisms over a nine-year period (unless a business should graduate early).[38]

- The 8(a) Business Development Mentor-Protégé Program, which was finalized in 1998, allows businesses participating in the 8(a) program to receive assistance from a successful business, which acts as the mentor. Both mentor and protégé can cooperate in competing for federal procurement and accessing capital in the form of equity loans.[39]

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[34] *See* Small Business Act of 1978, 15 U.S.C. §§ 631–633, 636, 637, 644), as cited in U.S. Government Accountability Office, *Small and Disadvantaged Businesses: Most Agency Advocates View Their Roles Similarly*, March 2004, p. 1 (hereafter cited as GAO, *Most Agency Advocates View Their Roles Similarly*). Note: Prior to 2004, GAO was known as the General Accounting Office.

[35] Small Business Act of 1978, 15 U.S.C § 644(k) (2000).

[36] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10, 15, and 41 U.S.C.) (extending the 5 percent goal to women-owned businesses).

[37] *See* Simplified Acquisition Procedures, 48 C.F.R. § 13 (2004).

[38] *See* Small Business Act of 1978, 15 U.S.C. § 631 (2000).

[39] U.S. Small Business Administration, "8(a) Business Development Mentor-Protégé Program," Nov. 3, 2003, <http://www.sba.gov/8abd/indexmentor.html> (last accessed May 23, 2005).

- In addition to participating in the 8(a) program, federal agencies can employ separate, supplemental SDB programs that encourage federal contracting with small and minority-owned enterprises. Qualifying for eligibility became somewhat more rigorous with post-*Adarand* requirements that businesses obtain formal certification to participate.[40] Additionally, after *Adarand*, DOJ authorized agencies to use various mechanisms to increase SDB participation, such as price evaluation adjustment, which adds up to 10 percent to the price of offers received from non-SDBs, subject to exceptions.

THE *ADARAND* DECISION: ESTABLISHING STRICT SCRUTINY

In 1995, the *Adarand* decision prompted federal agencies to reevaluate contracting practices.[41] The specific contract in question resulted from the Surface Transportation and Uniform Relocation Assistance Act of 1987, which mandated that at least 10 percent of DOT funds be expended with SDBs (or disadvantaged business enterprises—DBEs—as they are known in transportation procurement), using the same definitions of social and economic disadvantage found in the Small Business Act.[42] Agency regulations in place at the time of the legal challenge stated that a contract applicant should be presumed both socially and economically disadvantaged, and thus eligible for the program, if the applicant belonged to a certain racial group.[43] As with DOT, most federal contracts contained a subcontractor compensation clause, which gave prime contractors financial incentive to hire SDB-certified subcontractors.[44]

In this case, the prime contractor under a DOT-administered highway construction contract, which contained such a clause, awarded a subcontract to a certified disadvantaged business, even though another business, Adarand Constructors, Inc., submitted a lower bid. The majority of Adarand's work involved constructing guardrails as a subcontractor for federally funded state and federal highway projects. To qualify for DOT funds, states must abide by the agency's affirmative action programs and goals. As the only nonminority-owned guardrail contractor in Colorado, Adarand frequently lost bids because of prime contractors' reluctance to forgo potential financial incentives for contracting with SDBs.[45] Adarand filed suit against federal officials claiming that the race-based presumption of disadvantage violated the Fifth Amendment's Due Process Clause, which courts have interpreted to require equal enforcement of the laws.[46]

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[40] U.S. Small Business Administration, "SBA Details New Certification Process For Small Disadvantaged Businesses," news release 98-78, Sept. 21, 1998, <http://www.sba.gov/news/archive98/98-78.html> (last accessed May 23, 2005).

[41] *See Adarand*, 515 U.S. 200 (1995).

[42] *See* Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 106(c)(1), 101 Stat. 132.

[43] 49 C.F.R. § 23.62 (1994); 49 C.F.R. pt. 23, subpt. D, app. C (1994).

[44] *See Adarand,* at 205.

[45] Patrick A. Tolan, Jr., "Government Contracting with Small Businesses in the Wake of the Federal Acquisition Streamlining Act, the Federal Acquisition Reform Act, and Adarand: Small Business as Usual?" *Air Force Law Review*, vol. 44 (1998), pp. 89–90.

[46] *See Adarand,* at 206.

The United States District Court for the District of Colorado ruled in favor of the government.[47] The Court of Appeals for the Tenth Circuit affirmed, holding that DOT's program complied with a lower standard of review,[48] known as "intermediate scrutiny," based on its interpretation of previous Supreme Court decisions.[49] The appellate court found DOT's statutes and regulations were valid because they were "narrowly tailored" to fulfill the specific purpose of "providing subcontracting opportunities for small disadvantaged business enterprises, as required under section 502 of the Small Business Act."[50]

The plaintiff appealed to the Supreme Court, which held that courts should apply the same strict judicial standard of review to both Fifth Amendment and 14th Amendment equal protection claims. The Court left unanswered the ultimate question of whether the challenged regulations violated the strict scrutiny standard. In a 5-4 decision, the Court sent the case back to the lower courts, requiring that they review it using the "strict scrutiny" standard that had previously applied to similar state and local government contracting programs.[51] Strict scrutiny is the highest level of review applicable to equal protection challenges. It requires courts to perform a detailed examination of both the ends and means of racial classifications.[52]

Writing for the majority, Justice Sandra Day O'Connor stated that government racial classifications are subject to three propositions. Courts must review such policies using (1) skepticism: subjecting any preference based on race or ethnicity to a "most searching examination"; (2) consistency: applying the highest level of scrutiny to *all* racial classifications challenged under the Equal Protection Clause; and (3) congruence: analyzing federal, state, and local programs under the same standard.[53] She concluded:

> Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.[54]

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[47] Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992).

[48] Adarand Constructors, Inc. v. Peña, 16 F.3d 1537 (10th Cir. 1994).

[49] *See id.* at 1546 (explaining that the standards of scrutiny the Supreme Court used in *Fullilove v. Klutznick* and reaffirmed in *Metro Broadcasting, Inc. v. FCC* control the court's decision); *see also Adarand,* at 227 (overruling the *Metro Broadcasting* decision).

[50] Adarand Constructors, Inc. v. Peña, 16 F. 3d at 1547 (1994).

[51] *See Adarand*, at 204–05, 221–23 (discussing *Richmond v. J.A. Croson Co.*, which held that the 14th Amendment requires strict scrutiny of all race-based actions by state and local governments, and explaining that the lower court's failure to adhere to this decision was a basis for remand). *Croson* did not determine what standard of review the Fifth Amendment requires for programs of the federal government. However, previous cases, such as *Buckley v. Valeo* and *Weinberger v. Wiesenfeld*, had established that equal protection analysis is the same for the Fifth and 14th Amendments.

[52] *Adarand,* at 236.

[53] *Adarand,* at 223–24 (stating that equal protection applies to federal programs under the Fifth Amendment and to state and local programs under the 14th Amendment).

[54] *See Adarand,* at 224.

TABLE 1.2
***Adarand* Judicial Chronology**

1992:	A district court decided that DBE programs were constitutional. (Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992))
1994:	The Tenth Circuit Court of Appeals affirmed the lower court's decision. (Adarand Constructors Inc. v. Peña, 16 F.3d 1537 (10th Cir. 1994)).
1995:	The Supreme Court reversed the appellate court's decision and sent the case back to the lower courts to determine whether the programs would survive the strict scrutiny standard. (Adarand Constructors Inc. v. Peña, 515 U.S. 200 (1995)).
1997:	The district court found that the subcontracting compensation clause was unconstitutional. (Adarand Constructors Inc. v. Peña, 965 F. Supp. 1556 (D. Colo. 1997)).
1998:	The DBE program was reauthorized. (Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 113 § 1101(b)(1) (June 9, 1998)).
1999:	The Court of Appeals affirmed in part and reversed in part, finding that the case was moot because the plaintiff had been certified as a DBE since the lower court's finding. The same year, DOT issued regulations aimed at ensuring that its program was narrowly tailored. (Adarand Constructors, Inc. v. Slater, 169 F.3D 1292 (10th Cir. 1999)).
2000:	The Supreme Court again granted certiorari and reversed. The Court held that the state's certification of the subcontractor as DBE pursuant to its new procedures, adopted in response to subcontractor's suit, did not moot the subcontractor's cause of action. The Court directed the appellate court to reconsider the district court's 1997 decision. (Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000)). The Tenth Circuit Court of Appeals consequently upheld the constitutionality of the revised DBE program, finding that its new structure met the "compelling interest" and "narrowly tailored" requirements. (Adarand Constructors, Inc. v. Slater, 228 F.3d 1147 (10th Cir. 2000)).
2001:	The Supreme Court agreed to hear the case again. (Adarand Constructors, Inc. v. Mineta, 532 U.S. 941 (2001)) In October, the Supreme Court heard oral arguments, and in November dismissed the appeal on procedural grounds, noting that the petitioner changed its challenge to a program other than the one previously reviewed. The Court let stand the DBE program and, consequently, this instance of an affirmative action program. (Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001)).

Caption: For nearly a decade, the *Adarand* case worked its way through the judicial system, beginning in 1992 when a district court found Disadvantaged Business Enterprise (DBE) programs constitutional. The petitioner appealed, and in 1995, the Supreme Court established the strict scrutiny standard under which such challenges are to be reviewed. The Court sent the case back to the lower courts for examination under this test. In the interim, the Department of Transportation amended the DBE program in question, which an appellate court subsequently upheld. The Supreme Court rejected the petitioner's final appeal in 2001.

Justice Department interpretations of *Adarand* identify numerous conditions to fulfill the "narrow tailoring" requirement, for example, that (1) the government has considered race-neutral alternatives, (2) the scope of the program is contained, and (3) race is just one factor in the decision.[55]

The concurring justices took the race-neutral argument one step further. In his concurring opinion, Justice Scalia wrote,

> In my view government can never have a 'compelling interest' in discriminating on the basis of race in order to 'make up' for past racial discrimination in the opposite direction….In the eyes of government, we are just one race here. It is American.[56]

Similarly, Justice Thomas stated,

> In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice. In each instance, it is racial discrimination….[57]

The dissenting justices argued that prior law left open the door for certain affirmative action programs to continue or be created, provided they were examined and determined to serve a compelling interest, including redressing the lingering effects of past discrimination.[58]

In sending the *Adarand* case back to the district court, the Supreme Court noted that the court of appeals had not determined whether the interests served by the subcontractor compensation clause in question were compelling, or whether the clause was narrowly tailored and neither vague nor over- or under-inclusive.[59] The Court noted that the lower courts failed to ask whether race-neutral means to increase minority business participation had been considered,[60] or whether the program was limited in duration so that it would not exist longer than the discriminatory effects it was designed to eliminate.[61]

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[55] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,042. According to DOJ, other narrow tailoring criteria require that (1) any numerical target is reasonably related to the number of qualified minorities in the applicable pool, (2) the program is limited in duration and subject to periodic review, and (3) only minimal burden is imposed on nonbeneficiaries. *Id. See also* the discussion of narrow tailoring in *Adarand Constructors, Inc. v. Peña*, 965 F.Supp. 1956 (1997); *Croson* at 507, 510; *Fullilove* at 513; *Metro Broadcasting* at 594; and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1980).

[56] *Adarand*, at 239 (Scalia, J., concurring).

[57] *Id.* at 240 (Thomas, J., concurring).

[58] *Id.* at 269, 270 (Souter, Ginsburg, and Breyer, J.J., dissenting).

[59] *Id.* at 237.

[60] *Id.* at 238 (citing *Croson*, 488 U.S. at 507).

[61] *Adarand*, at 238 (citing *Fullilove,* 448 U.S. at 513).

APPLYING *ADARAND* TO FEDERAL CONTRACTING PROGRAMS

Acting on the Attorney General's mission to furnish advice on legal matters to the heads of executive departments and agencies of the government,[62] DOJ issued guidance on applying *Adarand* to federal contracting programs. In the guidance, Clinton administration officials justified the continued use of section 8(a) programs on the basis of congressional findings that they are needed to remedy the effects of past discrimination against minority-owned businesses.[63] Because *Adarand* left open the possibility that the government can demonstrate a compelling state interest if it can show how lingering effects of discrimination have diminished contracting opportunities for certain groups,[64] DOJ concluded that Congress' long legislative record documenting such discrimination provides sufficient evidence.[65]

In crafting its assessment, DOJ reviewed evidence collected post-*Adarand* by state and local governments among other sources, and concluded that, absent affirmative remedial efforts, "federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period."[66] DOJ continued:

> For the 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.[67]

At DOJ's direction, after the *Adarand* decision, federal agencies reexamined contracting procedures and began to alter disadvantaged business programs. DOT had already begun to modify its SDB contracting program. When the lower court reviewed the case again, it determined that DOT's program did not meet the strict scrutiny standard,[68] and during the appeals process, DOT altered the definition of "disadvantaged businesses" to include socially and economically disadvantaged firms, in addition to those challenged by discrimination, regardless of race.[69] The new Disadvantaged Business Enterprise program, DOT asserted, is open to "everyone, regardless of race or ethnicity, who meets the statutory criteria for social and economic disadvantage based on individual experience."[70]

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[62] U.S. Department of Justice, "Organization, Mission and Functions Manual; Office of the Attorney General," September 2004, <http://www.usdoj.gov/jmd/mps/mission.htm> (last accessed May 19, 2005).

[63] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,051.

[64] *Adarand*, at 237

[65] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,050.

[66] *Id*., p. 26,042.

[67] *Id*.

[68] Adarand Constructors, Inc. v. Peña, 965 F. Supp. 1556 (D. Colo. 1997).

[69] *See* DOT, "The New DBE Regulation."

[70] Brief for the Respondents at 4, Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) (No. 00-730) (citing 49 C.F.R. § 26.61(b)) (stating that the Supreme Court granted review again to determine whether the court of appeals was correct when it concluded that the DBE program is consistent with equal protection). The Court intended to review the same program addressed by the appellate case. However, rather than focusing on the DBE program, the petitioner changed its challenge to include regulations relating to direct procurement, which falls under

In 1999, DOT issued new regulations that significantly altered the program in response to *Adarand*.[71] The regulations designated 10 percent as a national aspirational goal for disadvantaged businesses, but mandated actual participation goals at levels based on the local market availability of DBEs, not a set percentage.[72] Moreover, the regulations required states to use race-neutral measures, including outreach and technical assistance, to meet as much of their goals as possible.[73]

Other agencies similarly revised their SDB programs. They focused largely on the narrow tailoring requirement, relying on six factors the courts identified to assess whether a program complies:

(1) whether race-neutral alternatives were first considered and determined to be insufficient solutions;

(2) the scope of the program and whether it is flexible;

(3) whether race is the sole factor in eligibility or one factor among others;

(4) whether any numerical target is reasonably related to the number of qualified minorities in the applicant pool;

(5) whether the duration of the program is limited and subject to periodic review; and

(6) the extent of the burden imposed on nonbeneficiaries of the program.[74]

DOJ also identified the components of disadvantaged business programs that needed to be reformed as a result of *Adarand*: eligibility criteria and certification procedures, the use of benchmark limits to determine contracting areas where discrimination might exist, and mechanisms for increasing opportunities for minority-owned firms that would survive strict scrutiny.[75]

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the purview of SBA, not DOT. Because the appellate court had not yet reviewed SBA's program under the strict scrutiny standard, nor had the petitioner proven that it had the standing to challenge the statute in question, the Court dismissed the case. The Court further noted that in the earlier *Adarand* case, it established that application of the strict scrutiny test should first be addressed by the lower courts, adding that the Supreme Court is a court of final review.

[71] Participation by Disadvantaged Business Enterprises in Department of Transportation Programs, 64 Fed. Reg. 5,095 (Feb. 2, 1999).

[72] *Id*., p. 5,131.

[73] *Id*., p. 5,112; *see also* U.S. General Accounting Office, *Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact*, June 2001, p. 4.

[74] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,042.

[75] *Id.,* p. 26,043.

Eligibility and Certification

Adarand did not significantly change the interpretation of SDB eligibility criteria, although it did modify certification procedures. Members of designated minority groups continue to be presumed economically and socially disadvantaged.[76] However, individuals who do not fall within the categorical presumptions may in limited instances prove their social and economic disadvantage "by a preponderance of the evidence" (i.e., more likely than not).[77] Before *Adarand*, the threshold for proof was "clear and convincing evidence."[78] In addition, the presumption of disadvantage is theoretically rebuttable, i.e., a firm's eligibility can be challenged.[79]

Although firms participating in the 8(a) program had to be certified by SBA, prior to *Adarand*, firms could self-certify as small disadvantaged businesses. As a result of the decision, in 1998, SBA developed eligibility standards for SDB certification: already-certified 8(a) firms automatically qualified, but others had to establish eligibility by submitting required documentation. SBA subsequently developed standards and conducted training seminars for other federal agencies, instructing them how to make eligibility determinations. DOJ guidelines instructed agencies to develop procedures that facilitate quick decisions so that the procurement process is not delayed and applicants have a fair opportunity to compete.[80] Agencies have subsequently transferred responsibility for certification determinations to SBA, with the exception of DOT. In 1999, DOT and SBA signed a memorandum of understanding, which grants certification reciprocity to 8(a), DBE, and other SDB participants.

In addition, regulations require applicants to submit certification that the business is owned and controlled by socially and economically disadvantaged individuals, as defined by standards similar to the 8(a) program.[81] State or local governments or other major contractors sometimes additionally certified firm ownership. According to DOJ, multiple sources of certification allowed agencies to take advantage of the extensive network of certifying entities in place prior to *Adarand*. From the federal government's perspective, reciprocity could eliminate the need for firms to obtain different certifications when they seek private and public contracts. Although DOJ highlighted the merits of multiple certification sources, small businesses argued that there were too many certifying entities, and the "streamlined" process remained burdensome.[82] To

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[76] *See* 13 C.F.R. § 124.103 (2005).

[77] *Id.* § 124.103(c).

[78] The White House, "Procurement Reforms: SDB Certifications and the Price Evaluation Adjustment Program," June 24, 1998, <http://www.clinton6.nara.gov/1998/06/1998-06-24-fact-sheet-on-procurement-reforms.html> (last accessed Nov. 18, 2004) (hereafter cited as The White House, "Procurement Reforms").

[79] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,044.

[80] *Id*.

[81] *Id*. (citing 13 C.F.R. §§ 124.103, 124.104). The economic threshold for SDB program participants is higher than for 8(a). Owners' net worth limits are $750,000 and $250,000, respectively.

[82] *See* Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648 (May 9, 1997) (hereafter cited as DOJ, Response to Comments to Proposed Reforms) (explaining that DOJ received more than 1,000 responses to its 1996 proposed reforms to affirmative action. Among the concerns expressed by small businesses were that (1) agencies would make inconsistent

ensure consistency, DOJ guidelines instructed SBA to conduct periodic audits of certifying organizations. However, beginning in 2005, SBA no longer accepts third-party certifications, and therefore no longer conducts such audits.[83]

When an SDB receives a contract, competing bidders, procuring agencies, or SBA can raise eligibility challenges. Such parties may protest eligibility on evidence that (1) the owners of the firm are not economically or socially disadvantaged, (2) the firm is not owned or controlled by individuals who meet the definitions of disadvantaged, or (3) the disadvantaged firm has not completed required percentages of the work it was contracted to do. SBA makes the final determination of eligibility within 15 days of the challenge.[84] The firm may appeal, but there are fines and punishments associated with misrepresentation.

Benchmark Limits

As discussed, the Supreme Court held that all racial classifications of government programs must be narrowly tailored. Federal procurement, as a government activity, must conform to this requirement. Thus, the measures agencies employ to achieve SDB participation goals, which are in many cases statutorily mandated, must also be narrowly tailored. The Clinton Justice Department's post-*Adarand* proposal called for the development of specific guidelines to limit race measures to certain areas of procurement. It established that the Department of Commerce, in consultation with the General Services Administration and SBA, would develop benchmarks and determine acceptable strategies (including the size of evaluation credits that can be applied) for each industry.[85]

Under the Clinton DOJ approach, benchmarks represent the level of minority contracting that is reasonably expected in a market, absent discrimination or its effects, and provide the basis of comparison with actual minority participation in each industry and, for construction, each region.[86] DOJ stated in its 1997 guidelines that benchmark analyses should include consideration of the extent to which discrimination has impeded the efforts of minority-owned firms to grow and the ability of minority entrepreneurs to start businesses.[87] The benchmark studies were supposed to be updated every five years as new Census data on minority firms became available. However, Commerce issued the last benchmark study in 1999, using fiscal year 1996 data. Since then, Commerce developed a new industry coding scheme, and its efforts to render industry-

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eligibility determinations; and (2) reliance on state, local, and private organizations for certifications would compromise efficiency).

[83] U.S. Small Business Administration, "Frequently Asked Questions: Small Disadvantaged Business (SDB)," no date, <http://app1.sba.gov/faqs/faqindex.cfm?areaID=22> (last accessed May 10, 2005). The agency's Web site states, "Private Certifiers are no longer available. All applications are being processed by the Office of Small Disadvantaged Business Certification and Eligibility in Washington DC." Agency regulations, however, still describe external certification procedures. *See* 13 C.F.R. § 124 (2004).

[84] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,045 (citing 48 C.F.R. § 19.508).

[85] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,045.

[86] *Id*.

[87] *See* DOJ, Response to Comments to Proposed Reforms, p. 25,650.

specific determinations of the need for SDB programs have focused primarily on developing a system for converting codes, rather than on benchmark calculations.[88] Furthermore, among other criticisms, experts have substantially questioned the studies' benchmark data, methodology, underlying theory of discrimination, and utility. The National Research Council recently endorsed these criticisms.[89]

Additional Mechanisms

In 1996, the Clinton Justice Department identified several race-conscious contracting mechanisms that federal procurement programs could use consistent with its interpretation of *Adarand*: SBA's 8(a) program; bidding credits for SDB prime contractors, which are statutorily permitted; and evaluation credits for nonminority prime contractors that award subcontracts to SDBs.[90] In accordance with the narrow tailoring requirements, price preference evaluation credits cannot exceed 10 percent, at the discretion of the contract officer, and can only be used for procurement in industries affected by lingering effects of discrimination against minority-owned firms, as determined by benchmark studies.[91] Moreover, while certified SDBs may receive credits, they still must compete with other bidders to win contracts.[92] Regardless of the mechanisms employed, DOJ made clear that in post-*Adarand* procurement, race must be only one factor in the decision to award a contract.[93]

To that end, the Court's parameters on the use of race-conscious measures require agencies to apply race-neutral strategies, such as outreach and technical assistance, at all times so that they use racial preferences only to the "minimum extent necessary to achieve legitimate objectives."[94] However, DOJ determined that agencies lacked consistency and sufficient effort in implementing outreach and other race-neutral programs. DOJ outlined several specific strategies, including the following:

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[88] Jeffrey Mayer, Economic Statistics Administration, Department of Commerce, electronic correspondence to Anna Maria Ortiz, civil rights analyst, U.S. Commission on Civil Rights, Apr. 7, 2005. Note also that the most recent economic census was in 2002. However, the Census Bureau's publication of many reports from this survey, including certain series related to industries and minority-owned businesses, is not scheduled until 2006. The Bureau plans to publish a bridge between industrial codes used in 1997 and 2002 in mid-2005. *See* U.S. Census Bureau, "Guide to the 2002 Economic Census: Schedule and Geographic Coverage for Reports, by Sector," Apr. 25, 2005, <http://www.census.gov/econ/census02/guide/g02sch3.htm> (last accessed May 6, 2005).

[89] *See, e.g.,* National Research Council of the National Academies, *Analyzing Information on Women-Owned Small Businesses in Federal Contracting,* 2005, pp. 59–60, *citing* George R. La Noue, "To the 'Disadvantaged' Go the Spoils?" *The Public Interest,* no. 138 (Winter 2000), pp. 91–98.

[90] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,046. Authority to allow bidding credits for prime contractors and subcontractors exists for the Department of Defense in 10 U.S.C. § 2323 and for all other federal agencies under the Federal Acquisition Streamlining Act, Pub. L. No. 103-355 § 7102, 108 Stat. 3243 (codified as amended at 15 U.S.C. § 644 (2000)).

[91] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,046.

[92] The White House, "Procurement Reforms."

[93] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,046.

[94] *Id*., p. 26,048.

- pursue race-neutral mentor-protégé programs that do not guarantee the award of subcontracts on a noncompetitive basis;
- eliminate the impact of surety costs from bids, as higher bond costs are a barrier to minority success in contracting;
- establish a minimum goal for including SDBs on agency mailing lists of bidders;
- establish a uniform system for publishing agency procurement forecasts;[95]
- target outreach and technical assistance toward industries in which SDB participation traditionally has been low;
- increase participation of Historically Black Colleges and Universities in research and development contracts;[96] and
- review contracting procedures and solicitations to identify practices that disproportionately affect opportunities for SDBs and do not serve a valid procurement purpose.[97]

DOJ reasoned that these measures would minimize the need for race-conscious strategies in the government's effort to welcome SDB participation.[98]

DEFINING AND EVALUATING RACE-NEUTRAL STRATEGIES

Adarand requires agencies to consider, and employ, race-neutral strategies before resorting to race-conscious ones. As DOEd explained in another context, serious consideration entails (1) identifying and evaluating a wide range of policies, rather than considering only one or two alternatives; (2) documenting the underlying facts, rather than relying on casual observation or assumptions; (3) demonstrating an empirical basis for determining whether race-neutral plans will be effective, rather than relying on speculation; (4) ensuring that assessments are supported by current, competent, and comprehensive data; and (5) periodically reviewing any race-conscious plans to determine whether they remain necessary.[99]

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[95] Each agency currently posts procurement opportunities on its own Web site or through SBA Online.

[96] Although contracts with Historically Black Colleges and Universities are, by definition, race-conscious, Executive Order 12,876 directs federal agencies to enter into such contracts, thus granting presumptive legal authority.

[97] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,049.

[98] *Id*., p. 26,046.

[99] U.S. Department of Education, Office for Civil Rights, *Inclusive Campuses: Diversity Strategies for Private Colleges*, report no. 3, Race-Neutral Alternatives Series, 2005, pp. 11–12.

The Commission has identified four elements that, if used more effectively, would enable race-neutral strategies to meet this requirement.

(1) Agencies should develop policy, procedures, and standards for evaluating race-neutral alternatives.

(2) Agencies should develop or identify a variety of race-neutral approaches and implement programs based on identified needs, as determined by baseline data.

(3) Agencies should continuously review the need for race-conscious programs and independently measure the success of race-neutral strategies.

(4) Agencies should engage in regular interagency communication to foster information sharing and to identify best practices and workable race-neutral strategies.

The Commission finds that these four elements will facilitate a fair and legally sound contract award system, provided agencies implement strong civil rights enforcement to identify and eliminate discrimination. Each element will be discussed in greater detail in the following chapter. Chapter 2 also catalogs race-neutral strategies agencies use to assist all small businesses, as well as those that target economically disadvantaged firms. And, finally, chapter 3 offers recommendations for agencies and Congress to ensure equal access to and fair competition for federal contracts.

Chapter 2: Elements and Examples of Race-Neutral Contracting

As noted in Chapter 1, in its 1995 *Adarand* decision, the Supreme Court stated that courts must ask whether agencies have given "any consideration [to] the use of race-neutral means to increase minority participation in government contracting" to determine whether a race-conscious program is legally permissible.[1] Department of Justice (DOJ) guidance explains that, drawing on an earlier case, the Court reasoned that because minority businesses tend to be smaller and less established, providing financial and technical assistance to all small and new firms irrespective of race might also increase contracting opportunities for minority-owned businesses.[2] Thus, *Adarand*'s narrow tailoring aspect requires agencies to explore race-neutral approaches to remedying discrimination and improving contracting opportunities for small and disadvantaged businesses before resorting to race-conscious measures.[3] This directive coincides with the government's interest in advancing small businesses generally.

In recent cases, the Supreme Court has held that narrow tailoring requires "*serious* good faith consideration" of race-neutral alternatives.[4] Despite this directive, agencies neither share a common understanding of what constitutes serious consideration, nor a definition for "race-neutral" contracting. At least one agency, the Department of Education (DOEd), interprets this to mean that institutions (or agencies) must consider "in a careful and professional manner" the applicability of reasonable alternatives.[5]

DOJ generally views programs that benefit disadvantaged individuals, but do not presume racial groups are disadvantaged, as race-neutral. DOJ characterizes statutes that establish a presumption that members of a racial group are disadvantaged as race-conscious.[6] According to one scholar, in general, race-neutral laws and regulations are those worded in such a way as to offer equal protection to everyone. Race-neutral programs and policies, which result from the laws, might include, for example, strategies to eliminate barriers affecting disadvantaged

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[1] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 238 (1995) (hereafter cited as *Adarand*) (citing Richmond v. J.A. Croson Co., 488 U.S. 469, 507 (1989)). *See also* Grutter v. Bollinger, 539 U.S. 306, 339 (2003) (hereafter cited as *Grutter*).

[2] U.S. Department of Justice, "Legal Guidance on the Implications of the Supreme Court's Decision in Adarand Constructors, Inc. v. Peña," June 28, 1995, p. 27 (hereafter cited as DOJ, "*Adarand* Guidance") (citing *Croson,* at 510).

[3] *Adarand*, at 238.

[4] *Grutter,* at 339, emphasis added.

[5] U.S. Department of Education, Office for Civil Rights, *Inclusive Campuses: Diversity Strategies for Private Colleges*, report no. 3, Race-Neutral Alternatives Series, 2005, p. 11 (hereafter cited as DOEd, *Inclusive Campuses*).

[6] DOJ, "*Adarand* Guidance," p. 47. DOJ has not revised its definition of neutrality in light of more recent case precedent, such as the Supreme Court cases of *Grutter* and Gratz v. Bollinger, 539 U.S. 244 (2003).

competitors, but include all persons defined by income, geographic location, age, or other race-neutral criteria.[7]

Federal agencies disagree among themselves about what factors render a program race-conscious or -neutral. Without formal guidance, agencies struggle with how to define targeted procurement programs within the legal parameters of *Adarand* and subsequent cases. DOEd, for example, relying on DOJ's post-*Adarand* definitions, identifies Small Business Administration (SBA)-offered disadvantaged business programs, such as the 8(a) business development program and small disadvantaged business (SDB) certification mentioned in the previous chapter, as race-conscious, but does not consider race or socioeconomic status in its own procurement initiatives.[8]

Other agencies, such as the Department of Transportation (DOT), the Department of State (DOS), and the Department of Housing and Urban Development (HUD), do not consider SBA programs race-conscious, even though they include a race-based presumption of disadvantage as one eligibility factor.[9] These three agencies assert that SDB, 8(a), and other programs have been tailored to comport with federal procurement regulations. HUD officials further stated that they do not consider 8(a) to be race-conscious because it does not preclude nonminority participation, and eligibility is governed only partly by race. Moreover, they note that the program has been upheld under *Adarand* standards.[10] In policy documents, HUD refers to small and disadvantaged business initiatives, including 8(a) and the Historicially Underutitilized Business Zone (HUBZone) strategy, as *socioeconomic* programs.[11] Indeed, federal regulations also classify 8(a), HUBZone, and SDB as socioeconomic programs.[12]

SBA, although acknowledging that the 8(a) initiative includes a race element, notes that the program focuses on disadvantaged status rather than race or ethnicity, and is therefore consistent

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[7] George R. La Noue and John C. Sullivan, "Race Neutral Programs in Contracting," *Public Administration Review*, vol. 55, no. 4 (July/August 1995), p. 348 (hereafter cited as La Noue and Sullivan, "Race Neutral Programs").

[8] U.S. Department of Education's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 11, 2005, p. 1 (hereafter cited as DOEd Interrogatory).

[9] U.S. Department of State's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 1, 2005, cover letter, pp. 1–2, 4 (hereafter cited as DOS Interrogatory); U.S. Department of Transportation's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 17, 2005, p. 18 (hereafter cited as DOT Interrogatory); and U.S. Department of Housing and Urban Development's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 21, 2005, p. 1 (hereafter cited as HUD Interrogatory).

[10] David Enzel, senior counsel, Office of General Counsel; Valerie Hayes, acting director, Office of Small and Disadvantaged Business; Bernard Morton, supervisory procurement analyst, Policy and Field Operations Division, Office of the Chief Procurement Officer; and Edward Girovasi, director, Policy and Field Operations Division, Office of the Chief Procurement Officer, U.S. Department of Housing and Urban Development; interview in Washington, DC, Apr. 19, 2005 (statement of Edward Girovasi), transcript p. 24 (hereafter cited as HUD follow-up interview).

[11] U.S. Department of Housing and Urban Development, *Procurement Policies and Procedures*, Handbook 2210.3 REV-9, p. 3-1 (hereafter cited as HUD, *Procurement Policies and Procedures*).

[12] Small Business Programs, 48 C.F.R. § 19 (2004).

with *Adarand*.[13] SBA additionally argues that these programs are statutorily mandated and that agencies have little discretion with regard to implementation.[14] However, SBA and other agencies also consider as valid for goal purposes many race-neutral programs that target small businesses generally, but which have no mechanisms to ensure equal participation of minority-owned businesses.[15]

Without a clear understanding of what constitutes race-conscious programming, agencies do not demonstrate practices that prove they seriously considered race-neutral alternatives or ensure that such demonstrations are comprehensively incorporated. DOT's program is, in part, an exception. The agency amended its Disadvantaged Business Enterprise (DBE) program post-*Adarand* and now requires contract recipients to obtain as much DBE participation as possible through race-neutral measures, including training, technical assistance, bonding assistance, business development programs, contract unbundling, and prompt payment.[16] This chapter examines these among other frequently used race-neutral strategies. However, DOT, like other agencies studied, has not established a system to measure the effectiveness of its race-neutral strategies or to determine the ongoing need for race-conscious programs, both of which are necessary to demonstrate serious consideration. Before agencies can fully integrate race-neutral alternatives into their procurement programs, they must have in place elements that ensure serious consideration of such measures.

ELEMENTS OF A RACE-NEUTRAL CONTRACTING SYSTEM

One agency, DOEd, recently began to translate the law for its funding recipients, and specified demonstrations suited to a higher education context.[17] DOEd's example is important because both legal guidance and literature on race-neutral alternatives in federal contracting are sparse; most of the related discussion has focused on higher education and not procurement per se. Neither the Supreme Court nor DOJ have provided guidance on what specific activities agencies

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[13] U.S. Small Business Administration's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 10, 2005, pp. 3, 8 (hereafter cited as SBA Interrogatory).

[14] U.S. Small Business Administration, Affected Agency Review of U.S. Commission on Civil Rights Draft Report, July 21, 2005 (hereafter cited as SBA Affected Agency Review). *See also* Edward Girovasi, director, Policy and Field Operations Division, Office of the Chief Procurement Officer, U.S. Department of Housing and Urban Development, electronic correspondence to Eileen Rudert, social science analyst, U.S. Commission on Civil Rights, July 7, 2005, re: affected agency review (hereafter cited as Girovasi correspondence) (noting that agencies operate within the bounds of the specific socioeconomic procurement programs authorized by Federal Acquisition Regulations and rooted in statute).

[15] SBA Interrogatory, pp. 1–2; DOD explains that it employs a wide range of the strategies described in this chapter as part of its race-neutral Service-Disabled Veteran-Owned Small Business Program, which does not aim specifically to increase procurement with SDBs. Frank Ramos, Director, Office of Small and Disadvantaged Business Utilization, U.S. Department of Defense, letter to U.S. Commission on Civil Rights, July 7, 2005, pp. 2–3.

[16] U.S. Department of Transportation, "What's New in the Department of Transportation's Disadvantaged Business Enterprise Rule," 1999, <http://library.findlaw.com/1999/Mar/11/129709.html> (last accessed May 19, 2005).

[17] *See* DOEd, *Inclusive Campuses*, p. 11. As noted in chapter 1, DOJ issued guidance to agencies after *Adarand*, which instructed them to consider race-neutral alternatives before adopting race-conscious measures. DOJ, "*Adarand* Guidance," pp. 27–28.

may demonstrate to meet serious consideration obligations. DOEd identified six practices, based on federal case law and other sources, that could demonstrate serious consideration of race-neutral alternatives:

(1) Identifying and evaluating a wide range of initiatives, rather than considering only one or two alternatives. This includes considering institutional impediments to achieving goals and all possible avenues for meeting them.

(2) Documenting the underlying facts that demonstrate whether a race-neutral plan will work, rather than relying on casual observation or undocumented assumptions.

(3) Demonstrating an empirical basis for determining whether race-neutral plans will be effective, rather than relying on speculation.

(4) Ensuring data to demonstrate such assessments are current, competent, and comprehensive.

(5) Periodically reviewing race-conscious plans, perhaps annually or biennially, to determine the need for continuing them and the viability of implementing race-neutral plans. Reviewing race-conscious programs periodically will also ensure that they are narrowly tailored.

(6) Analyzing data to establish causal relationships, rather than relying on broad assumptions, particularly before concluding that a race-neutral plan is ineffective.[18]

Although articulated by DOEd in the education context, each of these practices could be applied to the procurement setting. Using the DOEd model as a gauge, agencies do not give serious consideration to race-neutral contracting measures. Indeed, with the exception of DOT (in part), none of the agencies comply with these practices. That is, agencies do not systematically collect data, conduct disparity studies, measure the effectiveness of various strategies, or review contracting programs. Agencies fail to seriously consider and utilize a full range of race-neutral alternatives. Thus, the Commission developed and offers the following framework, representing actions agencies could undertake to meet this obligation. Drawing from agency interrogatories, academic literature, DOJ guidance, federal court opinions, and its own research, the Commission determined that essential elements of a race-neutral procurement framework include: (1) standards, (2) implementation, (3) evaluation, and (4) communication.

Element 1: Develop Standards and Policies Based on Sound Benchmark Data

Serious consideration of race-neutral alternatives requires agencies to regularly assess the basic assumptions they apply and the policies and practices they employ in the establishment of procurement programs, especially those designed to improve access. Such standards entail not only identifying areas of over- or under-inclusiveness, but also policies for ensuring the quality

[18] DOEd, *Inclusive Campuses,* pp. 11–12.

of the underlying science upon which such assumptions are based and determining when specific initiatives should be activated or discontinued. Such policy must include a framework for baseline metrics to identify strong and weak procurement areas both within specific agencies and governmentwide.

No agency reported having policy, procedures, or statistical standards for assessing the viability of race-neutral contracting, for determining when to discard such strategies in favor of race-conscious programs, or for ensuring the quality of evaluations forming the basis of such decisions.[19] Several agencies did not consider the programs they operate, even those that use race as one criterion for participation, such as SBA's 8(a) program, race-conscious and thereby needing justification.[20] For the most part, agencies are bound by legislation and regulations that define the parameters of their contracting methods and provide justifications for using existing SBA-administered race-conscious programs, rather than individual agency policies.[21] As listed above, DOEd offers extensive guidance to recipients of federal assistance (namely, educational institutions) on the empirical standards that could be used to examine the utility of race-neutral procedures, but does not apply similar internal procedures to its own procurement program.

SBA cited congressional findings that support legislated procurement mechanisms as a justification for governmentwide race-conscious programs. The agency related narrowly tailored aspects of the 8(a) and other SDB programs and referenced disparity studies and other research showing lower contracting rates and receipts among minority firms.[22] In reauthorizing these programs, Congress cited the lingering effects of discrimination as justification for their continued need.[23] DOJ stated that congressional findings carry weight and offer sufficient justification. However, after *Adarand*, DOJ also charged the Department of Commerce with conducting benchmark studies to limit the industries in which race-conscious measures could be used and to determine acceptable strategies. Commerce, using 1996 data, has released only one such study, in 1999, and therefore agencies and prime contractors cannot rely on it to justify goals or other race considerations.

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[19] DOT Interrogatory, p. 18; HUD Interrogatory, p. 1; U.S. Department of Energy's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 7, 2005, pp. 4, 8 (hereafter cited as DOEn Interrogatory). SBA argues that agencies are not required to measure the effectiveness of race-neutral contracting strategies and that such direction should come from Congress. *See* SBA Affected Agency Review.

[20] DOS Interrogatory, pp. 9, 11; DOT Interrogatory, p. 18; HUD Interrogatory, pp. 1, 3; DOEn Interrogatory, p. 4. SBA also notes that Congress alone has the power to amend or discontinue legislated programs. *See* SBA Affected Agency Review.

[21] DOS Interrogatory, p. 9; DOT Interrogatory, p. 18; HUD Interrogatory, p. 1; DOS Interrogatory, p. 8; DOEn Interrogatory, p. 4. *See* Spencer Abraham, secretary, U.S. Department of Energy, memorandum for all departmental elements, re: policy statement on supporting small businesses in implementing DOEn missions, Sept. 23, 2002. *See also* Girovasi correspondence (stating that it is not the role of any individual federal agency to depart from socioeconomic programs defined in regulations; nor may they create new ones).

[22] SBA Interrogatory, pp. 2–4.

[23] For a listing of congressional hearings on challenges facing minority-owned firms, *see* Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,051, note 12 (May 23, 1996) (hereafter cited as DOJ, Proposed Reforms to Affirmative Action in Federal Procurement).

In addition to identifying the empirical framework for evaluating procurement, agencies should implement standards for determining which types of contracting programs hold the most potential to reach out to small and disadvantaged firms given their acquisition needs. To demonstrate serious consideration of all appropriate alternatives, agencies must first collect and analyze performance and operational information in relevant industries (transportation, education, science, banking, etc.) To do so, agencies could institute multiple social science methods, including focus groups, surveys, literature reviews, and testing, with a goal to benchmark or establish areas in which procurement is over- or under-inclusive.

To ensure validity and longitudinal utility, agencies must develop precise standards for baseline data collection. Data should be (1) based on quantitative, rather than qualitative, demonstrations to reduce the potential for interpretive bias; (2) consistent, so that agencies can aggregate findings across studies to enable broader analysis and increase reliability; and (3) inclusive of all aspects of the procurement process, to include, for example, data on unsuccessful bids. Agencies should also identify measures that would support determinations of whether disparities can be attributed to discrimination. Finally, inferences drawn from the data should be statistically significant, meaning that the outcomes are unlikely to be due to chance.

Resulting benchmarks would represent the level of minority contracting an agency would reasonably expect to find in a given industry absent discrimination or its effects. Such representations would provide baselines against which individual agencies' actual minority procurement could be measured. Thus, agencies would periodically compare actual utilization of minority firms against the benchmark to determine when the effects of discrimination have been overcome and minority-owned firms can compete equally. Without such data, agencies can not determine whether the continuation or addition of race-neutral or -conscious programs will solve the problem.

Such benchmarks could be applied internally to compare procurement between various program offices of the same agency and thereby identify best practices. Furthermore, benchmarks could offer opportunities for agencies to compare their levels of procurement with those of other similarly situated federal offices. Internal benchmarks, in combination with those conducted federally, would enable agencies to identify and share governmentwide best practices. No agency reported establishing standards by which it compared its minority contracting performance against specific industries.

Agencies justify not collecting empirical data on the assertion that they have not developed their own race-conscious programs.[24] This statement highlights the significance of how agencies define and structure their contracting programs: they employ programs characterized by DOJ as race-conscious, but because they did not construct these programs independently, they find it unnecessary to develop evaluation standards. DOT, whose DBE program is a partial exception, provided a list of state and local disparity studies and stated that the department relies on these data "in an effort to justify the application of race-conscious measures."[25] However, the most

[24] DOS Interrogatory, p. 11; DOT Interrogatory, p. 18; DOEn Interrogatory, pp. 4, 8.

[25] DOT Interrogatory, p. 26.

recent such study was conducted in 1999, and many were pre-*Adarand* or used flawed methodology.[26] As a Government Accountability Office (GAO) report noted about DOT contracting, "Without explicit guidance on what makes a disparity study reliable, states and transit authorities risk using…[inaccurate] information in setting their DBE goals."[27] Moreover, DOT has not indicated that it has developed the requisite methodologies to review race-neutral alternatives. As with governmentwide benchmarks, current data do not exist to demonstrate the necessity of race-conscious programs, and if or why race-neutral alternatives are insufficient for expanding contracting opportunities to all qualified firms.

Element 2: Identify and Develop a Wide Range of Race-Neutral Alternatives

Serious consideration requires agencies to develop or identify a wide range of approaches, rather than considering only one or two alternatives (see practice 1 of the DOEd serious consideration practices), such as a few governmentwide programs. This should entail the development of a broad array of creative, innovative solutions tailored to the unique mission, strategic goals, and challenges of each agency.

Despite this critical principle, the Commission found that no agencies demonstrated serious efforts to identify or develop alternative tools and strategies. Instead, they have primarily implemented generic SBA programs. SBA programs are not a sufficient substitute for policies and programs tailored to the needs and experiences of particular agencies and based on actual agency data. To the extent that agencies continue to depend exclusively on others rather than developing their own approaches, they may forgo strategies with greater potential for enhancing the inclusiveness of their own contracting in the long run.

Element 3: Routinely Evaluate the Impact of Race-Neutral and -Conscious Strategies

Once agencies have determined, through valid data analyses, to use particular procurement strategies, they must then measure the effectiveness of such approaches. As DOEd identified under serious consideration practices 2 and 3, agencies should establish empirical standards for determining whether a race-neutral approach will be effective. Then they should collect and analyze data (practice 4), and establish causal relationships (practice 6), before concluding that such an approach is ineffective.[28] However, most agencies reported that they rely on congressional findings, DOJ, and SBA regulations and guidance, rather than their own analysis, to measure the success of both race-neutral and -conscious strategies.[29] Furthermore, they do not take the steps articulated in element 1 to ensure that programs are evaluated using appropriate benchmarks and policies for when to employ SDB procurement initiatives are followed.

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[26] *See* Ibid., exhibit 4; U.S. General Accounting Office (now the Government Accountability Office), *Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact,* June 2001, pp. 30–32 (hereafter cited as GAO, *DBEs: Critical Information is Needed)*.

[27] GAO, *DBEs: Critical Information Is Needed*, p. 32.

[28] DOEd, *Inclusive Campuses*, pp. 11–12.

[29] *See, e.g.,* DOT Interrogatory, p. 15.

In its post-*Adarand* guidance, DOJ stated that periodic reviews should consider not only the immediate need for race-conscious programs, but also whether these approaches should be further limited. Indeed, DOJ said the Court's narrow tailoring standard requires programs that consider race to be neither over- nor under-inclusive.[30] DOJ explained that, ideally, as barriers to minority contracting are removed and the use of race-neutral means succeeds, the need to consider race in decisionmaking will reduce and, eventually, be eliminated.[31] Despite this clear guidance, agencies have generally not established procedures to regularly review race considerations, including presumptions of disadvantage, in their contracting programs.

The review process need not be cumbersome. With respect to higher education, DOEd has stated that annual or biennial reviews would be sufficient to determine whether race-conscious plans remain necessary and whether sunset provisions should be established (practice 5).[32] Agencies must continually re-evaluate their procurement programs against benchmarks discussed under element 1, and adjust policies, targets, objectives, and goals in light of the standards they have established. In the course of evaluation, federal officials should ask: Does discrimination affect the agency's contracting? If so, what is its source and what will eliminate it? Have barriers declined over time? What policies or practices have reduced disparities the most? How effective are different policy interventions? Would race-neutral alternatives be equally effective? Such assessments are not possible without comparative data on the effectiveness of different approaches. Moreover, the same standards of review must be applied to race-neutral and -conscious programs so that neither is favored and results can be objectively compared.

The absence of policies, standards, and procedures indicates that agencies have not given consideration to the review process. They do not evaluate regularly the overall success of their contracting programs or measure separately the effects of race-neutral efforts such as unbundling or small business financial assistance. Nor is it currently possible to isolate the outcomes of these strategies because they are offered in conjunction with race-conscious programs. Most agency officials say they rely on statutorily established goals for federal contracting with SDBs, first authorized in the Small Business Act of 1978,[33] and federal procurement data to measure overall effectiveness and ensure that minority-owned businesses receive a fair share of government contracts. Thus, they compare contracts awarded to small, disadvantaged, and HUBZone-located businesses against agency-specific annual goals negotiated with SBA, which retains responsibility for implementing the goaling program.[34] Agencies may also, as DOEd reported, compare annual achievements against prior years to identify cause and effect, and target specific areas for improvement.[35]

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[30] *See* DOJ, "*Adarand* Guidance," pp. 35–38.

[31] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26, 048.

[32] DOEd, *Inclusive Campuses*, p. 12.

[33] Amendments to the Small Business Act and Small Business Investment Act of 1978, Pub. L. No. 95-507, 92 Stat. 175 (codified as amended by 15 U.S.C. §§ 631–633, 636–637, 644 (2000)) (hereafter cited as Small Business Act of 1978).

[34] SBA Interrogatory, p. 9; HUD Interrogatory, p. 4; DOEn Interrogatory, p. 5; DOS Interrogatory, p. 8; DOT Interrogatory, p. 14; DOEd Interrogatory, cover letter, p. 3.

[35] DOEd Interrogatory, cover letter, p. 3.

As DOS explained, agencies collect data by a firm's status as SDB, 8(a), or HUBZone certified to gauge progress toward statutory goals. They do not collect information on the ethnicity of the firm's owner. Thus, the procurement data system can measure SDB achievements, but not minority-owned firm achievements.[36] Furthermore, the Commission contends that the SBA-negotiated goals for 8(a) and SDBs measure the success of race-conscious programs, not race-neutral ones. Data for the HUBZone program measure contracting with businesses located in the designated areas, but not contracting with minority-owned enterprises, except perhaps when the firms qualify for both HUBZone and SDB preferences. Even then, however, there is no way to distinguish between minority- and nonminority-owned SDB firms. Thus, there is no accurate measure of whether the HUBZone program increases contracting with SDBs, or more specifically, minority-owned businesses.

The same is true of other programs at most agencies; they generally do not collect data on the number of nonminority SDB participants, nor have they established policy for periodic review of the continuing necessity of race-conscious measures.[37] SBA justifies this failure by stating that Congress, in authorizing its 8(a) and other SDB programs, conducts the requisite analysis to determine the continuing need for the programs provided under the Small Business Act.[38] The Department of Defense (DOD) is the only agency that keeps contract data on awards to SDBs that are not based on race in addition to those awarded through race-conscious programs such as 8(a) and, as such, can compare the success of both types of approaches.[39] The agency reports that its "non-preference awards" to SDBs surpassed 8(a) awards in FY 2000 and represent more than one-half of all of the dollars it awarded to SDBs in FY 2004.[40] However, DOD does not have a mechanism to specifically track whether race-neutral methods increase opportunities for SDBs, nor is there a way to compare expected and actual effects.[41]

Element 4: Communication and Coordination: Sharing Information and Best Practices

The absence of consensus as to what constitute race-neutral versus race-conscious procurement initiatives, and how to enforce nondiscrimination laws with respect to contracting, as will be discussed below, suggests a lack of interagency communication. Such failure to communicate has grave implications for the potential of innovative strategies to enhance the inclusiveness of federal contracting. Agencies that fail to communicate race-neutral best practices miss opportunities to reduce the need for race-conscious procurement programs. Agencies also miss opportunities to focus efforts on those strategies with the greatest potential for increasing federal contracting prospects for small and minority-owned businesses.

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[36] DOS Interrogatory, p. 8.

[37] SBA Interrogatory p. 7; DOT Interrogatory p. 17; HUD Interrogatory p. 3. *See also, e.g.*, DOT Interrogatory, p. 12; DOS Interrogatory, p. 8; DOEn Interrogatory, p. 4.

[38] SBA Interrogatory, pp. 7–8.

[39] U.S. Department of Defense's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 10, 2005, pp. 4, 11 (hereafter cited as DOD Interrogatory).

[40] DOD Interrogatory, p. 5 and attachment C, "Small Disadvantaged Business Program History," Feb. 16, 2005.

[41] DOD Interrogatory, p. 6.

Despite this apparent lack of communication, infrastructure for developing and sharing best practices exists. Agencies themselves identified several government channels or councils through which they may consult with other federal agencies to develop strategies that comply with narrow tailoring requirements or implement race-neutral alternatives to improve the competitiveness of minority-owned firms. However, agencies also indicated varied participation in and commitment to such mechanisms, thus curtailing the potential benefits of these channels of communication.

- First, many agencies reported that they consult SBA about aspects of contracting with small and disadvantaged businesses.[42]

- Second, Offices of Small Disadvantaged Business Utilization (OSDBUs), which are individual agency units dedicated to promoting procurement with such firms, have formed a Directors' Interagency Council. Several agencies—DOT, DOD, the Department of Energy (DOEn), and DOS—reported membership in this council, although its Web site includes all agencies the Commission queried except SBA.[43]

- Third, a statutorily established Chief Acquisition Officers Council has a Small Business Committee that might also serve as a venue for sharing information on race-neutral strategies. Three agencies—DOT, HUD, and DOEn—reported involvement with the council or its committee.[44]

- Fourth, the Federal Acquisition Streamlining Act[45] provides for a Small Business Procurement Advisory Council. Two agencies—DOT and DOD—claimed membership in this council.[46] SBA chairs the group that considers proposed procurement regulations that affect the small business community.[47]

- Finally, one federal agency suggested that, in addition to its own efforts to share best practices with other procurement officials, the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB) retains primary responsibility for such communications, and SBA should coordinate information on small business matters in particular.[48]

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[42] DOT Interrogatory, p. 7; DOD Interrogatory, p. 6.

[43] DOT Interrogatory, p. 7; DOD Interrogatory, p. 6; DOEn Interrogatory, p. 3; DOS Interrogatory, p. 5. Information about the OSDBU Directors' Interagency Council can be found at <http://www.osdbu.gov/>.

[44] DOT Interrogatory, p. 8; DOEn Interrogatory, p. 3; U.S. Department of Housing and Urban Development, Affected Agency Review of U.S. Commission on Civil Rights Draft Report, July 7, 2005, p. 1 (hereafter cited as HUD Affected Agency Review).

[45] Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10, 15, and 41 U.S.C.).

[46] DOT Interrogatory, p. 8.

[47] DOD Interrogatory, p. 6.

[48] HUD Interrogatory, p. 3; HUD Affected Agency Review, p. 1.

Despite the many channels of communication that agencies could use to learn about or share best practices to improve contracting with minority-owned firms, including race-neutral alternatives, no agency reported making efforts to compile or distribute such information, or to coordinate program activities. DOS officials, however, reported benefiting from interagency sharing. The agency borrowed heavily from a Treasury Department initiative to create a mentor-protégé program that pairs large experienced businesses with smaller inexperienced firms.[49] Although SBA provides assistance to other agencies, it does not report engaging in any internal or interagency collection and sharing of information on the workability or effectiveness of race-neutral strategies for federal contracting.[50] Overall, agencies' failure to compile and distribute information and share best practices hinders efforts to decrease reliance on race-conscious contracting programs.

RACE-NEUTRAL CONTRACTING STRATEGIES

Federal agencies use many race-neutral mechanisms to enable all small businesses to compete. The premise is that race-neutral small business strategies, if implemented fairly, should similarly assist minority-owned firms. In conducting this study, the Commission reviewed agency regulations and public information about specific contracting programs and asked the selected agencies what race-neutral strategies they employ in their procurement programs. Although, as inquiries uncovered, agencies work under different definitions of what race-neutral measures are, several common strategies emerged. For example, the Commission identified strategies to:

(1) enforce nondiscrimination and subcontractor compliance;

(2) increase knowledge about opportunities to contract with the federal government;

(3) provide education or technical assistance to improve business skills and knowledge of federal procurement and how to win contracts;

(4) give financial assistance or adjustments to offset the difficulties struggling firms encounter; and

(5) expand contracting opportunities and promote business development in underutilized geographic regions.

These strategies are available to all businesses meeting size and income criteria, and are therefore race-neutral.

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[49] DOS Interrogatory, p. 5.

[50] SBA Interrogatory, p. 8.

Strategy 1: Antidiscrimination Policy and Enforcement

The most important race-neutral strategy for any fair procurement system is the development of clear, widely disseminated antidiscrimination policies, supported by an effective enforcement program. Strong civil rights enforcement not only prevents agencies from perpetuating patterns of discrimination in government contracting, but also would largely obviate the need for procurement preference programs.[51] In other contexts, the Commission has long urged agencies to promote enforcement by committing staff and other resources; disseminating a nondiscrimination policy to staff, recipients, and beneficiaries, including procedures for filing and investigating complaints; and developing methods for identifying discrimination. Agencies can also—but typically do not adequately—conduct compliance reviews and develop efficient systems for processing complaints, and identify and resolve any questionable practices with technical assistance and appropriate sanctions.[52]

The Commission finds that the federal government lacks an appropriate framework for enforcing nondiscrimination in procurement. Indeed, agencies report an absence of statutory or regulatory guidance in this area.[53] Consequently, most agencies do not have standard nondiscrimination policies or procedures for federal contracting and fail to conduct outreach and technical assistance on discrimination. Even after directing specific questions to agencies, the Commission had difficulty identifying where a contractor or subcontractor would file a discrimination complaint, or what remedies would be available.

Beyond nondiscrimination, agencies are also responsible for ensuring that prime contractors comply with plans to meet subcontracting goals with small and disadvantaged businesses. Thus, civil rights enforcement tools are necessary in procurement: those that ensure nondiscrimination in contracting (which includes both discrimination by procurement officials and by prime contractors), and those that assess compliance with subcontracting plans.

Enforcement of Nondiscrimination in Contracting

Significantly, no agency was able to identify any statute or regulation that effectively prohibits all discrimination in federal procurement. Indeed, it appears that little guidance exists in this area, particularly with respect to subcontractors. For this reason, it is not surprising agencies have not implemented effective enforcement mechanisms to protect victims of discrimination.

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[51] La Noue and Sullivan, "Race Neutral Programs," p. 348.

[52] U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations? Volume I: A Blueprint for Civil Rights Enforcement,* September 2002, pp. 11–42 (hereafter cited as USCCR, *Ten-Year Check Up: Blueprint*).

[53] The lack of attention to civil rights concerns is evident even in DOJ guidance, which has a section titled "Enforcement." The discussion concerns individuals falsely claiming status as a small disadvantaged business to obtain federal contracts, not potential victims of discrimination. *See* DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,045.

Title VI of the Civil Rights Act of 1964 prohibits discrimination based on race, color, or national origin in all federally funded programs and activities.[54] However, these provisions do not apply to federal procurement at fair market value, government loan guarantees, or insurance contracts, because they are not considered federally funded activities.[55] Therefore, the regulations and operating procedures governing Title VI enforcement programs do not apply in the contracting context. Nor is Executive Order 11,246 applicable to discrimination against contractors. The executive order, which is enforced by the Office of Federal Contract Compliance Programs (OFCCP) at the Department of Labor (DOL), prohibits federal contractors and federally assisted construction contractors and subcontractors from discriminating in *employment* (*emphasis added*) decisions based on race, color, religion, sex, or national origin.[56] The order does not, however, expressly prohibit discrimination in contractor or subcontractor selection.

The only mechanisms available for addressing discrimination in contractor selection appear to be limited to contractors who have complaints about the bidding process. A disappointed bidder may file an administrative claim directly with the contracting officer or GAO and may sue in the U.S. Court of Claims for any procedural violation of the full and open competition requirement under procurement statutes.[57] However, these procurement mechanisms do not explicitly identify racial discrimination as grounds on which complainants may protest bids so long as the specific elements of full and open competition are satisfied.

A disappointed bidder may file a claim directly against an agency under the equal protection component of the Fifth Amendment's Due Process Clause, but will likely find significant drawbacks to seeking relief from racial discrimination in contract selection under such an argument. Equal protection claims under the Fifth Amendment are difficult to prove as long as facially neutral fair and competitive processes exist to ensure that the lowest and most qualified bidder receives the award. Proving that a facially neutral action has a discriminatory effect on a protected class would be difficult without the disparate impact provisions under Title VI.

Additionally, unlike Title VI, which requires each federal agency to promulgate regulations to enforce nondiscrimination provisions, the Fifth Amendment places no statutory enforcement obligation on agencies. Accordingly, federal agencies lack systems to handle preliminary claims of racial discrimination under the equal protection component of the Due Process Clause.

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[54] Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 24 (codified as amended at 42 U.S.C. § 2000d (2000)).

[55] *See* U.S. Department of Justice, Civil Rights Division, *Title VI Legal Manual*, Jan. 11, 2001, pp. 10, 17. DOJ also states that "a distinction must be made between procurement contracts at fair market value and subsidies; the former is not Federal financial assistance although the latter is." Ibid., p. 17.

[56] Equal Employment Opportunity, Exec. Order No. 11,246, 3 C.F.R. 339 (1964–1965).

[57] Bid protests may be filed with GAO under the Competition in Contracting Act. The disappointed bidder must file a timely protest, be an "interested party" in line for award, and submit substantiating evidence. GAO limits its reviews to a determination of whether the prospective vendor received fair and equal treatment compared to the selected contractor. Moreover, GAO decisions are not binding on the offending agency. To present a claim before the U.S. Court of Federal Claims, an aggrieved bidder would have to make a claim that discriminatory conduct violates the requirement for full and open competition under 10 U.S.C. § 2304 and 41 U.S.C. § 253. Under the Tucker Act, the Court of Federal Claims has jurisdiction to render judgment on an action alleging a violation of statutes or regulations in connection with procurement. *See* 28 U.S.C. § 1491(b)(1) (1998).

Subcontractors face even greater challenges and lack the same constitutional protection against racial discrimination by non-government actors. To some extent, private subcontractors may seek recourse for contractors' intentional discrimination under section 1981 of the Civil Rights Act of 1991, which guarantees equal protection of the laws in making and enforcing contracts.[58] Nevertheless, section 1981 claims must overcome the same barriers described above for equal protection claims under the Due Process Clause. Additionally, the high cost of litigation and the potential for alienating future clients or employers limit subcontractors' willingness to wage discrimination claims under section 1981.[59]

Although these limited protective mechanisms provide potential relief for some aggrieved bid protesters, none incorporates what have become standard civil rights protections in other areas. Asked how they enforce nondiscrimination in procurement, most agencies said they do not, nor have they considered doing so.[60] Agency responses thus underscore a significant void in civil rights law: no uniform standards currently exist regarding monitoring or enforcement for contractors or subcontractors alleging discrimination.

Only one agency, DOT, utilizes conventional civil rights enforcement mechanisms for addressing contractor complaints. DOT's unique contracting system may drive its enforcement procedures: grant and award recipients, in the form of states and local transit authorities, conduct most procurement activities, and Title VI presumably encompasses contractors receiving these funds. Consequently, DOT claims that its procurement program fully incorporates Title VI requirements.[61] In practice, DOT places responsibility for Title VI enforcement on the operating administration that granted the award, and enforcement of nondiscrimination by prime contractors on state and local transportation agencies receiving grants.[62]

In general, however, agencies disagree on what a business should do to file a discrimination complaint against a procurement officer or prime contractor. For example, a DOT Web page on civil rights suggests that its OSDBU and Office for Civil Rights provide services to businesses for civil rights violations under the DBE program.[63] However, DOT's statements to the

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[58] Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C.S. § 1981 (2005)). The relevant section states, "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts…as is enjoyed by white citizens." *Id.*

[59] *See* Robert E. Suggs, "Racial Discrimination in Business Transactions," *Hastings Law Journal*, vol. 42 (1991), pp. 1257, 1262–88. According to Suggs, only a small number of cases have addressed discrimination in business practices under § 1981, including only one single instance where a claim of racial discrimination in public procurement resulted in an award of damages to the plaintiff. *See* Brant Constr. Co. v. Lumen Constr. Co. Inc., 515 N.E.2d 868 (Ind. App. 1987). *But see also* Roscoe v. Aetna Cas. & Sur. Co., 1988 WL 88-Ar-0882-S, 214511, at 2 (N.D. Ala. Nov. 8, 1988) (the district court ruled that the plaintiff could not assert a § 1981 claim for discrimination in employment practices because he was not an employee as required by statute).

[60] *See, e.g.,* HUD follow-up interview, pp. 19–22; U.S. Department of Defense's Follow-up Response to the U.S. Commission on Civil Rights, May 6, 2005, pp. 3–4 (hereafter cited as DOD follow-up response).

[61] DOT Interrogatory, p. 18; HUD Interrogatory, p. 2; DOS Interrogatory, p. 16; DOEd Interrogatory, p. 5; SBA Interrogatory, p. 5; DOD Interrogatory, p. 5; and DOEn Interrogatory, p. 7.

[62] Operating administrations include: the Federal Aviation Administration (FAA), Federal Highway Administration (FHA), and the Federal Transit Administration (FTA). DOT Interrogatory, pp. 18–20.

[63] *See* U.S. Department of Transportation, "My Civil Rights," no date, <http://www.hotcr.ost.dot.gov/asp/MyCR.asp>

Commission do not directly indicate where businesses subjected to such discrimination should file complaints, and instead imply that SBA regulations cover these issues.[64]

SBA denies, however, that it bears responsibility for ensuring contracting nondiscrimination both governmentwide and in its own procurement, noting that the Small Business Act does not charge the agency with responsibility for monitoring racially discriminatory practices in federal contracting. SBA did not conduct any compliance reviews concerning discrimination in federal contracting from FY 2000 to 2004.[65] This is notable given DOT's apparent reliance on SBA regulations for antidiscrimination guidance.

Other agencies also lack uniform, codified complaint procedures. DOEn states that if a procurement officer's decisions evidence bias, it would refer the matter to the internal Office of Inspector General and apply sanctions according to agency guidance on employee misconduct.[66] However, DOEn does not have procedures to anticipate or prevent instances of discrimination by prime contractors. Instead, the aggrieved party (i.e., prospective subcontractor) is responsible for notifying the agency. DOEn cites its contract award process and built-in subcontracting standards as ways by which it ensures fair competition. Should complaints arise, DOEn suggests the aggrieved party could notify the contracting officer or OSDBU.[67]

Similarly, DOEd does not have a system to identify discrimination by prime contractors. Were a potential subcontractor to file a complaint, the agency's internal office of Contract Acquisition and Management (CAM) would investigate. Complaints against a procurement officer would be investigated by the CAM director in consultation with DOEd's Office of General Counsel.[68]

Legal advisers at DOS similarly contend that neither federal law nor acquisition regulations establish procedures for investigating discrimination complaints against prime contractors.[69] However, DOS states that were an allegation of discrimination by a procurement officer to arise, it would likely be investigated by the agency's Office for Civil Rights. Discipline measures would be proposed by the Office of Employee Relations of the Bureau of Human Resources.[70]

Officials at several agencies, including DOD, are unaware of any action involving discrimination by a procurement officer.[71] DOD states that its procurement system "was designed to ensure equal opportunity and equal treatment," and if an incident of discrimination were to occur, it

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(last accessed Mar. 16, 2005).

[64] DOT Interrogatory, p. 18.

[65] SBA Interrogatory, p. 5.

[66] U.S. Department of Energy's Follow-up Response to the U.S. Commission on Civil Rights, May 12, 2005, p. 1 (hereafter cited as DOEn follow-up response).

[67] Ibid., p. 2.

[68] U.S. Department of Education's Follow-up Response to the U.S. Commission on Civil Rights, Apr. 22, 2005, pp. 1–2 (hereafter cited as DOEd follow-up response).

[69] U.S. Department of State's Follow-up Response to the U.S. Commission on Civil Rights, Apr. 19, 2005, p. 4 (hereafter cited as DOS follow-up response).

[70] Ibid., p. 3.

[71] DOD follow-up response, p. 3; HUD follow-up interview, pp. 22, 27–28.

would be referred to management.[72] The agency similarly states that it has seen no evidence of prime contractor discrimination against subcontractors, nor does it make efforts to anticipate or prevent such misconduct.[73]

In contrast to other agencies, HUD expressly states its antidiscrimination policy in its *Procurement Policies and Procedures Handbook*: "Sources [prospective contractors] shall not be included or excluded on the basis of race, creed, color, sex, age, disability or national origin."[74] HUD officials stated that, although they know of no such instances, a subcontractor who feels he or she has been discriminated against could file a complaint with the agency's Inspector General or OSDBU.[75] HUD also indicated that a disappointed bidder may activate the GAO review process described above. Procurement officials concede that this is "a gray area when it comes to the law" and that jurisdictional and procedural areas are unclear.[76]

In short, inconsistent agency responses and actions illustrate weaknesses in systems for processing discrimination complaints in contracting. Moreover, confusion over the locus of enforcement efforts indicates agencies' immediate need for guidance.

Subcontractor Compliance Enforcement

The procurement goaling program Congress established in the Small Business Act of 1978, mentioned above, aims to ensure that agencies offer small and socially and economically disadvantaged enterprises the "maximum practicable opportunity" to compete for federal contracts.[77] The program entails governmentwide goals for both prime contracting and subcontracting utilization of small businesses, SDBs, and certain other firms.[78] Agencies exhibit much greater consistency in their approaches to subcontracting compliance enforcement than to contracting discrimination complaints. Most agencies report checking prime contractors' achievement of small business, SDB, HUBZone, and other goals against initial subcontracting plans on a quarterly or yearly basis, or in HUD's case, monthly. DOEn initiated a pilot program of OSDBU audits to validate data prime contractors submit as part of their subcontracting efforts, and DOD also conducts periodic reviews of subcontracting data to determine whether

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[72] DOD follow-up response, p. 3.

[73] Ibid., p. 4.

[74] HUD, *Procurement Policies and Procedures,* pp. 1–7, as cited in HUD Interrogatory, p. 1.

[75] HUD follow-up interview, pp. 17–18.

[76] Ibid. (statement of Girovasi), pp. 17, 27–28.

[77] *See* Small Business Act of 1978, 15 U.S.C. 644(g)(1) (2000).

[78] Small Business Administration (SBA), Office of Government Contracting, *Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals & Achievements,* July 3, 2003, p. 1 (hereafter cited as SBA, *Goaling Guidelines for the Small Business Preference Programs*); *see also* Small Business Act of 1978, 15 U.S.C. § 644(g) (2000).

SDBs are offered "the maximum practical opportunity to participate."[79] DOD does not, however, make a determination of "appropriate" SDB utilization.[80]

To comply with procurement goaling regulations, agencies require prime contractors to make "good faith efforts" to employ minority and SDB subcontractors. DOD guidance for acquisition personnel defines good faith effort as "honest intent to act without taking an unfair advantage over another person or to fulfill a promise to act, even when some legal technicality is not fulfilled."[81] DOD interprets failure to make a good faith effort as willful or intentional failure to perform in accordance with a subcontracting plan or an attempt to obstruct the plan. There is no objective legal standard for good faith; rather, it is based on the facts and circumstances of each case. Therefore, the guidance notes, parties must define at the outset what will satisfy contract performance requirements.[82] DOT similarly emphasizes that good faith determinations are contract-specific. Agency regulations also make clear that state and local grant recipients cannot presume summarily that a bidder failed to make a good faith effort simply because another bidder was able to meet its subcontracting goal.[83]

HUD explains that prime contractors must submit semiannual reports of contract-specific subcontracting achievements and annual reports summarizing such accomplishments in all contracts. OSDBU analyzes these reports to ensure that prime contractors meet their stated subcontracting goals. In addition, the agency conducts compliance reviews on a percentage of prime contractors each year. HUD officials stated that if they do not meet their goals, contractors must provide adequate justification.[84] In such instances, rather than pursuing punitive measures, HUD's OSDBU assists prime contractors in locating capable small businesses.[85] Other agencies do not report any use of punitive measures in response to failure to make good faith efforts.[86] Also, like other agencies, HUD did not explain what standards it uses to gauge good faith efforts to secure or maintain participation of disadvantaged businesses.[87]

Although compliance reviews, including on-site visits, are primarily SBA's responsibility, regulations authorize SBA to enter into agreements with other agencies to carry them out.[88] None of the agency statements indicates the existence of such agreements. Additionally, DOD

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[79] DOEn Interrogatory, p. 7; DOD Interrogatory, pp. 5–6.

[80] DOD Interrogatory, p. 5.

[81] DOD follow-up response, p. 5.

[82] Ibid.

[83] *See* 49 C.F.R. § 26, app. A (2004); DOT Interrogatory, p. 17.

[84] HUD follow-up interview, p. 29.

[85] HUD Interrogatory, p. 4.

[86] *See, e.g.,* DOS follow-up response, p. 4; DOT Interrogatory, p. 17; DOEn follow-up response, p. 3; and DOEd follow-up response, p. 2. DOD stated that there is no central database for the application of liquidated damages, and therefore each buying command would have to manually review contract files to determine if punitive measures have been taken. DOD follow-up response, p. 5.

[87] HUD Interrogatory, p. 4.

[88] *See* 13 C.F.R. § 125.3(f)(7) (2004). The regulations list a Web site where compliance review agreements are supposed to be published, <http://www.sba.gov/GC>; however, as of May 18, 2005, no such agreements were posted.

and DOEn interrogatories fail to clarify whether verification processes, discussed above, include on-site audits to check that prime contractors use the small businesses, SDBs, HUBZones, and other targeted subcontractors that they report. In its interrogatory, DOS notes that budget constraints prohibit regular subcontracting compliance reviews, but adds that it will investigate specific complaints from subcontractors about "bait and switch" techniques whereby a prime contractor does not follow through on its proposed subcontracts with targeted firms.[89] According to GAO, the Defense Contract Management Agency conducts on-site reviews with the majority of its prime contractors, prioritizing such reviews by the risk of noncompliance. GAO reports that civilian agencies rely on SBA to do similar reviews, and that while SBA prioritizes these investigations, it does not actually conduct them in order because of staff and travel constraints.[90]

Effective March 2005, SBA issued a list of factors agencies should consider in evaluating a prime contractor's good faith efforts.[91] The final rule states that prime contractors can demonstrate good faith by doing any one of the following: breaking out contract work into smaller units; conducting market research to identify small business subcontractors and suppliers; soliciting small business concerns early in the acquisition process; providing interested small businesses adequate and timely information about a contract's requirements and plans; directing small businesses that need assistance to SBA; assisting such firms in obtaining bonding, credit, insurance, equipment, and supplies; and/or participating in a formal mentor-protégé program.[92] It is noteworthy that all of these strategies for showing good faith are race-neutral. Good faith can also be demonstrated where a contractor fails to achieve its goal in one category of subcontracting goals, but overachieves its goal in another category by an equal or greater amount. One agency, DOEn, indicated that it circulated the new guidelines to procurement offices.[93]

In sum, agencies have procedures for reviewing subcontractor compliance, but until recently there were no uniform standards for determining whether a good faith effort has been made when prime contractors fail to achieve goals. Because agencies make such determinations case by case, conducting regular on-site audits and formal compliance reviews is critical. If goals are realistic and good faith efforts are race-neutral, enforcement of contracting plans will ensure that small and disadvantaged firms are in fact given the maximum practical opportunity to participate.

Strategy 2: Outreach

Outreach is an essential strategy for creating an inclusive contracting system. The Commission has made many recommendations about how to achieve effective outreach in its past reports,

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[89] DOD Interrogatory, p. 10.

[90] David E. Cooper, director, Acquisition and Sourcing Management, U.S. General Accounting Office, Dec. 13, 2001, letter to Senator Christopher S. Bond, Committee on Small Business and Entrepreneurship, United States Senate, re: small business subcontracting report validation can be improved, p. 3.

[91] DOEn follow-up response, exhibit B, "Policy Flash 2005-16," p. 2. *See* 13 C.F.R. § 125.3(b)(3) (2004).

[92] 13 C.F.R. § 125.3(b)(3) (2004).

[93] DOEn follow-up response, p. 3.

many of which concern enforcement under Titles VI and VII of the Civil Rights Act, but which apply equally well to informing disadvantaged business owners about federal contracting opportunities. For effective outreach, agencies could develop an outreach program targeting small and disadvantaged businesses. Agencies can include outreach in budget and planning documents, establish goals for conducting outreach activities, track the events and characteristics of the audience to ensure diversity, and train staff in presentation skills.[94]

Outreach consists of the activities through which agencies reach and target eligible program participants or beneficiaries about available government opportunities. The next step, to educate them about the participation process through capacity building such as technical assistance, is discussed below. Outreach takes many forms. For example, it includes formal training programs (conferences, workshops, or presentations to professional organizations, business owners, or advocacy groups), information dissemination through literature (e.g., factsheets, pamphlets, and booklets), Internet postings, the media, or public service announcements.[95]

Internet Postings and Searchable Databases

A 1996 DOJ assessment concluded that agencies lacked consistency and sufficient effort in implementing outreach to achieve race-neutral program outcomes. In particular, DOJ asked agencies to establish a uniform system for publishing agency procurement forecasts on the SBA Web site known as "SBA Online" and target outreach and technical assistance efforts toward industries in which participation of small disadvantaged businesses traditionally has been low.[96] This recommendation follows the Supreme Court's determination that the federal government has a compelling interest to redress past discrimination.[97] Since DOJ recommended publishing forecasts, government use of the Internet has grown tremendously both for informing agencies of certified small businesses and informing small businesses of contracting opportunities.[98] In particular, in 2000, DOEn made plans to create a new data entry system to forecast small business contracting opportunities. The agency expected the database to facilitate quick updating

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[94] USCCR, *Ten-Year Check Up: Blueprint*, pp. 31, 33, 34; U.S. Commission on Civil Rights, *Overcoming the Past, Focusing on the Future: An Assessment of the U.S. Equal Employment Opportunity Commission's Enforcement Efforts*, September 2000, pp. 200–261, 290–299 (hereafter cited as USCCR, *EEOC Enforcement Efforts*).

[95] USCCR, *EEOC Enforcement Efforts*, p. 220.

[96] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, pp. 26,042–63. This Web site is now accessed through FedBizOpps Team, "Federal Business Opportunities," no date, <http://www.fedbizopps.gov> (last accessed May 25, 2005).

[97] *See* discussion in chap. 1.

[98] *See, e.g.,* U.S. Department of Defense, "Central Contractor Registration," no date, <http://www.ccr.gov> (last accessed June 1, 2005) (hereafter cited as DOD, "CCR"); U.S. Department of Education, "FY 2005 Forecast of ED Contract Opportunities," Apr. 8, 2005, <http://www.ed.gov/fund/contract/find/forecast05.doc> (last accessed June 1, 2005); U.S. Department of State, "Office of the Procurement Executive (A/OPE) Acquisition Web Site," no date, <http://www.statebuy.state.gov/> (last accessed June 1, 2005); U.S. Small Business Administration, "U.S. Small Business Administration Subcontracting Network," Nov. 23, 2004, <http://web.sba.gov/subnet/> (last accessed June 1, 2005).

of program and field information and help small business owners search for contracting opportunities.[99]

During outreach, agencies such as DOD, HUD, and DOS, also encourage eligible small and minority-owned businesses to register in DOD- or SBA-maintained Internet databases of potential contractors and subcontractors, including the Central Contractor Registration (CCR), a DOD-maintained database of vendors seeking federal contracts.[100] Registration in such databases expands small businesses' opportunities because agencies and prime contractors may use them to identify firms from which to solicit procurement bids.[101] Searchable databases also offer a way for small and disadvantaged businesses to gain recognition as potential federal contractors and identify subcontracting opportunities. In addition to DOD's CCR, SBA maintains SUB-*Net*, a subcontracting database.[102]

Based on interrogatory responses, most agencies have not created their own supplemental databases of vendors and contractors, but instead rely on the CCR and SUB-*Net*. DOEn is one exception. It recently established an internal small business database, derived from the CCR, which includes approximately 3,500 firms with the capacity to compete for energy contracts.[103]

DOEd and HUD do not maintain small business databases, but use the CCR.[104] Likewise, DOD does not maintain its own small business database, but rather "encourages potential subcontractors to market themselves to prime contractors directly."[105] The agency encourages prime contractors to use SBA's SUB-*Net* independently. In addition to the CCR, DOS also uses the Department of Veterans' Affairs VIP access database, which includes veteran-owned small businesses.[106]

Conferences, Meetings, Forums, Media, and Printed Materials

Agencies should conduct race-neutral outreach for all small and disadvantaged businesses, though they may specially target areas where data show some groups are not participating in federal contracting because of lack of information and technical assistance. Some agencies deny

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[99] U.S. Department of Energy, *Office of Economic Impact and Diversity, Annual Report, FY 2000,* January 2001, p. 14 (hereafter cited as DOEn, *OEID, Annual Report FY 2000*).

[100] DOD, "CCR."

[101] DOD Interrogatory, p. 3; U.S. Department of Housing and Urban Development, *OSDBU Small Business Outreach Session*, presented by Ozema Moore, senior business utilization development specialist, and Meishoma Hayes, program specialist, no date, p. 24 (hereafter cited as HUD, *OSDBU Small Business Outreach Session*); DOS follow-up response, attachment on sample outreach, p. 2.

[102] U.S. Small Business Administration, "What is SUB-*Net*," no date, <http://web.sba.gov/subnet/dsp_what_is_subnet.cfm> (last accessed Mar. 7, 2005).

[103] DOEn Interrogatory, p. 2.

[104] DOEd Interrogatory, enclosure 1, p. 1, enclosure 2, p. 17; U.S. Department of Housing and Urban Development, "Small Business Policy," Mar. 21, 2005, p. 2 (hereafter cited as HUD, "Small Business Policy").

[105] DOD Interrogatory, p. 3.

[106] DOS Interrogatory, p. 3.

that their outreach efforts have changed either as a result of narrow tailoring requirements or emphasis on race-neutral alternatives.[107] For example, DOS officials stated that the agency's limited travel budget and ability of a small staff to cover many events had a larger effect on the number and scope of outreach activities than *Adarand*.[108]

Notably, DOT explained that the agency's OSDBU and the Minority Resource Center continue to offer myriad outreach initiatives designed to improve transportation-related business opportunities for small disadvantaged firms. Thus, the agency claims the narrow tailoring requirement has not affected its targeted outreach.[109] SBA, on the other hand, noted some changes it had made in outreach efforts since *Adarand.* For example, it eliminated race-conscious wording from some of its outreach program materials. The agency does not measure the effects of its outreach such that it can determine the results of these changes, that is, whether or not nonminority owners apply to or enter the program at higher rates.[110]

Other agencies do not target outreach to minority groups. For example, DOD officials stated that the agency provides the same type of outreach and counseling assistance to SDBs as it does to all small businesses.[111] HUD officials also reported that the agency's outreach programs target all small businesses and did not indicate whether or how minority-owned businesses might be included. HUD has, however, made efforts to conduct outreach throughout the country, including, for example, participating in a small business conference in Alaska.[112]

DOT sponsors events clearly targeted to minority-owned firms, such as a National Disadvantaged Business Enterprise Conference.[113] Other agencies reported hosting their own events, such as (1) networking sessions between (a) agency officials and small businesses regarding current contracting opportunities,[114] or (b) large prime contractors and small businesses; (2) annual industry days;[115] and (3) pre-bid conferences to identify qualified small

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[107] Ibid., p. 4; DOD Interrogatory, p. 1; DOEn Interrogatory, p. 1; DOT Interrogatory, p. 2.

[108] DOS Interrogatory, p. 4.

[109] DOT Interrogatory, p. 2.

[110] The Small Business Administration has marketed its 8(a) program more aggressively as business development for disadvantaged firms, at the same time emphasizing that the program is open to all socially and economically disadvantaged individuals regardless of race. It developed more inclusive outreach presentations and materials, particularly to include women-owned businesses; revised a Web page to promote greater inclusiveness; and changed the name of the "Office of Minority Enterprise Development" to the "Office of Business Development." SBA Interrogatory, pp. 5–6.

[111] DOD Interrogatory, pp. 3, 7. DOD officials further reported that the agency's Office of Small and Disadvantaged Business Utilization rarely organizes outreach conferences; they are generally coordinated by small business specialists within individual defense agencies. DOD follow-up response, p. 1.

[112] HUD Interrogatory, p. 2; HUD follow-up interview (statements of Valerie Hayes), pp. 8, 11.

[113] DOT Interrogatory, p. 2.

[114] DOEd Interrogatory, cover letter, p. 3; DOEn, *OEID, Annual Report FY 2000*, pp. 12, 14.

[115] DOS Interrogatory, p. 4.

businesses.[116] The agencies did not identify any activities related to these events that were designed to ensure participation of minority-owned firms.

In serving a broad constituency of small businesses with outreach, two agencies reported contact with many associations, including those that target the ethnic groups the Small Business Act identifies as having been subject to historic discrimination. For example, DOS and DOEn staff support or participate in annual conferences sponsored by minority group associations, often state and national black, Hispanic, or Asian American Chambers of Commerce.[117] In September 2000, the Secretary of Energy signed a memorandum of understanding with a coalition of 15 minority business organizations to encourage disadvantaged, 8(a), and minority-owned business participation in agency contracting.[118] DOEn also reported contact with minority journalists, legislators, and scientists through numerous conferences.[119]

DOEn reported extensive use of news media, including minority-targeted publications. In addition to general circulation publications, DOEn also (1) issues press releases about outreach to disadvantaged businesses; and (2) places news articles and ads in magazines and journals with minority business audiences (e.g., *Black Enterprise, Latina Style Magazine, Minority Business Entrepreneur, Indian Country National Newspaper,* and *Tribal Advocate Newsletter*). The agency also places advertisements on Web pages of minority media (e.g., www.blackenterprise.com). DOEn additionally employs other media sources, including Hispanic network radio and Internet chat rooms.[120]

Ensuring the Inclusiveness of Outreach

Even though agencies engage in outreach, little specific evidence exists that their efforts reach small and disadvantaged businesses. Only two agencies provided annual planning or reporting documents on outreach. For example, DOEn requires its programmatic components to submit an "Annual Small Business Plan" to its OSDBU each November 15. The plans report on outreach in

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[116] DOEd Interrogatory, cover letter, p. 3.

[117] DOS Interrogatory, p. 4 and tab 5; DOEn Interrogatory, attachment 2; U.S. Department of Energy, Office of Economic Impact and Diversity, Office of Small and Disadvantaged Business Utilization, *Report to the Secretary on the U.S. Department of Energy's Small Business Programs*, *Fiscal Year 2001*, September 2002, pp. 11–13 (hereafter cited as DOEn, OSDBU, *Report to the Secretary FY 2001*); U.S. Department of Energy, *Small Business Marketing Outreach 2002 and 2003,* no date (hereafter cited as DOEn, *Outreach 2002 and 2003*); U.S. Department of Energy, *Small Business Marketing Outreach 2004*, no date (hereafter cited as DOEn, *Outreach 2004*). Note that DOT also has contact with several similar organizations, although it did not name chambers of commerce and does not appear to so broadly represent Hispanic businesses. *See* DOT Interrogatory, p. 2 and exhibit 2.

[118] DOEn, *OEID, Annual Report FY 2000*, p. 13.

[119] For example, the agency's contacts were through the Hispanic Business Magazine Board of Economists at the U.S. Hispanic Economic Summit, the Latino Journal Legislators Reception and Small Business Conference, the Latina Style Magazine Business Conferences held in several cities, the National Summit of Hispanic State Legislators, the National Hispanic Engineering, Science and Technology (HESTEC) Week, and New Mexico Mathematics, Engineering, Science Achievement (MESA) Program. DOEn, OSDBU, *Report to the Secretary FY 2001*, pp. 11–13; DOEn, *Outreach 2002 and 2003*; DOEn, *Outreach 2004*.

[120] DOEn, *Outreach 2002 and 2003*; DOEn, *Outreach 2004*.

addition to program and field offices' strategies, performance, and contracting opportunities. Outreach objectives include establishing and strengthening partnerships with minority-owned business coalitions to promote full participation in the annual Small Business Conference, regional outreach meetings, and other activities. The 2000 report showed the department's intent to develop a comprehensive strategy for increasing 8(a) and minority business participation in agency contracting opportunities and submit it to the Office of Management and Budget.[121] Additionally, one agency asserts that its achievements of statutory goals for procurement evidence the success of outreach efforts in reaching SDBs.[122]

Beyond planning, having staff dedicated to outreach also makes a difference in the effectiveness of race-neutral strategies. DOEn's outreach may be more comprehensive than that of other agencies because it formed a small business advisory team to support OSDBU outreach goals. This team helped conduct meetings, promote outreach activities, and place advertisements in minority media.[123] However, the agency consistently fails to meet its reduced goals for procurement with SDBs. Because DOEn does not measure the effects of outreach, it is impossible to determine whether the efforts actually reach small and disadvantaged firms or whether stepped-up efforts could move the agency closer to its goals.

As with DOEn, agencies do not have methods for tracking the number of activities, expenditures, or other resources used for outreach, or the numbers and types of beneficiaries.[124] Such a system might help determine whether program information reaches minorities to ensure their participation in contracting programs. DOD, for example, elaborated that its decentralized buying commands determine the nature of outreach, allocate funds to conduct the activities, and evaluate the effectiveness of such efforts on specific audiences. DOD has no uniform requirement that individual defense agencies obtain or analyze such information.[125]

Strategy 3: Capacity Building

Technical Assistance

While the purpose of outreach is to provide access points for small and disadvantaged businesses, technical assistance provides the tools and knowledge necessary to compete for contracts. SBA administers several programs to assist individuals and small businesses, with emphasis on reaching members of socially and economically disadvantaged groups, veterans, women, and individuals with disabilities. The programs include training and education, advisory

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[121] DOEn, *OEID, Annual Report FY 2000*, pp. 12, 14.

[122] HUD Affected Agency Review, p. 1.

[123] DOEn, *Outreach 2004*, pp. 4–5.

[124] *See, e.g.,* SBA Interrogatory, pp. 5–6; DOD Interrogatory, pp. 2, 10.

[125] DOD Interrogatory, p. 2.

services, publications, financial assistance, and contract guidance.[126] For example, SBA conducts workshops on bid and proposal preparation, contract negotiation techniques, and contract cost estimations.[127]

The Small Business Development Center (SBDC) program is one of SBA's main technical assistance offerings. SBDC, administered in cooperation with the private sector, the educational community, and federal and state governments, provides information and guidance to individuals and small businesses in accessible branch locations. There are 63 lead centers located throughout the United States: four in Texas, six in California, and one in each remaining state, including the District of Columbia, Guam, Puerto Rico, Samoa, and the Virgin Islands. The lead centers coordinate small business program services through a network of sub-centers and satellite locations in each state or territory. There is currently a network of more than 1,100 service locations. SBA provides approximately 50 percent of the funding for operating costs for this program; sponsors cover the remainder.[128]

Specifically, the SBDC program provides the following to small businesses:

- counseling, training, and technical assistance in all aspects of management;
- assistance with financial, marketing, production, organization, engineering, and technical problems, and feasibility studies; and
- assistance with applying for federal Small Business Innovation and Research Grants.[129]

In addition, SBA's Office of Small Business Development, in compliance with section 7(j) of the Small Business Act, administers the 7(j) Management and Technical Assistance Program to assist SBA program participants, businesses operating in high unemployment or low-income areas, and businesses owned by low-income individuals to become competitively viable in the marketplace. To implement this program, SBA enters into grants and cooperative agreements or contracts with public or private organizations that can provide technical assistance to eligible businesses or individuals.[130]

Four of the federal agencies in this report rely heavily on SBA's technical assistance programs for small businesses. All of them have Web sites that provide technical guides to individuals and small businesses on bidding for contracts and subcontracts, identifying contracting opportunities, and locating technical assistance centers. In addition to direct links, every agency links to

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[126] *See* U.S. Small Business Administration, Small Business Development Center Program, "Starting Your Business," no date, <www.sba.gov/starting_business/index.html> (last accessed Mar. 15, 2005) (hereafter cited as SBA, "Starting Your Business").

[127] U.S. Small Business Administration's Follow-up Response to the U.S. Commission on Civil Rights, May 6, 2005, p. 1 (hereafter cited as SBA follow-up response).

[128] SBA, "Starting Your Business."

[129] Ibid.

[130] U.S. Small Business Administration, Office of Business Development, "7(j) Management and Technical Assistance Program," no date, <http://www.sba.gov/gcbd/7j.html> (last accessed May 24, 2005).

FedBizOpps, a governmentwide Web site, where vendors can access information on contract bidding and business opportunities.[131] Another helpful governmentwide Web site, not directly linked to agencies' Web sites, is Business.gov. Business.gov is an e-government initiative under the President's Management Agenda that provides assistance to small businesses interested in contracting with the federal government. SBA manages this site in collaboration with other federal agencies, including DOEn and DOT.[132]

Individual technical assistance can also be provided through counseling sessions and customized instruction, but this strategy remains largely unused. Federal regulations require all agencies to provide, upon request, post-award debriefings to unsuccessful bidders, but DOS was the only agency to report such debriefings.[133] DOS offers general counseling to small businesses about doing business with the agency, as well as more specific advice to firms competing for a specific contract.[134] While DOS contracting personnel reported conducting post-award debriefings, the agency does not have a specific policy outlining its debriefing procedures, nor does it collect data on success rates for future contracts after counseling.[135]

HUD offers customized technical assistance to potential contractors through some of its outreach programs. For example, the agency's OSDBU recommends that small businesses market their services by preparing "elevator speeches," i.e., very brief presentations with pertinent information: the company's name, core competencies, certifications, number of employees, number of years in business, agencies with which the company has done business, descriptions of major business accomplishments, and how the firm can help HUD. OSDBU, through its outreach programs, also provides instructions on how to prepare for contract negotiations and how to develop proposals.[136]

DOEn indicated that it does not provide assistance on how to prepare offers or attain awards, but contract officers frequently provide individual assistance to small firms with specific procurement issues or seeking marketing advice. Outreach conferences generally provide information on contracting opportunities, procurement procedures, program changes, and the like.[137]

The Defense Logistics Agency (DLA), on behalf of the Secretary of Defense, administers the DOD Procurement Technical Assistance (PTA) Cooperative Agreement Program. Through this program, a network of offices assists businesses in marketing goods and services to federal, state, and local governments. To establish the network, DLA awards cost-sharing cooperative agreements to state and local governments, private nonprofit and tribal organizations, and Indian

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[131] *See* FedBizOpps Team, "Federal Business Opportunities."

[132] *See* Business.gov, "About Us," no date, <http://www,business.gov/general/about.html> (last accessed May 2, 2005).

[133] Postaward Debriefing of Offerors, 48 C.F.R. § 15.506 (2004); DOS Interrogatory pp. 7–8.

[134] DOS follow-up response, p. 2.

[135] DOS Interrogatory, pp. 7–8, 11.

[136] HUD follow-up interview (statement of Valerie Hayes), p. 8; HUD, *OSDBU Small Business Outreach Session*, pp. 20–25.

[137] DOEn follow-up response, p. 1.

economic enterprises. Recipients provide technical assistance relating to bid opportunities, bid proposal preparation, pre-award surveys, quality assurance, and accounting systems. Like SBA's SBDC program, the network comprises centers throughout the United States.[138]

Similarly, DOT administers technical assistance through its nationwide program. The program, based on partnership agreements between DOT's OSDBU and chambers of commerce, trade associations, and minority education institutions, delivers services, including training and counseling, to DBEs and other small businesses through regional centers.[139]

Some agencies use another technical assistance vehicle, mentor-protégé programs, which foster business relationships between small businesses and large prime contractors. Like other capacity building strategies, such efforts seek to enable small and disadvantaged businesses to compete for contracts.[140]

Mentor-Protégé Programs

In its post-*Adarand* guidance, DOJ recognized partnering as an effective strategy, and recommended that agencies actively pursue race-neutral mentor-protégé programs that do not guarantee contract awards on a noncompetitive basis.[141] Mentor-protégé programs may or may not be race-neutral depending on whether they are open to all firms based on objective economic or social data. Mentor-protégé efforts should attempt to make small and disadvantaged firms more competitive, without altering standards for competition or establishing award preferences. Moreover, a nonminority-owned or non-SDB firm, acting as mentor, can benefit by sharing contract work requirements and at the same time receiving credit toward small business subcontracting goals.

Most Cabinet-level agencies model their individual mentor-protégé efforts after a program SBA runs for 8(a) participants, with some eligibility and administrative distinctions. For example, DOEn and DOD open protégé opportunities to other small businesses, including SDBs, women-owned small businesses, HUBZone firms, Historically Black Colleges and Universities, other minority institutions of higher learning, and service-disabled veteran-owned small businesses—providing they self-certify that they meet eligibility requirements.[142]

DOEn's program is race-neutral because it does not pre-select protégés based on minority status. Unlike other agencies' procedures, mentors select protégés based on internal needs.[143] DOEn requires that mentor firms be performing at least one agency contract. Firms may earn award

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[138] U.S. Department of Defense, "Procurement Technical Assistance Centers," updated May 5, 2005, <http://www.dla.mil/db/procurem.htm> (last accessed May 24, 2005).

[139] DOT Interrogatory, p. 1.

[140] DOS Interrogatory, tab 4, p. 3.

[141] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,049.

[142] Acquisition Regulations: Mentor-Protégé Program, 65 Fed. Reg. 21,367 (Apr. 21, 2000) (codified at 48 C.F.R. §§ 919.70, 952.219.70); DOD Interrogatory, p. 8.

[143] DOEn Interrogatory, p. 5.

fees associated with their performance as a mentor, as well as credit toward goals for subcontracts resulting from their agreements.[144]

DOD formed one of the first formal mentor-protégé programs. To provide incentives for prime contractors to subcontract with SDBs, Congress mandated the creation of the DOD Mentor-Protégé Pilot Program in 1990.[145] Full implementation of the program was delayed for a year because Congress did not provide specific funds for reimbursements, and DOD did not adopt an aggressive implementation strategy.[146] Later, in 1992, Congress rescinded $30 million from the pilot program, eliminating cash reimbursement for costs incurred providing assistance to protégé firms, and thus limiting participation to mentors seeking credit for subcontracting goals.[147]

Despite early setbacks, more than a decade later, in fiscal year 2004, the program served 184 participants and reimbursed mentor businesses for costs totaling more than $26 million.[148] Participation as a mentor or protégé cannot exceed three years.[149] DOD also requires that mentor firms have at least one active DOD subcontracting plan.[150] Although DOD emphasizes that the program provides no preferential treatment to participating firms with respect to contract awards, it recognizes the mentor-protégé program as "an effective way of increasing participation of minority-owned firms in federal contracting," as DOJ also concluded after the *Adarand* decision.[151]

Unlike DOD's long-established program, the DOS mentor-protégé program, which took effect in April 2005, is in the developmental stage.[152] DOS will require protégé firms to register in the CCR as small businesses. The agency expects 98 percent of initial mentor-protégé arrangements to be with SDBs and women-owned businesses, and will reach HUBZone and other eligible firms through outreach.[153] DOT's program is also in development. The agency describes the program as race-neutral; however, applicants must be either a DBE or certified through one of SBA's programs with racial components.[154] Some agencies have not used this strategy; DOEd, for example, does not operate a mentor-protégé program.[155]

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[144] Ibid., pp. 2–3.

[145] DOD Interrogatory, p. 8 (citing National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1607).

[146] U.S. General Accounting Office, *Defense Contracting: Interim Report on Mentor-Protégé Program for Small Disadvantaged Firms*, March 1992.

[147] Ibid., p. 3.

[148] DOD Interrogatory, p. 13.

[149] U.S. Department of Defense, "Policy and Procedures for the DOD Pilot Mentor-Protégé Program," DFAR Supplement, 1998, <http://www.acq.osd.mil/sadbu/mentor_protege/> (last accessed June 1, 2005).

[150] DOD Interrogatory, p. 8.

[151] Ibid., pp. 8–9 (citing Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648 (May 9, 1997)).

[152] DOS Interrogatory, p. 3.

[153] Ibid., pp. 6–7.

[154] DOT Interrogatory, p. 10.

[155] *See generally*, DOEd Interrogatory; HUD follow-up interview, pp. 38–39.

Teaming Efforts

Distinct from mentor-protégé programs, teaming emphasizes partnership for business purposes rather than learning. Some teaming efforts involve two or more small businesses working together and consolidating resources to meet contract demands. The OMB Office of Federal Procurement Policy (OFPP) recommends small-business teaming to compete for consolidated contracts as a strategy to counter potential limitations of bundling.[156] Other teaming efforts involve collaborations between large and small businesses in a relationship that is less formal than in the mentor-protégé context, but allows the small business to benefit from the large firm's resources and capabilities nonetheless.

Three agencies identify teaming as a strategy to improve small business competition. DOS encourages teaming efforts between large and small businesses, using both formal and informal methods. The agency pairs mentors and protégés, as discussed earlier, and hosts an annual workshop to introduce small business prospects to large prime contractors.[157] DOEn identifies teaming as a strategy to both increase opportunities for small businesses and expand the skill mix of the team.[158] When contracting opportunities are not suitable for small businesses, DOEd includes teaming evaluation credits in solicitations for large businesses.[159]

Certificates of Competency

SBA identifies its Certificate of Competency (COC) program as a great enhancement to its procurement assistance efforts, particularly for those businesses new to federal contracting.[160] Unlike technical assistance or mentor-protégé programs, SBA's COC program provides a formal procedure for demonstrating, rather than building, capacity. If a small business submits the lowest bid but loses a government contract because a procurement official deems the firm incapable of executing its terms, the company can apply to SBA for a COC. In response, SBA sends financial and industrial specialists to conduct a detailed evaluation of the firm's technical and managerial ability to fulfill the requirements. The specialists also consider past performance, credit ratings, integrity, tenacity, and perseverance in their decision.

A COC Review Committee, which includes legal as well as financial and technical representatives, decides whether a firm demonstrates the capacity to perform the specific contract. A firm's acceptance of a COC obligates it to undertake the contract. SBA makes COC

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[156] Executive Office of the President, Office of Management and Budget, Office of Federal Procurement Policy, *Contract Bundling: A Strategy for Increasing Contracting Opportunities for Small Business*, October 2002, p. 10 (hereafter cited as OFPP, *Contract Bundling*).

[157] DOS Interrogatory, p. 3; DOS follow-up response, p. 5.

[158] U.S. Department of Energy, Acquisition Letter, acquisition regulation no. 2004-03, May 5, 2004, p. 8 (hereafter cited as DOEn, Acquisition Letter).

[159] DOEd Interrogatory, p. 2.

[160] U.S. Small Business Administration, "Certificate of Competency Program," last modified Apr. 18, 2002, <http://www.sba.gov/GC/indexprograms-coc.html> (last accessed May 25, 2005).

decisions case by case for both firms and contracts. A business cannot apply for a COC prior to a procurement officer's assessment that it is ineligible for or incapable of completing a contract.[161]

Strategy 4: Financial Assistance

Agencies engage in a variety of race-neutral financial assistance strategies that overcome specific monetary barriers to government procurement with small and disadvantaged businesses. Financial assistance can be direct or indirect, depending on its goal. For example, several loan programs directly compensate for difficulties firms face in obtaining credit in commercial markets. In contrast, other programs provide indirect support for community development to foster a hospitable business environment.

Small business owners may experience difficulty securing loans because of commercial banks' reluctance to lend less than a minimal amount.[162] The SBA MicroLoan program, which offers entrepreneurs loans of up to $35,000 to grow nascent businesses, addresses this hurdle. Nonprofit community-based lenders administer the SBA-financed loans.

While some firms require microfinance, others require greater influxes of capital. Small Business Investment Companies (SBICs) and the New Markets Venture Capital (NMVC) program help firms in critical stages of growth. Under the SBIC program, management teams with venture capital experience apply to SBA for licensing. The SBIC then reviews small business applications for financing, extends loans and venture capital to firms it selects, and may offer ancillary benefits such as management advice. In exchange, SBA guarantees SBIC-issued debentures and provides favorable interest rates. Under NMVC, SBA does not license venture capital organizations but instead partners with them to meet business needs in specific underserved communities. SBA also guarantees NMVC debentures and provides operational grants to supplement private equity investments.[163]

SBA offers two race-neutral loan programs—504 and 7(a)—that provide capital to firms for general business purposes and procurement-related needs.[164] SBA's 504 loan program provides long-term, fixed-rate financing for small businesses within a community to purchase assets such as land, buildings, and machinery; to make street and infrastructure improvements; and to modernize or upgrade facilities. SBA prohibits businesses from using 504 loan money for working capital, purchasing inventory, consolidating or repaying debt, or refinancing. SBA works with private-sector lenders and Certified Development Companies (CDCs), which are nonprofit corporations dedicated to community economic development, to provide 504 loans. SBA requires small businesses to contribute at least 10 percent of the equity for each loan-sponsored project, and expects private lenders to issue a lien securing up to 50 percent of costs.

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[161] Ibid.

[162] Patrick D. O'Hara, *SBA Loans: A Step-by-Step Guide, Fourth Edition* (New York: John Wiley and Sons, 2002), p. 56.

[163] U.S. Small Business Administration, "Small Business Investment Companies (SBIC) Program," no date, <http://www.sba.gov/INV/overview.html> (last accessed May 24, 2005).

[164] SBA Interrogatory, p. 7.

In turn, SBA offers 100 percent guaranteed debentures to CDCs that issue liens to secure up to 40 percent of the remainder of each project's costs. Project assets and small business owners' personal guaranties act as loan collateral.[165]

SBA's 7(a) loan program guarantees portions of loans to small businesses that would otherwise have difficulty finding financing. Businesses may use 7(a) loans for a broader variety of needs than 504 financing, such as for refinancing debt or purchasing existing businesses. Though 7(a) does not require 8(a) or SDB certification, it does require that firm owners lack "excessive" personal and business financial resources. It also requires participating banks to apply for SBA approval to administer 7(a) loans. Depending on the business type and loan offered, SBA caps its guaranty rate at 50 to 75 percent and the maximum eligible loan at $2 million, leaving SBA with a maximum exposure amount of $1.5 million. SBA's 7(a) loans enable companies to purchase fixed assets and obtain working capital for limited time periods. [166]

In addition to SBA's loan programs, regulations authorize seven agencies to grant contractors loan guarantees for operating costs related to national defense production.[167] Under the regulations, Federal Reserve Banks work with agencies to provide guarantees of up to 100 percent on loans made by independent financial institutions. Before applying to an agency for a guarantee, businesses must locate a private sector lender willing to extend a loan conditional on government backing.[168] Defense-production loan guarantees apply to both prime and subcontracting firms but do not expressly target small businesses.[169]

While the foregoing programs directly target challenges facing small businesses, their influence on small and disadvantaged firms' federal procurement opportunities is indirect. Bonding guarantees and short-term working capital programs more directly overcome procurement barriers.

Advance Payments/Short-Term Lending Programs

Advance payments facilitate contract execution by enabling businesses to purchase equipment or supplies, or pay subcontractors.[170] These payments aid firms with too few resources to independently finance the start-up costs of a government project, those that expect large cash flow fluctuations through a contract's duration, or companies facing other barriers. Acquisition

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[165] U.S. Small Business Administration, "Certified Development Company (504) Loan Program," no date, <http://www.sba.gov/financing/sbaloan/cdc504.html> (last accessed Mar. 15, 2005).

[166] U.S. Small Business Administration, "Basic 7(a) Loan Program," no date, <http://www.sba.gov/financing/sbaloan/7a.html> (last accessed Feb. 25, 2005).

[167] *See* Loan Guarantees for Defense Production, 48 C.F.R. 32.302 (2004). The seven agencies are the Departments of Defense, Energy, Commerce, the Interior, and Agriculture; and the General Services and National Aeronautics and Space Administrations.

[168] 48 C.F.R. § 32.303.

[169] *Id.* § 32.301.

[170] *See generally id.* § 32.2; Advance Payments for Non-Commercial Items, 48 C.F.R. § 32.4 (2004).

regulations advise agencies to use advance payments sparingly, but recognize that businesses may seek such assistance for many reasons:

> …[A]dvance payment is the least preferred method of contract financing and generally they should not be authorized if other types of financing are reasonably available to the contractor in adequate amounts. Loans and credit at excessive interest rates or other exorbitant charges, or loans from other Government agencies, are not considered reasonably available financing.[171]

Agencies did not report using advance payments, despite their potential to help firms, as a race-neutral approach to increase contracting with SDBs.

Small business cash flow problems stemming from late payment on the part of agencies or prime contractors underlie congressional and SBA efforts to promote more timely payments. The Prompt Payment Act (PPA) of 1988 prescribes interest penalties for federal agencies and prime contractors that fail to pay vendors or subcontractors within 30 days of receipt of goods or services.[172] Along with registration in the CCR database, PPA enables faster compensation for work completed by establishing an electronic payment protocol for federal agencies. PPA also allows procurement officials to pay small businesses more rapidly than other types of firms, and to pay contractors before goods arrive when the product has been shipped.[173] DOS, for example, promotes an "Accelerated Pay Program" to expedite payments to existing small-business contractors beyond standard commercial compensation practice.[174]

Many procurement officers and government suppliers view short-term lending programs (STLPs) as feasible alternatives to advance payments. Under STLPs, a small business can use its accounts receivable as security for a loan to pay for supplies and labor associated with a project, effectively turning the contract's proceeds into collateral. Private sector lenders often administer these programs in coordination with agency offices. For example, DOT works with six specific banks to offer prime interest rate loans of up to $750,000 in its STLP; DOT's OSDBU and Minority Resource Centers sponsor the program. With the approval of the lending bank and procurement officer, a small business can renew an STLP loan repeatedly over the course of several years. [175]

Bonding Guarantees

Firms' inability to secure bonding at reasonable costs represents another barrier to securing federal contracts. Federal construction contracts exceeding $100,000 (and many other federal

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[171] 48 C.F.R. § 32.402(b).

[172] Prompt Payment Act of 1998, Pub. L. No. 100-496, 102 Stat. 2455 (codified as amended at 31 U.S.C. § 3901 et seq); Prompt Payment, 48 C.F.R. § 32.9.

[173] Payment Without Evidence that Supplies Have Been Received (Fast Payment), 5 C.F.R. § 1315.6 (2004).

[174] DOS Interrogatory, p. 2.

[175] DOT Interrogatory, p. 6; *see also*, U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization, "Capital Access– Short Term Lending Program," no date, <http://osdbuweb.dot.gov/mrc_services/shortTermLendingProgram.cfm> (last accessed May 24, 2005).

contracts over $25,000) require vendors to secure payment and performance bonds.[176] Payment bonds guarantee that a vendor will pay its labor, suppliers, and subcontractors. Performance bonds guarantee that a business will execute the terms of its contract fully. Some procurement scenarios and officials require other ancillary bonds, such as bid bonds to require a vendor to enter a contract if government grants it the award.[177]

According to the Surety Association of America, bonding differs from traditional insurance in that it acts more as a line of credit than as a means of spreading risk across entities. While a surety bond protects the interests of the procurer by ensuring project completion and minimizing the risk of loss, the contractor covered by the bond posts its own collateral and is responsible for compensating a surety company for defaulting on payment obligations.[178] As with many forms of credit, the financial prospects of a firm, its management and structure, and its experience greatly influence a bonder's decision to offer surety.[179]

Surety bond companies have vast discretion when deciding to extend coverage, and some allege that bonding choices are potentially arbitrary and even racially discriminatory.[180] In addition to factors discussed above, surety companies consider a firm's "reputation," its owner's "personal history," and other characteristics when determining whether to extend bond coverage. A 1994 GAO survey of small business owners found that surety bond firms were more likely to deny applications from minority-owned companies, state "requirements had changed" or to fail to justify denial of surety, and require extra documentation of these business owners.[181] Surety firms were also more likely to require higher collateral from minority-owned companies, and to demand "annual service fees" of these businesses.[182] Some have suggested that federal antidiscrimination laws do not apply to surety bond providers in several states.[183] DOS suggests that these problems pale in comparison to surety companies' reluctance to provide overseas bonding, limiting foreign contract opportunities for small and disadvantaged business.[184]

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[176] Though bonds normally cover the full cost of an award, regulations allow less than 100 percent bonding for some non-construction. *See* Bid Guarantee, 48 C.F.R. § 52.228-16 (2004).

[177] 48 C.F.R. § 28.101-2 (2004).

[178] The Surety Association of America, "Surety," no date, <http://www.surety.org/content.cfm?lid=70&catid=2> (last accessed May 24, 2005).

[179] María Enchautegui, Michael Fix, Pamela Loprest, Sarah von der Lippe, and Douglas Wissoker, "Do Minority-Owned Businesses Get a Fair Share of Government Contracts?" (Washington, D.C.: The Urban Institute, 1997), pp. 34–40.

[180] *See* bonding discussion in DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,060.

[181] U.S. General Accounting Office, *Small Business: Responses to Survey on Construction Firms' Access to Surety Bonds*, June 1995. These results do not control for size or age of firm nor for other potentially relevant factors in the decision to grant bonding.

[182] Ibid.

[183] Margaret Simms, statement before the U.S. Commission on Civil Rights, briefing on "Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs," Sept. 5, 1996, transcript, p. 83; Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, *Barriers Facing Minority- and Women-Owned Businesses in Pennsylvania*, August 2002, p. 19.

[184] DOS Interrogatory, p. 3.

Congress and SBA have experimented with several programs to mitigate difficulties small and disadvantaged businesses face in obtaining surety bonding. A pilot program in the early 1990s sought to grant exemptions from bonds for certain classes of businesses. Despite DOD's attempt to offer 30 of these exemptions, and several civilian agencies' participation, only 13 contracts (nine awarded by DOD) used bond waivers from fiscal years 1989 to 1991.[185] DOJ's discussion of post-*Adarand* race-neutral approaches to increasing procurement with small and disadvantaged businesses mentions another initiative that apparently failed to garner Congressional support: a DOD proposal to eliminate the cost of obtaining surety costs from bid evaluations.[186] However, in its response to Commission inquiries about race-neutral bonding assistance, DOD stated that it has no record of such proposal and expressly asserted that it does not subsidize or waive surety bonding requirements.[187]

Unlike other bonding initiatives, surety bond guarantee programs have been more successful in extending race-neutral assistance to businesses seeking federal contracts. These programs capitalize on existing private sector bonding infrastructure by using non-government firms to issue bonds to businesses that would otherwise have difficulty obtaining coverage at a reasonable price. In turn, government agencies guarantee a portion of these bonds, generally up to 80 percent. DOT's program, for example, guarantees up to 80 percent of losses on contracts less than $1 million, while SBA's bonding guarantee program covers up to 80 percent on bonds less than $2 million and 90 percent of bonds less than $100,000.[188] Guarantee programs shift large portions of the risk of bonding to government, which enables surety providers to extend coverage to inexperienced, small, or otherwise "risky" firms, knowing that they will not lose the full cost of a bond if a company defaults on its contract obligations.

Surety bond guarantee programs often extend technical assistance to companies to prepare applications or documentation. SBA provides forms and reviews bond guarantee applications directly.[189] DOT, however, recommends that firms seek application assistance from other government resources such as the Commerce Department's Minority Business Development Centers and Procurement Technical Assistance Centers.[190]

Although some small and disadvantaged companies may be able to obtain surety bonding without government guarantees or technical assistance, they may find the costs of standard bonds (for service fees, collateral, bond insurance, or other requirements) prohibitive. In some circumstances, federal acquisition guidelines allow companies to instead seek irrevocable letters of credit (ILCs) from federally insured investment-grade banks as collateral or as a substitute for

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[185] U.S. General Accounting Office, *Small Business: Use of the Surety Bond Waiver Has Been Limited*, July 1992.

[186] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, appendix, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey," p. 26,049.

[187] DOD Interrogatory, p. 3; DOD follow-up response, p. 7.

[188] DOT Interrogatory p. 6; U.S. Small Business Administration, "Financing Your Business: General Information," no date, <http://www.sba.gov/financing/bonds/osgprogram.html> (last accessed May 24, 2005).

[189] *See* U.S. Small Business Administration, Office of Surety Guarantees, <http://www.sba.gov/osg/> (last accessed May 24, 2005).

[190] U.S. Department of Transportation, "Capital Access–Bonding Assistance Program," no date, <http://osdbuweb.dot.gov/mrc_services/bondingAssistance.cfm> (last accessed May 24, 2005).

surety bonds.[191] An ILC allows the government to draw credit from the issuing bank against a set dollar amount if a company fails to fulfill its contract obligations. Presumably because ILCs involve less discretion and potential cost savings, DOJ identifies ILCs as potential race-neutral means of expanding procurement opportunities.[192]

In 2004, the District of Columbia delegate to the U.S. House of Representatives proposed legislation banning discrimination in bond provision and establishing penalties for companies that discriminate. The statement accompanying the legislation cited GAO's findings of disparities between minority- and nonminority-owned businesses in their ability to secure bonding and the costs of doing so.[193] The proposal was nearly identical to one offered but unpassed in 1993 that boasted the support of the National Association of Surety Bond Producers, and like its predecessor, the legislation did not go beyond the committee level.[194]

Strategy 5: Expanding Opportunities

Contract Unbundling

The Small Business Reauthorization Act of 1997 requires federal agencies to structure contracting requirements to facilitate small business competition and to eliminate obstacles to their participation. Bundling—the consolidation of multiple contracts into a single large one—counters this effort as it can have an exclusionary effect on small businesses. The 1997 act defines bundling as:

> [C]onsolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small-business concern due to (A) the diversity, size, or specialized nature of the elements of the performance specified; (B) the aggregate dollar value of the anticipated award; (C) the geographical dispersion of the contract performance sites; or (D) any combination of the factors described in subparagraphs (A),(B), and (C).[195]

Contract bundling gained prominence in the 1990s, a byproduct of efforts to streamline the government acquisition process.[196] While in some ways more efficient, bundling has had a negative effect on small businesses, which often do not have the means to compete for large projects. According to SBA estimates, for every $100 awarded on a bundled contract, small businesses lose $33.[197] Moreover, even though overall dollars spent on small business contracts

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[191] Sureties and Other Security for Bonds, 48 C.F.R. § 28.204-3 (2004).

[192] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, appendix, p. 26,049.

[193] *See* 150 CONG. REC. E952 (daily ed. May 21, 2004) (statement of Rep. Norton).

[194] La Noue and Sullivan, "Race Neutral Programs," p. 348.

[195] Small Business Reauthorization Act of 1997, 15 U.S.C. § 632(o) (2000).

[196] U.S. Small Business Administration, "SBA Announces Accomplishment in Effort to Unbundle Contracts," press release, Oct. 21, 2003, <http://www.sba.gov/news/03-76.pdf> (last accessed May 24, 2005).

[197] OFPP, *Contract Bundling*, p. 3.

remained constant over the years when bundling was prominent (between 1990 and 2001), new contract awards and the number of small businesses receiving federal contracts both declined sharply.[198]

Data estimates suggest that although bundled contracts comprise a small proportion of all procurements, they represent a large share of expenditures: between 1990 and 2001, bundled contracts represented 8.5 percent of all active contracts, but 44.5 percent of all prime contract dollars.[199] The larger the contract value, the more likely it is bundled, and the less likely small businesses can successfully compete. Analysts estimate that during the same 10-year period, SDBs and other small businesses combined accounted for only 7.4 percent of all bundled contracts and 13.3 percent of all bundled contract dollars. Ultimately, a bundled contract is 74 percent more likely to go to a large firm than a small one.[200] Small businesses competing for defense contracts are particularly vulnerable to bundling. DOD accounted for 65.6 percent of bundled contracts active between 1992 and 2001, representing 80.8 percent of bundled dollars.[201]

To counteract these outcomes and concerns expressed by small business advocates, the Small Business Reauthorization Act of 1997 required SBA to (1) review all proposed acquisition consolidations that small firms were providing at the time, but that would unlikely be awarded to them in the future; and (2) recommend alternate procurement methods.[202] Subsequent SBA regulations required agencies that intend to bundle contracts to provide justification. By definition, consolidated contracts suitable for *small businesses* are not bundled.[203]

The George W. Bush administration built upon these restrictions, making contract unbundling a priority in its Small Business Agenda. In response, OFPP developed a strategy for eliminating unnecessary contract bundling and mitigating the effects of necessary bundling.[204] OFPP also mandated that agencies conduct annual reviews and document efforts to avoid unjustified bundling.[205] Federal agencies have subsequently revised regulations governing the use of bundled contracts.

In October 2003, SBA, among 23 other agencies, issued a final rule on bundling to revise the definition to include task and delivery orders under governmentwide or multi-agency

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[198] Ibid., p. 4.

[199] Eagle Eye Publishers, Inc., *The Impact of Contract Bundling on Small Businesses, FY 1992–2001*, report prepared for U.S. Small Business Administration, Office of Advocacy, October 2002, p. 17.

[200] Ibid., pp. 19–20, 24.

[201] Ibid., p. 25.

[202] Small Business Reauthorization Act of 1997, § 413, 15 U.S.C. § 644 (2000); *see also* U.S. General Accounting Office, *Small Businesses: Limited Information Available on Contract Bundling's Extent and Effect*, March 2000, p. 7.

[203] DOEn, Acquisition Letter, p. 11. *See also* 13 C.F.R. § 125.2(b)(2) (2004).

[204] Angela B. Styles, administrator, Executive Office of the President, Office of Management and Budget, Office of Federal Procurement Policy, letter to President George W. Bush, Oct. 29, 2002.

[205] DOT Interrogatory, p. 8.

contracts.[206] The new regulations also require agencies to coordinate procurement activities with small business specialists, revise the threshold and documentation required for substantial bundling, and mandate that small business specialists notify the agency's OSDBU when strategies include unnecessary or unjustified bundling.[207] OSDBUs must identify proposed solicitations that involve significant bundling requirements and work with SBA and contracting officers on strategies to increase small business participation as contractors and subcontractors.[208]

Regulations require agencies to conduct market research to determine and justify the necessity of bundling. However, most agencies are not doing this; instead, they rely on internal reviews of large contracts for potential breakout opportunities to avoid bundling.[209] Bundling can be justifiable if it results in a substantial benefit, such as cost savings, improved quality, or quicker acquisition cycles.[210] DOD developed a benefit analysis framework, which includes market research, identification of anticipated benefits, notification responsibilities, and documentation of results.[211]

Where bundling is necessary and justified, agencies must take actions to mitigate its effects by increasing small business subcontracting opportunities.[212] Federal regulations require firms that receive contracts of $500,000 for products and services or $1 million for construction to prepare subcontracting plans.[213] Amended regulations require that these plans, and compliance with subcontracting requirements, serve as evaluation factors for future awards.[214] In other words, by enforcing subcontracting requirements, agencies can mitigate the impact of bundling and ensure open avenues for small businesses.

Asked about their efforts to unbundle contracts, agencies generally indicated that they try to determine whether large contracts can be apportioned to make them more accessible for small businesses. However, few of the agencies inaugurated specific unbundling policies or procedures.[215] Moreover, discrepancy exists in how agencies define and identify bundled contracts. For instance, DOEn stated that it has no bundled contracts that fit the administration's criteria. However, it is valuating large contracts to "identify breakout opportunities for small businesses,"[216] a task that may prove difficult given the large and complex nature of energy

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[206] Small Business Government Contracting Programs, 68 Fed. Reg. 60,006 (Oct. 20, 2003) (codified at 13 C.F.R. § 125) (hereafter cited as Small Business Contracting Programs).

[207] *See* 13 C.F.R. § 125.2 (2004).

[208] Small Business Contracting Programs, pp. 60,007–08.

[209] *See, e.g.,* DOEn Interrogatory, p. 3; DOD follow-up response, pp. 6–7; DOT Interrogatory, pp. 8–9.

[210] OFPP, *Contract Bundling*, p. 2.

[211] U.S. Department of Defense, Office of Small and Disadvantaged Business Utilization, *Benefit Analysis Guidebook: A Reference to Assist Department of Defense Acquisition Strategy Teams in Performing a Benefit Analysis Before Bundling Contract Requirements*, 2002 (hereafter cited as DOD, *Benefit Analysis Guidebook*).

[212] OFPP, *Contract Bundling*, p. 9.

[213] *See* 48 C.F.R. § 19.702 (2004).

[214] *See* 13 C.F.R. § 125.3(g) (2005).

[215] *See, e.g.,* DOEn Interrogatory, p. 3; DOD follow-up response, pp. 6–7; DOT Interrogatory, pp. 8–9.

[216] DOEn Interrogatory, p. 3.

contracts. The agency noted that these efforts could have a measurable effect on the number of small and disadvantaged businesses receiving contracts, although it has not assessed outcomes. The nature and structure of many DOEn contracts, such as those for management and operation of DOEn laboratories and facilities, often preclude small businesses from participating, resulting in low goals and participation rates, thus making it imperative that the agency take proactive steps to unbundle contracts.[217] In 2004, the agency created an "Advanced Planning Acquisition Team" (APAT) to act as the focal point for reviewing bundled acquisitions. The APAT, which is comprised of the agency's Office of Procurement and Assistance Management, its OSDBU, an SBA representative, and a representative of the DOEn element seeking an acquisition, reviews all proposed contracts over $3 million to prevent unnecessary bundling and to maximize small business procurement.[218]

DOD procures more than 80 percent of total bundled federal contract dollars. In 2002, the Under Secretary of Defense issued a statement requiring all service acquisition directors to avoid unnecessary and unjustified bundling and to make efforts to mitigate the negative effects on small businesses.[219] In addition, as noted above, DOD developed the *Benefit Analysis Guidebook,* a reference for acquisition specialists to determine whether contract bundling is justifiable and necessary.[220] The guide includes best practices for avoiding bundling.

Notwithstanding these initiatives, the agency stated in its interrogatory response that, to date, it has not unbundled contracts to expand small business prime and subcontracting opportunities, citing the relative newness of the regulatory definition of bundling.[221] The agency cites as normal practice, however, review of all contracts over $100,000 to determine whether they can be broken into smaller contracts. In some cases, contracts have been broken apart, and in others bundled requirements have been set-aside for small businesses.[222] In still other instances, small businesses have formed teaming arrangements to compete for bundled contracts.

On January 12, 2005, DOS issued its first annual assessment of contract bundling. The agency OSDBU reviewed all acquisitions exceeding $100,000 (more than 100 contract actions totaling $2.4 billion) and found that none were bundled.[223] The assessment report noted that in several instances, contracts previously awarded to large firms after open competition are now reserved

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[217] *See* U.S. Department of Energy, Office of Economic Impact and Diversity, Office of Small and Disadvantaged Business Utilization, "Report to the Secretary of Energy on the U.S. Department of Energy's Small Business Programs, Fiscal Year 2002 and 2003," Mar. 31, 2004, pp. 4–6.

[218] DOEn follow-up response, attachment C, Acquisition Letter 2004-03, May 5, 2004, pp. 10–11.

[219] E.C. Aldridge, Jr., under secretary of defense acquisition, technology, and logistics, U.S. Department of Defense, memorandum for service acquisition executives, directors, defense agencies, re: small business participation in consolidated contracts, Jan. 17, 2002.

[220] DOD, *Benefit Analysis Guidebook*, p. 3-1.

[221] DOD Interrogatory, p. 4; DOD follow-up response, p. 6. Contracts that fall under the definition of "bundled" are those solicited on or after Dec. 27, 1999.

[222] DOD follow-up response, pp. 6–7.

[223] Durie White, operations director, Office of Small and Disadvantaged Business Utilization, U.S. Department of State, letter to Hector Barreto, administrator, U.S. Small Business Administration, re: contract bundling, Jan. 12, 2005 (hereafter cited as White letter).

for small businesses or 8(a) set-asides upon expiration of existing contracts.[224] The department also noted that small businesses have had success using an "electronic reverse auction process." The reverse auction is characterized as the opposite of bundling because it involves small purchase contracts and as such favors small business competition.[225]

In a reverse auction, buyers (including federal agencies) interested in purchasing commercial items solicit and collect bids on the Internet; sellers submit real-time bids, in decreasing increments, on the sales contract.[226] In FY 2004, small businesses won 76 percent of DOS auction dollars, totaling $27 million.[227] Overall, of the 10,000 transactions completed using FedBid, the government's on-line procurement auction provider, more than 68 percent of the $200 million in purchases were awarded to small businesses.[228] FedBid began as a pilot program with DOS in 2001. Other agencies, including DOD, DOEn, and DOT, now participate as well.[229]

DOT established a policy that requires procurement staff to review proposed acquisitions above $2 million for unnecessary bundling. The agency also relies on prime contractor compliance with subcontracting plans to mitigate the potential effects of bundling.[230] By parceling out portions of large, consolidated contracts to small and disadvantaged businesses, prime contractors open opportunities to firms that otherwise might not be able to compete. Each operating administration must follow agency procedures and regulations. Although DOT indicates that, after implementation of these policies, the number of contracts awarded to small and disadvantaged businesses increased, it does not offer concrete evidence that unbundling is responsible for the change.[231]

Similarly, HUD cites its successful small business award record as evidence of its commitment to unbundling.[232] In a small business policy statement, the agency identifies specific procurement strategies, such as modular contracting and a "cascading" approach of bid solicitations, as means to avoid unjustified bundling.[233] Cascades invoke tiers of restricted competition to prioritize certain types of small businesses; bidding opens to all firms only if too few targeted enterprises submit responses to a contract solicitation. HUD developed its system in response to difficulties small businesses suffered accessing large and bundled contracts, and the agency allows procurement officers substantial discretion in choosing when to invoke cascades and which

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[224] Ibid., p. 1.

[225] DOS follow-up response, pp. 4–5.

[226] FedBid, "Frequently Asked Questions," no date, <http://www.fedbid.com> (last accessed Apr. 21,2005). FedBid is a third-party service provider specializing in online reverse auction procurement services for the federal government.

[227] White letter, p. 2.

[228] FedBid, "About FedBid," no date, <http://www.fedbid.com> (last accessed Apr. 21, 2005).

[229] Ibid.

[230] DOT Interrogatory, p. 8.

[231] Ibid., p. 9.

[232] HUD Interrogatory, p. 3.

[233] HUD, "Small Business Policy," p. 4.

businesses may bid in each tier.[234] The range of offers received determines whether cascades result in outcomes similar to unbundling. HUD reviews procurement proposals and pre-contract awards to identify bundled contracts.[235]

Rather than unbundling contracts per se, in 2001, DOEd began using Multiple-Award Task-Order (MATO) contracts to streamline acquisitions. Contractors compete for individual tasks under MATO contracts, such as research and policy analysis, program assessments, and data collection and analysis. Thus, businesses compete for a portion of a larger contract. The number of small businesses participating in MATO contracts increased from 19 to 47 (of a total of 104 businesses) between 2001 and 2004.[236]

Agencies acknowledge unbundling as a necessary administrative strategy, but have difficulty identifying bundled contracts. In 2004, two years after the OMB report on bundling and six months after agencies issued regulations, GAO examined the impact of strategies to mitigate the effects on small businesses.[237] GAO found that fewer contracts were bundled than suspected due to faulty reporting and coding. GAO also noted that the revised regulations do not establish guidelines to measure the extent to which bundling occurs or impacts small businesses. Thus, GAO concluded that it will be difficult to gauge efforts to identify and eliminate bundling and subsequently increase small business opportunities.[238] Moreover, it is difficult to measure how many small disadvantaged or minority-owned firms have benefited from contract unbundling.

The HUBZone Program

In addition to opening individual contracts to small and disadvantaged businesses, all agencies participate, to varying degrees, in an effort to create contract opportunities in economically distressed communities. Title VI of the Small Business Reauthorization Act of 1997 created the HUBZone Empowerment Contracting Program (the "HUBZone Program") to encourage federal agencies to contract with small businesses in historically underutilized business (HUB) zones.[239] The HUBZone program is race-neutral; eligibility for benefits is based on geographic location in a low-income area and business size, not on race or ethnicity. Procurement officers can grant evaluation preferences to HUBZone enterprises or restrict competition by setting aside contracts when there is a reasonable expectation two or more qualified HUBZone firms will bid. The program is not directed toward developing individual business owners or their firms, but to foster community development. It does so through requirements that qualified small businesses

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[234] HUD Affected Agency Review, pp. 1–2.

[235] Ibid., p. 2.

[236] DOEd Interrogatory, p. 2.

[237] *See* U.S. Government Accountability Office, *Contract Management: Impact of Strategy to Mitigate Effects of Contract Bundling on Small Businesses I*s *Uncertain*, May 2004.

[238] Ibid., p. 3.

[239] Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592 (codified as amended at 15 U.S.C. §§ 631–657 (2000)); HUBZone Empowerment Contracting Program Agency, 63 Fed. Reg. 31,896 (June 11, 1998) (codified at 13 C.F.R. pts. 121, 125, and 126) (hereafter cited as SBA, HUBZone Empowerment Contracting Program).

maintain a principal office in the HUBZone and employ staff who live in a designated distressed area.[240]

A HUBZone is a non-metropolitan or metropolitan area characterized by high unemployment and low income, or a federally recognized Native American reservation.[241] To be eligible for the program, a business must be located in a HUBZone; owned and operated by a U.S. citizen, an Indian tribal government, Alaska Native Corporation, or community development corporation; small relative to industry size standards; and/or staffed with 35 percent of its employees residing in the HUBZone. Congress determined that 3 percent of federal contracts should go to such businesses, though neither legislation nor congressional testimony document a rationale for this target.[242]

SBA certifies firms for the HUBZone program and places them on a list that federal agencies use in procurement.[243] A certified firm remains on the list to obtain federal contracts for one year, and can apply for recertification every year thereafter.[244] Certified businesses in the program qualify for certain set-asides and preferences in bid evaluation. Regulations also permit non-competitive awards when only one qualified HUBZone enterprise submits an offer. Prime contractors receive credit towards subcontracting goals for using HUBZone businesses.[245]

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[240] SBA, HUBZone Empowerment Contracting Program, p. 31,900. *Also see* Small Business Administration, "HUBZone: 'Historically Underutilized Business Zone,'" Aug. 3, 2002, <http://www.sba.gov/hubzone/> (last accessed Feb. 9, 2005).

[241] The economic criteria for a HUBZone are a median household income of less than 80 percent of the state median household income or an unemployment rate of not less than 14 percent of the statewide average. U.S. Small Business Administration, "Who We Are," June 24, 2004, <https://eweb1.sba.gov/hubzone/internet/general/whoweare.cfm#3> (last accessed June 1, 2005).

[242] Ibid.

[243] SBA maintains a list of qualified HUBZone firms on its Web site. It now includes more than 4,700 certified small business concerns expressing interest in working with the federal government as HUBZone contractors. One can identify such contractors through a simple state-by-state listing or a comprehensive search capability. *See* U.S. Small Business Administration, "Frequently Asked Questions," no date, p. 9, <https://eweb1.sba.gov/hubzone/internet/general/faqs.cfm> (last accessed Feb. 9, 2005) (hereafter cited as SBA, "HUBZone FAQs"); for state-by-state searches, *see* U.S. Small Business Administration, "Certified HUBZone Concerns – Search," no date, <https://eweb1.sba.gov/hubzone/internet/general/approved-firms.cfm> (last accessed June 2, 2005); for complex searching, *see* U.S. Small Business Administration, "HUBZone Contractor Gateway Search," Apr. 17, 2005, <http://dsbs.sba.gov/dsbs/dsp_searchhubzone.cfm> (last accessed June 2, 2005). Before 2004, SBA also maintained an on-line database, known as PRO-*Net*, containing profiles of more than 200,000 small businesses with varying eligibility for SBA programs. SBA updated the PRO-*Net* profile to reflect HUBZone certification. *See* U.S. General Accounting Office, *Small Business: HUBZone Program Suffers from Reporting and Implementation Difficulties*, October 2001, p.3 (hereafter cited as GAO, *Small Business: HUBZone Program Suffers*). On Jan. 1, 2004, SBA and other agencies jointly integrated PRO-*Net* into DOD's contractor database—the "CCR" at <http://www.ccr.gov>— providing all previously available capabilities. *See* U.S. Small Business Administration, "SBA, OMB, GSA and DOD Work Together to Integrate Pro-*Net* and CCR Database and Simplify Contracting Process for Small Businesses," Aug. 13, 2004, <http://pro-net.sba.gov/> (last accessed June 1, 2005); and DOD, "CCR." Thus, today, federal contracting officers use both the HUBZone list and CCR for procurements.

[244] SBA, HUBZone Empowerment Contracting Program, p. 31,900.

[245] SBA, "HUBZone FAQs."

The government implemented the HUBZone program gradually. With the ultimate goal of awarding 3 percent of federal prime contracts to certified HUBZone firms, the targets for fiscal years 1999 through 2002 were 1 percent, 1.5 percent, 2 percent, and 2.5 percent, respectively. Also, the 1997 statute designated 10 agencies to implement the HUBZone program through the end of FY 2000; another act added three more in November 1999.[246] Since FY 2001, the program has applied to all major federal agencies.[247]

Program implementation was difficult. First, government officials had difficulty contracting with HUBZone firms because SBA had certified a relatively small number of eligible enterprises (290) by the start of FY 2000. [248] Currently, SBA processes many program applications denying relatively few HUBZone status. The agency received increasing numbers of HUBZone applications: from more than 1,500 in FY 2000 to near 2,700 in FY 2002, then decreasing thereafter, ending at about 2,300 in FY 2004 (see figure 2.1). SBA officials claim the agency processed all the applications within a 30-day regulatory timeframe and withdrew only non-responsive firms. Withdrawals were fairly common in recent years (see figure 2.1). The number of denials was less than 100 in FYs 2000 to 2002, increasing to between 200 and 400 in FYs 2003 and 2004 (see figure 2.1). SBA denied applications of firms that did not meet eligibility requirements, such as for HUBZone location and small size.[249]

A second reason procurement officers had difficulty contracting with HUBZone firms when the program started was because they could not locate enterprises providing the needed goods and services based on overly general statements of capabilities.[250] Since then some agencies have offered firms technical assistance on writing specific capability statements.[251]

In other startup difficulties in 2000, agencies did not report HUBZone achievements accurately. Guidance on how to submit data was insufficient and resulted in overcounting some achievements (particularly firms that were certified during the term of the contract) and undercounting others. Because of the above and other issues (for example, program priorities and procedures appeared to favor serving small businesses through the 8(a) program rather than HUBZone), agencies failed to meet goals.[252]

FIGURE 2.1
Small Business Administration's Certifications of HUBZone Firms, Fiscal Years 2000 to 2004

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[246] *See* 15 U.S.C. § 657(a) (2000).

[247] GAO, *Small Business: HUBZone Program Suffers*, p. 3.

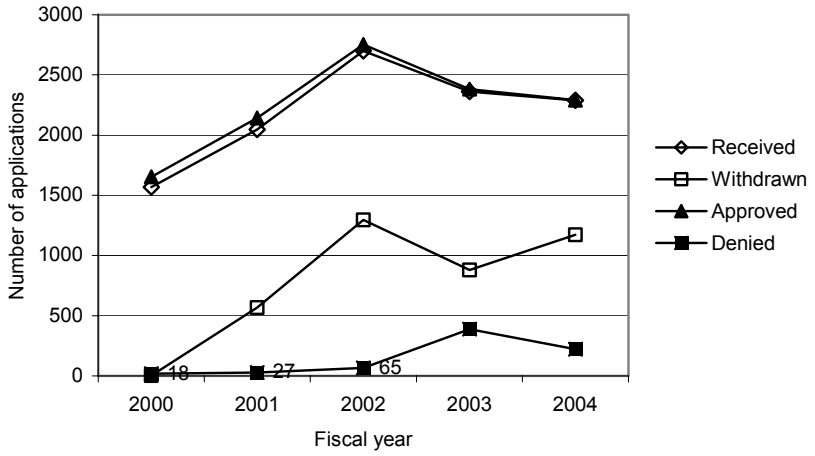
[248] Ibid., pp. 4–8.

[249] SBA follow-up response, pp. 2–3.

[250] GAO, *Small Business: HUBZone Program Suffers*, pp. 4–8.

[251] *See, e.g.,* HUD, *OSDBU Small Business Outreach Session,* p. 29.

[252] GAO, *Small Business: HUBZone Program Suffers*, pp. 4–8. In 2001, SBA clarified that contracting offices should show no preference for the 8(a) program over HUBZone when firms qualify under both. Fred C. Armendariz, associate deputy administrator for government contracting and business development, U.S. Small Business Administration, memorandum to district directors, deputy district directors, area directors, procurement center representatives, assistant district directors for business development, and business opportunity specialists, re: clarification of the interaction between HUBZone and 8(a) programs, Oct. 10, 2001.



Caption: The number of HUBZone applications SBA received increased in fiscal years 2000 to 2002, from more than 1,500 to 2,700, then fell to about 2,300. The number of HUBZone firms' applications denied was small until fiscal year 2003 when SBA rejected nearly 400. The agency rejected more than 200 in fiscal year 2004.

Note: The number approved exceeds the number received because of backlogs in processing applications.

Source: U.S. Small Business Administration, Follow-up Interrogatory Reponse, May 6, 2005, p. 3.

Data on the use of HUBZone mechanisms reflect these start-up difficulties. The 10 federal agencies initiating the program awarded only 52 HUBZone contracts during FY 2000.[253] By FY 2003, governmentwide federal procurement data showed 22,433 actions involving HUBZones amounting to $3.4 billion, just 1.2 percent of federal procurement.[254]

[253] GAO, *Small Business: HUBZone Program Suffers*, p. 8.

[254] U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report,* 2003, p. ix, <http://www.fpdc.gov/fpdc/fpr2003.htm> (last accessed Sept. 21, 2004).

TABLE 2.1
Selected Federal Agencies' Contracting Goals and Achievements for Businesses Located in HUBZones, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business Administration										
Prime	--	0.0%	2.0%	0.2%	2.5%	0.0%	3.0%	1.0%	3.0%	3.0%
Subcontracting	--	--	--	--	2.5%	--	3.0%	--	--	--
Department of Defense										
Prime	1.5%	0.4%	2.0%	0.7%	2.5%	0.5%	3.0%	1.2%	3.0%	3.0%
Subcontracting	0.0%	--	0.0%	0.5%	2.5%	0.7%	3.0%	1.0%	3.0%	3.0%
Department of Transportation										
Prime	1.5%	0.0%	2.0%	3.1%	2.5%	2.6%	3.0%	2.5%	3.0%	3.0%
Subcontracting	1.5%	--	1.5%	0.0%	2.5%	0.2%	3.0%	0.6%	3.4%	3.4%
Department of Energy										
Prime	1.5%	0.1%	2.0%	0.1%	2.5%	0.0%	3.0%	0.2%	1.5%	1.5%
Subcontracting	1.5%	--	1.5%	0.7%	2.5%	1.2%	3.0%	1.7%	3.0%	3.0%
Department of Housing and Urban Development										
Prime	1.5%	0.1%	2.0%	0.3%	2.5%	1.5%	3.0%	5.6%	3.0%	3.0%
Subcontracting	0.5%	--	0.5%	0.1%	2.5%	0.9%	3.0%	2.0%	3.0%	3.0%
Department of Education										
Prime	0.0%	0.0%	2.0%	0.1%	2.5%	0.1%	3.0%	1.0%	3.0%	3.0%
Subcontracting	1.5%	--	1.5%	0.0%	2.5%	0.8%	3.0%	0.3%	3.0%	3.0%
Department of State										
Prime	0.0%	0.1%	2.0%	0.4%	2.5%	2.2%[b]	3.0%	1.5%	3.0%	3.0%
Subcontracting	1.5%	--	1.5%	0.3%	2.5%	0.1%	3.0%	0.9%	3.0%	3.0%

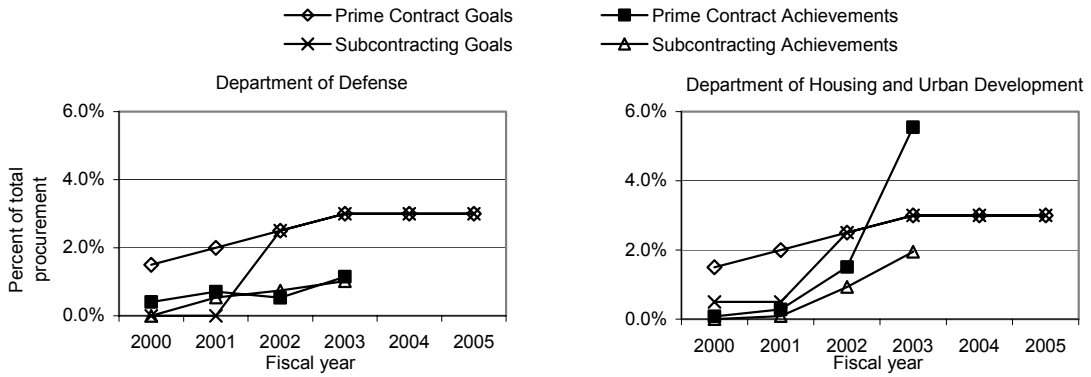
Caption: Goals were gradually incremented during early years of the HUBZone program, 2000 to 2003. All the selected agencies had prime and subcontracting HUBZone goals of 2.5 percent in fiscal year 2002 and 3 percent in 2003. All except DOEn had goals of 3 percent or higher in fiscal years 2004 and 2005. DOT exceeded its 2002 prime HUBZone goal; HUD was the only agency to exceed it in 2003.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

[b] Despite the Small Business Administration's published 2002 achievement shown above, Department of State officials claim the HUBZone actual was 3.4 percent, indicating that the agency exceeded its goal. *See* U.S. Department of State's Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 1, 2005, tab 2.

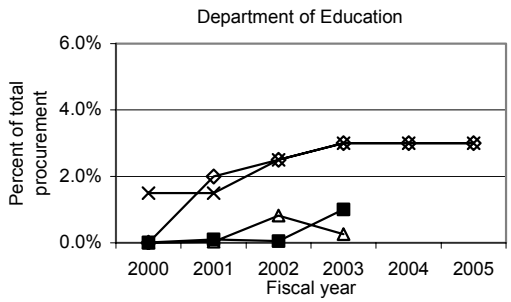
Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

FIGURE 2.2
Selected Federal Agencies' Contracting Goals and Achievements for Businesses Located in HUBZones, Fiscal Years 2000 to 2005

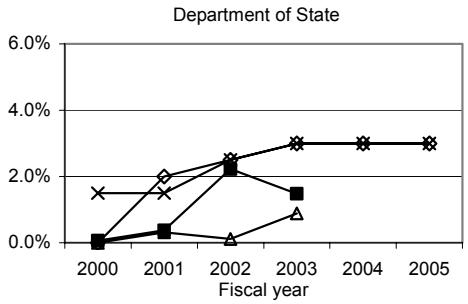


Caption: DOD HUBZone contracting has increased slightly since fiscal year 2000, but the agency has never met its goals.

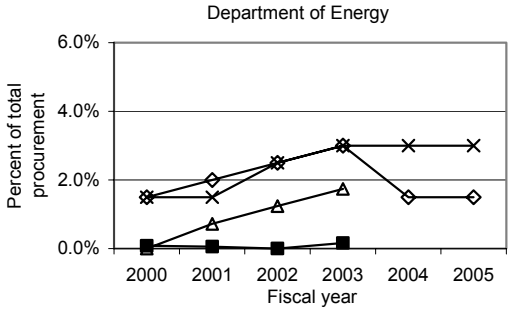
Caption: HUD contracting with HUBZone enterprises increased dramatically from fiscal years 2001 to 2003, and now exceeds the agency's prime contract goals.



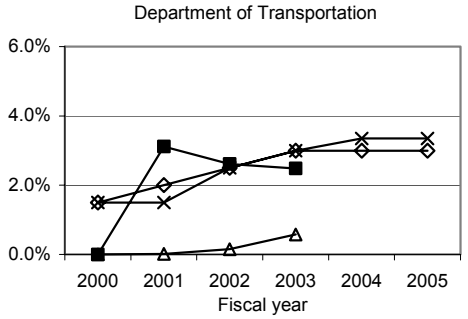
Caption: DOEd contracting and subcontracting with HUBZone enterprises remains well below the agency's goals.



Caption: Although DOS increased its contracting with HUBZone enterprises from fiscal years 2000 to 2003, agency achievements remain below goals.



Caption: Although DOEn HUBZone subcontracting has increased through fiscal years 2000 to 2003, prime contracting has been nearly nonexistent.



Caption: DOT has had more success increasing prime contracting in HUBZones than subcontracting, and exceeded its prime contract goals in 2002 and 2003.

Summary caption: From fiscal years 2000 through 2005, HUBZone prime and subcontracting goals were generally unmet by all six agencies. However, in 2001 and 2002, DOT met its prime contracting goals; and in 2003, HUD greatly exceeded its prime contracting goals.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

By 2003, most agencies in this study shared a 3 percent goal for HUBZone awards. However, individual agencies vary greatly in their actual contracting with businesses in these areas; for example, while 5.6 percent of FY 2003 HUD procurement went to these enterprises, DOEd awarded only 1.0 percent of its contracts to HUBZone program participants that year. Furthermore, DOEn negotiated a low HUBZone contracting goal of 1.5 percent for FYs 2004 and 2005 after awarding just 0.2 percent of contracts to these firms in FY 2003 (see table 2.1 and figure 2.2). No agency has yet reported attaining HUBZone subcontracting goals, which have generally stood at 3 percent since FY 2003. However, despite subcontract awards of only 0.6 percent in FY 2003, DOT ambitiously increased its HUBZone subcontracting goal to 3.4 percent for FYs 2004 and 2005 (see table 2.1 and figure 2.2). FY 2004 goaling achievements were still unavailable nearly a year after the period ended because of difficulties with a new electronic data system.[255]

Agency officials reported some efforts to increase procurement with HUBZone businesses. SBA identified several initiatives and strategies to assist other agencies. First, the agency has two Internet links: one familiarizes contract officers with statutory and regulatory provisions governing the program; the other allows contracting officials to search for qualified firms (i.e., through a specialized searchable database similar to that for small businesses).[256]

Second, SBA staff routinely conducts and participates in seminars and workshops with federal contracting officials to facilitate understanding of the program and encourage creating more opportunities for HUBZone participants. SBA's outreach efforts include conferences and briefings for procurement officials and program managers, offered through technical assistance centers. For example, a partnership with the Air Force provides for such training at bases throughout the country.[257]

Third, SBA's HUBZone Office developed a system to advise contracting officers of solicitations appropriate for HUBZone set-aside requirements, provide education about the program's statutory requirements, assist with market research, and encourage the redirection of procurement to HUBZone companies. An SBA analyst sends contracting officers lists of capable HUBZone companies for their solicitations.[258]

Among other agencies, DOD officials reported that they are sponsoring outreach and training efforts targeted to HUBZone small businesses.[259] DOS has designated an HUBZone advocate. The individual organized an exposition in 2004, resulting in acquisitions that were set aside for HUBZones.[260] DOEn, in a strategic plan, promises to include representatives of HUBZone enterprises on its small business advisory team and HUBZone outreach in its annual small

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[255] U.S. General Services Administration, facsimile to the U.S. Commission on Civil Rights, July 8, 2005, p. 1.

[256] SBA follow-up response, p. 1.

[257] Ibid., pp. 1–2.

[258] Ibid., p. 2.

[259] DOD follow-up response, p. 2.

[260] DOS follow-up response, p. 3.

business conference.[261] Finally, DOD proposed legislation to qualify small HUBZone businesses to participate in its mentor-protégé program and thereby increase contracting opportunities.[262]

Because the intent of the HUBZone program is to promote community development, SBA does not collect race-based data on the effects of this race-neutral approach, and thus the program's effectiveness at helping minority-owned firms participate in federal contracting opportunities is unproven.[263] Furthermore, because the program is race-neutral, one agency reported that it does not view HUBZone as a means to expand opportunities for minority businesses.[264] Although other agencies may not share this view,[265] their ability to collect data on an effect different from the legislated program purpose is no doubt impaired.

As for the program's success at economic development, among SBA's duties is to report to Congress on the effects of investment in HUBZone areas; agencies have reported economic improvements.[266] For example, the economic conditions in some HUBZone sites so improved as a result of the initiative that special solicitations and incentives for contracting in these areas were no longer needed.[267] Furthermore, in January 2005, SBA announced improvements to the HUBZone program that, among other things, will create more jobs in economically distressed communities.[268]

CONCLUSION

The race-neutral strategies discussed in this chapter, including strong enforcement of nondiscrimination policies, are designed to open contracting opportunities to all small businesses. Some intend to enable disadvantaged firms to compete without altering the terms of competition (e.g., outreach, technical assistance, and mentor-protégé programs). Others provide small and disadvantaged businesses the resources necessary to compete (e.g., financial assistance). Still other strategies open previously unattainable contracting opportunities to small

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[261] U.S. Department of Energy, *FY 2005 Strategic Plan for Small Business,* no date, p. 19 (hereafter cited as DOEn, *FY 2005 Strategic Plan*).

[262] DOD follow-up response, p. 2.

[263] *See, e.g.,* DOEn Interrogatory, p. 8. As DOS explains, dual status as HUBZone firms and 8(a) eligible ones (or tribally owned or Alaska Native-owned enterprises) would give a partial estimate. DOS Interrogatory, pp. 4, 11. DOT explains that its Offices of Small Disadvantaged Business Utilization and Minority Resource Center observes the impact of the HUBZone program indirectly when it provides business counseling and technical assistance to improve performance against the HUBZone goals. *See* DOT Interrogatory, p. 4.

[264] DOD Interrogatory, p. 10.

[265] For example, DOEn uses the HUBZone program as a vehicle to expand its contracting opportunities with small businesses, including minority-owned firms. DOEn Interrogatory, p. 2

[266] DOEn, *FY 2005 Strategic Plan*, p. 18.

[267] Recent changes guarantee HUBZone firms' eligibility to participate in the program until the results of the next census data collection, scheduled for 2010, are analyzed and publicly released. U.S. Small Business Administration, "SBA Improves HUBZone Program to Help Small Businesses Create More Jobs," news release 05-04, Jan. 27, 2005.

[268] Ibid.

businesses (e.g., unbundling), or expand economic potential in underutilized and distressed geographic regions (e.g., the HUBZone program).

Despite reliance on these common strategies, the Commission found that federal agencies do not seriously consider, much less implement, basic elements of race-neutral contracting systems. For example, the Clinton Justice Department directed agencies to regularly review race-conscious programs to determine their continued need, but agencies do not do so in a consistent or systematic manner. Instead, agencies rely upon congressional analysis, legislation, and regulation to justify the existence of race-conscious programs. In addition, DOJ stated that agencies should consider race-neutral alternatives to the maximum extent practicable. However, agencies offer no evidence that they examine the viability of a wide range of alternatives. Rather, they utilize many of the same race-neutral strategies, without measuring their impact and without rigorously exploring the prospect that existing race-conscious programs could be replaced with an expanded array of race-neutral initiatives.

DOEd pointed to systematic, timely, and comprehensive data collection as necessary to demonstrate serious consideration of race-neutral alternatives. Agencies generally do not develop policy, procedures, data, or statistical standards for when to use race-neutral versus race-conscious approaches, but rather rely on statutory provisions and SBA guidance. Yet, SBA expressly denies that it is responsible for providing formal assistance with implementation of independent race-neutral programs to other federal agencies. Only DOEn reported routinely assessing the effect of procurement procedures and policies on small disadvantaged businesses.

Moreover, agencies do not measure the effects of race-neutral efforts on minority-owned firms, nor do they collect appropriate data from which they can determine impact. Only DOD measures the success of race-neutral approaches in awarding contracts to minority-owned businesses or compares it to that of race-conscious ones. Agencies do not consciously or strategically use race-neutral measures as substitutes for race-conscious ones. Rather, they use race-neutral strategies to supplement their small business programs, which include racial elements to some extent.

Although several interagency committees and councils bring officials together, most agencies do not compile or distribute information to improve the effectiveness of race-neutral approaches. Despite guidance to target minority groups with outreach to ensure their participation in contracting opportunities, only two agencies included targeted outreach in planning documents, and none had tracking systems to determine whether small and disadvantaged businesses benefited.

Perhaps most alarming, this study did not find any enforcement system that would identify and eliminate discrimination. Agencies gave many and varied answers about how and where a contractor or subcontractor subjected to discrimination would file a complaint or receive resolution. However, they do not have comprehensive policies or procedures for processing complaints. Nor do they have uniform mechanisms or sanctions to redress discrimination. The absence of legal channels and remedies for discrimination in contracting is a serious omission in civil rights law. Failure to enforce nondiscrimination has the potential to undermine all other federal efforts to improve access to government contracts for enterprises historically discriminated against and, indeed, to ensure that procurement programs are inclusive.

Chapter 3: Findings and Recommendations

The effort to overcome discrimination in federal procurement began with the conviction that all Americans should be able to enter into contracts to provide goods and services for the federal government "without regard to their race, color, religion, sex, or national origin."[1] To combat discrimination on these bases, the executive and legislative branches made deliberate efforts to open opportunities to minority- and women-owned businesses. Forty years ago, President Lyndon Johnson signed Executive Order 11,246, which required federal contractors to eliminate discrimination in their employment decisions. The Nixon Administration supplemented this approach with specific race-conscious goals and timetables. Later, the federal government developed various programs intended to make contracting more inclusive. Some of these programs are race-neutral, while others are race-conscious.

Ten years ago, in the landmark case of *Adarand Constructors, Inc. v. Peña (Adarand)*, the Supreme Court held that programs that use racial classifications must be subject to strict scrutiny, in that they must serve a compelling government interest and be narrowly tailored to meet that interest. [2] Citing *Richmond v. J. A. Croson Co.,* the Court explained that, among other things, narrow tailoring requires that agencies must first explore race-neutral strategies and determine whether such alternatives would be adequate before resorting to race-conscious programs.[3] The Clinton Justice Department, applying the *Adarand* decision, instructed federal agencies to "make concentrated race-neutral efforts" and to limit the use of racial factors to the "minimum extent necessary to achieve legitimate objectives."[4]

Congress continues to authorize, and the federal government continues to administer, programs to ensure small and disadvantaged businesses (SDBs) have opportunities to compete. The Small Business Administration (SBA) conducts several programs that pursue this purpose, including race-conscious ones. In the authorizing legislation for the Small Business Act section 8(a) and SDB programs, for example, Congress decided that minority business owners would be presumed disadvantaged, and only had to prove economic need to participate.[5] In its 8(a) business development program, SBA certifies firms as disadvantaged according to statutorily set income thresholds and social criteria. SBA also administers an SDB certification program, in

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[1] *See* Exec. Order No. 11,246, 3 C.F.R. § 339 (1964–1965), *amended by* Exec. Order No. 11,375, 3 C.F.R. § 684 (1966–1970); Exec. Order No. 11,749, 3 C.F.R. § 803 (1966–1970); Exec. Order No. 12,086, 3 C.F.R. § 230 (1978); Exec. Order No. 13,279, 3 C.F.R § 258 (2002). *See also* 42 U.S.C. § 1981.

[2] Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995).

[3] *Id.*, at 237–38.

[4] U.S. Department of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,048, 26,050 (May 23, 1996).

[5] *See* Amendments to the Small Business Act and Small Business Investment Act of 1978, Pub. L. No. 95-507, 92 Stat. 175 (codified as amended at 15 U.S.C. § 631(f) (2000)).

which businesses that meet eligibility criteria may enlist a variety of procurement mechanisms, such as weighted bid evaluations and monetary incentives for prime contractors that subcontract with SDBs.

These two programs are the primary mechanisms by which federal agencies consign SDBs for contracting and subcontracting opportunities. SBA measures agencies' efforts against statutorily established goals for 8(a) and SDB contract awards. The measurements are not satisfactory indicators of the government's overall commitment to SDB contracting; they generally reflect only race-conscious efforts and not other small business strategies.

The 8(a) program's presumption that minority business owners are disadvantaged supports the Department of Justice's (DOJ) characterization of this program as race-conscious. Other agencies, however, disagree with DOJ's position on the basis that procedures exist which enable nonminority owners, who demonstrate they are disadvantaged, to participate. This disagreement is characteristic of the confusion and lack of communication that typifies the government's efforts to prevent discrimination in contracting.

During the decade since *Adarand*, agencies have largely failed to apply the Supreme Court's requirements, or DOJ's guidelines, to their contracting programs. Specifically, they have not seriously considered race-neutral alternatives, relying instead on SBA-run programs, without developing new initiatives or properly assessing the results of existing programs. Demonstration of serious consideration could include exploration of a variety of alternatives, systematic and comprehensive data collection, timely research (such as disparity studies and other forms of research), outcomes measurement, and periodic review of both race-conscious and race-neutral programs. Most agencies do not follow these practices, nor do they provide persuasive justification for their failure to do so.

Rather than developing and assessing race-neutral alternatives to their race-conscious programs, most agencies rely upon the same established programs. For example, agencies conduct some outreach and provide technical assistance to small businesses, but do not measure the effects of such efforts. They offer financial assistance, such as loans and advance payments, to small businesses to help them overcome monetary barriers to competing for contracts, but they do not adequately assess the results of these programs. The same is true of efforts to break apart, or unbundle, large contacts. Lack of data collection rendered impossible the efforts this study made to measure the effectiveness of race-neutral and -conscious programs independently. In general, agencies do not seriously consider whether new race-neutral initiatives could provide adequate alternatives to current race-conscious programs, nor do they appropriately assess the results of their existing programs.

Best contracting practices may involve a wide range of strategies, such as (1) increasing awareness of solicitations for procurement, (2) providing technical assistance to small businesses, and (3) expanding opportunities to compete for contracts. Effective race-neutral procurement systems would include elements that ensure nondiscriminatory access, build in measurement indicators, reach a wide audience, and maintain flexibility. In addition, clearly written, widely disseminated, and effectively enforced antidiscrimination laws, policies, and procedures should regulate all procurement decisions, including the selection of subcontractors.

The Commission, therefore, offers findings and recommendations in the following key categories (1) serious consideration of race-neutral alternatives, (2) antidiscrimination policy and enforcement, (3) ongoing review of procurement programs, (4) data and measurement, (5) communication and collaboration, and (6) outreach.

SERIOUS CONSIDERATION

Finding: Most agencies could not demonstrate that they consider race-neutral alternatives before resorting to race-conscious programs. Although DOJ offered post-*Adarand* guidance, agencies generally do not adhere to it. Moreover, DOJ has not provided specific guidance regarding what actions constitute serious consideration of race-neutral alternatives. As a result, agencies appear to give little thought to their legal obligations and disagree both about what the law requires and about the legal ramifications of their actions. One agency, the Department of Education (DOEd), has provided useful guidance regarding serious consideration of race-neutral alternatives in the context of higher education.

Recommendation: Agencies must adopt and follow guidelines to ensure serious consideration of race-neutral alternatives. Such a system could entail (1) identifying and evaluating a wide range of alternatives, (2) articulating the underlying facts that demonstrate whether race-neutral plans work, (3) collecting empirical research to evaluate success, (4) ensuring such assessments are based on current, competent, and comprehensive data, (5) periodically reviewing race-conscious plans to determine their continuing need, and (6) establishing causal relationships before concluding that a race-neutral plan is ineffective. Best practices may also include (1) statistical standards by which agencies would determine when to abandon race-conscious efforts; (2) ongoing data collection, including racial and ethnic information, by which agencies would assess effectiveness; and (3) policies for reviewing what constitutes disadvantaged status and the continued necessity for strategies to increase inclusiveness.

DOJ should coordinate the development of these guidelines, and effectuate legally compliant agency policies, by issuing clear definitions of race-neutral and -conscious programs, explaining carefully the circumstances under which agencies must seriously consider race-neutral alternatives, and establishing a solid framework for how agencies comport with the Supreme Court's instructions. A team of legal advisors, procurement specialists, and social scientists, coordinated by DOJ, should work together to develop clear guidelines and workable race-neutral contracting strategies in a manner similar to DOEd's effort in the higher education context. The guidelines should at least specify standards for data collection and analysis; measurement techniques; how, and with what frequency, agencies must review strategies; and examples representing a wide range of acceptable race-neutral alternatives.

Once agencies share an understanding of available race-neutral options, they will be better able to integrate them into comprehensive procurement systems. An integrated race-neutral approach would also ensure less reliance on race-conscious programs and greater access to federal contracting opportunities for all small businesses.

ANTIDISCRIMINATION POLICY AND ENFORCEMENT

Finding: The Commission has found that the federal government lacks an appropriate framework for enforcing nondiscrimination in procurement. Indeed, agencies reported that statutory or regulatory guidance in this area is lacking. Limited causes of action are available to contractors and subcontractors, but the most accessible mechanisms are restricted to procedural complaints about bidding processes.

Recommendation: The Commission asks Congress to enact legislation expressly prohibiting discrimination based on race, color, religion, sex, national origin, age, and disability in federal contracting and procurement. Legislation should include protections for both contractors and subcontractors and establish clear sanctions, remedies, and compliance standards. Congress should delegate enforcement authority to each federal agency that has contracting capabilities.

Finding: Most agencies do not have in place policies or procedures to prevent discrimination in contracting. For example, some agencies could not identify who has authority to investigate and resolve contracting discrimination complaints, and they appear to have given little thought to basic questions of antidiscrimination policy. In general, agencies are either unaware of or confused about whether federal law protects government contractors from discrimination.

Recommendation: DOJ and SBA should, without delay, facilitate agency development and implementation of civil rights enforcement policies for contracting. Agencies must establish strong enforcement systems to provide individuals a means to file and resolve complaints of discriminatory conduct. They also must adopt clear compliance review standards and delegate authority for these functions to a specific, high-level component. Doing so will help ensure that potential contractors and subcontractors have an opportunity to compete for federal funds without fear of discrimination.

Once agencies adopt nondiscrimination policies, they should conduct regular compliance reviews of prime and other large contract recipients, such as state and local agencies. Agencies should widely publicize complaint procedures, include them with bid solicitations, and codify them in acquisition regulations. Civil rights personnel in each agency should work with procurement officers to ensure that contractors understand their rights and responsibilities and implement additional policies upon congressional action.

Finding: Agencies generally employ systems for reviewing compliance with subcontracting goals made at the bidding stage, but do not establish norms for the number of reviews they will conduct, nor the frequency with which they will do so. Only recently did SBA release guidelines for agencies to evaluate when contractors have made a good faith effort to employ SDB subcontractors.

Recommendation: Good faith effort policies should be rooted in race-neutral outreach. Agencies should set standards for and carry out regular on-site audits and formal compliance reviews of SDB subcontracting plans to make determinations of contractors' good faith efforts to achieve established goals. Agencies should develop and disseminate clear regulations for what constitutes a good faith effort, specific to individual procurement goals and procedures. Agencies should also ensure that all prime contractors are subject to audits. They should require prime

contractors to demonstrate all measures taken to ensure equal opportunity for SDBs to compete, paying particular attention to contractors that have not achieved goals expressed in their offers.

ONGOING REVIEW

Finding: One requirement of narrow tailoring involves regular review of race-conscious programs to determine their continued necessity and to ensure that they are focused enough to serve their intended purpose. No agency reported policies, procedures, or statistical standards for when to use race-conscious instead of race-neutral strategies. Agencies have not established procedures to reassess presumptions of disadvantage.

Recommendation: Agencies must engage in regular, systematic reviews (perhaps biennially) of race-conscious programs, including those that presume race-based disadvantage. They should develop and document clear policies, standards, and justifications for when race-conscious programs are in effect.

Agencies should develop and implement standards for the quality of data they collect and use to analyze race-conscious and -neutral programs and apply these criteria when deciding effectiveness. Agencies should also evaluate whether race-neutral alternatives could reasonably generate the same or similar outcomes. Where the answer is yes, agencies should implement such alternatives.

Agencies should develop and publish draft review procedures by September 2007.

DATA AND MEASUREMENT

Finding: Agencies have neither conducted race disparity studies nor collected empirical data to assess the effects of procurement programs on minority-owned firms. Congress charged the Department of Commerce with conducting benchmark studies of minority participation in standard industries every five years, yet it has not done so since 1999, based on 1996 data. Consequently, agencies and prime contractors lack current data to determine whether SDB contracting in those industries has improved or whether any further race-conscious procurement is warranted.

Recommendation: Congress should enforce its earlier mandate that the Department of Commerce conduct regular benchmark studies. In addition, the National Academy of Sciences should develop standards for the data's scope and reliability. The Department of Commerce should adhere to an established schedule for the release of data by industry and geographic region. Other federal agencies should work with the Commerce Department to produce timely studies relevant to their specific contracting needs, and utilize the results in setting procurement goals.

Finding: Federal procurement data do not evaluate the effectiveness of or continuing need for programs, either race-neutral or -conscious. Nor have agencies developed such measures. The 1999 Commerce benchmark study, using 1996 data, is obsolete and its methodologies

controversial. In addition, the outcomes of race-neutral strategies cannot be isolated because agencies measure them in combination with race-conscious programs. Furthermore, most agencies rely on achievements of SBA-negotiated goals to demonstrate program effectiveness and ensure that minority-owned firms receive a specified share of contracts. The Department of Defense was the only agency that reported analyzing the success of race-conscious programs compared to race-neutral ones.

Recommendation: The White House should form a task force to determine what data Congress, DOJ, and agencies need to properly implement narrow tailoring in contracting and assess whether (1) race-conscious programs are still necessary, and (2) the extent to which race-neutral strategies are effective as an alternative to race-conscious programs. As a first order of business, the task force, with the weight of the Office of the President behind it, should audit all current and delinquent studies and reports. It should examine existing data sources, their strengths and inadequacies; recommend how to collect better, more timely data; and identify resources that must be devoted to this task. The task force should issue a report by March 2007, presenting its recommendations to Congress. It should urge the passage of legislation to provide support for the necessary data collection, with a schedule for requirements and accountability measures.

The task force should:

(1) evaluate the adequacy and frequency of surveys of minority-owned businesses for determining disparities nationally or in specific industries, and suggest what evidence from these surveys or other data sources (both in measures and level of outcomes) would enable agencies to improve contracting programs to meet present-day needs;

(2) examine the feasibility of disparity studies, including their cost and resultant quality, to determine if they support race-conscious programs, and whether they should be conducted governmentwide or by individual agencies;

(3) recommend changes in the measurement of contracting goals that better capture the success of race-neutral initiatives; and

(4) suggest measures of the success of race-neutral programs agencies might use until Congress offers guidance.

To apply information to serious consideration of race-neutral alternatives, data should be reliable, current, complete, and comprehensive. Data should facilitate analyses of causal relationships and relate to the effectiveness of agencies' race-conscious or -neutral programs.[6] The first step of the task force's review should identify standards, such as these, for data quality and articulate the degree to which they should be met, for example, how up-to-date data must be. The task force's recommendations and data collection advocacy must be grounded in standards emerging from widespread practice in social science and case law.

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[6] *See, e.g.,* U.S. Department of Education, Office for Civil Rights, *Inclusive Campuses: Diversity Strategies for Private Colleges*, report no. 3, Race-Neutral Alternatives Series, 2005, p. 12.

Finding: Agencies do not assess the effectiveness of individual race-neutral strategies. For example, even though contract unbundling is a priority of the current administration, and agencies follow policies to determine whether large contracts can be broken apart, they do not conduct the market research necessary to determine and justify bundling. Few agencies inaugurated specific unbundling policies or procedures, and agencies offer different definitions for bundled contracts. Thus, the government cannot readily measure how many SDBs have benefited from unbundling.

Recommendation: Agencies should measure the success of race-neutral strategies independently so that they can determine viability as alternatives to race-conscious measures. For example, agencies could track the number and dollar value of contracts broken apart, firms to which the smaller contracts are awarded, and the effect of such efforts on traditionally excluded firms.

Finding: Although the Historically Underutilized Business Zone (HUBZone) program is one of the few statutorily mandated race-neutral programs, agencies experience implementation problems, and most fall short of their contracting goals. None has attained HUBZone subcontracting goals. SBA does not collect race data on HUBZone participants, thus agencies cannot determine whether this strategy has resulted in contracts with minority-owned firms.

Recommendation: Given the federal government's poor record in HUBZone contracting, SBA should evaluate strategies agencies use and determine what additional efforts are needed, perhaps public education, improved outreach, or technical assistance to potential contractors. SBA should develop creative outreach approaches in consultation with HUBZone firms. SBA should also determine whether agencies appropriately prioritize HUBZone awards, for example, by a cascading approach or set-asides.

SBA could hire an external consultant to conduct a thorough audit of the HUBZone program, including an assessment of whether goals are aligned with implementation efforts. Where there is a disconnect, SBA should work with agencies and prime contractors to develop strategies for reaching HUBZone firms and strengthening incentives for participants. Congress should reevaluate the feasibility of the 3 percent contracting goal based on the availability and capacity of firms in economically distressed communities and revise required statutory goals and eligibility criteria accordingly.

COMMUNICATION AND COLLABORATION

Finding: Agencies do not communicate effectively with one another about efforts to strengthen procurement practices. For example, agencies do not engage in consistent information sharing or exchange of best race-neutral practices. Agencies that fail to communicate best practices miss opportunities to re-tool and improve programs.

Recommendation: Agencies should capitalize on existing infrastructure to share information and best practices, coordinate outreach, and develop measurement strategies. Regular meetings of the Offices of Small and Disadvantaged Business Utilization Interagency Directors' Council, the Small Business Procurement Advisory Council, and the Small Business Committee of the

Chief Acquisition Officers Council provide opportunities for agencies to discuss, develop, plan, and assess race-neutral and -conscious contracting strategies. However, meetings should focus on federal strategic issues, rather than how to carry out ministerial duties. Beyond the exchange of ideas and information, interagency communication would foster sharing of resources. For example, agencies could collaborate on the development of new strategies, as well as outreach and technical assistance where there is overlap in industries, geographic regions, and specific contracting needs.

OUTREACH

Finding: Even though agencies engage in outreach, there is little evidence that their efforts to reach small and disadvantaged businesses are successful. They largely do not produce planning or reporting documents on outreach activities, nor do they apply methods for tracking activities, expenditures, or the number and types of beneficiaries.

Recommendation: The Commission regards widely broadcast information on the Internet and in popular media as only one of several steps necessary for a comprehensive and effective outreach program. Agencies could use a variety of formats—conferences, meetings, forums, targeted media, Internet, printed materials, ad campaigns, and public service announcements—to reach appropriate audiences. In addition, agencies should capitalize on technological capabilities, such as listservs, text messaging, audio subscription services, and new technologies associated with portable listening devices, to circulate information about contracting opportunities. Agencies should include outreach in budget and planning documents, establish goals for conducting outreach activities, track the events and diversity of the audience, and train staff in outreach strategies and skills.

CONCLUSION

In 1995, *Adarand's* strict scrutiny requirements compelled agencies to narrowly tailor reliance on race-conscious programs and to seriously consider race-neutral alternatives that would effectively redress discrimination. Ten years later, the agencies in this study have still largely failed to satisfy this requirement. Indeed, no agency reviewed in this report engages in serious consideration of race-neutral alternatives. While agencies employ some, largely off-the-shelf, race-neutral strategies, they do not engage in the basic activities that are the hallmarks of serious consideration, such as program evaluation, outcomes measurement, reliable empirical research and data collection, and periodic review.

Agencies' mutually contradictory assessments, collective confusion, and failure to communicate effectively with one another hamper them from undertaking initiatives other than those that Congress has codified. Indeed, most agencies have not implemented even the most basic race-neutral strategy to ensure equal access, i.e., the development, dissemination, and enforcement of clear, effective antidiscrimination policies. Significantly, most agencies do not provide clear recourse for contractors who are victims of discrimination or guidelines for enforcement. The Supreme Court has acknowledged the importance of this objective, while recognizing the need for government programs that reduce reliance on racial classifications. To achieve that goal,

federal agencies should demonstrate sincere efforts to expand minority-owned firms' access to federal contracts through race-neutral procedures.

Dissenting Statement of Commissioner Michael Yaki

Preface

The Commission Majority's report entitled *Federal Procurement After Adarand* is neither an enforcement report as mandated by Congress nor a document that stands up to legal and policy scrutiny.

(1) It is a document fatally flawed in process, and fatally flawed in its interpretation of existing law and policy.

(2) Relying upon department policies that have no application to procurement and contracting, the Majority Report recommends that race-neutral programs and policies for minority-owned businesses seeking federal procurements and contracts should prevail over, and indeed replace, existing race-conscious programs that have been in place for the past 30 years.

(3) The Majority Report dismisses the existence of historical discrimination and the need for remedial action by the federal government and would instead place "nondiscrimination" legislation in place of affirmative action by the federal government as the only means by which minority-owned businesses, denied opportunity because of race, color, or national origin, could avail themselves of protection and relief.

(4) The Dissent argues that the Majority Report is built upon a theoretical house of cards that creates burdensome duties on federal agencies and does not stand up to rigorous review.

(5) The Dissent asserts that comprehensive studies of state and local procurement and contracting programs would provide better models and best practices for federal procurement programs, and would be in keeping with the Commission's historic mandate of fact-finding and making recommendations on how best to eliminate discrimination in our nation.

I

The Commission today takes a radical step backwards from the race-progressive policies this nation has undertaken for the last half-century by recommending, under the cloak of "race neutrality," the termination of all race-conscious programs and remedies from federal government contracting and procurement. By summarily concluding, without any supporting evidence, that federal agencies have disregarded constitutional duties, they seek to justify adoption of Trojan Horse "nondiscrimination" policies and burdensome compliance mechanisms

which will completely neuter federal agencies' efforts to remedy past discrimination and enhance equal opportunity for people of color.

Our nation was founded on the principle that all Men are created equal, though this lofty goal went largely unrealized for African Americans and minorities, even with the adoption of the 13th and 14th Amendments in the late 19th century. Worse, the Supreme Court in *Plessy v. Ferguson* construed the meaning of the 14th Amendment to bestow "equal but separate" status for persons of color which, as we know, seldom meant equal, but always meant separate.[1]

The United States Commission on Civil Rights was founded in 1957, in the wake of the landmark Supreme Court decision in *Brown v. Board of Education*.[2] *Brown* provided the first legal framework for tearing down the walls and back doors separating the races. The Commission was envisioned by President Eisenhower, a Republican, as a bipartisan fact-finding panel charged with investigating and making recommendations to the executive and legislative branches on how to end all forms of race discrimination in this country. *Brown* lit the fire of racial change; the Commission became the entity to fuel it even further.

Over the past half-century, the Civil Rights Commission has taken its fact-finding and recommendation powers seriously and substantively. Its 1961 report was considered by the Congress and the Supreme Court as the intellectual and factual grounding for the provisions of the landmark 1964 Civil Rights Act. Its hearings on the blatant, deliberate disenfranchisement of African Americans in southern precincts and parishes formed the basis of the Voting Rights Act of 1965.

The Commission has not remained static as American society has changed. In 1978 a Commission report challenging law enforcement agencies to recognize domestic violence as a crime put the issue on the national agenda. By the late 1980s Congress mandated the Law Enforcement Assistance Administration to focus on the "role of the criminal justice system in preventing and controlling violence and abusive behavior in the home." Moreover, Congress relied on a 1983 Civil Rights Commission report on the challenges disabled persons faced in their daily lives in enacting the Americans with Disabilities Act.

Today, racial discrimination persists. In testimony before this Commission as recent as this year, commentators and scholars, both liberal and conservative, conceded that discrimination persists. Barriers to equal opportunity remain.[3] The challenge for this Commission today is to continue the work begun nearly 50 years ago, understanding that society, mores, cultures, and technology have changed far more and yet far less than any could have envisioned from the first day of school at Little Rock Central High in September 1957. The challenge for this Commission today is to recognize that invidious, discreet, and intentional discrimination persists, and that our role is to engage in fact-finding and recommend ways and means to continue to combat this subtle evil

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[1] 163 U.S. 537 (1896).

[2] 347 U.S. 483 (1954).

[3] *See, e.g.*, NAACP Legal Defense and Educational Fund, Inc., "Closing the Gap: Moving from Rhetoric to Reality in Opening Doors to Higher Education for African American Students," June 23, 2005.

until it is eradicated from our society. By the action of the Commission Majority today, we utterly fail to meet this challenge.

To the contrary, it is a travesty that this same Commission should choose to use its platform as the moral watchdog for civil rights in this country to endorse the dismantling of a system that has brought countless minorities and women economic opportunity. It does so by utilizing faulty logic, suspect reasoning, and an erroneous interpretation and complete misreading of *Adarand Constructors v. Pena*[4] and *Grutter v. Bollinger*.[5] It does so by completely ignoring data received from federal agencies—data received in response to interrogatories propounded by Commission staff—that would substantiate the need for continued vigilance and use of race-conscious programs. It ignores data that suggests that federal agencies continue to fall short of promoting equal opportunity in our society, and, therefore, turns a blind eye to possible recommendations and policies that would sharpen our attack on persistent discrimination.

For these reasons, I respectfully dissent.

II

The Commission Majority's flawed report begins with its examination of *Adarand*. In *Adarand*, the Supreme Court ruled that strict scrutiny must be applied to all Fifth Amendment Equal Protection challenges to racial classifications. The Supreme Court ruled that federal programs which use racial criteria must also serve a compelling government interest (i.e., have a specific underlying purpose), and the program must be narrowly tailored to serve that interest.

The *Adarand* standard is rigorous, but race-conscious programs are still acceptable.[6] The Commission Majority states that *Adarand* requires agencies to "consider, *and* employ race-neutral strategies before resorting to race-conscious ones."[7] This is a reading of *Adarand* that simply does not exist in the text of the decision,[8] nor is it a reading that has gained any prominence, save by the current administration.

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[4] 515 U.S. 200 (1995).

[5] 539 U.S. 306 (2003).

[6] Ironically, for many scholars, the concept of affirmative action grew out of the government contracting context. In the face of rampant discrimination against African Americans in the construction trades in Philadelphia, President Nixon offered the "revised Philadelphia plan," which included goals and timetables for hiring specific ethnic and racial classes in the construction industry. And, in a final twist of irony to the report ratified by the Majority, it was Arthur Fletcher, a Republican and former chair of this very Commission, who claimed authorship for this first foray into affirmative action in federal contracting dollars. A majority of the circuit courts have continued to approve federal and state race-conscious programs in government contracting. In 2001, the Supreme Court let stand a 10th Circuit decision, brought by the *Adarand* plaintiffs, that upheld the constitutionality of the Disadvantaged Business Enterprise programs reworked since the original *Adarand* decision.

[7] U.S. Commission on Civil Rights, *Federal Procurement After Adarand*, September 2005, chap. 1, p. 18 (emphasis added) (hereafter "the Majority Report").

[8] The only mention of the term "race-neutral" in Justice O'Connor's decision comes in a discussion of the types of questions that could be asked in addressing whether a remedy was narrowly tailored. In this case, she cited two cases, one which asked "whether there was 'any consideration of the use of race neutral means to increase minority

Contrary to the Commission Majority's claim, Justice O'Connor in *Adarand* wrote:

> The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it….When race based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the 'narrow tailoring' test….[9]

Yet, the Majority Report simply ignores Justice O'Connor's statement.

Adarand provoked a wide-reaching and searching examination of existing federally based race-conscious programs by the Clinton administration. The Majority Report seeks to state as fact that "concentrated race-neutral efforts" are the standard for all federal agencies. In fact, by lifting one phrase from a multi-page document,[10] the Majority Report misreads the true intent of the reforms implemented by the Department of Justice (DOJ) during the Clinton administration. DOJ concluded:

> 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.*[11]

As with the Supreme Court's holding in *Adarand*, DOJ's post-*Adarand* guidelines do not square with the Majority Report's agenda: to eliminate all traces of affirmative action from federal procurement and contracting. It is as if these efforts, enacted by federal regulation to hew to the dictates of *Adarand*, did not exist. The Commission Majority simply acts as though these reform efforts were misplaced, misguided, or worse, contrary to law. The Majority Report is less a fact-finding, analytical report than an ideological tract whose mission is to provide the proverbial fig leaf to efforts intended to roll back all the gains that minorities have made, and return us to a system where minority businesses have been the victims of historical discrimination. The root

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business participation' in government contracting," (*Adarand*, *supra,* at 237, 238) (citing *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989)), and another "whether the program was appropriately limited such that 'it will not last longer than the discriminatory effects it is designed to eliminate'." (*Adarand, supra,* at 238) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 513 (1980) (Powell, J., concurring)).

[9] *Adarand*, *supra*, at 237.

[10] "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." Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,050 (May 23, 1996) (hereafter cited as DOJ, Proposed Reforms to Affirmative Action in Federal Procurement). In the context of the overall proposed rule, as will be demonstrated, *infra*, this isolated statement hardly makes the case for race-neutral efforts to the exclusion of all else.

[11] DOJ, Proposed Reforms to Affirmative Action, p. 26,042 (emphasis added).

and branch of the Majority Report's foliage, however, is provided by a stretched and tortured reading of a case that dealt with affirmative action in the field of education, *Grutter v. Bollinger*.

III

In *Grutter*, the Supreme Court held that the narrowly tailored use of race in admissions decisions by the University of Michigan Law School was in furtherance of a compelling interest and did not violate the Equal Protection Clause. In *Grutter*, the Court majority rejected the claim by the Bush administration that the mere existence of race-neutral means was sufficient reason to nullify the use of race-conscious procedures in admissions.[12]

Nonetheless, the Majority Report erroneously reinterprets Justice O'Connor's language in *Grutter* to insist that a "serious consideration of race-neutral alternatives"[13] requires federal agencies to (1) assume substantial regulatory and reporting burdens to eliminate a problem that may not exist, and (2) have DOJ become a "race-neutral cop" for the federal government. *Grutter* does no such thing. To the contrary, the Supreme Court held that student body diversity is a compelling state interest that can justify using race in university admissions.[14] *Grutter* recognizes the need for colleges and universities to use a broad array of tools, which includes race-conscious policies, and gives schools the deference and flexibility to take steps to close admissions gaps. The Court stated that "[n]arrow tailoring does not require exhaustion of every conceivable race neutral alternative."[15] While it requires a "serious, good faith consideration of workable race-neutral alternatives" there is no mandate to employ them.[16]

The need to give deference and flexibility to federal agencies does not exist in the Majority Report. Rather, a cookie-cutter, one-size-fits-all approach would be a more accurate characterization of the Commission Majority's conclusions. The Majority Report conveniently ignores the need and ability of federal agencies to utilize their own experience obtained from long years toiling in the fields of contracting and affirmative action. Although the fact that each agency has its own contextual history is irrelevant to the Majority Report, it is not to the Supreme Court. Justice O'Connor wrote that "[c]ontext matters when reviewing race-based governmental action under the Equal Protection Clause…. Not every decision influenced by race is equally objectionable."[17]

Having dismissed the validity of the legal theories underlying the Commission Majority conclusion, we must now turn to the underlying data relied upon in the report.

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[12] *Grutter*, at 340.

[13] The Majority Report, p. 23.

[14] *Grutter, supra*, at 329.

[15] *Id.,* at 335.

[16] *Id*.

[17] *Id.*, at 327.

IV

The Commission Majority's insistence on a misplaced, and erroneous, reading of *Grutter* has led it to rely disproportionately upon the Department of Education's (DOEd) misapplication of *Grutter* to its own review through its Office of Civil Rights. Despite the lack of attention to the relevant differences between university admissions and federal contracting and procurement, the report continually relies on DOEd's suggested policies for schools, colleges, and universities as though they were easily transferable to all other agencies of the federal government.[18] The inherent difficulty in applying these policies to federal contracting programs, as the Majority Report does mention, is epitomized by the fact that DOEd does not employ these policies for its own internal procurement processes.[19]

For example, the Majority Report utilizes DOEd's "six practices" as the talisman for determining whether federal agencies, such as the Department of Transportation (DOT) and the Small Business Administration (SBA), are meeting the "serious consideration" test. Indeed, the Majority Report uses the DOEd model as a "gauge"[20] for concluding that none of the agencies comply with the serious consideration test. This is a leap of logic that defies the imagination given the complexity and size of the other programs. There is no data from DOEd showing that any of these "six practices" have any effectiveness for educational institutions, let alone in the realm of procurement.

Further, the Commission Majority boldly asserts that annual or biennial reviews are not cumbersome. Even assuming this to be true in the context of university admissions, the admission process is a limited phenomenon; data from an applicant class of individual universities and multi-year procurement contracts that may or may not be broken down into multiple sub-contracts from a nationwide pool of applicants are hardly comparable. Yet no attempt is made in the report to account for, or explain how, relevant comparisons can be made across agencies and industries.

Compare the tautology the Commission Majority offers to the guidance provided by DOJ in its post-*Adarand* instructions:

> In addition to calculating the capacity of existing minority firms, the proposed system will examine evidence, if any, demonstrating that minority business formation and operation 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 include 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

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[18] *See, e.g.*, U.S. Department of Education, Office for Civil Rights, *Inclusive Campuses: Diversity Strategies for Private Colleges*, report no. 3, Race-Neutral Alternatives Series, 2005, which is cited throughout the Majority Report.

[19] The Majority Report notes that DOEd relies on DOJ's post-*Adarand* definitions. The Majority Report, chap. 2, p. 23. Indeed, the DOEd pamphlet "Doing Business with the U.S. Department of Education" cites the 8(a) set-aside program as an opportunity for potential contractors. *See* http://www.ed.gov/fund/contract/about/camdoingbusiness.pdf>.

[20] The Majority Report, p. 24.

> discrimination in procurement. That form of analysis holds constant a variety of variables that might affect business formation so that the effect of race can be isolated.[21]

The extent to which the Commission Majority has strayed from reality is illustrated by the continued criticism of DOT procurement and contracting processes in the Majority Report. DOT has, by the Commission Majority's own admission, amended its Disadvantaged Business Enterprise (DBE) program post-*Adarand* and now requires extensive race-neutral measures in addition to its race-conscious programs. The fact that DOT has relied upon state and local disparity studies, as well as a Department of Commerce benchmark study—more data by one agency alone than has been offered by the Commission Majority in defense of its conclusions—is apparently not enough. Nor, apparently, is the fact that the Supreme Court has upheld a ruling by the 10th Circuit that its program complies with constitutional principles persuasive to the Commission Majority.[22] Other courts have also upheld challenges to federal government DBE programs.[23] The lack of recognition of direct legal precedent bolstering DOT's post-*Adarand* compliance efforts is yet another example of the Commission Majority's faulty, skewed reasoning in the Majority Report.

Perhaps the most disturbing part of this report is its utter silence with regard to the very existence of data from the federal government. It is hypocrisy, at best, and deliberate obscurantism, at worst, when the Majority Report bemoans the lack of alleged data in federal agencies, for the very interrogatories propounded—with the exception of the DOEd policy interpretation of *Grutter*[24]—are, for the most part, not utilized in the report. In February of this year, interrogatories were submitted to seven different federal agencies: SBA; DOT; the Department of Defense (DOD); the Department of Housing and Urban Development; the Department of State; the Department of Energy; and DOEd. The interrogatories[25] asked for detailed information that included, among other things: (1) whether agencies achieved statutory goals for subcontracting with small disadvantaged businesses (SDBs); (2) data on the number and percentage of contracts going to SDBs as a whole, and to minority- and nonminority-owned firms as a subset, as well as the dollar value of those contracts for various fiscal years; and (3) data on SDB certification criteria.[26]

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[21] DOJ, Proposed Reforms to Affirmative Action, p. 26,046.

[22] Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001).

[23] *See, e.g.*, Concrete Works of Colorado v. City and County of Denver, 321 F.3d 950 (2003); Sherbrooke Turf, Inc., v. Minn. DOT, 345 F.3d 964 (2003); Gross Seed Co. v. Nebr. Dept. of Roads, 345 F.3d 964 (2003); Northern Contracting, Inc. v. Illinois, 2004 U.S. Dist. LEXIS 3226; No. 00-CV-4515; Western States Paving Co. v. Wash. State Dept. of Transp., 03-35783, 2005 U.S. App. LEXIS 8061 (9th Cir. 2005).

[24] It is interesting that the Department of Education is cited so frequently in the Majority Report, since it is hardly a major player in the delivery of contracts in the federal government. It would also be interesting to know how the department characterized its $241,000 contract to commentator Armstrong Williams to publicize the No Child Left Behind Act in relation to the interrogatories.

[25] As will be noted, *infra*, the interrogatories were substantially changed from their original without the consent of the Commission.

[26] *See* appendix C.

The results and analysis of these interrogatories are contained in appendices A, B, and E of my dissenting statement; they were deleted from the original version of the draft received by all Commissioners.[27]

What does the suppressed data reveal? To start, there is significant data demonstrating that socially and economically disadvantaged firms continue to lag well behind where they should be in proportion to the country's demographic composition or labor force representation.[28] In data represented in appendix A, African American-owned firms remain significantly underrepresented and also demonstrate the slowest growth in number, revenue, and survival rates.[29] Yet, rather than dealing with this data in the context of its conclusions, the Majority Report simply ignores it and avoids any attempt to reconcile the data with race neutrality.[30] It is as if the Commission Majority has lost the will to do battle with contrary data and, by deletion, clears the pathway for its own logic to run unimpeded.

The Majority Report also excludes all data offered by federal agencies in support of continuing race-conscious programs. SBA, for example, has faced multiple lawsuits alleging that its 8(a) business development program does not pass muster under *Adarand*. To date, however, SBA and the 8(a) program have survived all challenges on a facial and as applied basis.[31]

The Majority Report also dismisses the role that Congress plays in legislating and making findings. Again, the 8(a) program is a significant example of a program that explicitly has race-conscious elements yet remains viable, even in today's Congress.

The Commission Majority also fails to recognize significant legislative and regulatory changes since *Adarand* that make it impossible to isolate the direct effects of the decision or demonstrate causal relationships. The Majority Report seems to believe that the all the programs for procurement and contracting in the federal government should be dancing on the head of the proverbial *Adarand* pin. Even if so, they present no evidence to refute the earlier statement by the Department of Justice that discriminatory barriers are "real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible lingering effects of prior discriminatory conduct."[32]

One of the most important discussions that this report could have had concerns the data provided to the Commission by SBA with regard to its "goaling" program.[33] While the Small Business

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[27] They were originally chapters 2 and 3 in the June 17, 2005 draft distributed to Commissioners.

[28] No doubt the Commission Majority will trumpet the latest Census findings, released on July 28, 2005, one day before this dissent was due, to state that African American firms, for example, have shown gains. While this is true, it does not detract from the other data regarding the fact that many departments did not reach their statutory goals of awards to small disadvantaged businesses.

[29] Appendix A, pp. 97-104.

[30] The Commission Majority dismisses the deleted sections and accompanying data as "biased" or "incomplete" or "not rigorous enough." No analytical, intellectual, or specific points of criticism were raised by the Majority.

[31] Appendix B, p. 130.

[32] DOJ, Proposed Reforms to Affirmative Action, p. 26,051.

[33] In 1978 Congress enacted a program to encourage federal agencies to award a designated proportion of their

Act of 1978 established goals for small businesses in general, over time Congress amended its original goals and added goals for firms facing social and economic disadvantage and for subcontracts in addition to other categories. Congress charged SBA with implementing the goaling program to meet governmentwide goals. However, the Small Business Act recognized that different departmental missions and procurement needs affect the maximum practical contracting opportunities for small business concerns, and as such SBA negotiates annual agency-specific goals and reviews results.[34]

Given that SBA adapts goaling targets to each agency's needs, one might presume that agencies always meet these goals. However, the Commission's research shows decidedly mixed results in attaining procurement targets for 8(a), non-8(a) SDBs, and Historically Underutilized Business Zone (HUBZone) enterprises. The absence of this data, both positive and negative, speaks volumes about the Commission Majority's inability to deal with data that would detract from its theories and speculation.

V

We turn now to the most objectionable parts of the Majority Report: the so-called findings and recommendations made by the Commission Majority. While some parts of these have been discredited in parts II, III, and IV, it is instructive to go through some of them individually to show their utter lack of root and foundation.

Serious Consideration: The Majority Report, turning *Adarand* and *Grutter* on their heads, believes that the only way to implement this requirement is to create a six-prong test to "ensure" serious consideration is occurring.[35] The Commission Majority waxes on about a "team of legal advisors, procurement specialists, and social scientists" working together in harmony (no doubt of diverse ethnicities and gender, one would hope) to issue clear guidelines. The question remains: if DOJ has specifically provided guidance beforehand, and, according to the Commission Majority, agencies have ignored it, why not recommend that agencies work better to comply with the existing DOJ guidance? And, again, why rely upon the Department of Education admissions standards for guidance, which are irrelevant, not to mention the fact that DOEd plays such a relatively small role in federal contracting and procurement compared to DOD, DOT, and SBA?

Antidiscrimination Policy and Enforcement: The Majority Report recommends that Congress enact legislation "expressly prohibiting discrimination based on race, color, religion, sex, national origin, age, and disability in federal contracting and procurement. Legislation should include protections for both contractors and subcontractors…."

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prime contracts to small businesses. Congressional intent was to ensure that the government's procurement process is fair and unbiased and to open opportunities for small businesses to provide goods and services. *See* appendix B, pp. 142–43.

[34] Ibid.

[35] Interestingly enough, nowhere did the interrogatories propounded by the Commission ask an agency or department (a) to define "serious consideration," or (b) whether it considered this the standard. *See* appendix C.

This is, obviously, the ultimate Trojan Horse ploy. By stating that this kind of legislation would help enforce nondiscrimination in procurement, facially it appears neutral. In practice, however, it would, with one stroke, eliminate all race-conscious programs in federal contracting and provide private rights of actions to aggrieved majority-owned contractors against the federal government.[36] This turns antidiscrimination enforcement in the context of contracting on its head. It is one thing to recommend that the government act as an ally to minority firms which believe they suffer from discrimination; in so doing, agencies could set up more effective avenues for firms to lodge discrimination complaints, initiate investigations, and sanction offending firms. It is another to recommend that government be statutorily prohibited from providing for race-conscious remedies. This would be the inevitable result even if an agency were to comply with the twisted, cumbersome, near-impossible procedures for race-neutral alternatives and still found a need for race-conscious measures. Surely this is *not* the result intended by the Commission Majority.[37] Or is it?

Ongoing Review: As stated, supra, the idea that "ongoing review" can be an easy, ongoing procedure does not comport with the real world of federal procurement and contracting. Time frames, such as the suggested "biennial," obviously have no historic memory of the deliberate nature of change when it comes to racial discrimination. The absence of any compelling argument to contradict the Clinton administration reforms on affirmative action, especially benchmark studies and the reliance on state and local disparity studies, renders this suggestion moot from a policy and practical perspective.

Data and Measurement: As with Ongoing Review, supra, there is a surprising lack of heft to the arguments in this section. The suggestion that the National Academy of Sciences be employed to analyze and create benchmarks is also very unusual. The criticism of the 1996 Commerce benchmark study is deemed "controversial" because a ferocious critic of affirmative action in general and disparity studies in specific, Professor George La Noue, was hired by the Commission Majority to "evaluate" the final version of the Majority Report. Professor La Noue's comments included in the Majority Report described the 1996 Commerce study as "obsolete" and "its methodologies controversial."[38] Given that Mr. La Noue has published such articles as "To the 'Disadvantaged' Go the Spoils?"[39] and "Race Neutral Programs in Public Contracting,"[40] the conclusions are hardly unexpected. However, Professor La Noue even

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[36] María Enchautegui, Michael Fix, Pamela Loprest, Sarah von der Lippe, and Douglas Wissoker, "Do Minority-Owned Businesses Get a Fair Share of Government Contracts?" (Washington, D.C.: The Urban Institute, 1997), < http://www.urban.org/url.cfm?ID=307416> (hereafter cited as Enchautegui et al., "Do Minority-Owned Businesses Get a Fair Share?") (the results do not support claims of widespread reverse discrimination in contracting at the state and local government levels).

[37] Again, there is no evidence cited anywhere in the Majority Report that *reverse* discrimination exists in any of the federal programs examined.

[38] It bears pointing out that Professor La Noue is cited in the criticism of the benchmark study by the National Academy of Sciences.

[39] George R. La Noue, "To the 'Disadvantaged' Go the Spoils?" *The Public Interest*, no. 138 (Winter 2000).

[40] George R. La Noue and John C. Sullivan, "Race Neutral Programs in Contracting," *Public Administration Review*, vol. 55, no. 4 (July/August 1995).

acknowledges the difficulty faced by the Commission Majority's blithe bows to the ease of obtaining data when he testified before Congress and said:

> A federal disparity study would face formidable challenges in data gathering and analysis. The federal government makes purchases of almost every "particular service" imaginable, so there would have to be many disparity ratios calculated and it would be unlikely that the results would be consistent. For example, in the recent Texas state disparity study, women were found to be underutilized in the general and special trades construction category, but overutilized in the heavy and highway category. Making a single category of construction would have obscured that reality.[41]

If the Commission Majority were to also recommend full funding for civil rights enforcement, including the type of disparity and benchmark studies that scholars from both sides of the ideological divide would advocate, perhaps a middle ground could be sought. In the meantime, I believe that congressional authority under section five of the 14th Amendment should suffice to keep intact those programs still utilizing race as a means of promoting economic opportunity.

The remaining two recommendations—"Communication and Collaboration" and "Outreach"—can be dismissed by stating the obvious. Of course, agencies should communicate better. Regular meetings could help. But at the same time, the "relevant differences," as Justice O'Connor has said, may make many of those meetings irrelevant. The individual peculiarities of contracting between DOT and DOD are unique and perhaps irreconcilable. Differences of size and scale and departmental culture are formidable. Standardization is always the Holy Grail of the bureaucratic mind, but it can be the hobgoblin as well. Outreach is and should be a given in any scenario involving minority business programs. But there is a difference between "outreach" meaning "here is a program you should apply for" and "outreach" meaning "tell us what your problems are in applying for this program so we can fix it to better serve you and your constituency."[42] This distinction is lost on the Commission Majority.

VI

Finally, it must be noted that the procedure used to produce the Majority Report was fatally flawed from the outset and out of compliance with what the Commission approved.

In 2003, the Commission unanimously approved for its 2005 statutorily mandated enforcement report "Ten Years After *Adarand*: The Effect of Changed Federal Procurement Standards on Women- and Minority-Owned Businesses."[43] The original scope of the project, again passed unanimously, was to review the decision's effect on contracting levels of women- and minority-owned businesses. In sum, there was a concern that the aftermath of *Adarand* might have had

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[41] Testimony of George La Noue before the House Committee on the Judiciary, Subcommittee on the Constitution, Oct. 19, 1995.

[42] The Commission Majority is hardly an exemplar of outreach given that it would not allow the public to review the Majority Report as it was being discussed at the Commission.

[43] *See* appendix C.

undue and perhaps adverse impacts on the gains that women- and minority-owned businesses had made since the creation and implementation of federal SDB programs.

In March 2005, it was revealed at a meeting of the Commission that, in fact, the scope of the project had been changed without the consent of the Commission. It was further revealed that in February the Staff Director, with the consent of the Chair, revised the scope of the report to a "Race-Neutral Federal Contracting" project.[44] To his credit, the Chair of the Commission assumed responsibility for the error, called the process "tortured"[45] and acknowledged that mistakes had been made and would not be again. The final motion, adopted in April, stated that:

> [The Office of Civil Rights Evaluation (OCRE)] reshape the scope of the *Adarand* enforcement study to include information on federal agencies' use of race-neutral contracting vehicles, in addition to elements of the original project proposal. The resulting study will, one, report the amount of federal procurement funds going to small, disadvantaged, and HUBZone businesses; two, analyze continuing barriers facing socially and economically disadvantaged firs [sic]; and, three, examine the role of federal agencies, including SBA in implementing procurement programs for these firms following the Supreme Court decision that government procurement activity involving racial classification be subject to strict scrutiny. Specifically, OCRE will research if and how federal contract or federal agencies changed procurement practices to fulfill the compelling interest and narrow tailoring components of the *Adarand v. Pena* decision.[46]

It is clear from the final version of the Majority Report that the motion on April 8 to correct the scope of the report was completely disregarded in the final draft. Indeed, there was never a vote taken by the Commission to exclude the data which had previously been found in chapters 2 and 3 of the June 17, 2005 draft.[47] Now, in the Majority Report as it currently stands, nowhere to be found is any data on the amount of procurement funds going to small and disadvantaged businesses (only to HUBzone businesses which, coincidentally, is the only race-neutral program examined in the Majority Report); nowhere to be found is an analysis of continuing barriers facing socially and economically disadvantaged firms. Only lip service was paid to if and how federal agencies changed procurement practices to fulfill the requirements of *Adarand* except, as noted before, to erroneously interpret the mandates of the reform efforts of the Clinton administration.

Instead, not coincidentally, the final version of the Majority Report adheres to the original, unapproved concept paper sent out by the Staff Director and the Chair, which stated:

> [T]he project will consider the following:
> - Do agencies engage in race-neutral practices such as mentor-protégé programs, outreach, and financial and technical assistance as means to increase opportunities for small and disadvantaged businesses to win federal contracts?

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[44] U.S. Commission on Civil Rights, Mar. 15, 2005 meeting, transcript p. 139 (hereafter cited as USCCR, March transcript).

[45] Ibid., p. 146

[46] U.S. Commission on Civil Rights, Apr. 8, 2005 meeting, transcript, pp. 70, 72.

[47] Now incorporated as appendices A and B.

- Do agencies employ specific, best practices for such consideration?
- Are agencies developing and utilizing additional promising practices for race-neutral means of achieving statutory goals?[48]

Realizing that the report deviates substantially from the amended scope, the Commission Majority cannot cure its deficiency by passing a revised scope *post hoc*[49] to track the current version. For the federal agencies that spent considerable time and effort answering the interrogatories propounded to them in February, it was time and effort wasted.[50] For a Congress awaiting a mandated enforcement report, a volume on theory that is light on enforcement data is a similar waste.

VII

What, then, should the Federal government be doing post-*Adarand* with regard to public contracting and procurement? The Commission Majority, in ignoring the charter of this Commission, would have the Federal government engage in endless navel gazing in an attempt to find race-neutral means that, in practice, would paralyze existing efforts to combat discrimination. Despite the denials (or burials) of the Commission Majority, there remains consistent evidence that discrimination against minorities exists.[51]

We should, instead, turn the analysis on its head—as the scope of the report was supposed to do—and ask the question: what is the federal government doing, and is it enough to promote economic opportunity and remedy past and current discrimination?[52]

Unfortunately, because of the changed scope from the original goals of the report, and because the interrogatories propounded (which were also changed from their original version[53]) were not adequate to cover the data and policies needed for a full report, it is impossible to extrapolate from the data at hand.

What can be extrapolated is that federal agencies, particularly SBA and DOT, continue with efforts to promote economic opportunity and remediate past discrimination through a

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[48] *See* U.S. Commission on Civil Rights, Race-Neutral Federal Contracting Project Concept, appendix C.

[49] The Commission "revised" the scope of the report back to the Chairman's preferred version, by motion at the teleconference meeting of the Commission on July 22, 2005. I voted against revising the scope of the project.

[50] Perhaps the only consolation prize for all those hours spent is that the data resides in appendices A, B, and E.

[51] *See, e.g.*, David G. Blanchflower, Phillip B. Levine, David J. Zimmerman, "Discrimination in the Small Business Credit Market," Oct. 7, 1998 ("Quantitative evidence supports a conclusion of discrimination."); Timothy Bates, "Minority Business Access to Mainstream Markets," *Journal of Urban Affairs*, vol. 23, no. 1 (2001), pp. 41–56 (empirical evidence supports conclusion of discriminatory barriers to government contracting); Enchautegui et al., "Do Minority-Owned Businesses Get a Fair Share?" (repealing affirmative action policies would limit the tools available to government to rectify wide disparities).

[52] If you read the opening paragraph of the Majority Report, it is as if the federal government has been employing "various programs designed to expand opportunities" in a policy vacuum. There is no acknowledgement of the historical discrimination against minorities in federal contracting and procurement.

[53] USCCR, March transcript, pp. 140, 163.

combination of race-conscious and race-neutral means. I see no deviation, on its face, from the Supreme Court's mandate in *Adarand*. Federal agencies have been working, post-*Adarand*, with instructions from DOJ to consider race-neutral alternatives, but DOJ does not require agencies to (a) eliminate programs that have race-conscious elements, or (b) exhaust all race-neutral remedies before proceeding to race-conscious remedies. The Commission Majority offers no compelling evidence (indeed, no evidence at all) to find that any of the current programs are unconstitutional or illegal.

What is clear, however, is that a comprehensive study of federal contracting and procurement programs would be extremely time-consuming, unwieldy, and, ultimately, subject to the kind of scrutiny that gives rise to the old axiom about sausage-making. It is doubtful that, in a resource-limited time, sufficient resources would be appropriated by Congress for a thorough study. There certainly are not enough resources in our Commission's already meager budget to do justice to such a report.

I suggest that a good study would start with state and local governments. If the states are, as Justice Brandeis once said, the "laboratories of democracy,"[54] there are many states and municipalities that continue to promote economic policies that include race-conscious programs in contracting and procurement. These states, counties, and cities have more manageable procurement budgets and more clearly defined sample sizes, which make it relatively easier to draw conclusions, lessons, and best practices. More importantly, unlike the Commission Majority's reliance on DOEd admission policy manuals, any best practices would emanate from a practical platform with far greater application to federal contracting and procurement.

I would also suggest that there are good studies already in place for examination. No doubt the Commission Majority is ready to cast skepticism, aspersion, and conservative scholars by the thousands upon these studies. Yet, the sheer number and volume of these studies, and the consistency of the results, at least should give one pause to the fact that perhaps these states and municipalities may have done something right.

In my dozen-plus years in public service, I have met many people who have benefited from the existence of such programs at the local level. They have become leaders in construction management and the construction trades, owners of office supply companies and copy service stores, principals in accounting, law, and public affairs firms. All have told me, without hesitation, that government contracts have been instrumental in creating a solid financial footing for their companies. It has enabled them to grow to scale to survive and finally compete on their own, *without* regard to race, national origin, or gender. But, in the beginning, a helping hand—the hand that elevates someone from the basement of opportunity in which historical discrimination placed so many—was needed, and that assistance came from race-conscious minority business enterprise and women business enterprise programs.

We cannot simply turn away from this history of success; turn away from the legacy of discrimination; turn away from our responsibility as a Commission and a nation to ensure that

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[54] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

we are doing all that we can to create a more equal and just society. Yet that is what the Commission Majority report would recommend, and why I cannot join in its findings.

Dissent Appendix A: Small Businesses and Federal Contracting

TRENDS IN MINORITY-OWNED BUSINESSES AND FEDERAL PROCUREMENT

Like other policy changes, those that came about after the *Adarand* decision should be periodically reviewed to assure their effectiveness at fulfilling their stated purpose. This section evaluates the amount of contracts agencies awarded to minority-owned businesses over the past decade or more—starting in 1992 before *Adarand* through the most recently available data. The analysis first examines growth in the numbers of minority-owned businesses and their revenues. It then briefly discusses concurrent program changes that may affect small businesses' opportunities to compete for federal government contracts and could mask *Adarand* effects. Finally, the appendix examines trends in procurement data against the backdrop of *Adarand* and other changes.

Information on minority-owned businesses is derived from economic counts that the Census Bureau conducts. Trends in federal procurement are developed from data the General Services Administration collected and reported until recently hiring a contractor to perform the task. Both databases and the problems inherent in them are described in appendix D.

The Growth in Minority-Owned Businesses, 2002 and 1997 Census Figures

2002 Census Survey

The Census Bureau, on July 28, 2005, released new figures on minority small business growth in the United States current for 2002. The number of minority-owned businesses grew between 1997 and 2002 from an estimated 2.8 million to 4.1 million, a 68 percent increase. Specifically, Hispanic-owned businesses grew from more than 1.1 million to 1.57 million; African American-owned businesses grew from approximately 823,000 to 1.2 million; and Asian American-owned businesses grew from 893,000 to over 1.1 million.[1] (See table A.1.)

[1] U.S. Census Bureau, 2002 Survey of Business Owners, released July 28, 2005. Due to the late nature of the release, there was no time to put together bar graphs to illustrate. The raw table is incorporated in its entirety as table A.1.

TABLE A.1
Summary Statistics for Changes in the Number of U.S. Businesses and Their Receipts, 1997–2002

	All Firms[1]						
	Counts			Receipts ($billions)			Average Receipts
	1997	2002	Change	1997	2002	Change	2002
Total U.S. Businesses	20,821,934	22,977,164	+10%	$ 18,553	$ 22,635	+22%	$ 985,103
Female	5,417,034	6,492,795	+20%	$ 819	$ 951	+16%	$ 146,408
Male	11,374,194	13,185,703	+16%	$ 6,635	$ 7,096	+7%	$ 538,194
Hispanic or Latino	1,199,896	1,574,159	+31%	$ 186	$ 226	+22%	$ 143,866
White	18,422,070	19,894,823	+8%	$ 7,942	$ 8,304	+5%	$ 417,395
Black	823,499	1,197,988	+45%	$ 71	$ 93	+30%	$ 77,426
American Indian and Alaska Native	197,300	206,125	*	$ 34	$ 26	*	$ 128,057
Asian American	893,590	1,105,329	+24%	$ 303	$ 343	+13%	$ 310,606
Native Hawaiian and Other Pacific Islander	19,370	32,299	+67%	$ 4	$ 5	+26%	$ 161,640
	Firms with paid employees						
	Counts			Receipts ($billions)			Average Receipts
	1997	2002	Change	1997	2002	Change	2002
Total U.S. Businesses	5,295,151	5,526,111	+4%	$ 17,908	$ 21,867	+22%	$ 3,957,102
Female	846,780	917,946	+8%	$ 718	$ 813	+13%	$ 885,878
Male	3,485,921	3,525,524	+1%	$ 6,270	$ 6,599	+5%	$ 1,871,772
Hispanic or Latino	211,884	199,725	-6%	$ 159	$ 184	+16%	$ 921,090
White	4,573,528	4,712,168	+3%	$ 7,405	$ 7,629	+3%	$ 1,619,000
Black	93,235	94,862	**	$ 56	$ 70	+24%	$ 735,586
American Indian and Alaska Native	33,277	25,101	*	$ 29	$ 21	*	$ 847,492
Asian American	286,976	319,911	+11%	$ 275	$ 308	+12%	$ 961,379
Native Hawaiian and Other Pacific Islander	3,023	4,333	+43%	$ 4	$ 4	+16%	$ 998,481
	Firms with no paid employees						
	Counts			Receipts ($billions)			Average Receipts
	1997	2002	Change	1997	2002	Change	2002
Total U.S. Businesses	15,526,783	17,451,053	+12%	$ 645	$ 767	+19%	$ 43,979
Female	4,570,254	5,574,850	+22%	$ 101	$ 137	+36%	$ 24,648
Male	7,888,273	9,660,179	+22%	$ 365	$ 497	+36%	$ 51,499
Hispanic or Latino	988,012	1,374,434	+39%	$ 28	$ 43	+54%	$ 30,925
White	13,848,542	15,182,655	+10%	$ 536	$ 675	+26%	$ 44,426
Black	730,264	1,103,126	+51%	$ 15	$ 23	+54%	$ 20,761
American Indian and Alaska Native	164,023	181,024	*	$ 5	$ 5	*	$ 28,299
Asian American	606,614	785,418	+29%	$ 28	$ 36	+27%	$ 45,537
Native Hawaiian and Other Pacific Islander	16,347	27,966	+71%	$ 0	$ 1	+116%	$ 31,981

1/ Includes firms with paid employees and firms with no paid employees

* = Not directly comparable ** = Not statistically significant

Note: Race groups are for the group alone or in combination with some other race. Hispanics may be of any race.

Source: U.S. Bureau of the Census, "Summary Statistics for Changes in the Number of U.S. Businesses and their Receipts, 1997-2002," no date. See <http://www.census.gov/Press-Release/www/releases/archives/business_ownership /005477.html> (last accessed Aug. 4, 2005).

Comparison between 2002 and 1997—General Observations

While the data analyzed from 1997 are presented in detail, there are some general observations about the 2002 data that bear discussion.

First, for African American-owned businesses, the growth in businesses with paid employees had virtually no change, tracking trends spotted in 1997 (discussion below). The same lack of growth in paid-employee businesses was seen in the American Indian/Alaska Native category as well.

Second, while the growth pattern for minority-owned businesses is impressive, it does not answer the question of whether these businesses are comparable to similar nonminority-owned businesses in scale and creditworthiness. The data, and analysis, do not exist at this time.

Finally, the data cannot speak for the success or failure of federal procurement programs in the post-*Adarand* world. The data do not detail how many of these businesses avail themselves of the 8(a) or small disadvantaged business (SDB) programs at the federal level. They do not detail whether small and disadvantaged businesses are in industries that can find competitive sourcing for contracts from federal agencies. Nor do the data speak to whether any of these firms encountered the historic, persistent discrimination that continues to exist in our society.

What we do know, however, is that states and localities throughout this country, particularly in large metropolitan areas, have continued to pursue aggressive minority and women business enterprise programs. Many localities, such as San Francisco, Los Angeles, New York, Phoenix, and Chicago, among others, still have robust programs for minority and women business owners to participate in local government contracting and procurement.[2] With further study, we may find that these thriving programs, no doubt whose existence is infuriating to the Commission Majority, are a major source of minority business growth.

1997 Survey

The number of minority-owned businesses grew between 1992 and 1997 from an estimated 2.1 to 2.8 million (see figure A.1). Specifically, Hispanic-owned businesses grew from more than 860,000 to 1.1 million; African American-owned, from about 620,000 to 780,000; Asian American and Pacific Islander-owned, from 600,000 to more than 785,000; and American Indian and Alaskan Native enterprises, from roughly 100,000 to almost 190,000.[3] Minority-owned

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[2] Summaries and information can be found on the cities' Web sites: <http://www.sfgov.org/site/oca_page.asp?id=26537> (San Francisco, CA); <http://oaac.co.la.ca.us/WomMin.shtml> (Los Angeles, CA); <http://www.nyc.gov/html/sbs/html/mwbe.html> (New York City, NY); <http://phoenix.gov/CERTIFY/whodir.html> (Phoenix, AZ); and <http://egov.cityofchicago.org/city/webportal/portalEntityHomeAction.do?entityName=Procurement%20Services&entityNameEnumValue=34> (Chicago, IL).

[3] U.S. Census Bureau, *1997 Economic Census: Company Statistics Series, Company Summary, 1997*, EC97CS-1, September 2001, pp. 10, 15 (hereafter cited as Census Bureau, *1997 Economic Census—Company Summary*); U.S. Census Bureau, *1997 Economic Census: Survey of Minority-Owned Business Enterprises; Company Statistics Series, Summary, 1997*, EC97CS-7, July 2001, p. 14; U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, *1992 Economic Census: Survey of Minority-Owned Business Enterprises,*

businesses as a whole grew by 30 percent, as did those owned by Hispanics as well as Asian Americans and Pacific Islanders. American Indian and Alaskan Native-owned businesses grew in number by a tremendous 83.7 percent. In comparison, the number of African American-owned businesses grew 25.7 percent. (See figure A.2.)

For the period 1992–1997, the 30 percent growth in the numbers of minority-owned businesses looks high compared to the growth in U.S. firms generally, which grew 6.8 percent from about 17.3 million to 18.4 million. (See figures A.1 and A.2.) However, the growth is slow compared to the increase in minority-owned business between 1987 and 1992. For example, minority-owned businesses grew 62 percent from 1987 to 1992. African American-owned businesses grew 46 percent; Asian American- or Pacific Islander-owned businesses, 61 percent; and Hispanic-owned businesses, 83 percent during that period.[4]

The 68 percent growth tracks, as shown above, the more robust periods of growth in minority-owned businesses from 1987–1992.

In 1997, minority-owned businesses constituted 15.3 percent of all firms. Hispanic-, Asian American and Pacific Islander-, African American-, and Native American-owned firms were 5.9, 4.5, 4.0, and 1.0 percent of all enterprises, respectively.[5] In comparison, in 1997, Hispanics and African Americans comprised about 9 percent each of the employed civilian labor force; Asian Americans were over 3 percent.[6] Recent statistics from 2004 show that Hispanics, Asian Americans and Pacific Islanders, and African Americans are 13, 4.3, and 11 percent, respectively, of the employed civilian labor force.[7] Thus, for example, only Asian American-owned businesses are as common as the group's representation in the work force. The low

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Summary, MB92-4, September 1996, pp. 5, 6, 13 (hereafter cited as Bureau of the Census, *1992 Economic Census—Minority-Owned Business Summary*). Note that 1992 and 1997 statistics were not comparable, and the original sources applied adjustments to make comparisons. For minority groups, adjustments are applied to the 1997 figures and exclude "C" corporations. *See, e.g.,* U.S. Census Bureau, *1997 Economic Census—Company Summary,* pp. 6–7.

[4]Bureau of the Census, *1992 Economic Census—Minority-Owned Business Summary,* pp. 5, 13.

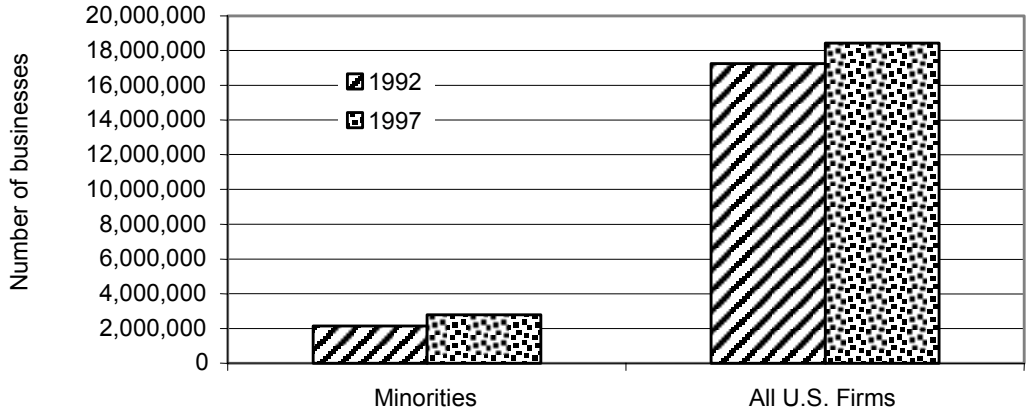
[5] Figures calculated from data in Census Bureau, *1997 Economic Census—Company Summary,* pp. 10, 15. *Also see* U.S. Small Business Administration, Office of Advocacy, *Dynamics of Minority-Owned Employer Establishments, 1997–2001,* February 2005 (hereafter cited as SBA, *Dynamics of Minority-Owned Employer Establishments*). Because this report uses establishments with paid employees, its statistics differ slightly. It shows that in 1997, 15.1 percent of businesses were minority-owned; and 6.1, 4.3, 4.2, and 1.0 percent were Hispanic-, Asian and Pacific Islander-; black-, and American Indian and Alaska Native-owned. Ibid, p. 5.

[6] Figures are calculated from U.S. Department of Commerce, *Statistical Abstract of the United States, 1998,* October 1998, pp. 51, 52, 54.

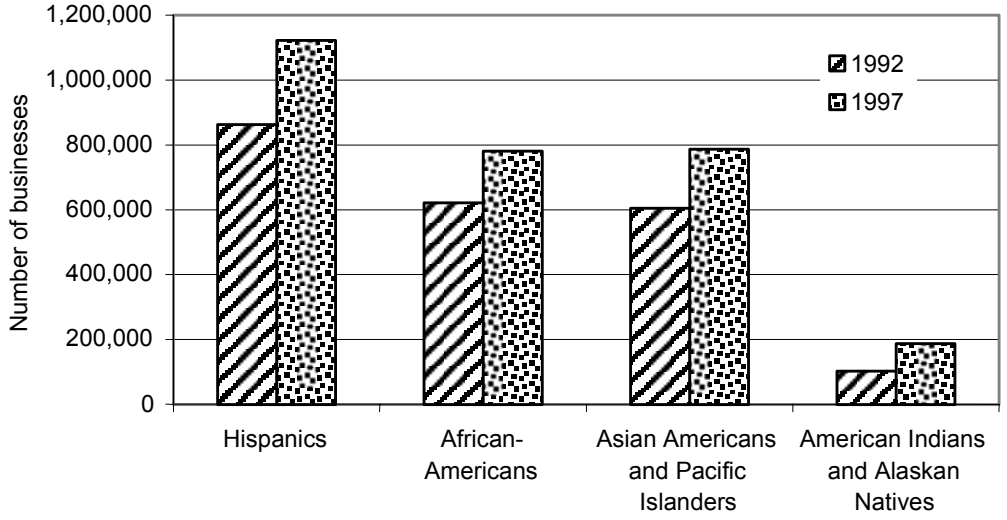
[7] Current figures are computed from the Bureau of Labor Statistics data for October 2004. *See* U.S. Department of Labor, Bureau of Labor Statistics, "Table A-1. Employment status of the civilian population by sex and age," Nov. 5, 2004, <http://www.bls.gov/news.release/empsit.t01.htm> (last accessed Nov. 23, 2004); U.S. Department of Labor, Bureau of Labor Statistics, "Table A-2. Employment status of the civilian population by race, sex, and age," Nov. 5, 2004, <http://www.bls.gov/news.release/empsit.t02.htm> (last accessed Nov. 23, 2004); U.S. Department of Labor, Bureau of Labor Statistics, "Table A-3. Employment status of the Hispanic or Latino population by sex and age," Nov. 5, 2004, <http://www.bls.gov/news.release/empsit.t03.htm> (last accessed Nov. 23, 2004).

numbers of minority-owned businesses thereby limit the potential small disadvantaged business contractors federal agencies use.[8]

FIGURE A.1
The Number of Minority-Owned Businesses, 1992 and 1997



Caption: The number of both minority-owned businesses and all U.S. firms grew between 1992 and 1997.

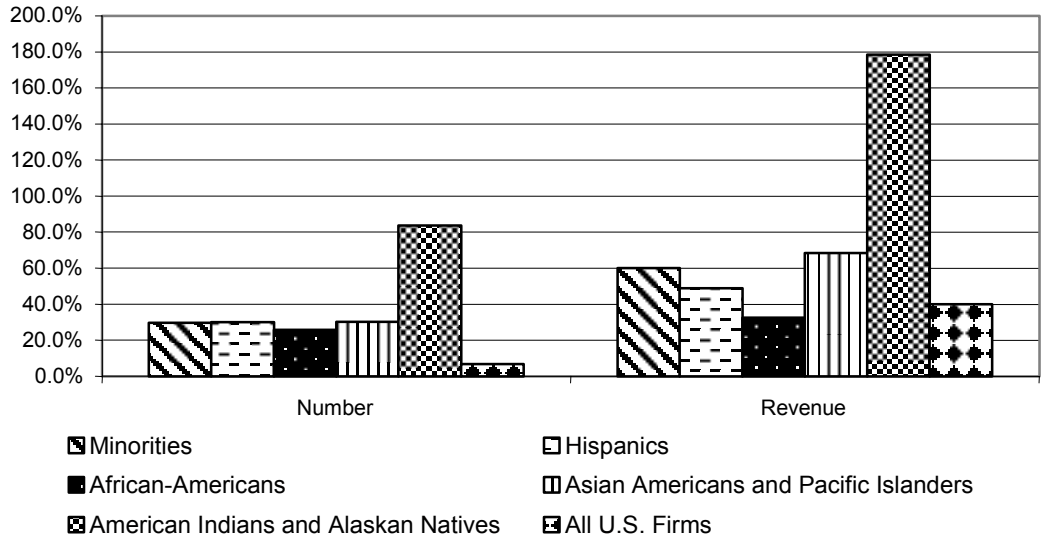


Caption: The number of businesses grew between 1992 and 1997 for each group: Hispanics, African Americans, Asian Americans and Pacific Islanders, and American Indians and Alaskan Natives.

Source: U.S. Census Bureau, 1997 Economic Census: Company Statistics Series, Company Summary, 1997, EC97CS-1, September 2001, pp. 10, 15; U.S. Census Bureau, 1997 Economic Census: Survey of Minority-Owned Business Enterprises; Company Statistics Series, Summary, 1997, EC97CS-7, July 2001, p. 14; U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 1992 Economic Census: Survey of Minority-Owned Business Enterprises, Summary, MB92-4, September 1996, pp. 5, 6, 13.

[8] Elsewhere, the Small Business Administration's Office of Advocacy contends that the growth in minority-owned businesses is unimpressive given increases in the proportion of minority population. *See* SBA, *Dynamics of Minority-Owned Employer Establishments*, pp. 4–8.

FIGURE A.2
Percent Growth in Numbers and Revenue[1] of Minority-Owned Businesses, 1992 to 1997



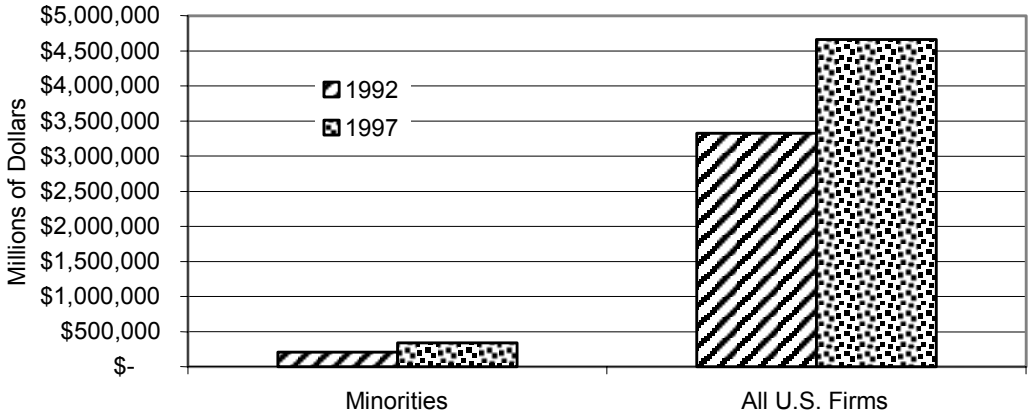
Caption: Between 1992 and 1997, the number of minority-owned businesses increased about 30 percent, more than all U.S. firms generally. Revenue of minority-owned businesses grew 60 percent, also more than that of all U.S. firms. However, the revenue of African American-owned firms grew only half as much as minority-owned businesses generally, and less than all U.S. firms.

[1]Growth in revenue is not adjusted for inflation.
Source: U.S. Census Bureau, 1997 Economic Census: Company Statistics Series, Company Summary, 1997, EC97CS-1, September 2001, pp. 10, 15; U.S. Census Bureau, 1997 Economic Census: Survey of Minority-Owned Business Enterprises; Company Statistics Series, Summary, 1997, EC97CS-7, July 2001, p. 14; U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 1992 Economic Census: Survey of Minority-Owned Business Enterprises, Summary, MB92-4, September 1996, pp. 5, 6, 13.

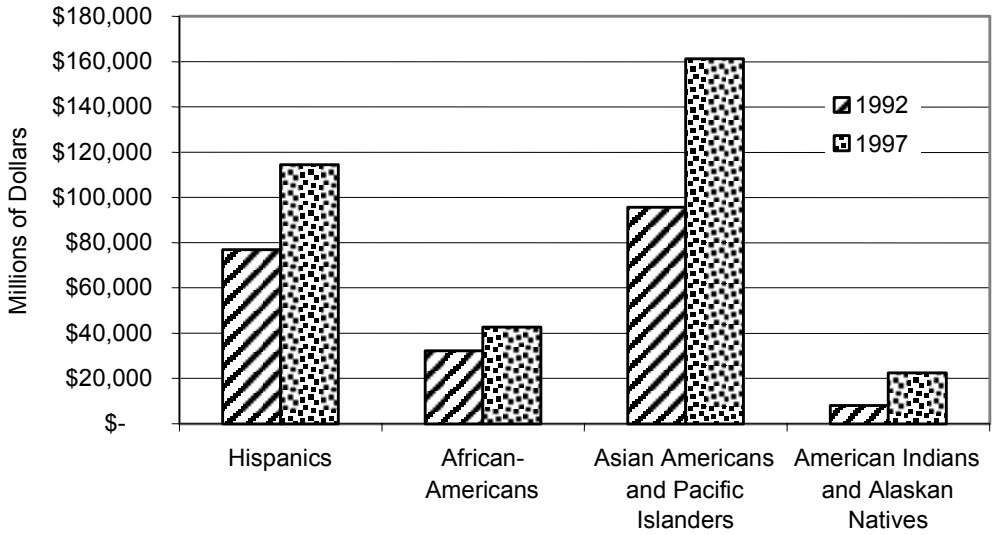
Revenue

Other indicators also show smaller growth patterns for black-owned firms. For example, minority-owned firms' revenue grew between 1992 and 1997 (see figure A.3). Sales and receipts of minority-owned businesses increased from $200 million to $300 million. Hispanic-owned businesses grew in revenue from $76,842 million to $114,431 million; African American-owned businesses from $32,197 million to $42,671 million; Asian American and Pacific Islander-owned businesses from $95,714 million to $161,142 million; and Alaskan Native/American Indian-owned businesses from $8,057 million to $22,441 million (see figure A.3).

FIGURE A.3
Revenue of Minority-Owned Businesses, 1992 to 1997[1]



Caption: The revenue of minority-owned businesses grew between 1992 and 1997, but was small relative to that of all U.S. firms and their growth.



Caption: The revenue of businesses owned by each minority group grew between 1992 and 1997. However, the revenue of African American-owned businesses is much less than that of Hispanic- or Asian and Pacific Islander-owned firms.

[1]Revenues are shown as reported and have not been adjusted for inflation.
Source: U.S. Census Bureau, 1997 Economic Census: Company Statistics Series, Company Summary, 1997, EC97CS-1, September 2001, pp. 10, 15; U.S. Census Bureau, 1997 Economic Census: Survey of Minority-Owned Business Enterprises; Company Statistics Series, Summary, 1997, EC97CS-7, July 2001, p. 14; U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 1992 Economic Census: Survey of Minority-Owned Business Enterprises, Summary, MB92-4, September 1996, pp. 5, 6, 13.

The percentage growth in revenue between 1992 and 1997 was 60 percent for minorities. Revenue of American Indian- and Alaskan Native-owned businesses grew 178 percent; Asian American and Pacific Islander-owned businesses increased 68 percent; and Hispanic-owned businesses 49 percent. However, revenue of African American-owned businesses increased only 32 percent. Notably the growth in sales and receipts of all U.S. firms was 40 percent between 1992 and 1997 (see figure A.2). Thus, revenue growth of black-owned businesses was less than the average for all firms, despite the existence of government programs to increase awareness of contracting opportunities. Low overall revenue may effectively constrain the capability of small firms to bid for contracts in ways discussed more fully later in this appendix.

The growth in revenue between 1992 and 1997 is less impressive when viewed against increases in sales and receipts from the previous era—1987 to 1992. For example, during the earlier period, revenue of minority-owned firms increased 160 percent. Sales and receipts for firms owned by Hispanics, Asian Americans and Pacific Islanders, and Native Americans nearly doubled (about 194 percent increases). African American-owned businesses experienced revenue increases of 63 percent, only slightly below the 67 percent revenue growth of all U.S. firms.[9] Additionally, the sales and receipts of minority-owned businesses are meager proportions of business revenue generally. In 1997, the revenues of minority-owned businesses account for only 7.1 percent of all U.S. firms' revenue. Businesses owned by Hispanics, African Americans, Asian American and Pacific Islanders, and Native Americans and Alaskan Natives are 2.2, 0.8, 3.7, and 0.4 percent, respectively.[10] Thus, minority-owned businesses must greatly expand their sales and receipts to reach parity with other U.S. enterprises.

Paid Employees

The majority of minority-owned businesses do not have paid employees. In 1997, only 20.1 percent of minority-owned businesses had paid employees. The proportion varied somewhat by race or ethnic group. For example, 31.8 percent of Asian American and Pacific Islander-owned businesses had paid employees, but only 11.3 percent of African American-owned firms did.[11]

As the number of minority-owned businesses has grown, so too has the proportion with paid employees. For example, in 1992, 15.9 percent of minority-owned and 10.4 percent of African American-owned businesses had paid employees, compared to the 20.1 and 11.3 percent, respectively, shown for 1997.[12] Again, the growth for black-owned businesses was both meager and less than for other groups.

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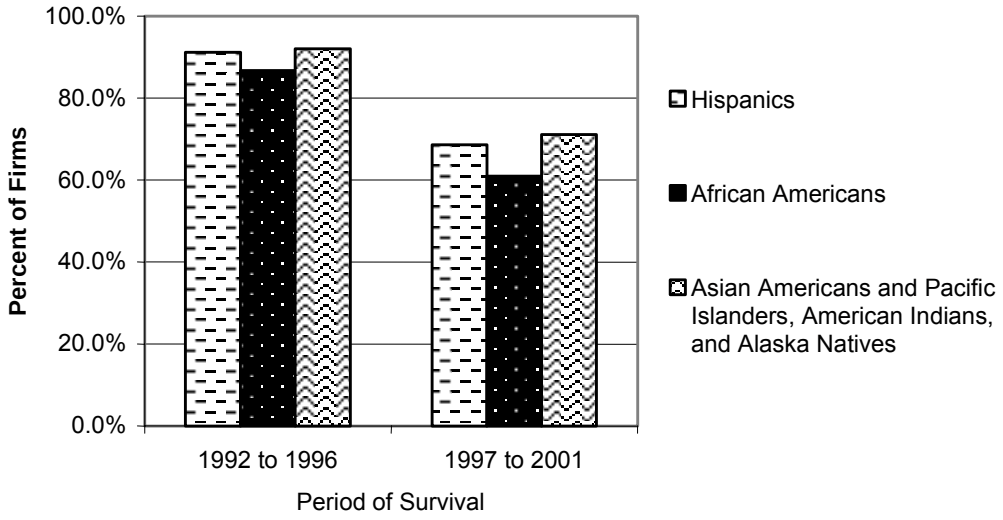
[9] Bureau of the Census, *1992 Economic Census—Minority-Owned Business Summary,* p. 5.

[10] Figures calculated from data in Census Bureau, *1997 Economic Census—Company Summary,* pp. 10, 15.

[11] Ibid., p. 15.

[12] Figures calculated from data in Bureau of the Census, *1992 Economic Census—Minority-Owned Business Summary*, p. 13, and Census Bureau, *1997 Economic Census—Company Summary*, p. 15. Growth in the proportion of paid employees grew from 14.9 to 17.7 percent for Hispanic-owned businesses, and 22.5 to 31.8 percent for Asian/Pacific Islander ones from 1992 to 1997. Ibid.

FIGURE A.4
Survival Rates of Firms with Paid Employees by Race/Ethnicity of Owner



Caption: Minority-owned firms with paid employees were much less likely to survive from 1997 to 2001 than from 1992 to 1996. However, African American-owned enterprises were less likely to survive than other groups in either period.

Source: U.S. Small Business Administration, Office of Advocacy, *Minorities in Business,* 1999, p. 25; U.S. Small Business Administration, Office of Advocacy, *Dynamics of Minority-Owned Employer Establishments, 1997-2001,* February 2005, p. 9.

Survival Rates

Research indicates that 75.5 percent of all firms in existence in 1992 survived until 1996, but these rates vary by racial/ethnic group. For example, 79.2 percent of firms owned by Asian Americans and Pacific Islanders, American Indians, and Alaska Natives, which were existing in 1992, survived until 1996, compared with 74.3 percent of Hispanic-owned firms, and only 68.9 percent of black-owned businesses. Firms with paid employees were more likely to survive. The rates were 91, 87, and 92 percent for Hispanic-, African American-, and Asian American-owned businesses with paid employees (see figure A.4), but only 70, 66, and 74 percent, respectively, for firms without.[13] New businesses in 1992 had even lower survival rates. Of all businesses with employees that started in 1992 and had positive payrolls, 47 percent survived until at least 1996. These rates were 44.9 percent for Hispanic-owned new businesses, 34.7 percent for new black-owned ones, and 50.4 percent for those owned by Asian Americans, Pacific Islanders, American Indians, Eskimos, and Aleuts.[14]

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[13] U.S. Small Business Administration, Office of Advocacy, *Minorities in Business*, 1999, pp. 8, 12, 16.

[14] U.S. Small Business Administration, Office of Advocacy, *Minorities in Business, 2001*, November 2001, p. 2

Recent data show substantially lower survival rates between 1997 and 2001. Even among firms with paid employees in 1997, the survival rates in 2001 are 72.1, 68.6, 67.0, and 61.0 percent for Asian American and Pacific Islander-, Hispanic-, American Indian and Alaska Native-, and African American-owned businesses, respectively.[15] (See figure A.4, which combines Asian American and Pacific Islander- and American Indian and Alaska Native-owned firms for comparison with the earlier year.) These data suggest, again, that minority-owned businesses, and black-owned firms in particular, continue to face substantial challenges. Low survival rates among businesses may hinder firms' ability to develop long-term rapport with federal agencies from which to seek contracts.

Summary

Whether measured in numbers, revenue, or paid employees, minority-owned businesses grew from the early to late 1990s. They grew in numbers and, for many minority groups, in revenue, more than businesses generally. However, African American-owned businesses have not grown as much as businesses generally. Furthermore, the numbers and revenue of minority-owned businesses did not increase nearly as much in the years spanning the1995 *Adarand* decision (i.e., between 1992 and 1997) as during an earlier period (1987 to 1992). This finding could result from myriad factors.

TRENDS IN FEDERAL CONTRACTING

The *Adarand* decision was only one of many developments affecting federal contracting in the 1990s. Legislative changes, which had both positive and negative influences on small businesses opportunities to compete for federal government contracts, include the Federal Acquisition Streamlining Act of 1994, the Federal Acquisition Reform Act of 1996, and the Small Business Reauthorization Act of 1997.

First, the Federal Acquisition Streamlining Act of 1994[16] (FASA) reformed acquisition procedures to allow agencies to contract with multiple firms for the same or similar products (known as multiple award contracts, MACs). New contract vehicles such as MACs accounted for an increasingly large portion of governmentwide expenditures for contracts over $25,000 between fiscal years (FYs) 1994 and1999.[17]

Second, FASA exempted purchases of $2,500 or less from the range of contracts previously reserved for small businesses and encouraged agencies to use purchase cards, similar to corporate credit cards, for purchases of this amount.[18] Small business representatives were

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(hereafter cited as SBA, *Minorities in Business, 2001*).

[15] *See* SBA, *Dynamics of Minority-Owned Employer Establishments*, p. 9.

[16] Federal Acquisition Streamlining Act, 15 U.S.C. § 644 (2000).

[17] U.S. General Accounting Office, *Small Business: Trends in Federal Procurement in the 1990s,* January 2001, pp. 3–4, 6 (hereafter cited as GAO, *Small Business Procurement Trends*).

[18] Federal Acquisition Streamlining Act, 15 U.S.C. § 644 (2000).

concerned that buyers making micropurchases were less likely to seek small businesses for these purchases. At the same time, FASA raised the ceiling for contracts reserved exclusively for small businesses—from $25,000 to $100,000—in an effort to encourage federal agencies to purchase more goods and services from small businesses and counter the negative effect of the new exemption.[19]

The Federal Acquisition Reform Act of 1996 authorized multi-agency contracts, known as governmentwide agency contracts, through which federal agencies could access each other's information technology contracts.[20] Some entrepreneurs were concerned that these contract vehicles would consolidate multiple agencies' requirements or demand performance over a wide geographic area and thereby diminish small businesses' ability to compete for federal contracts.[21]

The Small Business Reauthorization Act of 1997[22] increased a previous legislative goal for federal contract expenditures to small businesses from 20 to 23 percent beginning with fiscal year 1998.[23] Governmentwide procurement with small businesses was about 21 percent in FYs 1995 and 1996 and hovered around 23 percent in FYs 1998 to 2003.[24]

With so many changes, and particularly some in the years immediately before and after *Adarand,* one cannot isolate the effects of the 1995 Supreme Court decision. However, data can reveal whether more or less federal contracting with minority-owned businesses is coincident to the collective effects of these changes and *Adarand*.

Amounts of Federal Procurement

Federal procurement constitutes a significant portion of government expenditures.[25] The amount of federal procurement ranged around $200 billion in FYs 1992 through 1996. In FYs

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[19] GAO, Small Business Procurement Trends, pp. 4–5, 8.

[20] Federal Acquisition Reform (Clinger-Cohen) Act of 1996, Pub. L. No. 104-106, Div, D, E, 110 Stat. 642, 41 U.S.C. § 251(f) (2000).

[21] GAO, *Small Business Procurement Trends*, p. 4.

[22] Small Business Reauthorization Act of 1997, Pub. L. No. 105-135, 111 Stat. 2592, 15 U.S.C. § 631 note (1997).

[23] GAO, *Small Business Procurement Trends*, pp. 5, 12–13.

[24] U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report,* 2003, <http://www.fpdc.gov/fpdc/fpr2003.htm> (last accessed Sept. 21, 2004) (hereafter cited as GSA, *Federal Procurement Report, 2003*), and similar reports for 1995 through 2002. *Also see* GAO, *Small Business Procurement Trends*, pp. 14–15, 30.

[25] In FY 2003, procurement of $305 billion constituted about 14 percent of government outlays reported in the President's budget. *See* Office of Management and Budget, Executive Office of the President, *Budget of the United States Government, Fiscal Year 2004,* no date, <http://www.whitehouse.gov/omb/budget/fy2004/tables.html> (last accessed Feb. 17, 2005). Note further that the Federal Procurement Report for 2003 reports total procurement at $305 billion (p. 2), but shows only $277 billion for agencies' total achievements against small business and other goals (pp. viii–ix). *GSA, Federal Procurement Report, 2003*. (*See* appendix B for an explanation of the goals.) The data presented throughout this report are the lower numbers—the goaling achievements. Purchases exempt from goals for small businesses, including, for example, those less than $2,500, make up the differences. *See* 48 C.F.R. §

1997 to 1999, it dipped below that, ranging $182 to $190 billion. In FY 2000, it again hit $200 billion, and steadily increased since then—$220 billion in FY 2001, $235 billion in FY 2002, and $279 billion in FY 2003. [26] (See figure A.5, part (a).) Federal procurement through small business contracts ranged $39 to $43 billion between FYs 1992 and 1999. Since then it has steadily increased—$45 billion in FY 2000, $50 billion in FY 2001, $53 billion in FY 2002, and $66 billion in FY 2003. (See figure A.5, part (a).) Against this backdrop, the trends in federal procurement for small disadvantaged businesses show fairly steady increases in dollar amounts across the decade with only small setbacks in FYs 1996 and 1997. Federal procurement to small disadvantaged businesses was $8.3 billion in FY 1992, increased to $11.2 billion in FY 1995, then dropped to just under $11 billion in FYs 1996 and 1997. In FY 1998, at $11.5 billion, it surpassed earlier levels, and continued increasing thereafter, reaching about $19.5 billion in FY 2003. (See figure A.5, part (b).)[27] Thus, federal procurement to small disadvantaged businesses appears to have been slightly less in FYs 1996 and 1997, the years immediately following *Adarand*, but parallels general cuts in government expenditures.

Figure A.5 (part (b)) shows that federal procurement through the 8(a) program was $4.9 billion in FY 1992 and steadily increased to $6.4 billion in FY 1995. It remained at $6.4 billion in FYs 1996 and 1997, then fluctuated between $5.8 and $6.6 billion during FYs 1998 to 2002 before a sudden increase to $10.1 billion in FY 2003. Thus, contract awards through the 8(a) program did not fall during the years immediately following *Adarand*, but failed to grow. Federal procurement through the 8(a) program fluctuated more during FYs 1999 to 2002 than in the years right after *Adarand* (1995 to 1998).

Proportion of Procurement with Disadvantaged Businesses

The trends in the amounts of federal procurement to minority-owned businesses are not just a reflection of government purchasing as a whole or even of that directed to small businesses. The proportion of federal procurement to small, disadvantaged businesses increased nearly every year whether viewed against small businesses or the totality of federal contracting. Procurement through small, disadvantaged businesses was 21 percent of small business procurement in FY 1992 and increased to 30 percent by FY 2003 (with only a minor decrease in FY 2002 over that of FY 2001). (See figure A.6, part (a)). Figure A.6, part (b), shows similar trends in the proportion of procurement small, disadvantaged businesses represent of all federal contracting. This proportion increases from 4.1 percent in FY 1992 to 7.0 percent in FY 2003. (See figure A.6, part (b)).

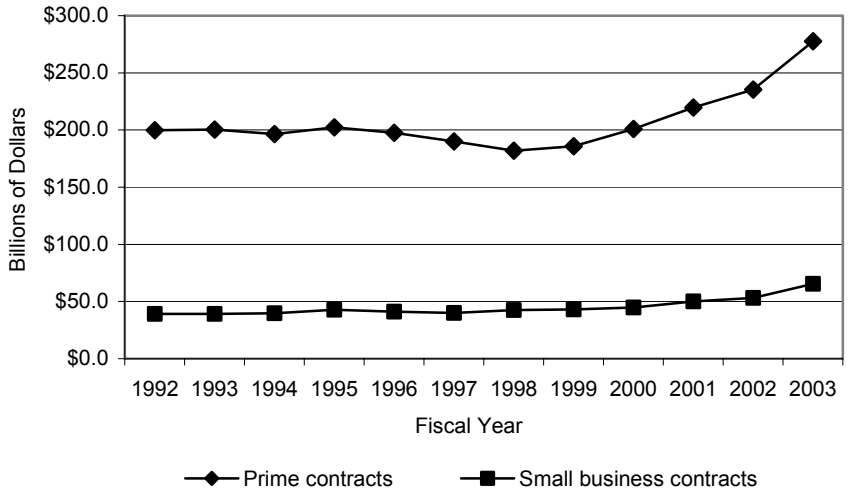
4.602 (c)(1) (2004).

[26] Figures are not adjusted for inflation. One report claims that the total amount of goods and services that the government purchased, including those bought with purchase cards, declined about 7 percent between fiscal years 1993 and 1999. Consequently, all businesses had to compete for a reduced total of federal contract expenditures. *See* GAO, *Small Business Procurement Trends*, p. 9.

[27] *See, e.g.,* GSA, *Federal Procurement Report, 2003*, and similar reports for other years.

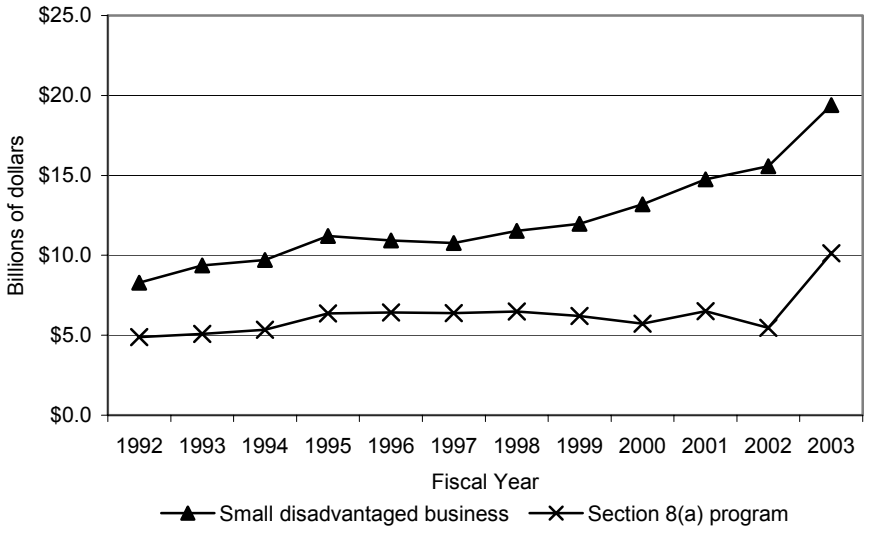
FIGURE A.5
Trends in the Amount of Federal Procurement, 1992 to 2004

(a) Procurement through prime contracts and small business contracts



Caption: Federal procurement through prime contracts was approximately $200 billion in fiscal year 1996 and before. It dropped below that in fiscal years 1997 to 1999, then grew to $277 billion in fiscal year 2003. Procurement with small businesses has increased slowly, but fairly steadily between fiscal years 1992 and 2002, with only slight reductions in fiscal years 1996 and 1997.

(b) Procurement through small disadvantaged businesses and the 8(a) program

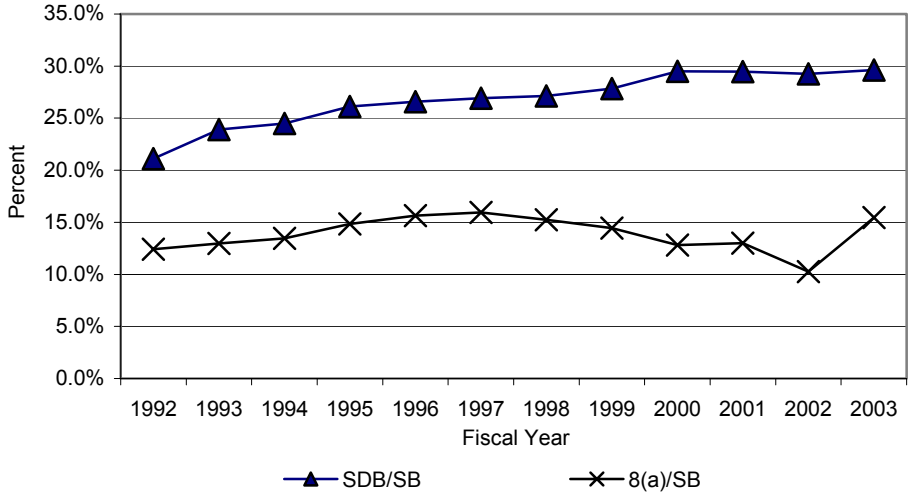


Caption: Procurement with small disadvantaged businesses increased across the decade, although small setbacks occurred in the years after the *Adarand* decision--1996 and 1997---coincident with cuts in federal expenditures. Contracting through the race-conscious 8(a) program fluctuated more during fiscal years 1999 to 2002 than imediately after *Adarand*.

Source: U.S. General Services Administration, Federal Procurement Report, Fiscal Year[s] [1992 through 2003], "Report on Annual Procurement Preference Goaling Achievements."

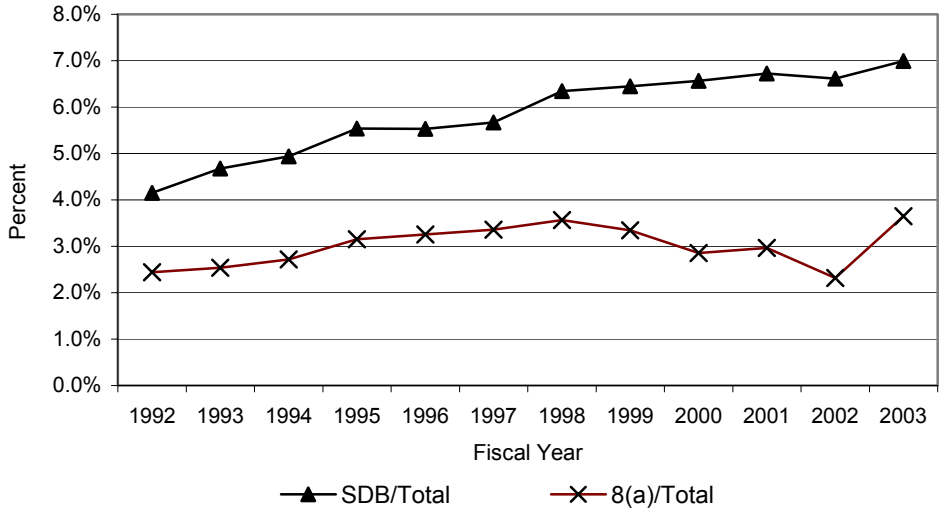
FIGURE A.6
Trends in the Proportions of Federal Procurement, 1992 to 2004

(a) Amount of procurement through small disadvantaged businesses and the 8(a) program as a proportion of small business contracts



Caption: Contracting with small disadvantaged enterprises increased across the decade as a propotion of procurement with small businesses. The proportion of small business contracting through the 8(a) program was dropping in fiscal years 1998 to 2002, not in 1996 and 1997, when agencies were responding to *Adarand* .

(b) Amount of procurement through small disadvantaged businesses and the 8(a) program as a proportion of all federal contracts

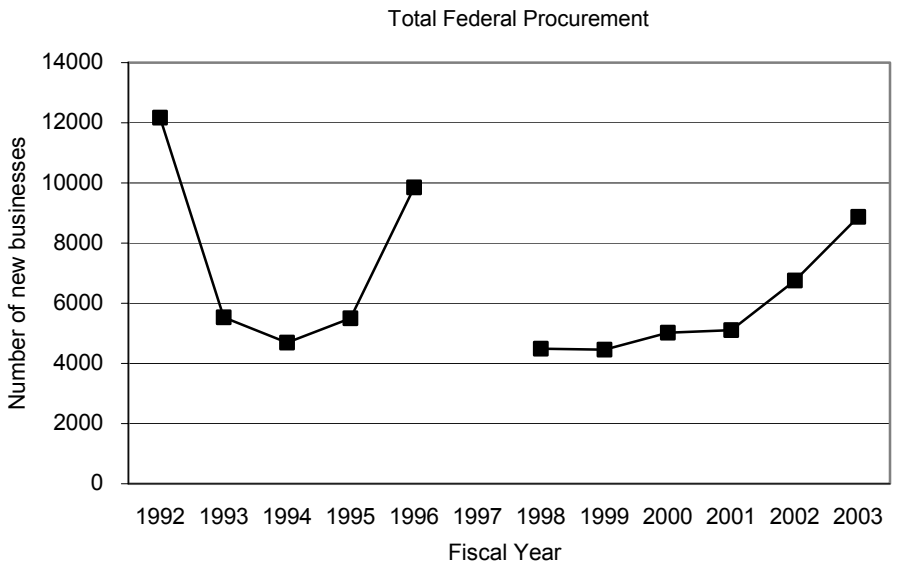


Caption: Although contracting with small disadvantaged enterprises also increased as a propotion of total federal procurement, at its most in fiscal year 2003, it never exceeded 7 percent. The proportion of contracting through the 8(a) program as a proportion of total procurement also dropped in fiscal years 1998 to 2002.

Source: U.S. General Services Administration, Federal Procurement Report, Fiscal Year[s] [1992 through 2003], "Report on Annual Procurement Preference Goaling Achievements."

The proportion of procurement through the 8(a) program increased from 12.4 percent of that awarded to small businesses in FY 1992 to 15.9 percent in FY 1997 and then decreased thereafter, dropping to a low of 10.3 percent in FY 2002. But, in FY 2003, the proportion of small business procurement carried out through the 8(a) program rose again to 15.5 percent, almost as high as its peak in FY 1997. (See figure A.6, part (a).) Thus, fluctuations in federal usage of the 8(a) program occur in recent years more so than when responses to *Adarand* were first crafted.

FIGURE A.7
Number of New Small Disadvantaged Business Contracts the Federal Government Awarded by Fiscal Year (1992 to 2003)



Caption: New contracts with disadvantaged businesses dropped during fiscal years 1993 to 1995 and were low again in 1998 to 2001. The reductions correspond to the filing of the *Adarand* case and recent efforts to reform contracting programs programs, rather than to the Supreme Court's "narrow tailoring" decision. (Data are unavailable in 1997 when reporting requirements for SDBs changed.)

Source: U.S. General Services Administration, Federal Procurement Report, Fiscal Year[s] [1992 through 2003], "Small Business Ownership Report, Number of New Businesses by Type of Contractor--SF 279."

New Contracts with Disadvantaged Businesses

To examine whether the pool of firms receiving procurement is expanding, figure A.7 shows the number of contracts over $25,000 the federal government awarded to small disadvantaged businesses that had not previously had any. The numbers of new small disadvantaged business contractors dropped dramatically from 12,165 in FY 1992 to 5,536 in FY 1993 and further to 4,695 in FY 1994. They increased in FYs 1995 and 1996, reaching 9,852, before dropping to about 4,500 to 5,000 in FYs 1998 through FY 2001. They began increasing again in FYs 2002 and 2003 ending at 8,869. (See figure A.7. Data for FY 1997 are unavailable because reporting requirements for SDBs changed that year—see appendix D.) If *Adarand* affected this pattern, it

may have suppressed the number of new contractors during a period of uncertainty after the case was filed and before it was decided. Once the Supreme Court issued its decision, the number of new contractors returned to previous levels in FY 1996. Other program changes may have brought about the drop in procurement with new firms in FY 1998.

Procurement by Race/Ethnicity of Firm's Owner

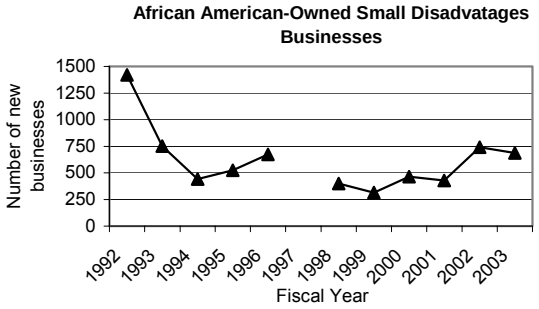
The Federal Procurement Data System's (FPDS) reporting of specific racial or ethnic groups is limited. The Small Business Administration (SBA) maintains additional race/ethnicity data on 8(a) participants that the agency presents to Congress.

First, the FPDS data by race and ethnicity are available only for the Department of Defense's (DOD's) new contract awards to small disadvantaged enterprises. Figure A.8 shows the new contract awards by racial/ethnic groups summed for women- and "other," meaning male-owned, small disadvantaged businesses. The number of new contracts awarded to each of the five racial/ethnic groups dropped between FYs 1992 and 1994, increased somewhat by 1996, and dropped below FY 1994 levels again during FYs 1998 and 1999. Four out of five groups were awarded more new contracts in FYs 2002 and 2003 than in FY 1994. However, Asian Indian Americans received fewer new contracts than in FY 1994 throughout FYs 1998 to 2003 (see figure A.8). Furthermore, the FYs 2002 and 2003 increases for other groups were not great. Native American-owned small disadvantaged businesses were the only group ever to receive more new contracts than in FY 1992.

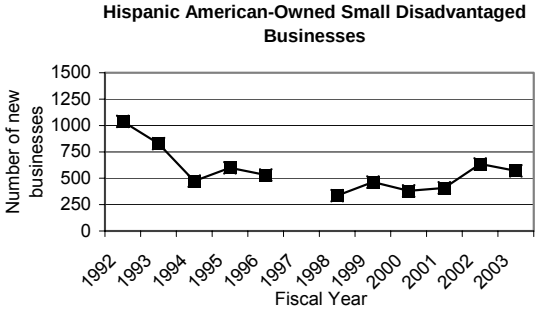
The largest effects are for African Americans. The number of DOD awards to new black-owned businesses dropped from 1,419 in FY 1992 to 441 in FY 1994. In FYs 1998 and 1999, the number of new contracts awarded to African American-owned businesses was 399 and 314, respectively. In FYs 2002 and 2003, African Americans received 742 and 686 new contracts.

The decrease in the number of contracts awarded in FYs 1992 to 1994 to Hispanics and Asian Americans and Pacific Islanders was less severe than for blacks. DOD contracts with new Hispanic owners decreased from 1,039 to 475 and ranged between 337 and 636 in ensuing years; for Asian Americans and Pacific Islanders, numbers dropped from 773 to 457 in FY 1994 and ranged 201 to 333 thereafter, with the exception of FY 2002, when new contracts reached 546. (See figure A.8.) Thus, minority-owned businesses suffered from major DOD reductions in new contracts awarded them in the years after *Adarand* was filed but before it was decided, and further reductions in years following Department of Justice (DOJ) guidance. DOD has never since awarded similar numbers of new contracts to these three groups.

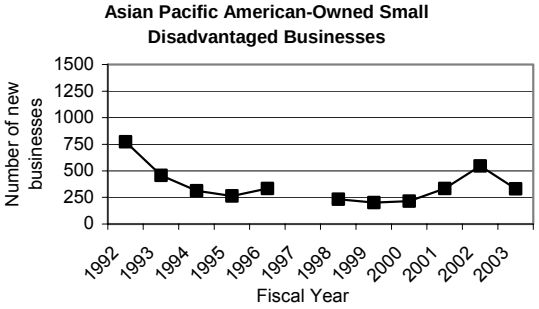
FIGURE A.8
Number of New Small Disadvantaged Business Contracts the Department of Defense Awarded by Race/Ethnicity and Fiscal Year (1992 to 2003)



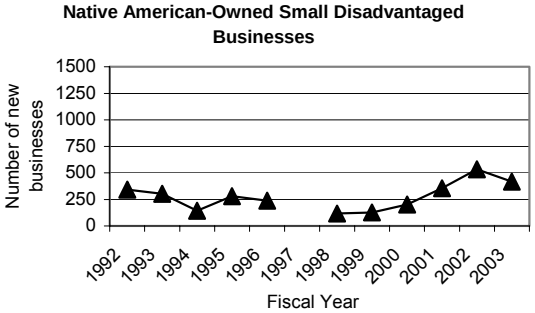
Caption: The number of new contracts with African American-owned businesses dropped from more than 1,400 almost to 400 between fiscal year 1992 and 1994, then decreased almost to 300 in 1999.



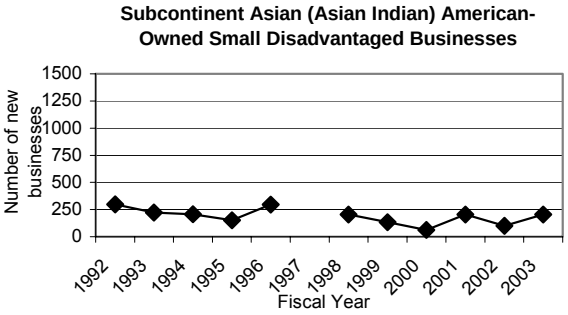
Caption: New contracts with disadvantaged Hispanic American-owned businesses dropped from more than 1,000 to below 500 from fiscal years 1992 to 1994, then almost to 300 in 1998.



Caption: New contracts with Asian/Pacific American-owned firms dropped from about 800 to 250 in fiscal years 1992 to 1994, then further to 200 in 1999.



Caption: New contracts with disadvantaged Native American-owned businesses dropped from 342 to 142 from 1992 to 1994, then to 317 in 1998.



Caption: New contracts with Asian Indian American-owned firms decreased from about 300 to 150 in fiscal years 1992 to 1994, then fell to 133 in fiscal year 1999 and 64 in 2000.

Summary caption: The Department of Defense awarded substantially fewer new contracts to each of five racial/ethnic groups between fiscal years 1992 and 1994 and fewer still in 1998 and 1999. The largest drops were for African Americans. (The 1997 data are unavailble because reporting requirements for SDBs changed that fiscal year.)

Source: U.S. General Services Administration, Federal Procurement Report, Fiscal Year[s] [1992 through 2003], "Small Business Ownership Report, Number of New Businesses by Ethnic Group--SF279."

Other race-specific data are available on the 8(a) program, which encourages agencies to contract with small disadvantaged businesses. SBA reports to Congress show that the largest proportion of certified 8(a) participants are African American owners, but the percentage has been dropping. For example, in 1996, 45.4 percent of eligible firms were African American-owned; 0.3 percent were Caucasian-owned. Since then, the percent of certified black-owned businesses decreased from, for example, 40.7, 39.8, 39.3, to 37.9 percent each fiscal year from 2000 to 2004. At the same time, the proportion of Caucasian American-owned firms in the program increased—1.8, 2.7, 3.1, and 4.8 percent each year from 2000 to 2004.[28] Furthermore, as appendix B explains, participation in the 8(a) program does not guarantee federal contracts.

Overall, black-owned businesses experienced the most severe setbacks in recent trends, in both the number of new awards DOD makes to disadvantaged groups and 8(a) program participation. Unfortunately, little specific race or ethnic group data is available for agencies' new or ongoing contracts.[29] Thus, one cannot determine whether federal procurement programs—8(a), SDB, or race-neutral ones—help African American-owned businesses, which grew more slowly than other small or minority-owned businesses during the period analyzed here.

PERSISTENT DISPARITIES IN FEDERAL PROCUREMENT

Congress states that the long-standing effects of discrimination continue to influence the size and nature of minority-owned businesses, and their ability to compete.[30] Minority-owned business assistance and other procurement programs exist "to ensure that all businesses have an equitable

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[28] U.S. Small Business Administration, Office of Minority Enterprise Development, *A Report to the U.S. Congress on Minority Small Business and Capital Ownership Development For Fiscal Year 1996,* no date, p. 12, <http://www.sba.gov/8abd/reports/med1996rpttocongress.html> (last accessed Apr. 8, 2005). U.S. Small Business Administration, Office of Business Development, *Report to the U.S. Congress on Minority Small Business and Capital Ownership Development, Fiscal Year 2003,* no date; U.S. Small Business Administration, Office of Business Development, *Report to the U.S. Congress on Minority Small Business and Capital Ownership Development, Fiscal Year 2002,* no date; U.S. Small Business Administration, Office of Business Development, *Report to the U.S. Congress on Minority Small Business and Capital Ownership Development, Fiscal Year 2001,* no date; U.S. Small Business Administration, Office of Business Development, *Report to the U.S. Congress on Minority Small Business and Capital Ownership Development, Fiscal Year 2000,* no date.

[29] In one exception, the Department of Housing and Urban Development reports FY 2004 procurement with SDBs according to racial/ethnic categories. Just over 40 percent of contract actions with small disadvantaged businesses (8(a)s and others) were with African American-owned firms. Numbers calculated from U.S. Department of Housing and Urban Development, "HUD Procurement System (HPS): Procurement Opportunities Program Performance Summary Report (FPDS Validated), Reporting Period: 10/01/2003-09/30/2004," no date.

[30] *See* 15 U.S.C. § 621 (f)(1)(B) (2000); and Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,042, 26,050 (May 23, 1996) (hereafter cited as DOJ, Proposed Reforms to Affirmative Action in Federal Procurement) (citing *Small and Minority Business in the Decade of the 1980's (Part 1): Hearings Before the House Comm. on Small Business*, 97th Cong., 2nd Sess., 1981, p. 4 (hereafter cited as House Comm. on Small Business, *Small and Minority Business*); H.R. REP. NO. 92-238, pt., at 3, 7 (1972); H.R. REP. NO. 103-870, at 5, 7, 15 n. 36 (1994); U.S. Congress, *Availability of Credit to Minority and Women-Owned Small Businesses: Hearing Before the Subcomm. on Financial Institutions Supervision, Regulation and Deposit Insurance of the House Comm. on Banking,* 103d Cong., 1st Sess., 1994, pp. 6, 27 (statements of Andrew Hove and Wayne Smith) (hereafter cited as House Comm. on Banking, *Availability of Credit*).

opportunity to participate in federal procurement."[31] Agencies must promote minority and disadvantaged business development to achieve statutory goals, and also ensure that such programs comply with *Adarand's* legal requirements. Race-neutral programs, by helping all firms to compete, are designed to expand contracting opportunities for minority and disadvantaged business owners.[32] However, some believe that a goal to increase minority and disadvantaged businesses' share of federal procurement, even if only commensurate with their representation among companies capable of executing contracts, demands special effort. The effectiveness of race-neutral contracting programs thus hinges on a program's ability to (1) reach such firms and help them become competitive, and (2) render federal contracting more fair without establishing separate criteria that create a disadvantage for other enterprises.

To accomplish this goal, procurement assistance programs focus on eliminating barriers that appear to impact small, minority-owned, and disadvantaged firms more than large, established enterprises. For example, minority-owned firms tend to be smaller and newer than their nonminority counterparts.[33] As a result, programs to increase federal contracting opportunities frequently are designed to overcome challenges facing *small* and *new* businesses. The following section describes difficulties facing businesses that affect all firms, and which may disproportionately hinder minority-owned businesses' access to federal contracts.

Individual Financial Circumstances

SBA estimates that 50 percent of small businesses fail within one year of starting, and 95 percent within five years.[34] Many failures stem from unforeseen financial difficulties that increased capital might overcome, or cash flow problems when prime contractors do not pay on schedule.[35] When entrepreneurs have low income and wealth, as is the case for many minorities, they find it more difficult to overcome such financial challenges and often cannot recover from even minor periods of resource deprivation. Lower rates of homeownership and savings among minorities result in decreased collateral for private-sector financing, such as short-term loans and alternative financing that could make a difference during periods of resource scarcity. [36] Furthermore, low-income and low-wealth business owners are less likely to have connections to social and familial networks that can provide temporary financial relief.[37]

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[31] U.S. Department of Education, *Doing Business with the U.S. Department of Education*, November 2004, p. 13, <http://www.ed.gov/fund/contract/about/booklet1.html> (last accessed May 31, 2005).

[32] George R. La Noue and John C. Sullivan, "Race Neutral Programs in Contracting," *Public Administration Review*, vol. 55, no. 4 (July/August 1995), p. 348.

[33] María Enchautegui, Michael Fix, Pamela Loprest, Sarah von der Lippe, and Douglas Wissoker, The Urban Institute, *Do Minority-Owned Businesses Get a Fair Share of Government Contracts?,* 1997, pp. 34–35 (hereafter cited as Urban Institute, "Fair Share").

[34] U.S. Small Business Administration, "Are You Ready? Why Small Businesses Fail," no date, <http://www.sba.gov/starting_business/startup/areyouready.html> (last accessed Mar. 10, 2005).

[35] Pennsylvania Advisory Committee to the U.S. Commission on Civil Rights, *Barriers Facing Minority- and Women-owned Businesses in Pennsylvania*, August 2002, p.20 (hereafter cited as PAC/USCCR, *Barriers Facing Minority- and Women-owned Businesses*).

[36]Ibid., p.18.

[37] Urban Institute, "Fair Share," pp. 34–36.

Access to Capital and Credit

In addition to lack of wealth and insecure personal financial circumstances, many minority business owners face reduced access to capital and credit, including loans and start-up financing. Research documents racial discrimination in business lending, though researchers disagree on the magnitude of its effects.[38] At least, most concede that business owners who have either limited wealth or experience or both often face higher loan costs and interest rates than those who have ample collateral and long credit histories.[39] Furthermore, many minority entrepreneurs report avoiding applying for loans for fear they will be rejected.[40]

Small business owners generally may have difficulty securing financing from banks that set a minimum loan size. Many banks, for example, will not make commercial loans of less than $100,000 or an even higher amount.[41] Additionally, residential segregation and patterns of poverty may unduly impact minorities' access to credit because some banks are unwilling to lend in locations they perceive as dangerous, low-income, or of limited income potential.[42]

Minority firms also lack access to capital, including access to social and business networks that provide information on (or sources of) start-up and venture capital, discussed below.[43] The Urban Institute suggests that residential segregation limits minority-owned businesses' market access to white consumers.[44] Also, while government offers some prime contractors mobilization funds for start-up costs, it rarely extends this financing to small business subcontractors.[45] Delayed or irregular payments from government and prime contractors can create significant cash flow problems.[46] Additionally, because they lack the bulk purchasing power of their larger counterparts, small businesses often pay vendors more for supplies.[47]

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[38] Ibid., p. 36. *See also* DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, pp. 26,057–58.

[39] David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, "Discrimination in the Small Business Credit Market," working paper 6840, National Bureau of Economic Research Working Paper Series, Cambridge, MA, December 1998.

[40] Ken Cavalluzzo, Linda Cavalluzzo, and John Wolken, "Competition, Small Business Financing, and Discrimination: Evidence From a New Survey," in Jackson L. Blanton, Alicia Williams, Sherrie L.W. Rhine (eds.), *Business Access to Capital and Credit: A Federal Reserve System Research Conference*, ed. (proceedings of a conference held in Arlington, VA, March 8–9, 1999), pp. 180–265 (hereafter cited as Blanton, Williams, and Rhine (eds.), *Business Access to Capital and Credit*).

[41] *See, e.g.,* Commercial Direct, "Get a Quote," <http://www.commercialdirectloans.com/apply.jsp> (last accessed May 25, 2005).

[42] Raphael Bostic and Patrick Lampini, "Racial Differences in Patterns of Small Business Finance," in Blanton, Williams, Rhine (eds.), *Business Access to Capital and Credit,* pp.149–179.

[43] Urban Institute, "Fair Share," pp. 36–37.

[44] Ibid., p. 39.

[45] PAC/USCCR, *Barriers Facing Minority- and Women-owned Businesses*, p.18.

[46] Ibid., p.20.

[47] Urban Institute, "Fair Share," p. 42.

Insurance and Bonding

Most government contracts for construction, repair, or other public works require performance and payment bonding to ensure that the contractor will finish a project and pay laborers and suppliers.[48] The same factors that hinder minority and small business owners' access to credit and capital also influence their ability to obtain insurance and bonding at a reasonable cost. Surety companies usually require contractors to have experience, but firms may not acquire proficiency without bonding. Bonders may charge newer firms and business owners, or small firms with little credit or collateral, substantially more in fees than they do larger companies with experience, rendering these smaller companies' bids uncompetitive, even when they obtain bonding. Bonding adds substantially to the up-front costs contractors pay, and may exceed the means of small companies that have already spent significant amounts to prepare bids, secure suppliers, and hire laborers during periods when cash flow may be low.[49]

In addition to the factors above, DOJ's guidance discusses municipal and state disparity studies and reports to Congress documenting racial bias in surety bonding.[50] Overall, the bonding process may be arbitrary, and at least one expert has suggested that surety companies structure themselves to avoid regulatory requirements, including some state antidiscrimination laws.[51] These factors compound difficulties small and disadvantaged businesses face in obtaining insurance and bonding.[52]

Size and Administrative Capacity

New and small businesses may not have the resources to mobilize additional workers for a specific contract. Furthermore, they may not retain levels of human capital or technical experts sufficient to identify procurement opportunities, fill out government paperwork, or write competitive proposals that conform to federal requirements. They may lack financial and management skills (or assets) to plan for speculative chances at future government contracts.[53] These kinds of businesses also may retain too few employees or insufficient equipment and supplies to realistically compete with other firms for prime contracts.[54]

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[48] *See* 40 U.S.C. § 3131 *et. seq*. (requiring bonding for all projects over $100,000, although Federal Acquisition Regulation guidelines permit alternatives to payment bonds for projects between $25,000 and $100,000). 40 U.S.C. § 3134 provides that the secretaries of Transportation, Army, Navy, and the Air Force may waive bonds for certain types of projects.

[49] PAC/USCCR, *Barriers Facing Minorities and Women-owned Businesses*, p. 19.

[50] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,060.

[51] Margaret Simms, statement before the U.S. Commission on Civil Rights, briefing on "Civil Rights Implications of Regulatory Obstacles Confronting Minority Entrepreneurs," Sept. 5, 1996, transcript, p. 83.

[52] PAC/USCCR, *Barriers Facing Minority- and Women-owned Businesses*, p. 19.

[53] See discussion in Urban Institute, "Fair Share," pp. 34–40. The Small Business Administration's 8(a) Business Development Program aims largely to help businesses overcome these kinds of deficits. Michael K. Fauntroy, analyst in American national government, Government and Finance Division, Congressional Research Service, U.S. Library of Congress, *Disadvantaged Businesses: A Review of Federal Assistance*, Jan. 14, 2002, pp. 3, 15–16.

[54] SBA, *Minorities in Business, 2001*, pp. 14–16; Urban Institute, "Fair Share," pp. 34, 41.

Technology and Expertise

Many government contracting opportunities require specific technological knowledge and capacity. Trade unions and apprenticeships help business owners develop relevant skills and expertise, but historically many of these organizations have discriminated against minorities.[55] Additionally, many newer and minority-owned businesses lack a contracting record to demonstrate their ability to complete proposed work plans. Procurement officials and prime contractors may be reluctant to hire such firms, especially where awards are based on past performance.[56]

In addition to experience and skills, government contracts may require specialized manufacturing equipment or other technology. Given their size and financial constraints, few small businesses can make such large capital investments up front without advance payments or guaranteed contracts.

Interpersonal and Business Networks

Business and social networks are critical to a firm's ability to establish itself. According to DOJ:

> Contrary to the common perception, contracting is not a "meritocracy" where the low bidder always wins. . .[personal and informal] networks can yield competitive advantages, because they serve as conduits of information about upcoming job opportunities and facilitate access to the decisionmakers (e.g. contracting officers, prime contractors, lenders, bonding agents and suppliers).[57]

Access to networks increases businesses' abilities to learn of procurement opportunities, find out about potential contracts in a timely fashion, learn of new market prospects, find capital, identify decisionmakers, and understand unwritten cultural and agency-specific factors that influence the propensity of contracting officials to accept a bid.[58] Personal familiarity garnered through networks may influence a procurement officer's evaluation of a business owner's integrity or ability to do a job, and may be particularly important for contracts that are non-competitive or are awarded based on a firm's previous contract performance.[59] When procurement officers solicit bids orally or through limited written requests, they may not contact all qualified firms, and firms without access to business networks may never hear of these contracting

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[55] *See* DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,054.

[56] *Id.*, p. 26,055.

[57] *Id.*, p. 26,059.

[58] *See* Federal OSDBU Directors Interagency Council, "Model Code of Expectations between Federal Offices of Small and Disadvantaged Business Utilization (OSDBU's) and Small Businesses," August 2003, <http://www.osdbu.gov/Assets/PDF/Best%20Practices.pdf> (last accessed May 31, 2005).

[59] *See discussion in* Urban Institute, "Fair Share," pp. 34–40.

opportunities.[60] Personal familiarity may also enable certain firms to secure capital at a cost below that quoted to unfamiliar companies.[61]

Well-placed contacts in educational institutions, family, and trade and professional associations open important avenues through which entrepreneurs may access information and provide evidence of a firm's capability for work opportunities. The quality and quantity of these access points have a bearing on the nature and number of awards for which a contractor will be considered. If minorities have less access than nonminorities, the impact of their exclusion from networks is exacerbated.[62]

Design Discretion

Discretionary factors related to project design may limit the ability of small and minority-owned businesses, more than others, to compete for projects. One is the flexibility that procurement officials possess for setting contract size.[63] While large, consolidated projects may streamline the contracting process, they preclude small business participation because they call for exceptional amounts of human, technological, and financial capital.

Additionally, government officials can phrase bid solicitations in ways that favor certain firms. When deliberate, this practice is illegal; however, procurement officers may inadvertently use language that unnecessarily limits which firms can win contracts.[64] Other factors discussed above can magnify the effects of such practices on small and disadvantaged businesses. For example, firms that lack access to networks may not learn what language procurement officers prefer.[65]

Discrimination

Many policymakers agree that historical discrimination contributed significantly to present-day problems, including those documented above. Few agree, however, about the extent to which past discrimination hampers minority businesses' current ability to compete for federal contracts. Discussing evidence it collected after *Adarand* as to whether government has an interest in proactively increasing contracting opportunities for minorities, the Clinton Justice Department wrote:

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[60] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,060.

[61] Brian Uzzi and James J. Gillespie, "What Small Firms Get Capital and at What Cost: Notes on the Role of Social Capital and Banking Networks," in Blanton, Williams, Rhine (eds.), *Business Access to Capital and Credit,* pp. 413–444.

[62] *See discussion in* Urban Institute, "Fair Share," pp. 34–40.

[63] Ibid., p. 41.

[64] Ibid.

[65] *See* Ibid., pp. 34–40.

> All told, the evidence that the Justice Department has collected to date is powerful and persuasive. It shows that the discriminatory barriers facing minority-owned businesses are not vague and amorphous manifestations of historical societal discrimination. Rather, they are real and concrete, and reflect ongoing patterns and practices of exclusion, as well as the tangible lingering effects of prior discriminatory conduct.[66]

Allegations of discrimination in contracting persist.[67] Anecdotal evidence, compliance reviews, and data presented before Congress and the courts demonstrate specific concerns about discrimination in federal contracting, even if they are not as widespread as before.[68]

Overall, minority-owned businesses and disadvantaged firms face myriad challenges as a result of personal factors, history, and aspects of the contracting process. Procurement assistance initiatives, discussed in appendix B, address these challenges both directly and indirectly to increase small disadvantaged businesses' share of federal contract dollars.

THE FEDERAL PROCUREMENT PROCESS: HOW AGENCIES MAKE PURCHASES

Minority-owned businesses continue to face multiple barriers to success, and data confirm that these firms have historically fared poorly in federal contracting. Vast spending on federal procurement—approximately $300 million in FY 2003 alone—makes government contracts a potentially important source of revenue for small and disadvantaged businesses.[69] Programs

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[66] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,050.

[67] *See generally,* Thinket Ink Info. Res., Inc. v. Sun Microsystems, Inc., 368 F.3d. 1053, (9th Cir. 2004) (illustrating the difficulties facing companies seeking to file discrimination suits against prime contractors or procurement officials). The appellate court disagreed with the lower court over whether Thinket, a company owned by African-Americans, had a "racial identity" for standing to file a discrimination case under 42 U.S.C. § 1981(b) prohibiting discrimination in contractual relationships. After fighting various statutes of limitation, the U.S. District Court for the District of Northern California ruled that the company lacked standing to sue under state law prohibiting independent contractors from bringing such a claim;; Solomon Moore, "'Fronts' Said to be Rife in Contracting," *Los Angeles Times,* Aug. 6, 2001, p. B.1; Bob Egelko, "Judge Blasts Contra Costa After Contracting Bias Reports Surface," *San Francisco Chronicle*, June 22, 2001, p. A.21; Robert Schwab, "Arbiter Revisits U.S. West Case; Settlements in Discrimination Suit Could Be Rescinded, Official Says," *Denver Post,* Feb. 12, 2000, p. C.02*;* Darrel Rowland, "Business Owners' Problems With State Detailed in Report," *Columbus Dispatch*, Aug. 24, 2001, p. 3B; John Sanko, "State Urged to Give Work to Minority Contractors; Group Threatens to File Bias Suit, Stage Protests," *Denver Rocky Mountain News*, May 17, 2000, p. 23A.

[68] *See* DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,050 (citing House Comm. on Small Business, *Small and Minority Business*, pp. 3, 7; H.R. REP. NO. 103-870, at 5, 7, 15 and 36 (1994); House Comm. on Banking, *Availability of Credit*, pp. 6, 27.

[69] In FY 2003, procurement of $305 billion constituted about 14 percent of government outlays reported in the President's budget. *See* GSA, *Federal Procurement Report, 2003,* p. 2; and Office of Management and Budget, Executive Office of the President, *Budget of the United States Government, Fiscal Year 2004*, "Summary Tables," no date, <http://www.whitehouse.gov/omb/budget/fy2004/tables.html> (last accessed Feb. 17, 2005). Although the Federal Procurement Data System denotes "contract actions," this report uses the phrase "contracts" interchangeably with "contract actions." Technically, in addition to contracts, "contract actions" may include purchase orders, calls against a blanket purchase agreement, delivery orders, and other types of orders, as well as modifications to existing agreements. *See, e.g.,* U.S. Department of Transportation, "Instructions for Preparing Standard Form 291, 'FPDS Summary Contract Action Report ($25,000 or Less),'" no date, p. 3, <http://www.dot.gov/ost/m60/earl/sf281ins.htm> (last accessed Sept. 23, 2004).

designed to assist these firms must accommodate a large and often complicated procurement infrastructure that generates millions of contracts each year.[70]

The federal government purchases myriad goods and services, from basic office supplies to advanced weapons systems. Though the General Services Administration (GSA) procures some supplies and assets for governmentwide use, most departments and agencies purchase goods and services directly from vendors. GSA administers government supply schedules, which are contracts for which firms agree to supply materials and services at set prices for a limited time period. Government offices and programs can place orders for routine purchases and contracts directly with GSA-approved vendors on these lists or schedules, reaping the benefits of volume-discounted prices, lower administrative and regulatory costs, and access to pre-approved vendors within various procurement categories. For the most part, agencies do not rely on GSA's services for uncommon or program-specific procurement. [71]

President Bush's Management Agenda of 2001 (PMA),[72] and ensuing legislation such as the E-Government Act of 2002,[73] aim to reduce regulatory burdens, such as overlapping paperwork for different agencies, that face businesses working with the federal government. Information technology advancements have enabled better cross-agency coordination of procurement processes, easing the paperwork burden for businesses involved in federal contracts.[74] The PMA continued to focus attention on performance-based contracting; acquisition officers weigh contractor evaluations on previous federal projects when making procurement decisions in addition to information in each individual bid. The recently-established Past Performance Information Retrieval System facilitates performance-based contracting by enabling procurement personnel to consult a centralized Internet database to obtain composite information on vendor work.[75]

The Federal Acquisition Regulation (FAR)[76] is a base set of guidelines that dictate each stage of the government procurement process from inception through contract execution and payment.[77]

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[70] GSA, *Federal Procurement Report*, *2003,* pp. viii–ix; with 5.7 million actions, DOD awarded half of all federal contracts and nearly 70 percent of the dollars spent. The Department of Veterans' Affairs awarded the second most number of contract awards (3.7 million, or more than 32 percent), and the Department of Energy ranked the second highest total dollar amount, $21.1 billion, or over 7 percent of all federal procurement. Ibid.

[71] For information on supply schedules and other services, *see* U.S. General Services Administration, "Acquisition Solutions," Jan. 12, 2005, <http://www.gsa.gov> (last accessed May 31. 2005).

[72] Executive Office of the President, *Implementing the President's Management Agenda for E-Government: E-Government Strategy,* April 2003 (hereafter cited as EOP, *President's Management Agenda).*

[73] The E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 44 U.S.C. §§ 101 note, 3501 note, 3601 note (2002) (hereafter cited as The E-Government Act of 2002).

[74] *See* 48 C.F.R. § 9.104-3(b) (2004).

[75] U.S. Department of Defense, E-Business Office, "Past Performance Information Retrieval System," Jan. 25, 2005, <http://www.ppirs.gov> (last accessed June 1, 2005).

[76] The General Services Administration, the National Aeronautics and Space Administration, and DOD jointly issue governmentwide instructions—the Federal Acquisition Regulation (FAR)—codified at 48 C.F.R. §§ 1-99 (Chapter 1) (2004). For access to the FAR, see the "Federal Acquisition Regulation (FAR) Home Page," no date, <http://www.acqnet.gov/far> (last accessed June 1, 2005).

[77] *See* Federal Acquisitions Regulations System, 48 C.F.R. §§ 1–99 (2004).

Individual departments also develop and follow individual supplements to FAR guidelines; the complexity of each agency's guidelines varies. For example, the Defense Federal Acquisition Regulation Supplement (DFARS),[78] a DOD guidance document, has more than 600 pages and encompasses a variety of purchasing scenarios and procedures unique to the agency. In contrast, the Education Acquisition Regulation (EDAR)[79] varies minimally from FAR.

FAR guidelines vary depending on the size and nature of the service or contract sought (see table A.2). Under FASA, authorized employees can make "micro-purchases" of under $2,500 without obtaining competitive bids.[80] Other legislation mandates the use of small businesses, when such bids are competitive, for purchases between $2,500 and $100,000.[81] For procurement actions exceeding $100,000, agencies issue either an "invitation for bid" (IFB) dictating a sealed bid procedure (for defined specifications) or a "request for proposal" (RFP) for work requiring negotiation, or when there exist more than a single method of achieving the desired outcome. [82] Competition for these contracts is "open," that is, all qualified companies may bid on IFBs and RFPs for contracts exceeding $100,000.

FAR requires agencies to post acquisitions larger than $25,000 on the Web site www.FedBizOpps.gov; some agencies voluntarily do so at an even lower dollar threshold. Generally, contracts between $2,500 and $100,000 are subject to "simplified acquisition procedures," which are regulations exempting procurement officials from issuing open IFBs or RFPs.[83] An agency's head of contract activity may establish different thresholds for simplification.[84] Though officials still must post every purchase expected to exceed $25,000 on the Internet, they need only solicit three bids for purchases less than the $100,000 ceiling, and can do so informally using telephone or limited mailings, usually to local business interests.[85]

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[78] *See id.* at §§ 200–299.

[79] *See id.* at §§ 3400 –3499.

[80] Federal Acquisition Streamlining Act, 15 U.S.C. § 644 (2000).

[81] *See* Simplified Acquisition Procedures, 48 C.F.R. § 13 (2004).

[82] For a brief overview of purchasing legislation and FAR requirements, *see* the pamphlet, U.S. Small Business Administration, *How the Government Buys,* no date, <http://www.sba.gov/businessop/basics/buys.html> (last accessed June 1, 2005).

[83] *See* Simplified Acquisition Procedures, 48 C.F.R. § 13.

[84] General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1. (hereafter cited as GSA, facsimile to USCCR).

[85] *See* Simplified Acquisition Procedures, 48 C.F.R. § 13 (stating that certain products and services have a higher price threshold for simplified acquisition procedures).

TABLE A.2
General Purchasing Policy for Non-Exempt Items and Services

	Contract Size	Posting Requirements	Bid Procedure	Policy
Micropurchases	$2,500 or less	● None	● No bid issued; buyers use government purchasing cards	● Regulations encourage procurement officials to use GSA-approved vendors ● No business size restriction
Simplified Acquisition Procedures (purchases from $2,500 to $100,000)			● Competition requirements eased	● Contracting officer has broad discretion to set evaluation criteria ● May use "best value" and other non-related price factors
	$2,500 to $25,000	● Oral or electronic solicitations of 3 or more sources	● Non-binding quotations	● Reserved for small businesses ● Procurement official discretion to restrict competition to HUBZone or service-disabled veteran-owned small business concerns
	$25,000 to $100,000	● Written (paper) solicitation of 3 or more sources ● Post planned purchases on www.FedBizOpps.gov	● Written non-binding quotation, or ● Proposal detailing proposed execution strategy	● Reserved for small businesses ● Procurement official discretion to restrict competition to HUBZone or service-disabled veteran-owned small business concerns
Full and Open Competition	$100,000 to $5,000,000	● Written solicitation of qualified firms registered in PRO-Net/CCR ● Posting on www.FedBizOpps.gov	● Sealed bids prioritize price/price related factors ● Negotiated bids call for "best value"	● Use small business concerns if reasonable expectation 2 or more will bid at fair market value ● May use "best value" and other non-related price factors

Caption: Acquisition procedures differ according to contract value. Federal policy directs agencies to award purchases of $2,500 to $100,000 to small businesses. Government agencies should use small businesses for procurements of $100,000 to $5,000,000 if officials expect bids at fair market value from two or more. In addition, micropurchases—that is, those of less than $2.500—are not subject to small business initiatives.

Source: Simplified Acquisition Procedures, 48 CFR § 13 (2004); U.S. Small Business Administration, "How the Government Buys," no date, <http://www.sba.gov/businessop/basics/buys.html> (last accessed June 1, 2005).

The FAR specifies that "contracting officers should use the Central Contractor Registration database…as their primary sources of vendor information,"[86] which standardizes the procurement process under simplified acquisition procedures; ensures consistency, integrity, and

[86] *Id.* § 13.102.

reliability of data on potential bidders, and reduces the administrative burden of all parties.[87] The DOD-maintained Central Contractor Registration (CCR) database is a key element of efforts to modernize federal acquisition. FAR regulations obligate prospective prime vendors to register as a vendor in the searchable database as a prerequisite to eligibility for government contract awards or payments.[88] Subcontractors may choose to register, but are not required to unless they plan to bid directly. CCR allows procurement officials to search for vendors based on size, location, or status (for example, as a veteran- or woman-owned firm) in addition to product or service the company provides.[89]

In 2004, CCR incorporated several Small Business Administration-run databases, including PRO-*Net*, and an Historically Underutilized Business Zone (HUBZone) Empowerment Contracting registry, discussed in chapter 2 and appendix B. At one point, the PRO-*Net* database was the main information source for procurement officers seeking small business participants in SBA business and certification programs.[90] Contracting officials would search PRO-*Net* and other databases to identify firms that qualified for special consideration under several SBA and governmentwide programs, including small disadvantaged business certification and participation in the 8(a) Business Development program. While firms still must apply with SBA for certification in programs formerly covered by these other registries, the centralized CCR system simplifies procurement officers' abilities to locate certain types of vendors or businesses in geographic areas. SBA still maintains a subcontracting network database called SUB-*Net* in which prime contractors (and federal agencies and other organizations) post subcontracting opportunities, and subcontractors search for solicitations and teaming prospects.[91]

In addition to databases that enable federal officials to identify contractors, or businesses to search for contracting opportunities, the Federal Procurement Data System (FPDS) supports the development, collection, and dissemination of annual procurement data to meet the needs of Congress, the executive branch, and the public sector.[92] FPDS is a system for recording government procurement actions, amounts, and the characteristics of firms receiving the contracts. Since GSA began the data collection in 1978 through a recent transfer of system maintenance to a contractor, agencies have used FPDS data to analyze the impact of

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[87] GSA, facsimile to USCCR, p. 1.

[88] *See* Policy, 48 C.F.R. § 4.1102 (2004).

[89] Central Contractor Registration, 48 C.F.R. § 4.11.

[90] U.S. Small Business Administration, "SBA, OMB, GSA and DOD Work Together to Integrate PRO-*Net* and CCR Database and Simplify Contracting Process for Small Businesses," Aug. 13, 2004, <http://pro-net.sba.gov/> (last accessed June 1, 2005).

[91] U.S. Small Business Administration, "What is SUB-*Net*," no date, <http://web.sba.gov/subnet/dsp_what_is_subnet.cfm> (last accessed March 7, 2005).

[92] Public Law 93-400 established the Federal Procurement Data System (FPDS). The statute required the Office of Management and Budget's Office of Federal Procurement Policy to set up the system. The U.S. General Services Administration's Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center issued reports through the analysis of 2003 data. Beginning Oct. 1, 2004, a private enterprise assumed operation of the FPDS. As a result, the system is newly redesigned to provide fewer printed reports than in the past, but enhanced on-line data manipulation. The Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796; GSA, *Federal Procurement Report, 2003*, "Foreword," and "Highlights."

congressional and presidential initiatives and federal acquisition policy changes.[93] This system is the source of the procurement data in this analysis.

Summary

Over the past decade, minority-owned businesses have grown substantially. Furthermore, federal procurement trends both prior to and following *Adarand* show growth in small and disadvantaged business contracting. Changes to national policies affecting small business and implemented around the same time as *Adarand* make it difficult to clearly attribute growth patterns to the decision, new legislation, or economic trends.

Trends suggest that growth rates for African American-owned businesses are less than for other minority groups or for businesses generally. But, to the extent that access to government contracting could help such enterprises, publicly available federal data do not offer information on entrepreneurs of specific racial/ethnic groups except for firms newly under contract with one agency, the Department of Defense, and participation rates in one small business program—8(a)—which need not result in procurement awards. Thus, the government cannot determine whether small business programs benefit firms that continue to confront obstacles in accessing federal contracts.

Many factors contribute to the ease with which small and disadvantaged businesses participate in federal procurement. All small businesses face barriers, such as unfavorable financial circumstances and a need for management skills. Other obstacles, such as exclusion from social and business networks and present or historical discrimination, may impede minority-owned firms unequally.

[93] GSA, *Federal Procurement Report, 2003,* "Foreword."

Dissent Appendix B: Federal Programs to Promote Small and Minority Business Contracting

The *Adarand* decision compelled agencies to reconsider strategies for providing equal access to federal contracts for small and disadvantaged businesses. After the decision, agencies subjected contracting programs to the strict scrutiny standard, which requires establishing a compelling governmental interest for using race, and applying "narrowly tailored" strategies to achieve that interest. Agencies rely on Congress, the President, and the courts to articulate what constitutes a compelling governmental interest. Although Congress has not specified what makes a contracting program narrowly tailored, several governmentwide efforts to increase procurement with small and minority firms have withstood legal challenges under the strict scrutiny standard.

This appendix describes governmentwide programs to promote procurement with small and disadvantaged businesses (SDBs). It begins by examining two federal responses to historically low levels of contracting with these firms. First, Congress created new offices and a council of agency executives dedicated to expanding SDB access to federal contracting opportunities. Second, at least one agency's policy statement articulates a commitment to increasing procurement with SDBs and delineates strategies for eliminating barriers for small businesses in bold terms.

The appendix examines several legislated programs that impact federal procurement opportunities for SDBs. It discusses in detail the Small Business Administration's (SBA's) 8(a) and mentor-protégé programs. The appendix also considers SDB certification, industry benchmarks, and accompanying programs to enhance contracting opportunities for certified businesses. It concludes by examining SBA's goaling program, which implements statutorily established targets for contracting with specific types of small businesses.

THE PRIORITY OF CIVIL RIGHTS IN CONTRACTING

In other contexts, Commission research has found that many federal agencies pay insufficient attention to civil rights. The Commission generally identifies the priority agencies place on civil rights by assessing the commitment of resources, both funding and staffing; organizational structure for meeting civil rights goals; oversight and accountability with regard to civil rights enforcement; strategic planning with civil rights objectives; and regular issuance of policy

guidance.[1] Such are the criteria the Commission now applies in judging the priority of civil rights in procurement, an area it has studied little in the past.[2]

In studying efforts to promote contracting with small and minority-owned businesses, the Commission first examined Offices of Small and Disadvantaged Business Utilization (OSDBUs).[3] In the past, the Commission has shown that the effectiveness of civil rights components depends on their placement within the agency, authority, functions, and coordination with other offices.[4] A brief review of these aspects with regard to OSBDUs is below, followed by a discussion of one agency's strong policy statement, representing a model for others to follow.

Offices of Small and Disadvantaged Business Utilization

In 1978, Congress amended the Small Business Act to establish OSDBUs with procurement powers at each federal agency.[5] Section 15 (k) of the Small Business Act charges each agency's OSDBU director with promoting the interests of small and disadvantaged businesses pursuing federal contracts.[6] The legislation assigns several specific responsibilities to OSDBUs, including overseeing contracts to ensure that small businesses have the maximum practicable opportunity to participate as prime and subcontractors; providing assistance and information for firms preparing contract bids; and ensuring timely payment of contractors. OSDBU staff consult with SBA to implement these responsibilities.[7]

To maximize influence over the procurement practices of their respective agencies, section 15 (k) also requires OSDBU directors to report to the head or deputy of each department.[8] In practice, the Government Accountability Office[9] (GAO) found that nearly half of OSDBU directors reported to a lower authority than required within their agency. Additionally, upon receiving a congressional exemption to the reporting requirement in 1988, the Department of

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[1] U.S. Commission on Civil Rights, *Ten-Year Check-Up: Have Federal Agencies Responded to Civil Rights Recommendations, Volume I: A Blueprint for Civil Rights Enforcement*, September 2002, pp. 10–25 (hereafter cited as USCCR, *Ten-Year Check-Up, Blueprint)*.

[2] One previous Commission study suggested that agencies pay little attention to civil rights in contracting, as expressed through a lack of interagency coordination. *See* State Advisory Committees to the U.S. Commission on Civil Rights, *Promises and Perceptions: Federal Efforts to Eliminate Employment Discrimination Through Affirmative Action,* October 1981, p.12.

[3] *See generally,* U.S. Department of Commerce, "Federal OSDBU Directors Interagency Council," no date, <http://www.osdbu.gov> (last accessed May 24, 2005).

[4] USCCR, *Ten-Year Check-Up, Blueprint*, pp. 13–15.

[5] Amendments to the Small Business Act of 1978, Pub. L. No. 95-507, 92 Stat. 1757 (codified as amended at 15 U.S.C. §§ 631–633, 636, 637, 644 (2000)) (hereafter cited as Small Business Act of 1978). *See also* U.S. Government Accountability Office, *Small and Disadvantaged Businesses: Most Agency Advocates View Their Roles Similarly*, March 2004, p. 1 (hereafter cited as GAO, *Most Agency Advocates View Their Roles Similarly*).

[6] *See also,* 48 C.F.R. § 19.201 (2004).

[7] Small Business Act of 1978, 15 U.S.C § 644(k) (2000).

[8] *Id.* § 644(k)(3).

[9] Until 2001, GAO was known as the General Accounting Office.

Defense (DOD) twice lowered the authority level to which its OSDBU director reports. [10] GAO concluded that directors' failure to report to the appropriate authority dilutes their potential influence on small and disadvantaged business procurement policy.[11]

Interrogatory responses confirm that the placement of OSDBUs within an agency affect communication about program activities. DOD, for example, has one oversight OSDBU that collects and disseminates information on procurement and program activity. This office reports to the deputy undersecretary of defense for acquisition technology and logistics (AT&L), who in turn responds to the under secretary of defense for AT&L, who answers to the deputy secretary of defense.[12] Additionally, each military service also houses an OSDBU charged with reporting to the director or deputy director of its respective agency, as well as many distinct procurement offices.[13] DOD reports that its decentralized purchasing authority precludes coordination between personnel and subordinate OSDBUs with respect to SDB programs.[14] In contrast, the Department of Housing and Urban Development's (HUD) one OSDBU reports directly to the secretary.[15] Secretarial support for procurement with SDBs, expressed through a strong policy statement discussed below,[16] and high expectations for awarding contracts to small, women-owned, and minority-owned firms foster targeted procurement at HUD.[17]

Apart from ineffective structural placement, other factors suggest that OSBDUs are weak. For example, a recent GAO survey revealed that OSDBU directors view their obligations under the Small Business Act differently, despite statutory language outlining eight specific duties. Of 24

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[10] U.S. Government Accountability Office, *Small and Disadvantaged Businesses: Some Agencies' Advocates Do Not Report to the Required Management Level*, September 2003, p. 3.

[11] Ibid., p. 3.

[12] U.S. Department of Defense, "Office of the Secretary of Defense Organizational Chart," March 2001, <http://www.defenselink.mil/odam/omp/pubs/GuideBook/Pdf/Osd.PDF> (last accessed May 6, 2005).

[13] 48 C.F.R. § 219.201 (2004); U.S. Department of Defense (DOD), "Foreword," *Small Business Specialists,* October 2002, <www.acq.osd.mil/sadbu/publications/sbs/sbs.html> (last accessed Feb. 11, 2005).

[14] U.S. Department of Defense, Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 10, 2005, p. 6 (hereafter cited as DOD Interrogatory).

[15] U.S. Department of Housing and Urban Development, "HUD's Organizational Chart," Jan. 20, 2005, <http://www.hud.gov/about/index.cfm> (last accessed Feb. 23, 2005).

[16] Mel Martinez, secretary, U.S. Department of Housing and Urban Development, "HUD Small Business Policy Statement," May 16, 2001, <http://www.hud.gov/offices/osdbu/policy/statement.cfm> (last accessed Jan. 26, 2005) (hereafter cited as Martinez, "HUD Small Business Policy Statement").

[17]David Enzel, senior counsel, Office of General Counsel, Valerie Hayes, acting director, Office of Small and Disadvantaged Business, Bernard Morton, supervisory procurement analyst, Policy and Field Operations Division, Office of the Chief Procurement Officer, Public Housing Development, and Edward Girovasi, director, Policy and Field Operations Division, Office of the Chief Procurement Officer, U.S. Department of Housing and Urban Development, interview in Washington, DC, Apr. 19, 2005 (statement of Edward Girovasi), transcript p. 30 (hereafter cited as HUD follow-up interview). *See also, e.g.,* U.S. Department of Housing and Urban Development, "HUD Secretary Mel Martinez Receives Award for Commitment to Women and Minority Businesses," May 5, 2003, <http://www.hud.gov/offices/osdbu/awards/wow2003.cfm> (last accessed Jan. 28, 2005) (hereafter cited as HUD, "HUD Secretary Mel Martinez Receives Award"); U.S. Department of Housing and Urban Development, "HUD Recognized for Exemplary Small Business Contracting Achievements," May 2, 2002, <http://www.hud.gov/offices/osdbu/awards/perkins.cfm> (last accessed Jan. 28, 2005) (hereafter cited as HUD, "HUD Recognized for Exemplary Small Business Contracting Achievements").

directors surveyed, nearly 80 percent agreed on five duties, including supervising OSDBU personnel; identifying and increasing small business access to large contracts containing many different tasks (called "bundled" contracts); and helping firms obtain agency payments. Many OSDBU directors also reported assuming responsibility for additional duties, such as reviewing and reporting subcontracting plans and conducting outreach to small businesses. However, approximately one-third of the respondents did not believe they were responsible for other tasks outlined in section 15(k), such as helping small business subcontractors obtain payments from prime contractors.[18] Along with several OSDBU directors' reports that they lack adequate resources and influence in the procurement process, the GAO report provides evidence that these offices may fall short of Congress' expectations.[19]

Finally, the federal OSDBU Director's Interagency Council, a forum for discussing small and disadvantaged business policy, enables directors and their representatives to share best practices that effectively help small and disadvantaged businesses to overcome formal and informal barriers to contracting opportunities.[20] Voting council members comprise the directors or director's designee from OSDBU offices within most Cabinet-level agencies as well as several other departments. Subordinate staff and delegates from other OSDBU offices and agencies, as well as other interested parties, may participate in meetings but do not have voting powers.[21] All departments in this study except for SBA are council members, but interrogatory responses do not clarify agencies' activity levels in the organization.[22] Agencies that participate in the interagency council only nominally may not reap the full benefits of shared information related to their office missions.

HUD's Policy Statement

Policy statements complement OSDBU activities and programs such as those SBA runs (discussed below) by articulating strategies for increasing procurement with SDBs. A strong policy statement can help an agency increase SDB contracting by clarifying roles among internal offices and establishing high expectations for small business utilization. Individual agencies have authority to develop and customize statements encouraging small business contracting. For example, in 2001, then Secretary of Housing and Urban Development Mel Martinez issued a

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[18] GAO, *Most Agency Advocates View Their Roles Similarly*, pp. 5–7.

[19] *See generally,* ibid.

[20] *See* Federal OSDBU Directors Interagency Council, "Model Code of Expectations between Federal Offices of Small and Disadvantaged Business Utilization (OSDBU's) and Small Businesses," August 2003, <www.osdbu.gov/Assets/PDF/Best%20Practices.pdf> (last accessed May 31, 2005).

[21] Federal OSDBUs Directors Interagency Council, "Charter," Feb. 20, 2003, <http://www.osdbu.gov/Aboutthecouncil.htm#charter> (last accessed May 24, 2005).

[22] DOD Interrogatory, p. 6; U.S. Department of Education Response to U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 11, 2005, p. 2 (hereafter cited as DOEd interrogatory); U.S. Department of State Response to U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 1, 2005, p. 5 (hereafter cited as DOS Interrogatory); U.S. Department of Energy Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 7, 2005, p. 3 (hereafter cited as DOEn Interrogatory); U.S. Department of Transportation Response to U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 17, 2005, p. 7.

particularly strong small business policy statement.[23] HUD's policy directs OSDBU or the chief procurement officer to:

- "set high goals for contracting with small businesses in all preference categories" to award at least half of contract dollars to small enterprises;
- publish an annual procurement forecast within the first 30 days of each fiscal year (as legislation and regulations require all agencies to do), update it with changes in anticipated contract actions, and distribute copies to field offices, small business interest groups, trade associations, chambers of commerce, and sponsors of outreach events;
- contact certified eligible SDBs, 8(a)s, and HUBZone firms about any small business set-asides through SBA's online database, PRO-*Net*, (now included in the Central Contracting Registry (CCR) described in appendix A) and other means;
- conduct aggressive outreach to small businesses (by participating in national conferences and trade fairs explaining how to conduct business with HUD and its grantees) and target specific contracting areas where minority-owned businesses are underrepresented;
- provide annual training on small business initiatives for program and procurement staff and monthly classes on agency contracting opportunities for small business representatives;
- develop strong avenues of communication and support with national and regional minority organizations, for example, by entering into memoranda of understanding regarding the dissemination of information;
- make maximum use of set-asides, non-competitive procurements, and price evaluation credits as the law and regulations permit in areas where SDBs have been underutilized;
- ensure that bid solicitations contain subcontracting goals above the governmentwide level for small businesses and selection evaluation factors related to SDB participation;
- encourage teaming arrangements on agency procurements, promote partnerships between large contractors and small disadvantaged businesses, and develop a mentor-protégé program that fosters technical and managerial capabilities of 8(a) firms and SDBs for areas in which they have been underutilized; and
- use procurement strategies that avoid contract bundling (i.e., consolidation).[24]

After the statement's issuance, women and minority business owners' groups recognized HUD with an award for its leadership in reaching out to their businesses.[25] In response to Commission

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[23] Martinez, "HUD Small Business Policy Statement."

[24] Ibid.

[25] *See, e.g.* HUD, "HUD Secretary Mel Martinez Receives Award;" HUD, "HUD Recognized for Exemplary Small

inquiries, HUD said it did not employ agency-specific SDB programs beyond those that SBA sponsors. Instead, HUD identified its secretary's high expectations, as well as the agency's conscious commitment to increasing procurement with SDBs and rewards for employees who do so, as reasons for its success in expanding access to federal contracting opportunities.[26]

PROGRAMS TO PROMOTE CONTRACTING WITH SDBS

The Section 8(a) Program

SBA's 8(a) Business Development Program, named for section 8(a) of the Small Business Act, acknowledges that certain businesses lack key resources to successfully compete for contracts against larger, better situated, and more strongly financed firms, and offers SDBs assistance. The 8(a) program withstood legal challenges to the use of race as one of several eligibility criteria because, as a business development program, its application is narrowly tailored and therefore legally permissible under *Adarand*.[27] Although the program is built on the presumption that African Americans, Asian Americans, Hispanic Americans, and Native Americans are socially disadvantaged, regulations allow others, such as women, persons with disabilities, or individuals not presumptively disadvantaged, to establish social disadvantage case by case.[28] Furthermore, the 8(a) program targets economic disadvantage more than other SDB programs. To be eligible for 8(a), an owner's net worth must not exceed $250,000.[29] These are the reasons some agencies give for considering this program race-neutral. For the purpose of this discussion, the program is characterized as race-conscious because race is a factor in determining eligibility.

Under the program, SBA contracts with agencies to perform work and then subcontracts the work to 8(a) firms it has certified as economically and socially disadvantaged.[30] SBA has also signed memoranda of understanding with 25 federal agencies allowing them to directly contract

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Business Contracting Achievements."

[26] *See generally,* U.S. Department of Housing and Urban Development Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 18, 2005 (hereafter cited as HUD Interrogatory); HUD follow-up interview, pp. 30–32, 35–36 (statements of Girovasi, Enzel, and Hayes).

[27] U.S. Small Business Administration Response to the U.S. Commission on Civil Rights Interrogatory on Federal Contracting, Mar. 10, 2005, p. 5 (hereafter cited as SBA Interrogatory) (stating, "SBA has been named in a number of suits alleging that the 8(a) program does not pass constitutional muster under the Adarand case. To date, none have resulted in an adverse decision finding that the program facially or as applied is unconstitutional.").

[28] For other individuals to obtain certification for program participation, they must demonstrate that they have been subjected to racial or ethnic prejudice or cultural bias because of their membership in a particular group. 13 C.F.R. § 104.103 (2005).

[29] Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26,043 (May 23, 1996) (hereafter cited as DOJ, Proposed Reforms to Affirmative Action in Federal Procurement); U.S. General Accounting Office, *Small Business: Status of Small Disadvantaged Business Certifications,* January 2001, p. 2 (footnote) (hereafter cited as GAO, *Status of Small Disadvantaged Business Certifications*).

[30] Michael K. Fauntroy, analyst in American national government, Government and Finance Division, Congressional Research Service, U.S. Library of Congress, "Disadvantaged Businesses: A Review of Federal Assistance," updated Jan. 14, 2002, p. 15 (hereafter cited as Fauntroy, "Disadvantaged Businesses: A Review of Federal Assistance").

with 8(a) companies.[31] Depending on circumstances, the 8(a) program enables procurement officials to award some contracts non-competitively to certified firms, or to establish set-asides restricting bidding to 8(a) enterprises.[32] All Cabinet-level departments and major independent agencies participate in the 8(a) program.[33]

The 8(a) program also provides technical, financial, and practical assistance to help participating businesses develop the experience necessary to be viable without SBA support. Firms in the developmental stage of 8(a) receive training in financial and marketing skills (e.g., loan packaging, accounting, and bookkeeping), and management. SBA expects businesses in the transitional period to obtain a progressively larger share of revenue from non-8(a) sources to enhance their chances of survival after graduation. The program limits participation to nine years, and if a firm's net worth exceeds the eligibility criterion during this period, it will be required to leave the program early.[34] Businesses are much more likely to leave the 8(a) program because of the time limit than other factors: of 857 exiting firms in fiscal year (FY) 2003, only one was an early graduate. In contrast, 718 (84 percent) exited upon completing their nine-year term.[35]

SBA processing of 8(a) applications has mostly increased in recent years. Figure B.1 shows businesses submitted approximately 2,400 applications in FYs 2000 and 2001 and from about 3,700 to more than 3,900 in FYs 2002 to 2004. SBA returned a large proportion of processed applications as incomplete—approximately 1,100 in FYs 2000 and 2001 and 2,000 to 2,500 in FYs 2002 to 2004. In comparison, the numbers SBA approved (ranging 819 in FY 2000 to just over 1,200 in FYs 2003 and 2004) or denied (between 316 and 403 each year) were smaller (see figure B.1). SBA denied applications for multiple reasons related to eligibility criteria. However, depending upon the fiscal year, between 30 and 35 percent of the reasons for denying 8(a) applications concerned the businesses' potential for success.[36] That SBA already engages in extensive outreach and education to potential 8(a) participants, as well as assistance in completing applications for certifications, suggests that simplifying and improving the application process might best expand access to the program.

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[31] U.S. Small Business Administration, "Certification Programs," no date, <http://www.sba.gov/training/certprograms.html> (last accessed May 31, 2005).

[32] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,046.

[33] Fauntroy, "Disadvantaged Businesses: A Review of Federal Assistance," p. 15.

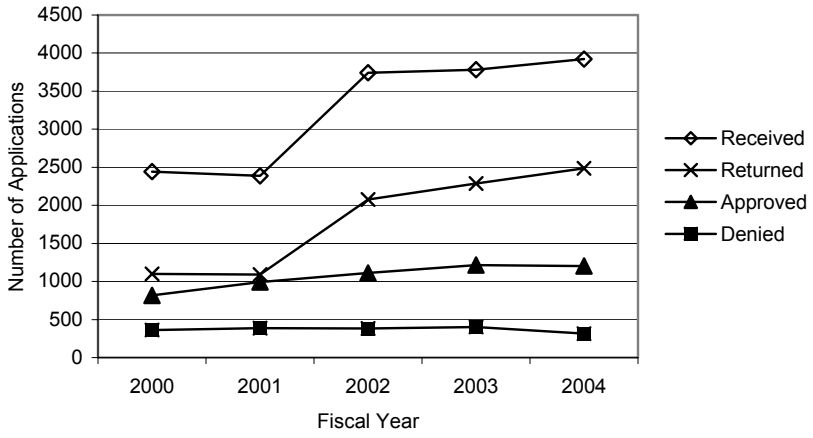
[34] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,043. *Also see* Fauntroy, "Disadvantaged Businesses: A Review of Federal Assistance," p. 16; U.S. General Accounting Office, *Small Business: SBA Could Better Focus Its 8(a) Program to Help Firms Obtain Contracts*, July 2000, p. 5 (hereafter cited as GAO, *SBA Could Better Focus 8(a)*).

[35] In addition, 92 (11 percent) were excluded for failing to meet reporting requirements, and 46 (5 percent) voluntarily left the program prior to graduating. U.S. Small Business Administration, Office of Business Development, *Report to the U.S. Congress on Minority Small Business and Capital Ownership Development Fiscal Year 2003*, no date, p. 18 (hereafter cited as SBA, *Minority Small Business and Capital Ownership Development, FY 2003)*.

[36] Failure to meet eligibility criteria were other common reasons for denying applications, for example, economic disadvantage (11 to 20 percent of the justifications depending on the fiscal year); ownership (also 10 to 20 percent); control and management (8 to 17 percent); and social disadvantage (5 to 6 percent). U.S. Small Business Administration, "8(a) Data [compiled] for Civil Rights Commis[s]ion," May 12, 2005.

Certification for the 8(a) program, however, does not always confer the benefit of receiving federal contracts. A 2000 nationwide survey of 8(a) firms found that owners, most of whom join the program for contracts, were concerned that a few businesses receive most of the awards and effectively limit opportunities available to others. For example, of the more than 6,000 firms in the 8(a) program in FY 1998, 209 received 50 percent of the total dollar amount of 8(a) contracts. Furthermore, about half the enterprises in the program in a given year—for example, more than 3,000 in FY 1998—received no 8(a) contracts. Although many firms may have been in the early stages of business development, 24 percent of the survey respondents who had participated in the program for at least two years had yet to win an 8(a) contract. SBA officials explain that not all 8(a) firms win contracts from the program because they vary in skills and experience. Other factors also are relevant, such as not having the lowest bid.[37]

FIGURE B.1
Small Business Administration's Certifications of 8(a) Businesses, Fiscal Years 2000 to 2004



Caption: Between fiscal years 2000 and 2004, the number of 8(a) applications SBA received rose substantially--approximately 2,500 to 4,000--with most of the increase occuring between 2001 and 2002. The agency returned correspondingly large numbers of applications as incomplete--from about 1,100 to 2,500. The number of applications SBA approved ranged only 800 to 1,200; but the number of applications denied also remained low, approximately 300 to 400.

Source: U.S. Small Business Administration, "8(a) Data [compiled] for Civil Rights Commis[s]ion," May 12, 2005.

In addition to the program's effect on access to contracts, a GAO report questioned whether SBA appropriately promotes the targeted training and assistance for aspects of the program. Only one-fifth of surveyed firms joined the program so that they could learn more about how to manage a business. Furthermore, many of the businesses were not newly formed or the owners already had more than 10 years' management experience. The study also found that SBA is unable to track the training and assistance it provides to 8(a) firms, and has been unable to do so for more than a

[37] GAO, *SBA Could Better Focus 8(a)*, pp. 3–4, 6, 44–45.

decade. GAO concluded that the lack of a tracking system for training and assistance impairs SBA's ability to measure the program's performance and determine what support firms need.[38]

SBA measures the success of the 8(a) program using the number of firms still independently owned and operated three years after leaving the program. Recent statistics suggest that the number of successful firms is increasing. SBA reports the percentages of independently operational 8(a) participants when leaving the program as 41 percent in 2000, 64 percent in 2001, 58 percent in 2002, and 64 percent in 2003.[39] In the future, the agency plans to analyze financial trends to determine a firm's progress compared to its non-8(a) peers.[40] The planned analysis will be much more helpful than previous measures in assessing whether race-conscious programs such as 8(a) benefit disadvantaged groups more than race-neutral approaches.

The 8(a) program is also designed to provide increased contracts and business development assistance to small and disadvantaged businesses; SBA measures this goal as the percentage of firms that receive federal contracts, technical assistance, and mentoring. In 2001, SBA programs aimed to provide business development and financial assistance to 25 percent of its certified small and disadvantaged businesses, including 8(a) firms. GAO noted that SBA efforts to increase business development suffered dramatic funding cuts shortly after they began and recommended that SBA target its limited training to owners with little management experience.[41]

SBA's 8(a) Mentor-Protégé Program

Another mechanism by which SBA provides assistance to 8(a) firms is through the 8(a) Mentor-Protégé Program. Certified firms are paired with a successful large business, which offers guidance and access. Types of assistance the mentor may offer are technical and/or management advice, financial assistance in the form of loans or startup costs, subcontract support, and help performing prime contracts through joint venture arrangements. Both mentor and protégé cooperate in competing for federal procurement and accessing capital (equity loans). Mentor incentives may include reimbursement from the contracting agency for costs incurred from providing developmental assistance, credit toward subcontracting goals, or a combination.[42]

SBA requires that protégés be in good business standing and in the developmental stage of the 8(a) program; have never received an 8(a) contract; or be a size that is less than half the standard in its primary industry. A mentor firm must be a federal contractor in good standing, demonstrate

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[38] Ibid., p. 4.

[39] SBA, *Minority Small Business and Capital Ownership Development, FY 2003*. *See also* similar reports for FYs 2000, 2001, and 2002.

[40] U.S. Small Business Administration Follow-up Response to the U.S. Commission on Civil Rights, May 6, 2005, p. 4 (hereafter cited as SBA follow-up response).

[41] The program is known by the section 7(j), which provides its funding. *See* GAO, *SBA Could Better Focus 8(a)*, pp. 13–14, 22.

[42] U.S. Small Business Administration, "8(a) Business Development Mentor-Protégé Program," Nov. 3, 2003, <http://www.sba.gov/8abd/indexmentor.html> (last accessed Mar. 7, 2005); GAO*, SBA Could Better Focus 8(a)*.

favorable financial health, and display commitment and ability to assist protégé firms.[43] Mentors may be businesses that have completed the 8(a) program, are currently in the transitional stage of the 8(a) program, or non-8(a) participants, large or small.[44]

Mentors and protégés must enter into written agreements that set forth goals and plans, assess the protégé's needs, and describe the types of assistance the mentor will provide. SBA approves the agreements, which must be a minimum of one year in duration. Mentors and protégés may continue their relationship after the original agreement expires, upon review and approval by SBA.[45] SBA evaluates the mentor-protégé relationship annually or semiannually—as is the case for DOD and the Department of Transportation (DOT)—to review the progress and growth of the protégé firm against the goals set forth in the agreement. This evaluation examines the specific actions the mentor took to develop the capabilities of the protégé firms, the number and dollar value of each subcontract awarded to the protégé, each contract awarded as a joint venture, and a description of the success meeting the protégé firm's developmental needs.[46]

Although the 8(a) mentor-protégé program goal is worthy, its success has not been clearly documented. GAO found that SBA had established only 40 mentor-protégé agreements as of April 2000, and planned an additional 60 by the end of that fiscal year. The study concluded that if this participation level continued, the program would only reach a small fraction of the nearly 6,000 certified 8(a) firms.[47] By 2004, the number had increased, but remained small. That year, SBA approved 147 mentor-protégé agreements; the goal for 2005 is to approve 150 such arrangements. As of April 28, 2005, the agency had achieved 60 percent of its goal (with 90 agreements) for the year.[48] Although meeting agency goals is important, mentor-protégé program participants still comprise only 2.5 percent of all 8(a) firms.

Small Disadvantaged Business Certification and Programs

Agencies generally operate independent programs aimed at procurement with SDBs, distinct from 8(a). Like 8(a), SDB programs help the government identify capable disadvantaged contractors, but do not directly offer technical and financial assistance to enable small businesses to become viable competitors for federal procurement.[49] In other words, 8(a) concentrates primarily on business development, whereas SDB programs identify businesses based on size and other criteria in industries that Department of Commerce (Commerce) benchmark studies, discussed below, determined are underutilized because of historical discrimination. Both aim to remedy the traditional exclusion of minority-owned firms from contract opportunities.

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[43] U.S. Small Business Administration, "The SBA Mentor-Protégé Program: An Overview," Feb. 7, 2005, <http://www.sba.gov/8abd/mentoroverview.html> (hereafter cited as SBA, "Mentor-Protégé Program"). *See also* SBA Interrogatory, p. 8.

[44] SBA, "Mentor-Protégé Program."

[45] Ibid.

[46] Ibid.

[47] GAO, *SBA Could Better Focus 8(a)*, pp. 15, 45.

[48] SBA follow-up response, p. 2.

[49] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,043.

To be eligible to participate in agency SDB programs, regulations require businesses to be certified as small and also socially and economically disadvantaged, and use criteria similar to those for the 8(a) program. To become certified, business owners must show they have experienced social and economic bias as individuals or as members of a group, and that they face reduced credit and capital opportunities. Regulations rely on 8(a) definitions of social disadvantage (see above), which presume that most racial and ethnic minorities qualify. Nonminority members may gain certification upon demonstrating that they have experienced individual bias based on attributes including but not limited to "ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or. . .personal experiences of substantial and chronic social disadvantage."[50] The SDB net worth cap is higher than 8(a)'s $250,000 limit; an owner of an SDB must not have a net worth exceeding $750,000 (excluding any primary residence and equity in the business).[51]

SBA conducts SDB certification for other agencies, with the exception of DOT, which has a memorandum of understanding with SBA establishing certification reciprocity.[52] With Department of Justice (DOJ) guidance and Federal Acquisition Regulations (FAR), individual agency regulations dictate which programs and procurements require SDB certification. Agencies use the CCR, described in appendix A, to identify and verify SDB-certified firms for contract solicitations and awards. Firms retain certification for up to three years, after which they must reapply to maintain eligibility.[53]

Recent studies have examined whether the SDB program effectively serves minority businesses, and such scrutiny prompted program modification. For example, the Clinton administration changed the eligibility process from self-certification of social disadvantage to one that requires evidence and a formal SBA decision.[54] Although heralding the change for reducing possible program fraud, many feared that SBA would be unable to process all applications when the new procedures were implemented. These concerns proved unfounded. Only 5,456 new businesses applied for certification during the implementation period, substantially fewer than the 30,000 SBA expected. More than two-thirds of certifications went to businesses already participating in the 8(a) program; SBA certified 2,629 of the new applications.[55]

FIGURE B.2
Small Business Administration's Certifications of SDBs, Fiscal Years 2000 to 2004

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[50] Business Credit and Assistance, 13 C.F.R. § 124.103(b)(2)(ii) (2005).

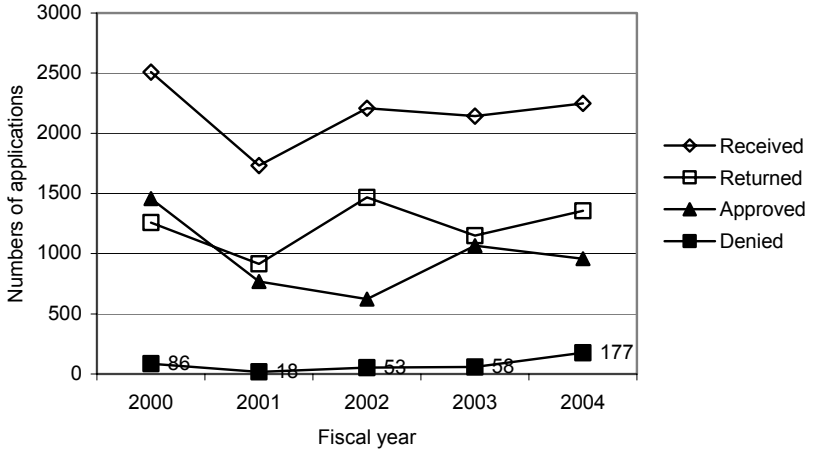
[51] *See, e.g.,* GAO, *Status of Small Disadvantaged Business Certifications,* p. 2, footnote.

[52] SBA Interrogatory, p. 4; U.S. Small Business Administration, "Programs to Assist Business: SBA/DOT Certification Reciprocity for Disadvantaged Businesses," Aug. 13, 2001, <http://www.sba.gov/8abd/indexprograms-dotcert.html> (last accessed June 1, 2005).

[53] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, pp. 26,043–44.

[54] U.S. Small Business Administration, "SBA Details New Certification Process For Small Disadvantaged Businesses," news release 98-78, Sept. 21, 1998, <http://www.sba.gov/news/archive98/98-78.html> (last accessed June 3, 2005).

[55] *See* GAO, *Small Business: Status of Small Disadvantaged Business Certifications*, pp. 2, 6–8.



Caption: The number of SDB applications SBA received in fiscal year 2001 dropped from about 2,500 to about 1,700, then rose to about 2,300 in subsequent years. The number of applications the agency returned as incomplete was more than half the number received. The number of approved SDB applications dropped from about 1,500 to 600 in fiscal years 2000 to 2002, but has increased to about a 1,000 per year since then. The number of applications denied is generally small.

Source: U.S. Small Business Administration, Follow-up Interrogatory Reponse, May 6, 2005, p. 3.

Considerably fewer firms applied for SDB certification in subsequent years. The number of applications dropped from about 2,500 in FY 2000 almost to 1,700 in FY 2001 and hovered around 2,200 thereafter. The number approved was highest—near 1,500—in FY 2000 and ranged approximately 600 to 1,100 in more recent years. As with the 8(a) applications, large numbers—between 900 and 1,400 each year—were incomplete and returned, suggesting that firms may need more or improved technical assistance. Of completed applications, SBA declined fewer than 100 per year in FYs 2000 to 2003 and nearly 200 in FY 2004 (see figure B.2). The SDB tracking system does not enable searching or sorting by the reason for the decline without reviewing each individual record,[56] and thus does not help to determine whether or not there are patterns in which factors contribute to denials. Despite these arguable deficiencies in the tracking system, processing is fairly efficient—the typical SDB certification takes less than 45 days. Furthermore, SBA's implementation of an electronic application system in September 2004 expedited processing: in May 2005, agency officials reported an average of 21 days for processing applications in the previous two months.[57]

Benchmarks for SDB Utilization

To narrowly tailor SDB programs, DOJ post-*Adarand* guidance calls for Commerce to annually calculate "benchmarks" to determine in which industries government underutilizes qualified minority-owned firms. Original benchmark studies use bidding records and Federal Procurement Data System (FPDS) data to calculate SDB "capacity" (the proportion of companies capable of

[56] SBA follow-up response, pp. 2–3.

[57] Ibid.

meeting government procurement needs) in relation to the number of contract awards to these firms.[58] FAR limits SDB assistance to procurement in industries where benchmarks indicate insufficient government contracting; the severity of the underrepresentation determines the extent to which agencies may employ SDB programs to remedy the effects of past discrimination.[59]

DOJ characterizes SDB programs as race-conscious, and it articulates reservations about using these strategies more than necessary.[60] Accordingly, FAR requires Commerce to annually monitor contract awards against benchmarks to ensure that agencies discontinue SDB programs in industries or regions that attain adequate representation in government procurement. Using a complicated statistical methodology and FY 1996 contracting records, Commerce calculated the original benchmarks in 1998. In 1999, noting "the consistency in recent federal procurement patterns," Commerce declared its intent to calculate new benchmarks every three years but to monitor contract data annually for indications more frequent estimates were necessary.[61] Despite this declaration, to date Commerce has not recalculated the original benchmarks. Commerce did, however, revise the benchmarks from industries identified using the Census' Standard Industrial Classification codes into the government's current standard, the North American Industry Classification System.[62] Because the differences between the systems can be confusing, the SBA Web site links to an industry code conversion calculator to allow businesses and procurement officials to check eligibility for contracting programs requiring SDB certification.[63] Table B.1, below, provides a partial list of industries and services in which benchmarks have demonstrated government underutilization of capable minority firms, and are thus subject to SDB procurement mechanisms to remedy such disparity.

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[58] *See* Small Disadvantaged Business Procurement; Reform of Affirmative Action in Federal Procurement, 65 Fed. Reg. 35,714, 35,716 (June 30, 1998).

[59] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,047.

[60] *Id*., p. 26,046.

[61] Small Disadvantaged Business Procurement: Reform of Affirmative Action in Federal Procurement, 64 Fed. Reg. 52,086 (Sept. 30, 1999).

[62] Jeffrey Mayer, Economic Statistics Administration, Department of Commerce, electronic correspondence to Anna Maria Ortiz, civil rights analyst, U.S. Commission on Civil Rights, Apr. 7, 2005.

[63] U.S. Small Business Administration, "Small Disadvantaged Business (SDB) Certification and Eligibility," May 19, 2004, <http:www.sba.gov/sdb/indexaboutsdb.html> (last accessed May 31, 2005).

TABLE B.1
Industries in Which Benchmarks Demonstrate Minority Firm Underrepresentation (partial list)

Industries	Services
Agriculture	Electric
Fishing	Gas
Forestry	Sanitation
Construction	Wholesale trade
Mining	Retail trade
Manufacturing	Finance
Transportation	Insurance
Communications	Real estate

Caption: SDB programs apply only to certified companies in industries where benchmarks have shown persistent underutilization of minority firms, including agriculture, construction, electric and gas services, and others.
Source: U.S. Small Business Administration, "About Small Disadvantaged Business (SDB) Certification and Eligibility, May 19, 2004, <http://www.sba.gov/sdb/indexaboutsdb.html> (last accessed May 12, 2005).

SDB Assistance Mechanisms

FAR identifies three SDB procurement assistance mechanisms subject to benchmark limits and a fourth that can be used to limit competition to certain categories of firms regardless of market capacity. Two strategies, an evaluation factor and a monetary incentive, concern subcontracting with SDBs. The third, a price evaluation adjustment, concerns prime contracts. As of December 2004, SBA directed civilian agencies to discontinue use of the price evaluation adjustment upon the expiration of the authorizing statute; DOD, NASA, and the Coast Guard may employ this mechanism in limited circumstances.[64]

Evaluation Factor Credits

FAR grants government procurement officials discretion in setting bid evaluation standards, such that price is not always the prime factor in contract decisions.[65] Regulations permit acquisitions staff to grant evaluation factor credits based on a prime contractor's planned subcontracting with SDBs.[66]

In general, solicitations above $500,000 require prime contractors to submit subcontracting plans with their bids detailing proposed utilization of small businesses, SDBs, women-owned and

[64] Federal Acquisition Regulation Systems, 48 C.F.R. § 19.1101 (2004); Laura Auletta, Civilian Agency Acquisition Council, U.S. General Services Administration, "Expired Program Authority for the Price Evaluation Adjustment for Small Disadvantaged Business Program," Dec. 27, 2004, p. 1 (hereafter cited as Auletta, CAAC Letter). As will be discussed below, price evaluation adjustments cannot be used for 12 months after DOD achieves its SDB contracting goals.

[65] 48 C.F.R. § 19.701.

[66] *Id*. § 19.1203.

HUBZone enterprises, and service-disabled veteran-owned firms.[67] Procurement officers who choose to evaluate subcontracting plans in addition to other factors driving the award decision must clearly state the relative weight of different elements in the bid solicitation. FAR does not dictate how to weigh subcontracting plans, and instead acknowledges that "each contracting officer must consider each plan in terms of the circumstances of the particular acquisition."[68] Along with other criteria, contracting officials who choose to employ evaluation credits must assess bid submissions based on contractors' past compliance with subcontracting plans, and whether the proposed strategy is realistic given the potential pool of SDBs to perform the work.[69] The requirement that prime contractors submit utilization plans (and progress reports) with most negotiated contracts means that evaluation factors pose little, if any, additional burden on prospective vendors, and interrogatories suggest that procurement officials frequently employ this mechanism to increase subcontracting with SDBs and other small businesses.[70]

Monetary Incentives

In addition to evaluation factors, FAR allows contracting officers to employ a monetary incentive to increase prime contractor utilization of SDBs. To use this mechanism, officials include a clause in contract solicitations to offer competing firms a dollar incentive up to 10 percent of the cost of subcontracting for exceeding proposed goals, subject to a number of exceptions. While several departments mentioned their ability to employ monetary incentives, only one agency, the Department of Education (DOEd), reported using this mechanism when negotiating complex multi-million dollar contracts.[71] The Commission suspects that the structure of the monetary incentive may deter contracting officials because the mechanism may unintentionally provide a reason to understate SDB subcontracting plans so that a business can easily exceed its stated goals. Additionally, HUD officials suggested that procurement officers rarely employ monetary incentives because to do so, agencies must spend either program budgets or operating resources in addition to the allocated cost of a contract.[72] Other agencies in this study also mentioned the cost of monetary incentives as a deterrent.[73]

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[67] *Id*. § 19.708.

[68] *Id*. § 19.705.

[69] *Id*. § 19.705-4.

[70] DOS Interrogatory, p. 5; HUD follow-up interview, p. 37; DOD Interrogatory, p. 3.

[71] DOEd Interrogatory, p. 2; U.S. Department of Education Follow-up Response to U.S. Commission on Civil Rights, Apr. 22, 2005, p. 2 (hereafter cited as DOEd follow-up response); DOD Interrogatory, p. 3; U.S. Department of Defense Follow-up Response to U.S. Commission on Civil Rights, May 6, 2005, p. 10. DOEd reports that it weighs SDB subcontracting plans and achievements, in addition to a host of other factors, in its decision to award monetary incentives to a contractor. DOEd follow-up response, pp. 2–3.

[72] HUD follow-up interview, p. 35.

[73] DOS Interrogatory, p. 5 (stating, "[the] State Department does not have the resources to provide financial incentives to encourage large primes to subcontract with SDBs and other small businesses"). *Also,* U.S. Department of State Follow-up Response to U.S. Commission on Civil Rights, Apr. 19, 2005, p. 6 (hereafter cited as DOS follow-up response) (stating, "[w]e do not have funds for financial incentives").

Price Evaluation Adjustment

The price evaluation adjustment for SDBs applies to bids for contracts greater than $100,000. To use the adjustment, procurement officers inflate the bids of non-SDBs by a percentage determined by regional and industry benchmarks, up to 10 percent, and evaluate bids accordingly. Thus, price evaluation adjustments do not restrict competition or set aside procurement, but instead offer SDBs an advantage on one factor among others in contracting evaluations.

Even before legislation for SDB price evaluation adjustments expired in late 2004 and SBA notified civilian agencies to discontinue their use, regulations strictly limited use of the strategy.[74] Procurement officials could not use the adjustment for certain types of contracts, such as when price was not a selection factor (e.g., architectural services), or for awards restricting competition to 8(a) program participants or other firms.[75] FAR also prohibited officials from using the adjustment if the resultant bids would exceed fair market value by more than the percentage evaluation factor applied.[76]

Because different statute governs DOD, the National Aeronautics and Space Administration, and the Coast Guard, regulations allow these agencies to continue using SDB price evaluation adjustments. However, defense authorization statutes in FY 1999 and 2003 require DOD to suspend the price evaluation adjustment for 12 months following each year in which the department attained its SDB contracting goal of 5 percent.[77] Having regularly exceeded its 5 percent SDB goal, DOD has suspended authority for the adjustment program every year since 2001.[78] SBA notes that because agencies can no longer use price evaluation adjustments, they rely more heavily on the 8(a) program to contract with SDB firms.[79]

Set-Asides

Prior to *Adarand*, SBA and other agencies operated strict "set-aside" programs, sometimes referred to as the "rule of two," that limited competition for certain contracts to SDBs. When a contract officer identified two or more qualified SDBs to bid on a project for an amount within

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[74] Auletta, CAAC Letter, p. 1.

[75] 48 C.F.R. § 19.11 (2004).

[76] *Id*. §§ 19.1103, 19.202-6(a).

[77] The Strom Thurmond National Defense Authorization Act Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat. 2139 *et seq*. (codified as amended at 5 U.S.C. § 3104 note).]; The Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458 (2002).

[78] Deidre A. Lee, director, defense procurement, Office of the Under Secretary of Defense, memoranda for directors of Defense agencies, deputy for acquisition and business management, deputy assistant secretary of the Air Force (contracting), deputy assistant secretary of the Army (procurement), executive director for procurement management, executive director for logistics policy and acquisition management, and director, Defense Contract Management Agency, re: suspension of the price evaluation adjustment for small disadvantaged businesses, Jan. 25, 2001, Jan. 31, 2002, Jan. 24, 2003, and Jan. 23, 2004.

[79] U.S. Small Business Administration, Affected Agency Review of U.S. Commission on Civil Rights Draft Report, July 21, 2005.

10 percent of fair market price, the contract was set aside exclusively for SDB competition.[80] In 1994, for example, approximately one-sixth of DOD contracting with minority-owned firms resulted from the rule of two.[81] After the *Adarand* decision, DOJ prohibited civilian agencies' SDB set-asides and banned DOD's use of them for two years. DOJ permitted agencies to replace set-asides with evaluation credits and the now largely defunct price evaluation adjustment.[82]

Set-asides are now based on size and geographic criteria more than race-related factors, and apply only to established SDB programs. In fact, regulations require officials to reserve contracts that fall between $2,500 and $100,000 for exclusive bidding by HUBZone, 8(a), service-disabled veteran-owned, or small or very small businesses.[83] Procurement officials subject many contracts exceeding $100,000 to bidding restrictions as well; regulations prioritize HUBZone enterprises over small businesses in general for setting aside awards of this size.[84] FAR grants exceptions from set-asides for certain industries, types of acquisitions (such as those critical for national security), and when no small businesses extend an acceptable offer. FAR also permits officials to implement "partial" set-asides for contracts easily subdivided.[85]

Agency implementation of set-asides varies. Several agencies, notably HUD and DOD, rely on a cascading set-aside procedure that invokes tiers of restricted competition to prioritize the types of small businesses to which the agency awards contracts; the Department of State (DOS) uses a similar strategy called "order of consideration."[86] HUD does not use any one hierarchy in its cascading set aside.[87] HUD policy directs contracting personnel to construct cascades using an appropriate hierarchy of small business set-asides, taking into consideration the history of the procurement, the market research for the specific requirement, and current accomplishments against the agency's various small business contracting goals. Staff may use any combination of the small business set-asides that federal acquisition regulations authorize as a cascading set-aside, but the last tier is unrestricted (i.e., all business types). The adequacy of competition at the higher tiers determines whether or not the award process reaches the unrestricted tier.[88] Thus, for

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[80] GAO, *Status of Small Disadvantaged Business Certifications*, p. 6.

[81] DOJ, Proposed Reforms to Affirmative Action in Federal Procurement, p. 26,043.

[82] GAO, *Status of Small Disadvantaged Business Certifications*, p. 6.

[83] *See* 48 C.F.R. § 19.5 (2004).

[84] *Id*. § 19.501.

[85] *Id*. § 19.502-3.

[86] *See* DOS follow-up response, "Open Market Small Business Procurement Procedures Order of Consideration" (omitted attachment provided via fax, Durie White, Department of State to Latrice Foshee, civil rights analyst, U.S. Commission on Civil Rights, Apr. 28, 2005, p. 6). DOS' order of consideration gives first priority to the 8(a) program with emphasis on HUBZone 8(a) concerns. In the second tier, if there are two or more capable HUBZone firms, the award is set aside for HUBZones, For awards of $2,500 to $100,00, the third tier sets contracts aside for small business if there are two or more them are capable. For awards over $100,000, the third tier reserves contracts for HUBZone small businesses if only one such firm satisfies requirements (i.e., sole source); the fourth consideration is the small business set-aside; and the fifth level is full and open competition. Ibid. State has successfully met all but its HUBZone goals. *See below*.

[87] HUD notes that "cascades may employ any combination of the small business set-asides authorized in Part 19 of the Federal Acquisition Regulation." U.S. Department of Housing and Urban Development, Affected Agency Review of U.S. Commission on Civil Rights Draft Report, July 7, 2005.

[88] Ibid., p. 1.

example, if in one HUD schema, 8(a) businesses are top priority, and two or more qualified 8(a) firms compete for a contract, the contract officer can restrict competition for the contract to 8(a) businesses. If too few 8(a) firms bid, the officer can award the contract competitively to a second tier of HUBZone enterprises. If competition among HUBZone firms is inadequate (i.e., fewer than two qualified bids), the officer can open bidding to small disadvantaged veteran-owned businesses and then to all small businesses.

HUD developed the cascading set-aside procedure in conjunction with SBA.[89] DOD's cascading system prioritizes firms differently, and rank orders very small firms, HUBZone enterprises, and small businesses before opening competition to all businesses if cascading set-asides fail to generate enough bids from appropriate firms.[90] The Department of Energy (DOEn) notes that its strategic plan contains sections on contracting with various businesses subject to set-asides for ease of reference, and that it is currently revising its guidance for procurement officers to clarify the order of preference among programs based on law.[91]

SBA'S PROCUREMENT GOALING PROGRAM

In 1978 Congress enacted a program to encourage federal agencies to award a designated proportion of their prime contracts to small businesses. Congressional intent was to ensure that the government's procurement process is fair and unbiased and to open opportunities for small businesses to provide goods and services. The Small Business Act defines and sets governmentwide goals in eight major goaling categories, five for prime contract awards to small businesses, and three for subcontracts.[92] Over time Congress has amended its original goals and added ones for firms facing social and economic disadvantage and for subcontracts in addition to other categories.[93] Congress has also added goals for businesses located in HUBZones.[94]

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[89] HUD Interrogatory, p. 1; U.S. Department of Housing and Urban Development, *Cascading Set-Aside Solicitation Provisions,* no date.

[90] U.S. Department of Defense, Defense Logistics Agency, Defense Logistics Acquisition Directive Revision 5 § 19.59 (as revised by DLA Procurement Policy Letter (PROCLTR) 02-14, July 31, 2002, "Cascading/Combined Set-Aside Logic in Business Systems Modernization (BSM)"), <http://www.dla.mil/j-3/j-336/logisticspolicy/DLADrev5parts/lastDLADrev5updated.htm> (last accessed June 1, 2005). DOD's cascading system applies to acquisitions between $2,500 and $100,000 and has slight variations when awards are between $2,500 and $50,000. Ibid. As indicated in the text, DOD has not been as successful as HUD in meeting its goals for 8(a) or HUBZone firms. *See below*.

[91] U.S. Department of Energy, Follow-up Response to the U.S. Commission on Civil Rights, May 12, 2005, p. 3; U.S. Department of Energy, Affected Agency Review of U.S. Commission on Civil Rights Draft Report, July 7, 2005; *see also*, U.S. Department of Energy, *FY 2005 Strategic Plan for Small Business,* no date, pp. 11, 19. Agency officials consider all activities with regard to set-asides to be race-neutral, apparently including those involving the 8(a) program. Ibid.

[92] Small Business Administration, Office of Government Contracting, *Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals & Achievements,* July 3, 2003, p. 1 (hereafter cited as SBA, *Goaling Guidelines for the Small Business Preference Programs*); *see also* Small Business Act of 1978, 15 U.S.C. § 644(g) (2000).

[93] SBA, *Goaling Guidelines for the Small Business Preference Programs*, p. 1.

[94] Ibid.

Current governmentwide prime contract goals include: 23 percent to small businesses, 5 percent to small and disadvantaged firms (divided between 8(a) and other SDB programs), and 3 percent to HUBZone businesses.[95] For subcontract goals, SBA identifies prime contracts over $500,000 (over $1 million in construction) and other large efforts likely to require smaller projects. It then works with each agency to project subcontracting possibilities, and sets goals based on these opportunities and an agency's prior data.[96] The governmentwide subcontracting goal for SDBs is 5 percent.

Congress charged SBA with implementing the program to meet governmentwide goals. However, the Small Business Act recognized that different departmental missions and procurement needs affect the maximum practical contracting opportunities for small business concerns, and as such SBA negotiates annual agency-specific goals and reviews results.[97]

To start negotiations, SBA assigns prime contract goals of the higher of either the governmentwide statutory level or the agency's average achievement over the past three years. An agency must make a compelling case if it wants to set lower goals, and SBA cannot accept proposed goals from an agency without first ensuring that the sum of all federal contracts will meet or exceed the statutory governmentwide level.[98] For example, as will be discussed in greater detail below, DOEn has successfully negotiated significantly reduced contracting goals annually. SBA has accepted as justification the assertion that the nature of DOEn procurement often precludes small business participation.[99] By surpassing their goals, other agencies ensure that, despite one agency's shortfall, governmentwide prime contracting goals are met.

At the end of each fiscal year, SBA requests federal procurement data showing each agency's prime and subcontract statistical achievements and governmentwide accomplishments. If an agency has failed to achieve any proposed prime or subcontract goal, it must submit a justification to SBA and propose a plan for corrective action.[100]

Agency Goal Achievements

Given that SBA adapts goaling targets to each agency's needs, one might presume that agencies always meet these goals. However, the Commission's research shows decidedly mixed results in attaining procurement targets for 8(a) firms, non-8(a) SDBs, and HUBZone enterprises. The section below describes contracting goals and achievements in using small and minority-owned

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[95] U.S. Small Business Administration, "Final Prime Contract Goals Negotiated by Agencies for FY 2005," April 2005, < http://www.sba.gov/GC/goals/finalprimegoals_2005.pdf> (last accessed May 17, 2005) (hereafter cited as SBA, "Final Goals for FY 2005"); U.S. Small Business Administration, "Federal Procurement and Small Business Goals," no date, <http://www.sba.gov/businessop/basics/procurement.html> (last accessed May 17, 2005).

[96] SBA, *Goaling Guidelines for the Small Business Preference Programs,* p. 5.

[97] Ibid., p. 2.

[98] Ibid.

[99] DOEn Interrogatory, p. 6.

[100] U.S. Small Business Administration, "Methodology for Establishing Goals," no date, p. 5, <http://www.sba.gov/GC/goals/indexmethod.html> (last accessed June 1, 2005).

businesses for each of the seven agencies this study considers. (Appendix E provides corresponding tables summarizing goals and achievements.) Agencies' attainment of HUBZone goals is discussed in the Majority Report.

U.S. Small Business Administration

Despite the small amount of SBA's own procurement, its goals are important because of the example it sets for other agencies that rely on its contracting programs. SBA establishes and must meet its own procurement goals.[101] SBA's small business and SDB targets exceed those of other agencies. The agency's FYs 2002 and 2003 prime contracting goals were 60 percent to small businesses and 46.5 percent to SDBs (see appendix E, table E.1). SBA raised its small business goals from 55 percent in FYs 2000 and 2001. However, it cut its 8(a) goals in half over the years—from 40 percent in FYs 2000 to 2001 to 20 percent in FYs 2004 and 2005 (see appendix E, table E.1).

Despite ambitious plans, SBA has not achieved its prime contracting goals for small businesses since FY 2001. In fact, as the small business goals have grown, achievements have steadily declined. With the exception of FY 2002, the agency has similarly fallen short of its 8(a) contracting goals specifically, as well as its overall SDB goals (see tables B.2 and E.1). The current goal of 36 percent to all SDBs appears more attainable than the higher goals of previous years, but SBA has struggled to achieve consistent SDB contracting levels that would exceed even this reduced goal. Data are not available for SBA's subcontracting achievements.

U.S. Department of Defense

With by far the largest amount of procurement of any federal agency, DOD was moderately successful at meeting its small business program goals in 2003. DOD's goal for small business prime contract awards was at the governmentwide target—23 percent (see figure B.3). It awarded approximately $42 billion or 22.4 percent to small business concerns. While seemingly minute,

the 0.6 percent shortfall translates to more than $1 billion. On the other hand, SDB procurement in FY 2003, including 8(a) firms, exceeded the 5 percent goal. FY 2005 goals for DOD are: 23 percent for small businesses and 5.7 percent for 8(a) and other SDBs combined (see figure B.4 and appendix E, table E.2).[102]

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[101] SBA, *Goaling Guidelines for the Small Business Preference Programs,* p. 2.

[102] Federal Procurement Data System, "Report on Annual Procurement Preference Goaling Achievements," fiscal year 2003 through fourth quarter, pp. viii–ix (hereafter cited as FPDS, "Goaling Achievements, FY 2003"); U.S. Small Business Administration, "Final FY 2003 Prime Contract Goaling Achievements," no date, <http:www.sba/GC/goals/fund_2003prime.pdf> (last accessed June 1, 2005); SBA, "Final Goals for FY 2005"; DOD Interrogatory, attachment C. While the DOD Interrogatory reports identical figures, DOD's OSDBU reports slightly different figures; *see* Department of Defense, "Program Goals and Statistics," no date, <http://www.acq.osd.mil/sadbu/statistics/goals_printerfriendly.htm> (last accessed May 31, 2005).

Figures B.3 to B.5 show a broader picture of SDB goals and achievements for DOD prime contracts and subcontracts for FYs 2000 to 2003. Although DOD exceeded its SDB goals each year, it did not always surpass individual 8(a) or non-8(a) SDB goals (see figure B.5 and tables B.2 and E.2). DOD also failed to attain its SDB subcontracting goals between FYs 2001 to 2003, when the target was 5.0 percent and its achievement ranged from 4.6 to 4.9 percent (see figure B.4 and table E.2).

U.S. Department of Transportation

The Surface Transportation Assistance Act of 1982 established DOT contracting goals at 25 percent to small businesses and 10 percent to socially and economically disadvantaged businesses (including 8(a) concerns).[103] In recent years, DOT has negotiated much higher goals with SBA than those stated in the legislation. Although they remain higher than the governmentwide requirement, the agency's small business goals have declined in recent years—50 percent in FY 2003, 47.7 in FY 2004, and 38.0 percent in FY 2005 (see figure B.3 and table E.3).

SDB goals are 9.5, 17.6, and 15.3 percent in FYs 2003 to 2005, respectively (see figure B.4). In FY 2003, the most recent year for which data are available, achievement exceeded the 8(a) goal, but not that for non-8(a) SDBs (see figure B.5). That year, DOT awarded 40.7 percent of procurement dollars to small businesses, totaling approximately $825 million, and 14.3 percent to SDBs.[104] Expectations for FYs 2004 and 2005 are higher generally, but even more so for the 8(a) program (see figure B.5).

DOT also adopted subcontracting goals of 40 percent for small businesses and 5 percent for SDBs in FY 2003, and far exceeded both goals. In FYs 2004 and 2005, negotiations with SBA raised each of DOT's subcontracting goals (see figures B.3 and B.4 and table E.3). With sustained performance, DOT will surpass its 2004 and 2005 small business and SDB goals.

U.S. Department of Energy

As noted, each agency pursues an annual goal that represents the "maximum practicable opportunity for small business concerns."[105] DOEn's small business goals demonstrate the

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[103] The Surface Transportation Assistance Act of 1982 was the first statute mandating DOT's Disadvantaged Business Enterprise (DBE) program. The 10 percent DBE goal was reauthorized by the Intermodal Surface Transportation Efficiency Act of 1991, and later the Transportation Equity Act for the 21st Century in 1998. Laws also require a 10 percent goal for airport improvement funds and concession contracts. *See* Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, 105 Stat. 1914 (codified as amended in scattered sections of 23 U.S.C.); Transportation Equity Act of the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (codified as amended in scattered sections of 23 U.S.C.).

[104] FPDS, "Goaling Achievements, FY 2003."

[105] 48 C.F.R. § 19.201 (2004) (stating that "[i]t is the policy of the Government to provide maximum practicable opportunities in its acquisitions to small businesses, veteran-owned small businesses, service-disabled veteran-owned small businesses, HUBZone small businesses, small disadvantaged businesses, and women-owned small business concerns"); *see also* U.S. Department of Energy, Office of Economic Impact and Diversity, Office of

flexibility to negotiate adjustments. Agency documents explain the unique nature of energy contracts that make procurement with small and disadvantaged businesses particularly challenging. First, DOEn oversees facilities and laboratories through management and operating (MO) contracts, which account for approximately 85 to 90 percent of the agency's procurement. The nature of work performed under MO contracts generally renders them more suitable for large businesses and educational institutions, and multi-year contracts.[106] Another reason the agency gives for low awards to small businesses is a secretarial policy that no longer allows contractual arrangements for security services at nuclear facilities.[107]

Because of the unique character of DOEn's contracts in FYs 2000 and 2001, SBA established the agency's small business goal at only 5 percent. Yet, DOEn fell short of its goal both years. In 2002, DOEn negotiated a reduction to 3.7 percent (see figure B.3).[108] As a condition for granting the reduced goal, SBA required DOEn to develop a strategy for how and when it will meet the 23 percent goal. In response, DOEn proposed a 20-year plan, indicating a gradual increase of 1 percent per year until FY 2022.[109] In 2002, the secretary also issued a policy statement instructing all departmental elements to seek ways to improve access for small businesses, SDBs, and HUBZone businesses, and asked the agency's OSDBU to prepare an agencywide small business strategy.[110]

Despite the reduced 2002 goal, DOEn's achievements once again fell short and the agency established a Small Business Working Group to develop individual goals for each of its components. In 2003, 4.1 percent of DOEn contracting dollars went to small businesses, slightly exceeding the agency goal (see figure B.3 and table E.4). DOEn notes that prime contracting dollars awarded to small businesses have increased from $500.3 million in FY 2000 to $902 million in FY 2004.[111] Although a sizable increase, the 2004 figure still represents only 4.3 percent of the agency's total procurement dollars. In another demonstration of support for these programs, Congressmen have sought GAO investigations of the department's contracting practices producing low achievement.[112]

Small and Disadvantaged Business Utilization, "Strategic Plan for Small Businesses," no date, p. 3 (hereafter cited as DOEn, OSDBU, "Strategic Plan") (illustrating that agency documents often replicate FAR language).

[106] U.S. Department of Energy, Office of Economic Impact and Diversity, Office of Small and Disadvantaged Business Utilization, "Report to the Secretary of Energy on the U.S. Department of Energy's Small Business Programs, Fiscal Year 2002 and 2003," Mar. 31, 2004, pp. 4, 7. *See also*, DOEn Interrogatory, p. 6. Agency documents indicate that in 2002 DOEn began assessing the MO process to identify contracting opportunities for small businesses.

[107] DOEn Interrogatory, p. 6.

[108] DOEn, OSBDU, "Strategic Plan," p. 3.

[109] Theresa Speake, director, Office of Small and Disadvantaged Business Utilization, U.S. Department of Energy, letter to Fred C. Armendariz, associate deputy administrator, Office of Government Contracting and Business Development, U.S. Small Business Administration, re: 20-year plan, July 12, 2002.

[110] Spencer Abraham, secretary, U.S. Department of Energy, memorandum to all departmental elements, re: policy statement on supporting small businesses in implementing DOE missions, Sept. 23, 2002.

[111] DOEn Interrogatory, p. 6.

[112] U.S. General Accounting Office, *Achieving Small Business Prime Contracting Goals Involves Both Potential Risks and Benefits,* May 18, 2004; Mary Clare Jalonick, "Senate Chairmen Want to Know Why Energy Department

In keeping with its low procurement with small businesses, DOEn goals and achievements for SDBs are also low. In FYs 2000 to 2003, goals for SDBs have ranged from 1.3 to 5.0 percent, but the agency awarded 1.5 percent or less to SDBs every year (see figure B.4 and tables B.2 and E.4).

The agency performs better with respect to subcontracting with small businesses. Its goals are much higher, and achievement exceeded them in FYs 2001 to 2003 (see figure B.3 and table B.2). However, DOEn's subcontracting goals with SDBs fluctuate, and the agency exceeded them only at their lowest levels. Furthermore, DOEn's SDB achievements for subcontractors dropped between FYs 2001 and 2003 (see figure B.4 and table E.4).

U.S. Department of Housing and Urban Development

HUD's prime contract goals are high—in FYs 2002 and 2003 the agency aimed to award 30 percent of contract dollars to small businesses, and 5.5 percent each to 8(a) and non-8(a) SDBs, for a total of 11 percent to SDBs. HUD exceeded these goals. In FY 2003, 54 percent of its procurement dollars went to small businesses and about 28 percent went to SDBs (see figures B.3 to B.5 and table E.5).

SBA negotiated higher goals with HUD in FY 2004 and 2005—38 percent for small businesses and 13.2 percent for SDBs (see figures B.3 to B.6 and table E.5).

HUD nevertheless exceeded its small business and SDB subcontracting goals. HUD's subcontracting with small businesses was 54.4 percent in FY 2001, 55.5 percent in FY 2002, and nearly 60.7 percent in FY 2003. Its subcontracting with SDBs was 12.2, 21.2, and 28.9 percent in each respective fiscal year (see figures B.3 and B.4 and table E.5).

HUD's ability to exceed its goals is driven by the secretary's policy directive, described earlier in this appendix, and a number of other initiatives that promote contracting with small and disadvantaged businesses. First, HUD establishes internal "stretch goals"—targets higher than the SBA-negotiated levels to encourage staff to surpass the official mark. An internal agency Web page posts the stretch goals to ensure staff awareness.[113] For example, while HUD negotiated a 38 percent small business prime contracting goal with SBA for FY 2004, it set an internal stretch goal of 50 percent. For subcontracting, HUD's SBA-negotiated goal is 37.2 percent; the internal stretch goal is 40 percent.[114]

Second, HUD's procurement staff accesses a database allowing ongoing examination of progress in meeting goals. A contracting office can use this database to redirect efforts toward goals that are unmet. For example, if the database reveals that mid-year achievements exceed the goal for

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Shuns Small Businesses," *CQ Today*, Dec. 9, 2004, p. 10.

[113] HUD follow-up interview, pp. 18, 30–33 (statements of Girovasi).

[114] U.S. Department of Housing and Urban Development, "HUD Small Business Goals for FY 2004," no date (attachment to David H. Enzel, senior counsel, Office of General Counsel, U.S. Department of Housing and Urban Development, electronic correspondence to Eileen E. Rudert, social science analyst, U.S. Commission on Civil Rights, May 5, 2005).

small business but are under the 8(a) goal, staff can initiate market research to identify 8(a) firms and try to target a specific buy as an 8(a) set-aside.[115]

Third, HUD employs cascading set-asides, described above, which prioritize awards to 8(a) and HUBZone firms rather than small businesses generally. These set-asides thus ensure that procurement procedures favor those businesses for which goals are harder to attain.

U.S. Department of Education

DOEd's progress toward its small business contracting goals has been modest. In FY 2003 only 16.8 percent of spending (about $171 million, or about 3,000 contract actions) was with small businesses and just 3 percent ($31 million) was with SDBs (see figures B.3 and B.4 and appendix table E.6). In 2003, DOEd awarded only 0.7 percent to 8(a) businesses. Its awards to non-8(a) SDBs have risen since FY 2000, but remain below the 2.5 percent goal (see figure B.5 and table E.6). Notwithstanding its 2003 achievements, DOEd's FY 2005 prime contracting goals match governmentwide goals (see figures B.3 to B.5 and table E.6).

DOEd exceeded only its subcontracting goal for SDBs in 2003. Against a mark of 5 percent, it awarded 6.8 percent to SDB subcontractors. Its SDB subcontracting goals for FYs 2004 and 2005 are 6 percent (see figure B.4 and table E.6).

U.S. Department of State

DOS officials announced that the agency met its small business goals for the last five years.[116] One exception was in 2001, when the agency awarded 8 percent to 8(a) firms, which slightly missed the goal of 8.8 percent (see figure B.5 and table E.7). Generally, however, DOS performance has been high. In 2003, the agency awarded 48.3 percent of its procurement dollars to small businesses and 21.0 percent to SDBs (see figures B.3 to B.6 and table E.7). DOS also exceeded SDB subcontracting goals, which have been set at 5 percent from FY 2000 to FY 2005, against DOS achievements ranging 7.4 to 13.9 percent (see figure B.4 and table E.7).

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[115] HUD follow-up interview, pp. 12–13 (statement of Girovasi).

[116] DOS Interrogatory, tab 2.

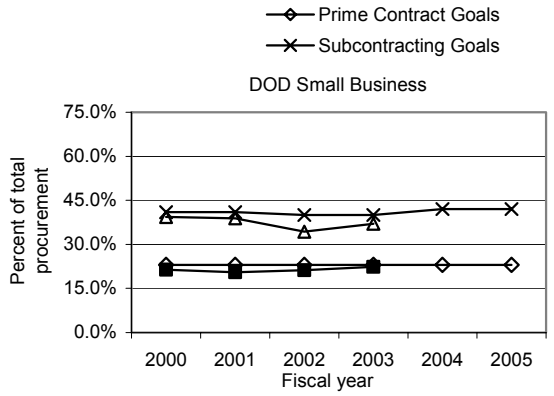
TABLE B.2
Summary of Selected Agencies' Performance Against Prime and Subcontracting Goals for Small Disadvantaged Businesses, Fiscal Years 2000 to 2004

	Small Disadvantaged Business Goals			
		Prime Contracts		Subcontracting
	Both 8(a) and non-8(a) SDBs	8(a)	Non-8(a) SDBs	
GOVERNMENTWIDE				
2003	Exceeded	Exceeded	Exceeded	Unmet
2002	Exceeded	Unmet	Exceeded	Exceeded
2001	Exceeded	Exceeded	Unmet	Unmet
2000	Exceeded	Exceeded	Unmet	Exceeded
DEPARTMENT OF DEFENSE				
2003	Exceeded	Exceeded	Exceeded	Unmet
2002	Exceeded	Unmet	Exceeded	Unmet
2001	Exceeded	Zero Goal	Unmet	Unmet
2000	Exceeded	Zero Goal	Unmet	Exceeded
DEPARTMENT OF EDUCATION				
2003	Unmet	Unmet	Unmet	Exceeded
2002	Unmet	Unmet	Unmet	Unmet
2001	Unmet	Unmet	Exceeded	Unmet
2000	Exceeded	Exceeded	Unmet	Unmet
DEPARTMENT OF ENERGY				
2003	Unmet	Unmet	Unmet	Exceeded
2002	Unmet	Unmet	Unmet	Exceeded
2001	Unmet	Unmet	Unmet	Unmet
2000	Unmet	Unmet	Unmet	Unmet
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT				
2003	Exceeded	Exceeded	Exceeded	Exceeded
2002	Exceeded	Exceeded	Unmet	Exceeded
2001	Exceeded	Unmet	Exceeded	Unmet
2000	Unmet	Unmet	Exceeded	Unreported
DEPARTMENT OF STATE				
2003	Exceeded	Exceeded	Exceeded	Exceeded
2002	Exceeded	Exceeded	Exceeded	Exceeded
2001	Exceeded	Unmet	Exceeded	Exceeded
2000	Exceeded	Exceeded	Exceeded	Exceeded
DEPARTMENT OF TRANSPORTATION				
2003	Exceeded	Exceeded	Unmet	Exceeded
2002	Exceeded	Exceeded	Unmet	Unmet
2001	Exceeded	Unmet	Exceeded	Exceeded
2000	Unmet	Unmet	Exceeded	Exceeded

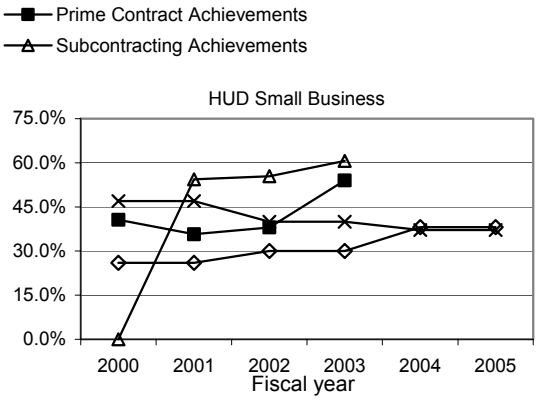
Caption: Government agencies vary in their attainment of statutory small business, 8(a,) and non-8(a) SDB goals for prime contracting and subcontracting. Between fiscal years 2000 and 2003, DOS exceeded its goals in nearly every category, whereas DOEn has never met any of its prime contracting goals. Collectively, governmentwide prime contracting goals have mostly been met.

Compiled by U.S. Commission on Civil Rights from other sources.

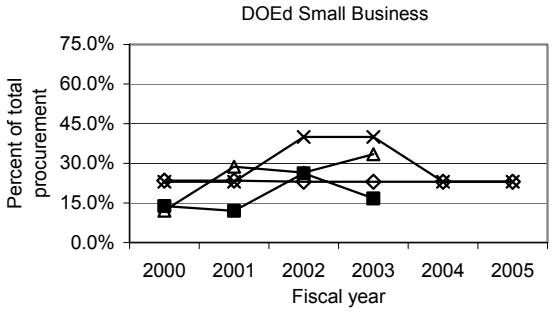
FIGURE B.3
Selected Federal Agencies' Contracting Goals and Achievements for Small Businesses



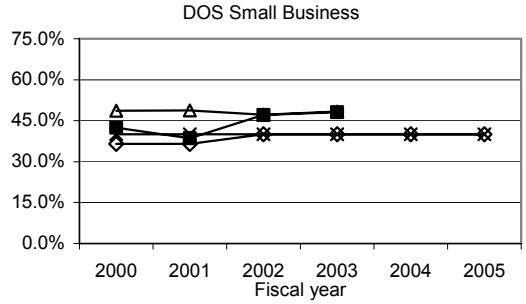
Caption: DOD generally met or nearly met its small business prime and subcontracting goals from fiscal years 2000 through 2003.



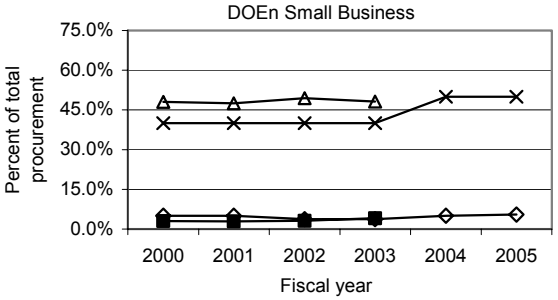
Caption: From fiscal years 2000 to 2003, HUD consistently exceeded its small business prime and subcontracting goals.



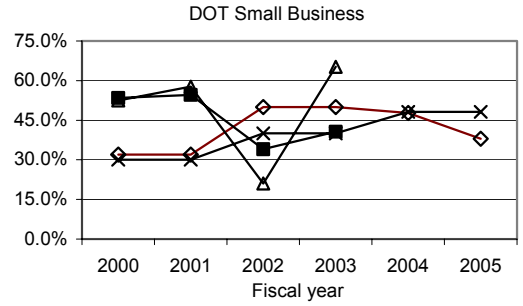
Caption: DOEd has generally failed to meet prime and subcontracting goals for small business from fiscal years 2000 to 2003



Caption: In fiscal years 2000 through 2003, DOS consistently exceeded its SDB prime and subcontracting goals.



Caption: DOEn generally met its small business goals, although its prime contracting goals are quite low.

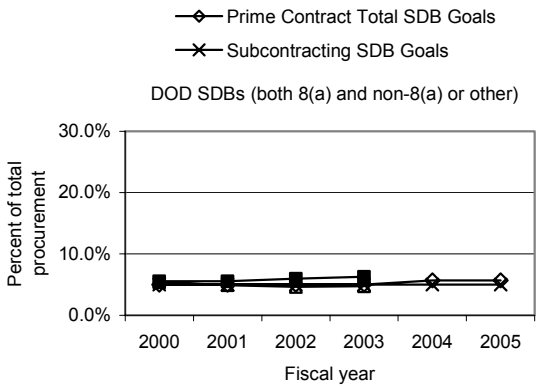


Caption: DOT has had mixed success in meeting its small business prime and subcontracting goals.

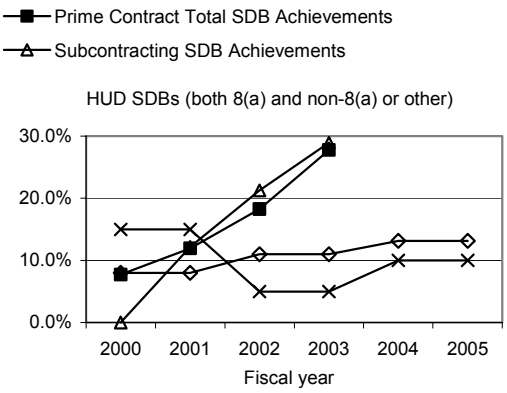
Summary caption: Agencies have different levels of goals and success at meeting them. DOEn's prime contracting goals were extremely low from fiscal years 2000 through 2004 and barely met. DOEd generally did not meet its goals. DOT's pattern of meeting goals is inconsistent, with the agency exceeding its goals in some years but not others. On the other hand, DOD, DOS, and HUD generally met prime contracting goals, but at varying levels.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

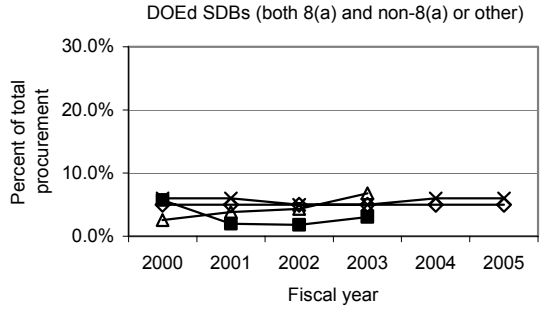
FIGURE B.4
Selected Federal Agencies' Contracting Goals and Achievements for Small Disadvantaged Businesses



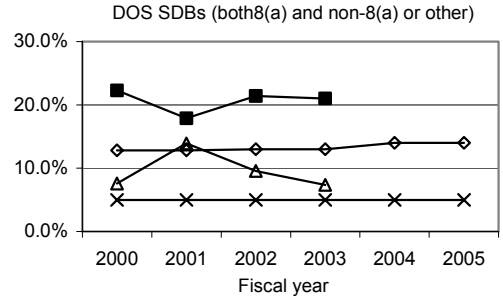
Caption: Overall, DOD contract awards to SDBs were on par with its goals in fiscal years 2000 to 2003.



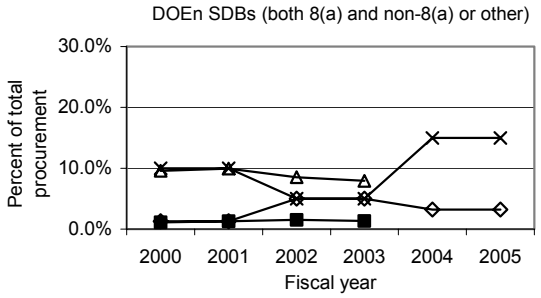
Caption: With the exception of subcontracting in fiscal year 2001, HUD met and increasingly exceeded its SDB prime and subcontracting goals from fiscal years 2000 through 2003.



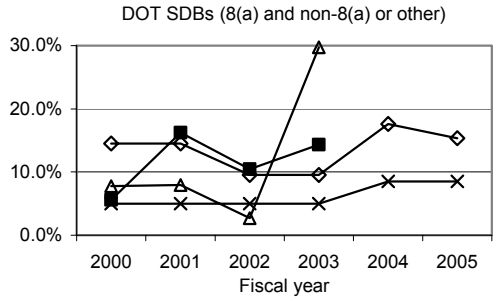
Caption: DOEd SDB contracting usually fell slightly short of its goals in fiscal years 2000 through 2003.



Caption: In fiscal years 2000 through 2003, DOS consistently exceeded its SDB prime and subcontracting goals



Caption: Although DOEn surpassed its SDB subcontracting goals in fiscal years 2002 and 2003, it has yet to meet its SDB prime contracting goals.

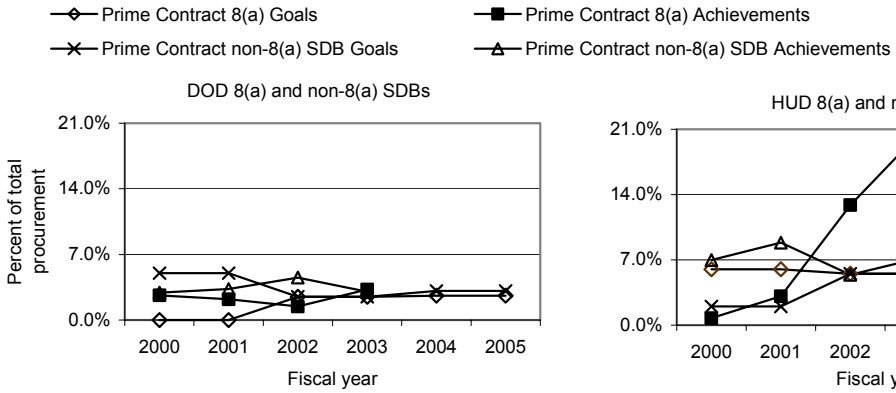


Caption: DOT has generally met or exceeded its SDB prime and subcontracting goals in fiscal years 2000 through 2003.

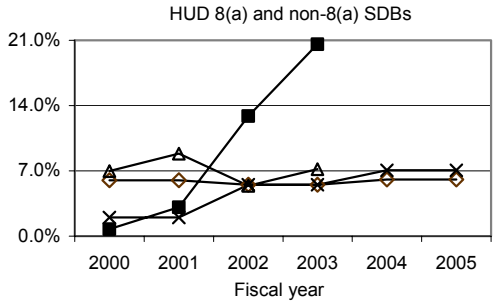
Summary caption: DOD generally attained and DOEd nearly achieved their fairly modest SDB contracting goals. DOS and DOT generally met or exceeded, and HUD has increasingly exceeded its SDB contract goals. DOEn failed to meet its prime contracting goals in fiscal year 2002 and fiscal year 2003, but met its subcontracting goals consistently.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

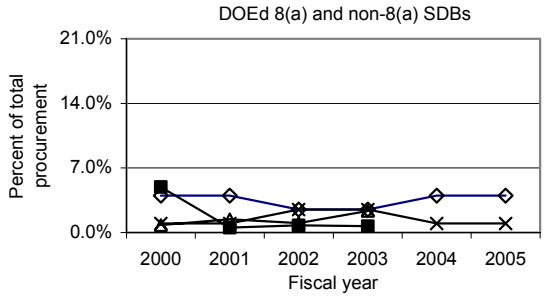
FIGURE B.5
Selected Federal Agencies' Prime Contracting Goals and Achievements for 8(a) and Non-8(a) SDBs



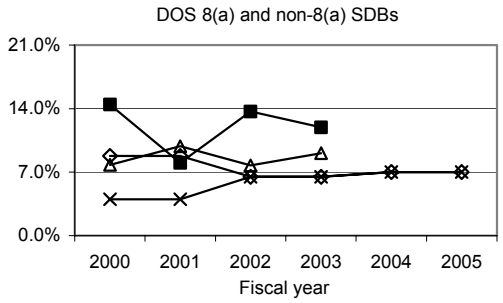
Caption: From fiscal years 2000 to 2003, DOD has occasionally met its 8(a) and non-8(a) SDB prime contracting goals.



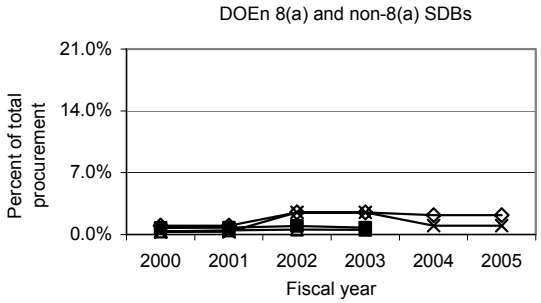
Caption: HUD prime contracting with 8(a) firms far surpassed its goals in fiscal years 2002 and 2003, and it has usually exceeded its goals for non-8(a) SDB awards



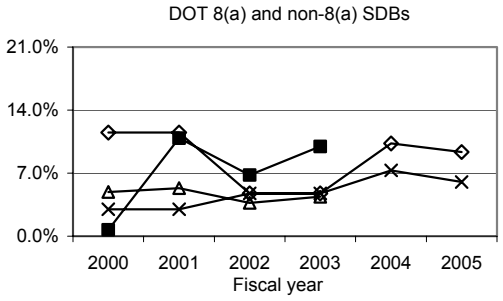
Caption: DOEd has generally failed to reach its modest goals for 8(a) and non-8(a) contracting.



Caption: Since fiscal year 2000, DOS has almost always surpassed its goals for contracting with 8(a) and non-8(a) SDBs.



Caption: Despite having the lowest goals of any agency, DOEn failed to attain any of its 8(a) and non-8(a) SDB contract goals from fiscal year 2000 to 2003.



Caption: Between fiscal years 2000 and 2003, DOT has had mixed success in attaining contract goals for 8(a) and non-8(a) SDBs.

Summary caption: DOS met or exceeded nearly all of its prime contracting goals for 8(a) and non-8(a) SDBs from fiscal years 2000 through 2003. In fiscal years 2002 and 2003, DOT and HUD prime contracts also surpassed their goals for 8(a) firms. In contrast, DOD, DOEd and DOEn struggled to meet their prime contracting goals for 8(a) and non-8(a) SDBs in fiscal years 2000 to 2003.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

Achievement Summary

In sum, HUD and DOS were successful in meeting small disadvantaged business goals, particularly in recent years (see table B.2). DOD and DOT met SDB goals overall, but failed to reach targets in some segments. Recently, DOEn and DOEd have met subcontracting goals for SDBs, but rarely met performance goals for prime contracts.

DOEn demonstrated that goals are negotiable by establishing much lower levels to accommodate the nature of the agency's procurement. However, intense scrutiny of greatly reduced goals is necessary, and SBA's request for a written strategy, the agency's formation of an internal working group, and congressional oversight were appropriate responses.

Finally, HUD had many initiatives to promote success in meeting goals. They included, for example, a database allowing ongoing examination of progress in meeting goals and procedures prioritizing awards to 8(a) and HUBZone firms rather than business segments where goals are more easily met.

CONCLUSION

Recognizing that small disadvantaged and minority-owned firms continue to have trouble accessing a fair share of federal contracts, the government has taken many steps to expand procurement opportunities without placing undue burdens on other firms. Congress has created agencies and offices, such as SBA and OSDBUs, to increase government's effectiveness in expanding contracting opportunities. Agencies have also established internal policies to emphasize a commitment to small and disadvantaged businesses. Moreover, Congress has legislated several programs to increase the share of federal procurement going to these businesses. These programs, which include setting statutory targets for procurement, SBA's 8(a) program, mentor-protégé arrangements, and small disadvantaged business certification, vary in effectiveness, and also in the extent to which they are race-conscious.

Dissent Appendix C: Sample Interrogatory

UNITED STATES [redacted] RIGHTS
[redacted]
624 NINTH STREET, NW, WASHINGTON, DC 20425
www.usccr.gov

[redacted]

February 8, 2005

[redacted]
Secretary
[redacted]
Washington, DC [redacted]

Dear [redacted]

The Supreme Court's 1995 decision in *Adarand v. Peña* significantly changed the way federal agencies conduct procurement programs aimed at small and disadvantaged businesses. The Court determined that to survive strict judicial scrutiny, such programs must be narrowly tailored, and the use of race-conscious measures should be limited. The U.S. Commission on Civil Rights (Commission) is studying race-neutral alternatives employed by federal agencies and the extent to which agencies continue to use affirmative action in contracting programs. A more detailed project description is attached. This effort arises from the Commission's responsibility to appraise the laws and policies of the Federal Government with respect to discrimination or denials of equal protection of the law according to race, color, sex, national origin, and other bases. (See Section 3(a)(2) P.L. 103-419). The examination will result in a report with findings and recommendations sent to the affected agencies, the President, the Congress, and the general public. The publication is scheduled for release in September 2005.

Staff has conducted preliminary research and is now seeking information from affected agencies, such as yours. I would appreciate your designating a member of your staff to coordinate and facilitate our interactions. With this letter, I am also enclosing a set of interrogatories and document requests. Within the next week, please have an appropriate person from your agency contact us. We will be happy to answer any questions or discuss any concerns you or your designee might have regarding the project, the interrogatories, the document requests, or the deadline for responding.

Because of the complexity of issues surrounding federal contracting, we anticipate having further questions and scheduling interviews with your staff at a later date. However, careful and complete written responses to the interrogatories will minimize the need for in-person interviews and save time and effort. In order to complete this project before the deadline established by the Commission, we must receive your written response to the enclosed interrogatories no later than February 28, 2005.

Please direct any questions or concerns about the interrogatories to Eileen Rudert, Anna Maria Ortiz, or Mireille Ziesemiss at (202) 376-8582. Thank you for your cooperation.

Sincerely,

GERALD A. REYNOLDS
Chairman

Enclosures

U.S. COMMISSION ON CIVIL RIGHTS

RACE-NEUTRAL FEDERAL CONTRACTING

Project Concept

In 1995, the Supreme Court made a landmark decision in *Adarand v. Peña,* changing the landscape of affirmative action in federal contracting. The Court held that federal programs that use racial and ethnic criteria as a basis for decision-making are subject to "strict judicial scrutiny." Such programs must serve a compelling government interest and must be narrowly tailored to serve that interest. "Narrow tailoring" requires agencies to consider race-neutral alternatives in federal procurement and to justify use of race-conscious measures.

To implement the regulatory requirements of *Adarand*, the Department of Justice (DOJ) recommended that agencies pursue a variety of race-neutral alternatives to limit the use of affirmative action to the "minimum extent necessary to achieve legitimate objectives."[1] DOJ maintains that these objectives include statutorily established government-wide goals of 23 percent contracting with small businesses, 5 percent contracting with business interests controlled by socially and economically disadvantaged individuals, 5 percent contracting with women-owned small businesses, and 3 percent contracting with small firms qualified as in Historically Underutilized Business Zones (HUBZones).[2] Regulations allow agencies to adjust their own goals in line with the narrow tailoring requirement of *Adarand*.

DOJ recommended that agencies pursue mentor-protégé programs, engage in constant outreach, eliminate the impact of surety costs from bids, and undertake other race-neutral measures before considering race-conscious initiatives such as targeted solicitation and price evaluation credits. DOJ's recommendation that agencies pursue race-neutral alternatives rests upon the belief that race-neutral tools will help agencies comply with the legal requirements of *Adarand* and help minorities and disadvantaged businesses by eliminating barriers facing all small businesses seeking federal contracts. Because government's interest is to redress discrimination, agencies must also aggressively enforce existing antidiscrimination laws.

This project asks what programs and practices agencies pursue in order to fulfill the requirements of *Adarand*. In other words, what race-neutral alternatives do federal agencies use to fulfill the statutory small business and small disadvantaged business goals and at the same time ensure nondiscrimination in contracting?

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[1] Department of Justice, "Proposed Reforms to Affirmative Action in Federal Procurement," p. 9.

[2] *See* 15 USC § 644.

Specifically, the project will consider the following:

- Do agencies engage in race-neutral practices such as mentor-protégé programs, outreach, and financial and technical assistance as means to increase opportunities for small and disadvantaged businesses to win federal contracts?
- Do agencies employ specific, best practices for such consideration?
- Are agencies developing and utilizing additional promising practices for race-neutral means of achieving statutory goals?
- How do agencies measure the impact of race-neutral programs on federal contracting, if at all?
- What sorts of mechanisms are in place to ensure that government contracting is not discriminatory?
- What triggers the use of race-conscious initiatives in addition to or in place of race-neutral measures?

To implement the study, staff will conduct intensive background research using the Internet and other sources. They will conduct a literature review on race-neutral contracting, as well as pertinent federal statutes, regulations and data. Staff will identify a set of agencies to study more deeply and will prepare interrogatories to assess these agencies' use of race-neutral methods of procurement. The study report will conclude with findings and recommendations.

[redacted]

U. S. COMMISSION ON CIVIL RIGHTS INTERROGATORY

AND DOCUMENT REQUEST

Deadline: February 28, 2005

1. Under the narrow tailoring requirement of the Supreme Court's 1995 *Adarand v. Peña* decision, federal agencies must make a good faith effort to employ race-neutral measures to improve contracting opportunities for small businesses generally, and minority-owned firms in particular.

   What race-neutral programs or practices does the [redacted] employ to comply with this requirement (e.g., technical assistance, mentoring, small business database maintenance, teaming efforts, etc.)? Please explain in detail and provide all relevant policy statements or guidance.

2. Have the scope and frequency of the agency's outreach to minority-owned businesses changed as a result of the narrow tailoring requirement? Please explain in detail, including types of outreach and target audiences and provide relevant data for each fiscal year from 2000 to 2004.

3. Does [redacted] view [redacted] program as a race-neutral means to expand contracting opportunities for minority-owned businesses? How does [redacted] measure the impact of this program on contracts with these businesses? Please provide any relevant data or policy guidance about [redacted] activities.

4. Does [redacted] maintain a database of small businesses eligible for contracts? If so, please explain how the list is organized and how often it is updated.

5. What types of race-neutral financial incentives or assistance does [redacted] provide to (1) prime contractors to encourage subcontracting with small and disadvantaged businesses; and (2) to small and disadvantaged businesses to enable them to compete for contracts?

6. Please describe eligibility requirements and participation rates for [redacted]. Are these financial assistance measures available to all small businesses?

7. The [redacted] page on [redacted] Web site indicates that the program is out of money and being revised. What is the status of the revision efforts? How has the lack of resources adversely impacted small and disadvantaged businesses?

8. Does [redacted] coordinate with or consult other federal agencies with regard to the development of race-neutral initiatives or "best practices" for ensuring compliance with case law and at the same time improving the competitiveness of minority firms?

9. President Bush has prioritized the unbundling of large contracts to create more contracting opportunities for small businesses. How has [redacted] addressed this priority? Has unbundling had a measurable effect on the number of small disadvantaged or minority-owned firms receiving contracts? Please explain.

10. What has the agency done to ensure that procurement procedures are not administratively onerous, thereby limiting small business participation?

11. Please describe [redacted] programs (such as the mentor-protégé program) that may not be purely race-neutral based on eligibility requirements, but that are designed to enable minority-owned firms to compete for contracts on equal footing. How does [redacted] make the distinction between, and the legal justification for, such programs and those that are purely race-neutral?

12. Has [redacted] made a conscious effort to identify procurement procedures or policies that, although race-neutral, may have a disparate impact on minority firms? If so, what has the agency done to modify these procedures? Please provide examples.

13. Please explain [redacted] Disadvantaged Business Enterprise (DBE) certification process in detail and provide documents outlining certification criteria. Can an economically disadvantaged firm, regardless of the owner's race, be certified?

14. How many participants in [redacted]'s small and disadvantaged business programs are NOT minority- or women-owned firms (not including those that participate solely in programs for service-disabled veterans)? Please provide relevant data on the number and percentage of nonminority firms receiving certification and subsequently contracts (see also data request in question 12).

15. How does the agency measure the overall effectiveness of its race-neutral practices? Please provide any related data, including the number and percentage of contracts going to small disadvantaged businesses as a whole, and minority-owned firms as a subset, and the dollar value of those contracts for each fiscal year from 2000 to 2004.

16. Does [redacted] track whether contract recipients achieve the statutory 10 percent goal for subcontracting with DBEs? By what standards does [redacted] gauge good faith efforts to secure DBE participation? Where the goal is not met, what assistance does [redacted] offer? Please explain.

17. What mechanisms are in place to ensure that race-conscious programs are used only when race-neutral programs are not effective? Does the agency have an established policy for periodic review of the continuing necessity of race-conscious measures? Please provide any relevant written guidance or policies.

18. What justification(s) does [redacted] use to apply race-conscious measures? Does the agency rely on statistical evidence to determine where such measures are needed? Please provide any relevant empirical or disparity studies.

19. Enforcement of nondiscrimination laws is critical to ensuring that minority-owned businesses have equal opportunity to compete for federal contracts. To what extent has [redacted] incorporated enforcement of Title VI of the Civil Rights Act in its procurement program? Is the agency's enforcement program complaint-driven or based on compliance reviews and other preventive measures? Has [redacted] pursued legal sanctions against prime contractors or other funding recipients for discrimination against minority firms? Please provide data on complaints, compliance reviews, and resolutions/remedial actions for each fiscal year between 2000 and 2004.

20. To what extent do [redacted] Office of Small and Disadvantaged Business Utilization and Office for Civil Rights coordinate with respect to Title VI enforcement?

21. Please explain how [redacted] monitors recipients to ensure compliance with the DBE provisions outlined in agency regulations.

22. To what extent does [redacted] examine prime contractors to validate subcontracting data and ensure that small and disadvantaged businesses are being appropriately utilized?

DOCUMENT AND DATA REQUEST

Please provide the following documents, based on the above questions:

1. Policy statements or guidance outlining race-neutral programs or practices aimed at improving small and disadvantaged business participation in agency contracts.

2. Data on outreach activities, including number, type, and targeted audience, for each fiscal year from 2000 to 2004.

3. Policy guidance governing [redacted] participation in [redacted] activities and data on the number and dollar amount of [redacted] contracts, by race of participating firm ownership, for fiscal years 2000 to 2004.

4. Policies or guidelines outlining DBE certification criteria.

5. Data on the number and percentage of contracts going to small disadvantaged businesses as a whole, and minority- and nonminority-owned firms as a subset, and the dollar value of those contracts for each fiscal year from 2000 to 2004.

6. Policy statements or guidance governing the use and review of race-conscious programs.

7. Empirical or disparity studies used to justify the application of race-conscious measures.

8. Enforcement data on Title VI complaints, compliance reviews, and resolutions/remedial actions for each fiscal year between 2000 and 2004.

Dissent Appendix D: Sources of Data on Minority-Owned Businesses and Federal Contracting

Key data sources to measure trends of minority-owned businesses consist of (1) the U.S. Census Bureau's survey of minority-owned businesses, conducted every five years; and (2) the Federal Procurement Data System, updated each fiscal year.[1]

CENSUS BUREAU'S SURVEYS OF MINORITY-OWNED BUSINESSES

The Census Bureau inaugurated its survey of minority-owned businesses in 1972 and has continued to collect information every five years since then. The survey is part of a long-existing economic census that in 1997 collected data from 3.7 million companies.[2] The Bureau took its most recent economic census in 2002, but will not release detailed data on minority-owned businesses to the public until 2006.[3] For examining the trends herein, data are available from the 1992 survey,[4] taken before *Adarand*, and the 1997 one, collected afterward. Thus, the 1997 data capture results soon after *Adarand,* but leave most of the decade since the decision unstudied.

Furthermore, the Census Bureau reports that the 1992 and 1997 figures are not comparable because of changes in survey methodology. Among the most significant changes, the 1997 survey (1) included a legal type of corporation that was mostly excluded from the 1992 survey; and (2) assigned minority ownership using a more stringent criteria (i.e., owning 51 percent of the interest in the firm rather than having 50 percent minority owners). The Census Bureau provides adjusted numbers to make comparisons between the 1992 and 1997 figures that differ from the published survey results.[5] Because of the lack of comparison between 1992 and 1997

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[1] *See, e.g.,* U.S. Small Business Administration (SBA), Office of Advocacy, *Minorities in Business*, 1999, p. 5.

[2] U.S. Census Bureau, *History of the 1997 Economic Census,* POL/00-HEC, July 2000, p. 2, and Appendix B, p. B-17.

[3] U.S. Census Bureau, "Guide to the 2002 Economic Census: Schedule and Geographic Coverage for Reports, by Sector," Apr. 25, 2005, <http://www.census.gov/econ/census02/guide/g02sch3.htm> (last accessed May6, 2005). The Census Bureau released preliminary numbers on July 28, 2005, but more detailed analyses are not yet available.

4 See, e.g., U.S. Department of Commerce, Economics and Statistics Administration, Bureau of the Census, 1992 Economic Census: Survey of Minority-Owned Business Enterprises, Summary, MB92-4, September 1996.

[5] In the first change, the 1997 survey included the legal form of organization known as "C" corporations, although the 1992 survey contained only a small sample of such in a women-owned business survey and none in the minority survey. "C" corporations, as identified in the 1997 survey were 11 percent of all U.S. firms, although they accounted for 75 percent of all U.S. firms' receipts. U.S. Census Bureau, *1997 Economic Census: Company Statistics Series, Company Summary,1997,* EC97CS-1, September 2001, pp. 6, 12 (hereafter cited as U.S. Census Bureau, *1997 Economic Census—Company Summary*).

In effect, the latter methodological change excluded from the 1997 survey businesses that were 50 percent minority-

figures, this study reports the unadjusted 1997 statistics but describes 1992–1997 changes as percentage increases or decreases between the adjusted 1992 and 1997 figures. At the same time, some comparisons between 1992 and 1997 are shown using the proportions minority-owned businesses represent of all U.S. businesses.

Information available from the Economic Censuses that indicates the growth or decline of minority-owned businesses from 1992 to 1997 includes:

- the number of such firms,
- the sales and receipts, that is, revenue, of those enterprises,
- the number of them with paid employees,
- the revenue of those with paid employees,
- the number of employees of minority-owned firms, and
- the annual payroll of those with paid employees.[6]

The Small Business Administration (SBA) issued reports on minority-owned businesses in 1999, 2001, and 2005 containing analyses of all the sources listed above.[7]

THE FEDERAL PROCUREMENT DATA SYSTEM

The Federal Procurement Data System[8] develops, collects, and disseminates annual procurement data to meet the needs of Congress, the executive branch, and the public sector. Since data

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and 50 percent nonminority-owned and equally owned male/female firms. The 1997 survey revealed 84,586 businesses which were 50 percent minority-/50 percent nonminority-owned firms. They were 0.4 percent of all U.S. firms and had 0.2 percent of all firms' sales and receipts. Similarly, 3.6 million firms were equally male-/female-owned businesses. The equally male-female-owned businesses represented 17.5 percent of all U.S. firms, but accounted for only 5.1 percent of total receipts. U.S. Census Bureau, *1997 Economic Census--Company Summary*, pp. 6, 10.

To better compare 1992 and 1997 data, the Census Bureau adjusted the minority group figures by excluding the "C" corporations from the 1992 statistics. The 1997 data was not adjusted for the small number of 50 percent minority/50 percent nonminority firms. *See,* U.S. Census Bureau, *1997 Economic Census: Survey of Minority-Owned Business Enterprises; Company Statistics Series, Summary, 1997,* EC97CS-7, July 2001, pp. 13–14 (hereafter cited as U.S. Census Bureau, *1997 Economic Census—Minority Summary*).

[6] *See, e.g.,* U.S. Census Bureau, *1997 Economic Census: Survey of Minority-Owned Business Enterprises; Company Statistics Series, Black, 1997,* EC97CS-3, March 2001, p. 17. *Also see similarly titled reports for Hispanics (EC97CS-4), Asian and Pacific Islanders (EC97CS-5), and American Indians and Alaska Natives (EC97CS-6).*

[7] *See* U.S. Small Business Administration, Office of Advocacy, *Minorities in Business*, 1999; U.S. Small Business Administration, Office of Advocacy, *Minorities in Business, 2001*, November 2001; U.S. Small Business Administration, Office of Advocacy, *Dynamics of Minority-Owned Employer Establishments, 1997-2001*, February 2005. Despite the recent date of this last report, it contains no information on establishments that opened after 1997. Ibid., p. 3.

[8] Public Law 93-400 established the Federal Procurement Data System (FPDS). The statute required the Office of

collection began in 1978, the system has yielded analyses of the impact of congressional and presidential initiatives in socioeconomic sectors, such as small business, and assessments of the impact of federal acquisition policy.[9]

The analysis in this report comes largely from tables included in the preface of annual reports issued for fiscal years 1992 to 2003. Among these are the "Report on Annual Procurement Preference Goaling Achievements" and small business ownership reports. [10]

The goaling achievements report provides data on governmentwide and agency procurement with small businesses, small disadvantaged enterprises, firms qualified for SBA's 8(a) program, and those certified as located in Historically Underutilized Business Zones (HUBZones). Agency achievements are available for the years this report studies—1992 through 2003—although some reported information has changed. First, the HUBZone program was implemented in 1998.[11] As a result, agencies' achievements against HUBZone goals are available only for FYs 2000 to 2003. Second, since FY 2001, reports have carried a column of data for non 8(a) small disadvantaged businesses (SDBs), clarifying that SDB data comprise the sum of 8(a) and non 8(a) SDBs. Before 2001, data labeled "SDB" represented the non-8(a) SDBs.[12]

The federal procurement system provides two small business ownership tables. Both show the number of new businesses receiving federal contracts. The first displays the number of each agency's new businesses by type of contractor: women-owned small businesses; women-owned small disadvantaged firms; and other small disadvantaged enterprises. The second table crosstabulates each type of contractor by race or ethnic group, but only for the Department of

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Management and Budget's Office of Federal Procurement Policy to set up the system. The U.S. General Services Administration's Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center issued reports through the analysis of 2003 data. Beginning Oct. 1, 2004, a private enterprise assumed operation of the FPDS. As a result, the system is newly redesigned to provide fewer printed reports than in the past, but enhanced on-line data manipulation. U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report,* 2003, "Foreword," and "Highlights," <http://www.fpdc.gov/fpdc/fpr2003.htm> (last accessed Sept. 21, 2004) (hereafter cited as GSA, *Federal Procurement Report 2003*).

[9] Ibid.

[10] *See, e.g.,* U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report,* 2001, pp. vi-ix (hereafter cited as GSA, *Federal Procurement Report 2001). See also* reports with similar names from earlier and later years.

[11] U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report,* 1999. U.S. General Services Administration, Office of Governmentwide Policy, Office of Acquisition Policy, Governmentwide Information Systems Division, Federal Procurement Data Center, *Federal Procurement Report,* 2000.

[12] GSA, *Federal Procurement Report 2001.*

Defense.[13] The Commission analyzed SDBs by combining the women-owned small disadvantaged firms and the other small disadvantaged enterprises.

[13] *See, e.g.,* GSA, *Federal Procurement Report 2003*, pp. vi and vii.

Dissent Appendix E: Selected Agencies' Small and Disadvantaged Business Goals and Achievements

Tables E.1 to E.7 show the seven selected agencies' goals and achievements for contracting with small and disadvantaged businesses for fiscal years 2000 to 2005. They show the prime and subcontracting goals and actual percentages for small businesses and small disadvantaged businesses (SDBs). They also show the goals and achievements for the Small Business Administration's 8(a) program separate from non-8(a) SDBs, as well as the two combined for prime contracts. There are no separate subcontracting goals for 8(a) and non-8(a) SDBs.

TABLE E.1
Small Business Administration's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	55.0%	62.7%	55.0%	72.2%	60.0%	55.5%	60.0%	48.1%	60.0%	60.0%
Subcontracting	--	--	--	--	40.0%	--	40.0%	--	--	--
Small Disadvantaged Businesses										
8(a) Prime	40.0%	12.6%	40.0%	18.5%	23.3%	32.1%	23.3%	23.0%	20.0%	20.0%
Non 8(a) SDB Prime	10.0%	33.9%	10.0%	3.6%	23.3%	10.2%	23.3%	9.5%	16.0%	16.0%
Total Prime	50.0%	46.5%	50.0%	22.1%	46.5%	42.3%	46.5%	32.4%	36.0%	36.0%
Subcontracting	--	--	--	--	5.0%	--	5.0%	--	--	--

Caption: SBA's goals are generally higher than other agencies' goals. In fiscal years 2000 and 2001, SBA exceeded its small business prime contracting goals. In fiscal years 2002 through 2004, goals increased by 5 percent but were unmet. Overall, from fiscal years 2000 through 2003, SBA had sporadic success in meeting its 8(a) and non-8(a) SDB contracting goals.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

TABLE E.2
Department of Defense's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	23.0%	21.4%	23.0%	20.5%	23.0%	21.2%	23.0%	22.4%	23.0%	23.0%
Subcontracting	41.0%	39.3%	41.0%	38.9%	40.0%	34.3%	40.0%	37.0%	42.0%	42.0%
Small Disadvantaged Businesses										
8(a) Prime	0.0%	2.6%	0.0%	2.2%	2.5%	1.4%	2.5%	3.3%	2.6%	2.6%
Non 8(a) SDB Prime	5.0%	2.9%	5.0%	3.3%	2.5%	4.5%	2.5%	3.0%	3.1%	3.1%
Total Prime	5.0%	5.6%	5.0%	5.5%	5.0%	6.0%	5.0%	6.3%	5.7%	5.7%
Subcontracting	5.0%	5.4%	5.0%	4.9%	5.0%	4.6%	5.0%	4.7%	5.0%	5.0%

Caption: Generally, DOD's achievements came close to but did not meet its small business and SDB goals in fiscal years 2000 and 2003. However, DOD exceeded its non-8(a) SDB prime contracting goals in fiscal years 2002 through 2004.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005); DOD Interrogatory.

TABLE E.3
Department of Transportation's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	32.0%	53.5%	32.0%	54.6%	50.0%	34.1%	50.0%	40.7%	47.7%	38.0%
Subcontracting	30.0%	52.4%	30.0%	57.8%	40.0%	21.1%	40.0%	65.3%	48.2%	48.2%
Small Disadvantaged Businesses										
8(a) Prime	11.5%	0.7%	11.5%	10.9%	4.8%	6.8%	4.8%	10.0%	10.3%	9.3%
Non 8(a) SDB Prime	3.0%	4.9%	3.0%	5.3%	4.8%	3.7%	4.8%	4.4%	7.3%	6.0%
Total Prime	14.5%	5.6%	14.5%	16.2%	9.5%	10.5%	9.5%	14.3%	17.6%	15.3%
Subcontracting	5.0%	7.8%	5.0%	8.0%	5.0%	2.7%	5.0%	29.8%	8.5%	8.5%

Caption: DOT exceeded its small business contracting goals in fiscal years 2000 and 2001; however, the department failed to meet its fiscal year 2002 through 2004 goals. In contrast, DOT's SDB 8(a) and non 8(a) goals were unmet in fiscal years 2000 and 2001, but the agency achieved these goals in fiscal years 2002 and 2003.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

TABLE E.4
Department of Energy's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	5.0%	3.0%	5.0%	2.9%	3.7%	3.1%	3.7%	4.1%	5.1%	5.5%
Subcontracting[b]	40.0%	48.0%	40.0%	47.5%	40.0%	49.4%	40.0%	48.2%	50.0%	50.0%
Small Disadvantaged Businesses										
8(a) Prime	1.0%	0.8%	1.0%	0.8%	2.5%	1.0%	2.5%	0.8%	2.2%	2.2%
Non 8(a) SDB Prime	0.3%	0.4%	0.3%	0.5%	2.5%	0.6%	2.5%	0.5%	1.0%	1.0%
Total Prime	1.3%	1.1%	1.3%	1.3%	5.0%	1.5%	5.0%	1.3%	3.2%	3.2%
Subcontracting	10.0%	9.6%	10.0%	10.0%	5.0%	8.5%	5.0%	7.9%	15.0%	15.0%

Caption: DOEn generally did not meet its small business prime contracting goals; however, it generally exceeded its subcontracting goals from fiscal year 2000 through fiscal year 2003. DOEn's SDB 8(a) and non 8(a) goals were consistently unmet.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

[b] Department of Energy officials report different subcontracting goals and achievements--targets of 45.8 , 46.9, 47.0, and 48.0 percent in fiscal years 2000 to 2003, and performance at 48.7, 47.3, 48.9, and 48.1 percent, respectively. The conclusion that the agency exceeded goals is the same with either set of numbers. *See* U.S. Department of Energy, Affected Agency Review of U.S. Commission on Civil Rights Draft Report, July 7, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

TABLE E.5
Department of Housing and Urban Development's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	26.0%	40.7%	26.0%	35.7%	30.0%	38.0%	30.0%	54.0%	38.1%	38.1%
Subcontracting	47.0%	--	47.0%	54.4%	40.0%	55.5%	40.0%	60.7%	37.2%	37.2%
Small Disadvantaged Businesses										
8(a) Prime	6.0%	0.8%	6.0%	3.1%	5.5%	12.9%	5.5%	20.6%	6.1%	6.1%
Non 8(a) SDB Prime	2.0%	7.0%	2.0%	8.8%	5.5%	5.4%	5.5%	7.2%	7.1%	7.1%
Total Prime	8.0%	7.7%	8.0%	11.9%	11.0%	18.3%	11.0%	27.8%	13.2%	13.2%
Subcontracting	15.0%	--	15.0%	12.2%	5.0%	21.2%	5.0%	28.9%	10.0%	10.0%

Caption: From fiscal years 2000 through 2003, HUD usually met or exceeded its small business and SDB contracting goals. The agency vastly exceeded prime contracting goals in 2004.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

TABLE E.6
Department of Education's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	23.5%	13.9%	23.5%	12.0%	23.0%	26.2%	23.0%	16.8%	23.0%	23.0%
Subcontracting	23.0%	12.1%	23.0%	28.7%	40.0%	26.4%	40.0%	33.4%	23.0%	23.0%
Small Disadvantaged Businesses										
8(a) Prime	4.0%	4.9%	4.0%	0.5%	2.5%	0.8%	2.5%	0.7%	4.0%	4.0%
Non 8(a) SDB Prime	1.0%	0.8%	1.0%	1.5%	2.5%	1.0%	2.5%	2.3%	1.0%	1.0%
Total Prime	5.0%	5.7%	5.0%	2.0%	5.0%	1.8%	5.0%	3.0%	5.0%	5.0%
Subcontracting	6.0%	2.6%	6.0%	3.8%	5.0%	4.3%	5.0%	6.8%	6.0%	6.0%

Caption: DOEd generally did not meet its small business goals from fiscal year 2000 through fiscal year 2004, except in fiscal year 2002 when it exceeded its prime contracting goals, and in fiscal year 2001 when it exceeded its subcontracting goals. DOEd's SDB 8(a) and non 8(a) SDB goals were generally unmet.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).

TABLE E.7
Department of State's Goals and Achievements for Small and Disadvantaged Businesses, Fiscal Years 2000 to 2005

	2000		2001		2002		2003		2004[a]	2005[a]
	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Actual	Goals	Goals
Small Business										
Prime	36.5%	42.5%	36.5%	38.6%	40.0%	47.1%	40.0%	48.2%	40.0%	40.0%
Subcontracting	40.0%	48.7%	40.0%	48.7%	40.0%	47.2%	40.0%	48.3%	40.0%	40.0%
Small Disadvantaged Businesses										
8(a) Prime	8.8%	14.5%	8.8%	8.0%	6.5%	13.7%	6.5%	11.9%	7.0%	7.0%
Non 8(a) SDB Prime	4.0%	7.8%	4.0%	9.9%	6.5%	7.8%	6.5%	9.1%	7.0%	7.0%
Total Prime	12.8%	22.3%	12.8%	17.9%	13.0%	21.4%	13.0%	21.0%	14.0%	14.0%
Subcontracting	5.0%	7.6%	5.0%	13.9%	5.0%	9.6%	5.0%	7.4%	5.0%	5.0%

Caption: DOS fairly consistently exceeded its small business and SDB contracting goals from fiscal year 2000 through fiscal year 2004; exceptions are fiscal years 2001 and 2004, when the agency failed to meet its 8(a) prime contracting goals.

[a] Agencies' 2004 achievements are unavailable because of problems with a newly implemented data system. This report was published before fiscal year 2005 ended. *See* General Services Administration, facsimile to U.S. Commission on Civil Rights, July 8, 2005, p. 1.

Source: Compiled by USCCR using U.S. Small Business Administration, "Government-wide Procurement Preference Goaling Program," no date, <http://www.sba.gov/GC/goals/> (last accessed June 1, 2005).