

Affirmative Action in Procurement: A Preview of the Post-*Adarand* Regulations in the Context of an Uncertain Judicial Landscape

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Introduction

Great media interest accompanied the spring 1997 publication of the Clinton Administration's proposed approach for addressing affirmative action in federal procurement.¹ On 9 May 1997, the Federal Acquisition Regulation Council published in the Federal Register proposed rules intended to "mend, not end" affirmative action in federal procurement.² On the same day, the Department of Justice (DOJ) published an accompanying notice which addressed more than a thousand comments raised in response to the DOJ's proposed reforms,³ which were published the preceding year.⁴

Although affirmative action in federal procurement is not new,⁵ the recently proposed regulatory scheme has been more than two years in the making. Given the scope of the changes and the underlying need for the change, the elapsed time is

understandable. Throughout this period, various interest groups have watched the development of the rules with keen interest. When these proposed rules become final, they will dramatically alter the procedure through which the government provides expanded opportunities for small disadvantaged businesses (SDBs) to gain access to federal procurement awards. When implemented, the new procedures will merit attention by procurement attorneys due to the ongoing controversy surrounding the topic they address;⁶ the introduction of innovative solutions intended to survive intense judicial scrutiny; and the high-profile, ongoing litigation that prompted the need for revised rules.

This article introduces the proposed regulatory scheme in the context in which the rules were prepared; discusses the judicial decisions (focusing primarily on *Adarand Constructors, Inc. v. Pena*⁷) that led the government to embark upon its effort

1. See Stephen Barr, *Contracting Rule Changes to Affect Minority Firms*, WASH. POST, May 7, 1997, at A19; John M. Broder, *U.S. Readies Rules Over Preferences Aiding Minorities*, N.Y. TIMES, May 6, 1997, at A1 (Washington Final Ed.); Laurie Kellman, *Race, Sex Preferences on Contracts Survive*, WASH. TIMES, May 7, 1997, at A1; Hilary Stout & Eva M. Rodriguez, *Government Contracts to Minority Firms Increase Despite Court's 1995 Curb on Affirmative Action*, WALL ST. J., May 7, 1997, at A20; *Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences In Contract Actions*, 67 FED. CONT. REP. 547 (BNA May 12, 1997); *FAR Proposal Adopts Price Evaluation Adjustment to Benefit SDBs*, 39 GOV'T CONT. ¶ 240 (May 14, 1997).

2. Federal Acquisition Regulation; Reform of Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,786 (1997).

3. Response to Comments to Department of Justice Proposed Reforms to Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,648 (1997).

4. 61 Fed. Reg. 26,042 (1996).

5. The Department of Defense (DOD) has afforded preferences to small disadvantaged business (SDBs) by statute since 1987. The defense authorization and/or appropriations acts of 1987 and the following years have established the goal that five percent of all the DOD procurements be awarded to SDB concerns, which include historically black colleges and universities and other minority institutions. In order to meet the five percent goal, Congress authorized the DOD to use less than full and open competition and price preferences not to exceed ten percent. See, e.g., 10 U.S.C. § 2323, formerly Pub. L. No. 99-661, § 1207 (10 U.S.C. § 2301); see also U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 226.7003 (Apr. 1, 1984) [hereinafter DFARS]. In 1994, through the Federal Acquisition Streamlining Act, Congress extended the authority in section 2323 to all agencies. Pub. L. No. 103-355, § 7102, 108 Stat. 3243 (1994) (codified at 15 U.S.C. § 644 note). Regulations to implement this new statutory authority were delayed because of *Adarand* and the corresponding effort to review Federal affirmative action regulations. See, 60 Fed. Reg. 48,258, 48,259 (1995).

6. For a discussion of recent, related proposed legislation, see *Bill to Ban Contracting Preferences Wins House Judiciary Panel Approval Along Party Lines*, 68 FED. CONT. REP. 28 (BNA July 14, 1997) and *GOP Legislators Renew Campaign to Ban Racial Preferences in Government Programs*, 67 FED. CONT. REP. 740 (BNA June 23, 1997).

7. 115 S. Ct. 2097 (1995). Regardless of the significance one attaches to the *Adarand* decision, the practitioner should be acquainted with some of the post-*Adarand* decisional law which interprets and applies the landmark decision.

to redefine its methodology for promoting affirmative action through federal procurement; highlights recent judicial decisions that have applied *Adarand* in the context of federal procurement and may have complicated the landscape upon which the new rules will be imposed; provides an overview of the proposed rules; and offers a number of considerations for the practitioner in anticipation of the promulgation of the new rules.

***Adarand*: A Landmark Case Alters the Existing Landscape**

On 12 June 1995, the United States Supreme Court issued its landmark opinion in *Adarand Constructors, Inc. v. Peña*.⁸ Some legal commentators believe that *Adarand* was the most significant decision to address a social issue since *Brown v. Board of Education*.⁹ Others believe that *Adarand* is simply the logical extension of the Supreme Court's holding in *City of Richmond v. J.A. Croson Co.*,¹⁰ in which the Court applied a strict scrutiny standard of review to a local, race-based affirmative action measure.¹¹ In *Adarand*, the Court arguably applied the same standard to a federal program.¹²

The underlying facts of *Adarand* are rather straightforward. In 1989, the Central Federal Lands Highway Division (CFLHD) of the United States Department of Transportation (DOT) awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company (Mountain Gravel).¹³ Mountain Gravel then solicited bids for the guardrail work under the contract.¹⁴ *Adarand Constructors, Inc.*, a Colorado-based highway construction contractor, submitted the low bid for the work.¹⁵ Gonzales Construction Company (Gonzales) also submitted a bid for the project.¹⁶

The prime contract between Mountain Gravel and the CFLHD granted Mountain Gravel additional compensation if it retained subcontractors for the project which were small businesses controlled by "socially and economically"¹⁷ disadvantaged individuals. Gonzales was certified as such a business; *Adarand* was not.¹⁸

Despite *Adarand*'s low bid, Mountain Gravel awarded the subcontract to Gonzales.¹⁹ The Chief Estimator of Mountain Gravel submitted an affidavit to the Court stating that it would have accepted *Adarand*'s bid had it not been for additional payment it received by hiring Gonzales instead.²⁰

8. *Id.*

9. 347 U.S. 483 (1954). See William T. Coleman, *Adarand and Its Aftermath, How the Supreme Court Overestimated Precedent and Underestimated the Impact of Its Decision*, 31 PROCUREMENT LAW. 12 (Winter 1996). In his article, Mr. Coleman, General Counsel for the United States Army, noted:

[T]he Supreme Court's analysis was off the mark, and more importantly for the procurement community, it appears that the Court gave no thought to the impact of the decision. With billions of procurement dollars riding in the balance, policymakers, regulation writers, and procurement officials are faced with the daunting task of reengineering a massive set of programs under the Supreme Court's guidelines that would have been better left to the more flexible give-and-take of legislative rulemaking procedures.

Id. at 12. See also, Margery Newman, *Affirmative Action and the Construction Industry*, 25 PUB. CONT. L.J. 433, 448 (1996) ("Actually, *Adarand* may beg more questions than it answers."); Reba Cecilia Heggs, *Practitioner's Viewpoint: What to Expect After Adarand*, 25 PUB. CONT. L.J. 451, 456 (1996) ("The most probable effect will be increased work for agency attorneys and private counsel litigating both sides of an unresolved social and legal issue."); Devon E. Hewitt, *Adarand: Misplaced Politics in the Courts*, 30 PROCUREMENT LAW. 1 (Spring 1995); *Adarand: New Law Needed?*, 30 PROCUREMENT LAW. 19 (Spring 1995).

10. 488 U.S. 469 (1989).

11. *Id.*

12. See 48 C.F.R. §§ 19.001, 19.703(a)(2) (1996).

13. *Adarand*, 115 S. Ct. at 2101.

14. *Id.*

15. *Id.*

16. *Id.*

17. "[S]ocially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." 15 U.S.C. § 637(a)(C)(5) (1994). "[E]conomically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged." *Id.* § 637(a)(6)(A).

18. *Adarand*, 115 S. Ct. at 2101.

19. *Id.*

Subcontracting plans similar to the one included in the contract between Mountain Gravel and the CFLHD are required in many federal agency contracts. Additionally, federal law requires that the clause specifically state that “the contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.”²¹

Adarand: Arguments and Findings

After losing the guardrail contract to Gonzales, Adarand filed suit in the United States District Court for the District of Colorado. Adarand argued that the presumption set forth in the Small Business Act “discriminates on the basis of race in violation of the Federal Government’s Fifth Amendment obligation not to deny anyone equal protection of law.”²² The government disagreed, and the district court granted the government’s motion for summary judgment.²³ Adarand appealed the district court’s decision to the Tenth Circuit, which affirmed the lower court’s ruling.²⁴ The United States Supreme Court granted certiorari.

In a five-to-four decision, the Supreme Court vacated and remanded the case. The Court declared that all racial classifi-

cations by government actors, whether benign or pernicious, must be analyzed by a reviewing court using a “strict scrutiny” standard.²⁵ Only those affirmative action programs that are narrowly tailored to achieve a compelling government interest will pass constitutional muster.²⁶ With *Adarand*, the Supreme Court overruled its decision from five years earlier in *Metro Broadcasting, Inc. v. FCC*.²⁷

Anticipating possible repercussions, Justice O’Connor, author of the majority opinion in *Adarand*, stated:

Because our decision today alters the playing field in some important respects, we think it is best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following *Metro Broadcasting* and *Fullilove*, analyzed the case in terms of intermediate scrutiny. It upheld the challenged statutes and regulations because it found them to be narrowly tailored to achieve [their] significant governmental purpose of providing subcontracting opportunities for small disadvantaged enterprises The Court of Appeals did not decide the question of whether the interests served by the use of subcontracting compensation clauses are properly described as “compelling.” It also did not address the question of narrow tailor-

20. *Id.*

21. *Id.* at 2103.

22. *Id.* at 2101.

23. *Adarand Constructors, Inc. v. Skinner*, 709 F. Supp. 240 (D. Colo. 1992).

24. *Adarand Constructors, Inc. v. Skinner*, 16 F.3d 1537 (10th Cir. 1994).

25. *Adarand*, 115 S. Ct. at 2113. To survive the strict scrutiny standard, the classification must be tested by two prongs. First, there must be a compelling government interest for the racial or ethnic classification. That is, what is the government’s reason for using a racial or ethnic classification? Second, in addition to advancing a compelling government goal or interest, any governmental use of race must be narrowly tailored. Put another way, the strict scrutiny test means:

[T]he justices will not defer to the decision of the other branches of government but will instead independently determine the degree of relationship which the classification bears to a constitutionally compelling end The Court will not accept every permissible government purpose as sufficient to support a classification under this test, but will instead require the government to show that it is pursuing a “compelling” or “overriding” end—one whose value is so great that it justifies the limitation of fundamental constitutional values.

. . . .

Even if the government can demonstrate such an end, the Court will not uphold the classification unless the justices have independently reached the conclusion that the classification is necessary to promote the compelling interest. Although absolute necessity might not be required, the justices will require the government to show a close relationship between the classification and promotion of a compelling or overriding interest. If the justices are of the opinion that the classification need not be employed to achieve such an end, the law will be held to violate the equal protection guarantee

RONALD D. ROTUNDA, ET AL., TREATISE ON CONSTITUTIONAL LAW SUBSTANCE AND PROCEDURE § 18.3 (1986).

26. *Adarand*, 115 S. Ct. at 2097.

27. 497 U.S. 547, 567-68 (1990). In *Metro Broadcasting Inc.*, the Court “relied on *Bakke* and Justice Stevens’ vision of affirmative action” to uphold FCC affirmative action programs in the licensing of broadcasters on nonremedial grounds; the Court said that “diversification of ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation’s radio and television airwaves.” *Id.*

ing in terms of our strict scrutiny cases, by asking, for example whether there was “any consideration of the use of race-neutral means to increase minority participation in government contracting [citation omitted], or whether the program was appropriately limited such that it “will not last longer than the discriminatory effects it is designed to eliminate”²⁸

Even though the Supreme Court announced the appropriate standard to apply to race-based classifications (i.e., “strict scrutiny”), it did not address the underlying merits of the case itself.²⁹ As discussed below, the district court recently published its decision on the remand in *Adarand*. In the intervening two years, however, the Court’s *Adarand* decision served as the foundation for a number of subsequent cases and the proposed regulations discussed below. Several federal courts have taken tentative steps to apply the strict scrutiny standard to federal acquisitions.³⁰ In most of these cases, however, the plaintiffs lacked standing to challenge the constitutionality of a particular program under *Adarand*.³¹

On Remand, *Adarand* Obtains Summary Judgment

In early June 1997, on remand from the United States Supreme Court, the United States District Court for the District of Colorado granted summary judgment in favor of *Adarand*.³² As discussed above, in its landmark 1995 decision, the Supreme Court held that all programs imposing race-based

classifications must be adjudicated under the strict scrutiny standard. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.³³

In his seventy-one page decision on remand, Judge John L. Kane, Jr. summarized the underlying facts³⁴ and then embarked upon an in-depth discussion and analysis. The core issue was the application of the strict scrutiny test, and Justice O’Connor had framed the issue:

[A]ll governmental action based on race . . . should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws [under the Fifth or Fourteenth amendment] has not been infringed All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further a compelling governmental interest.³⁵

On remand, Judge Kane concluded that the subcontracting compensation clause program was not sufficiently narrowly tailored to pass the strict scrutiny test.³⁶ Judge Kane, however, in dicta, discussed the application of the compelling interest prong of the strict scrutiny test.³⁷

28. *Adarand*, 115 S. Ct. at 2118 (citation omitted).

29. *Id.* at 2119. The Court, in explaining its rationale for remanding the case, stated that unresolved questions involving complex regulatory regimes implicated by the use of subcontractor compensation clauses needed to be addressed. *Id.* The Court submitted to the lower courts the question of “whether any of the ways in which the government uses subcontractor compensation clauses can survive strict scrutiny.” *Id.* As noted above, Justice O’Connor noted: “Because our decision today alters the playing field in some important respects, we think it is best to remand the case to the lower courts for further consideration in light of the principles we have announced.” *Id.* at 2118.

30. See, e.g., *C.S. McCrossan Co. v. Cook*, No. 95-1345-HB, 1996 WL 310298 (D.N.M. Apr. 2, 1996); *Cortez III Serv. Corp. v. NASA*, 950 F. Supp. 357 (D.D.C. 1996); *Ellsworth Assocs., Inc. v. United States*, 926 F. Supp. 207 (D.D.C. 1996); *Dynalantic Corp. v. Department of Defense*, 937 F. Supp. 1 (D.D.C. 1996).

31. The doctrine of standing serves to “identify those disputes which are appropriately resolved through the judicial process.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). In order to meet the jurisdictional requirement for standing, three elements must be established: (1) an “injury in fact,” which is an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct; and (3) that it is likely, as opposed to speculative, “that injury will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

32. *Adarand Constructors, Inc. v. Pena*, 965 F. Supp. 1556 (D. Colo. 1997). See generally *Adarand Wins Summary Judgment; Court Says Federal DBE Program Fails Strict Scrutiny Test*, 67 FED. CONT. REP. 687 (BNA June 9, 1997); *District Court Rejects Constitutionality of Affirmative Action Programs in Remand of Adarand*, 39 GOV’T CONT. ¶ 287 (Fed. Pubs. June 11, 1997).

33. *Adarand*, 115 S. Ct. at 2113.

34. *Adarand*, 965 F. Supp. at 1557.

35. *Id.* at 1569 (citing *Adarand*, 115 S. Ct. at 2112).

36. *Id.* at 1570.

37. *Id.* Judge Kane considers such a discussion important “in light of the lacuna left by the Court on the subject when it remanded the case.” *Id.*

The Court Finds A Compelling Interest

In applying the strict scrutiny test, the initial inquiry is whether the interest cited by the government as its reason for injecting the consideration of race is sufficiently compelling to overcome the suspicion that racial characteristics ought to be irrelevant so far as treatment by the governmental actor is concerned.³⁸ Judge Kane commented that the compelling interest inquiry is the linchpin of constitutionality under the strict scrutiny test, and he reasoned that the narrow tailoring prong merits review only when the governmental action under judicial review is shown to be supported by such a compelling interest.³⁹

Adarand argued that the government did not show a compelling interest in the use of race in awarding federal contracts. Adarand asserted that the government admitted that there had been no history of race-based governmental discrimination in awarding construction contracts in Colorado.⁴⁰ Adarand argued, under *Richmond v. J.A. Croson Co.*,⁴¹ that “there must be specific findings of past state-sponsored discrimination before adopting a race-based remedy” More specifically, Adarand contended that there must be particularized findings that the federal government has discriminated on the basis of race in awarding federal highway construction contracts in Colorado.⁴² After detailing the broad array of government responses, the court noted that:

[T]he diametric arguments of the parties concerning what constitutes a compelling governmental interest for Congress and the evidence required to establish such an interest are not surprising. They reflect the [Supreme Court] majority’s failure . . . to define the parameters of Congress’ powers under § 5 of the Fourteenth Amendment “to

enforce, by appropriate legislation, the provisions of this article” Not surprisingly, Justice O’Connor side-stepped this issue of Congress’ acknowledged unique Section 5 powers, since addressing it would have opened a Pandora’s box that would have significantly weakened the notion of congruence.⁴³

Judge Kane explained that “nothing in [*Adarand*] or any other Supreme Court decision persuades me that in subjecting a statutory or regulatory scheme created by Congress to strict scrutiny, one is to ignore Congress’ ability to legislate nationwide to address nationwide problems thus placing it on the same constitutional plane as a city council.”⁴⁴ Nonetheless, Judge Kane reasoned that “Congress must still establish that the interest in eliminating the targeted evil is so compelling that it justifies the use of race, the most suspect of all classifications.”⁴⁵ After extensive analysis, the court attributed significantly more weight to the government’s record “than to that brushed aside in *Croson*”⁴⁶ and concluded that “Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a ‘compelling governmental interest.’”⁴⁷

Failing the Narrow Tailoring Test

The court was not similarly swayed with regard to the government’s effort to narrowly tailor its program. Finding the subcontracting compensation clause to be a “bonus,” Judge Kane explained that:

To the extent that [a subcontracting compensation clause] payment acts as a gratuity for a prime contractor who engages a [disadvantaged business or DBE], it cannot be said to be narrowly tailored to the government’s interest of eliminating discriminatory barriers.

38. *Id.* According to the court in *Adarand*, compelling interest is the linchpin of constitutionality under strict scrutiny. In *Fullilove v. Klutznick*, 448 U.S. 448, 533-35 (1980), the Court noted that “[a] ‘compelling’ interest is required because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic”

39. *Adarand*, 965 F. Supp. at 1570. In a parenthetical, Judge Kane seemed agitated by the fact that the Supreme Court, in remanding the case, did not “give any meaning to the phrase compelling interest” either by a definition or illustration. *Id.*

40. *Id.*

41. 488 U.S. 469 (1989).

42. *Adarand*, 965 F. Supp. at 1562.

43. *Id.* at 1572 (citations omitted).

44. *Id.* at 1573.

45. *Id.*

46. *Id.* at 1574 (citation omitted).

47. *Id.* at 1576.

ers Where subcontracting to a DBE does not cause an increase in costs, the prime contractor receives additional payment because of a choice based only on race.⁴⁸

The court further found “it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such program is both underinclusive and overinclusive.”⁴⁹ The court further distinguished the disputed program (which lacked individualized inquiries) from the 8(a) program (which mandates inquiry into each participant’s economic disadvantage).⁵⁰ As a result, the court found the challenged affirmative action programs unconstitutional.

Other Courts React to the Supreme Court’s *Adarand* Decision

Dynalantic: *8(a) Under Fire*

In the period between the Supreme Court’s *Adarand* decision and the district court’s decision on remand, federal courts grappled with the prospect of applying the principles of *Adarand*, and several initial cases raised the threshold question of standing. The first case was *Dynalantic Corp. v. Department of Defense*.⁵¹ In that case, the plaintiff, a nonminority-

owned small business, sought an injunction to prevent the Navy from awarding a contract under the Small Business Administration’s (SBA) 8(a) program.⁵² The plaintiff argued that the 8(a) program, with its implementing statute and regulations, violated the Fifth Amendment of the United States Constitution. More specifically, Dynalantic claimed the 8(a) program was a “race-based” program that excluded Dynalantic from competing for the subject procurement (a helicopter trainer project) solely on the basis of race.

The court rejected the plaintiff’s argument. The court held that Dynalantic lacked standing to challenge the constitutionality of the 8(a) program. Initially, the court noted that Dynalantic failed to meet the “injury-in-fact” requirement with respect to the issue of the SBA’s alleged discrimination in administering the 8(a) program.⁵³ The court analogized Dynalantic to *Ray Baillie Trash Hauling, Inc. v. Kleppe*,⁵⁴ the only federal circuit case to squarely address the issue of standing to challenge the constitutionality of the 8(a) program on equal protection grounds.

Just like the plaintiff in *Ray Baillie*, Dynalantic neither applied for the 8(a) program nor did it ever contend that it could satisfy the social or economic disadvantage requirement.⁵⁵ In addition to the injury-in-fact requirement, the court found that Dynalantic lacked standing under the “redressability prong of

48. *Id.* at 1579.

49. *Id.* at 1580.

50. *Id.* at 1580-81.

51. 937 F. Supp. 1 (D.D.C. 1996).

52. *Id.* at 1-2. The court in *Dynalantic* provided a synopsis of the Small Business Administration’s 8(a) program. The court stated:

Under the 8(a) program, the SBA may award government procurement contracts to “socially and economically disadvantaged small business concerns.” 15 U.S.C. § 637(a). A small business concern seeking admission to the 8(a) program must be certified by the SBA as being at least 51 percent owned and controlled by one or more individuals that satisfy the criteria for social and economic disadvantaged status. 15 U.S.C. § 637(4)(A).

. . . .

A business that is certified for entry into the 8(a) program may participate in the program for a maximum period of nine years. 15 U.S.C. § 636(j)(10); 13 C.F.R. § 124.110(a). However, a participant in the 8(a) program may be graduated from the program before the expiration of the nine years if the business substantially achieves its business plan. 13 C.F.R. § 124.208(a). Further, any individual will be deemed ineligible for continued participation in the program if that individual’s personal net worth exceeds \$750,000.

Id. at 2.

53. *Id.*

54. 477 F.2d 696, 710 (5th Cir. 1973). In this case, a white-owned small business never applied for entry into the 8(a) program. In finding that Ray Baillie lacked standing to bring the action, the Fifth Circuit noted:

“[P]laintiff [has] failed to meet . . . [the injury-in-fact] requirement with respect to the issue of SBA’s alleged discrimination in administering the section 8(a) program. The plaintiffs never applied for participation in the section 8(a) program. Furthermore, they do not even contend that they are socially and economically disadvantaged and therefore eligible for participation in the program. Thus, whatever the outcome of the litigation, the plaintiffs will not be directly affected.”

Id. at 710.

55. *Dynalantic*, 937 F. Supp. at 6.

the Article III standing analysis.”⁵⁶ As to “redressability,” it is well established that a court should invalidate only so much of a statute as is necessary.⁵⁷ As the Supreme Court stated in *Buckley v. Valeo*,⁵⁸ “[u]nless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as law.”

The court in *Dynalantic* found that if the presumption of social disadvantage was struck down as unconstitutional, the balance of the statutory and regulatory scheme would remain valid. According to the court:

If the presumption of social disadvantage were struck, all applicants to the 8(a) program would be required to demonstrate social disadvantaged status by providing clear and convincing evidence. Further, as is presently the case, an 8(a) applicant would not be certified for participation unless he or she independently demonstrated economic disadvantage. Thus, *Dynalantic*’s alleged injury-in-fact would not be redressed by striking 13 C.F.R. § 124.105(b) since it has failed to allege that it is either socially or economically disadvantaged.⁵⁹

Although the resolution of *Dynalantic* was made on the constitutional principle of standing, the court made several important comments about *Adarand*. First, the court noted that the case raised a number of issues of first impression. Next, the

court observed that the degree to which congressional findings on race-based discrimination are entitled to some “heightened level of deference is not ascertainable at this time.”⁶⁰ Third, in fashioning a remedial program, the court stated, “drawing on antitrust principles, the relevant geographic and product markets that Congress must consider in fashioning a federal remedial program have not been fleshed out.”⁶¹ Finally, the court asked whether Congress had to make specific findings in a particular industry (i.e., military simulator industry) or could Congress rely upon findings of discrimination in the greater defense industry.⁶² These issues were left for future resolution by courts.

Dynalantic appealed both the denial of its motion for a preliminary injunction and the judgment against it to the Court of Appeals for the D.C. Circuit,⁶³ where it received a divided, yet more favorable, welcome. After enjoining the procurement pending appeal, the appellate court reversed the district court in a two-to-one decision.⁶⁴ In doing so, the court took a far broader approach to standing than the court below.

By the time the case reached the appellate court, the procurement had been canceled and removed from the 8(a) program.⁶⁵ Because the plaintiff, *Dynalantic*, could now compete for the contract, the government asserted that the issue challenged below was moot. *Dynalantic* and the appellate court disagreed. The court granted *Dynalantic*’s alternative request to allow it to amend its pleadings to raise a general challenge to the 8(a) program.⁶⁶ Rather than limit its focus to the present procurement, the court questioned “whether future use of the 8(a) program will impact” on *Dynalantic*.⁶⁷

56. *Id.*

57. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

58. 424 U.S. 1, 108 (1976).

59. *Dynalantic*, 937 F. Supp. at 7.

60. *Id.* at 10. This goes to the compelling interest component of the strict scrutiny test. That is, what is the reason for using racial or ethnic classifications? Should Congress, as opposed to a state legislature or federal agency, be given special deference in determining what is a compelling interest?

61. *Id.* With respect to geographic markets, “it is not clear at the present time with limited record developed to date, whether Congress may rely upon evidence of discrimination in just a few states or whether Congress must demonstrate that there has been discrimination throughout the country.” *Id.*

62. *Id.*

63. See generally Eileen Malloy, *D.C. Circuit to Hear Constitutional Challenges to 8(a) Procurements in DynaLantic, Cortez III*, 67 FED. CONT. REP. 154 (BNA Feb. 10, 1997); *D.C. Circuit Set to Hear Post-Adarand Constitutional Challenge of 8(a) Set-Aside*, 39 GOV’T CONT. ¶ 94 (Fed. Pubs. Feb. 26, 1997).

64. *Dynalantic Corp. v. Department of Defense*, No. 96-5260, 1997 U.S. App. LEXIS 13622 (D.C. Cir., June 10, 1997); see generally, Eileen Malloy, *D.C. Circuit Panel Says DynaLantic Has Standing to Challenge 8(a) Program, May Amend Complaint*, 67 FED. CONT. REP. 717 (BNA June 16, 1997); Eileen Malloy, *D.C. Circuit Hears DynaLantic’s Appeal From Dismissal of Its 8(a) Challenge*, 67 FED. CONT. REP. 482 (BNA Apr. 21, 1997).

65. The government affidavit explained that the procurement was removed from the 8(a) program because the delays associated with the litigation had led to operational and safety concerns. At the time, no simulator was available for training on the designated aircraft. *Dynalantic*, 1997 U.S. App. LEXIS 13622, at *7. See also Eileen Malloy, *Navy Cancels 8(a) Procurement Being Challenged By DynaLantic Corp.*, 67 FED. CONT. REP. 222 (BNA Feb. 24, 1997).

66. *Dynalantic*, 1997 U.S. App. LEXIS 13622, at *9.

67. *Id.* at *19.

Absent a government declaration that it would “decide never again to set aside a simulator contract under 8(a),” the appellate court concluded that “Dynalantic’s injury looms close enough to support its standing to pursue the case.”⁶⁸ The court specifically noted, among other things, that: the number of qualified 8(a) firms registered with the procuring center had more than doubled between 1993 and 1995; the procuring center sets aside every contract for which qualified 8(a) firms are available; and because the sole source 8(a) procurements are not preceded by public notice, “Dynalantic learns about their award only after the fact.”⁶⁹ As a result, the majority, despite a strong dissent,⁷⁰ concluded that:

Dynalantic’s injury—its inability to compete on equal footing with 8(a) participants—is traceable to the 8(a) program and is likely to be redressed by a decision holding all or part of the program unconstitutional. Dynalantic thus has standing to challenge the constitutionality of the 8(a) program. . . .⁷¹

Ellsworth Associates: *Standing Limits Review*

In *Ellsworth Associates, Inc. v. United States*,⁷² the plaintiff ran smack into a more conventional “standing” brick wall. Ellsworth, a minority-owned business, was the incumbent con-

68. *Id.* at *20.

69. *Id.* at *20-21.

70. Chief Judge Edwards, in dissenting, frankly stated:

Appellant’s challenge . . . is moot because the government canceled its bid solicitation and gave adequate assurances that 8(a) would not be used again should solicitation be reopened. Thus, appellant prevailed on the precise issue that prompted this lawsuit. However, applicant now smells blood and has decided that, so long as it is already in court, it might just as well use the occasion to attack the entire statute.

Id. at *23. In another colorful passage, the Chief Judge explained that:

During oral argument . . . the suggestion was made that use of a “social and economic disadvantage” standard is essentially the same as providing that “only rich white business people will get procurement jobs.” This suggestion is completely off the mark: the disputed “social and economic disadvantage” standard includes both whites and blacks, whereas the hypothetical standard favoring “rich white business people” expressly excludes blacks. No doubt a program preferring “rich white business people” would fail constitutional scrutiny, but to acknowledge this is to say absolutely nothing about the merits of the 8(a) set-aside.

Id. at *26-27.

71. *Id.* at *22.

72. 926 F. Supp. 207 (D.D.C. 1996).

73. *Id.* at 208.

74. 13 C.F.R. § 124.208 (1996). Firms graduate from the 8(a) program when they successfully achieve the targets, objectives, and goals set forth in their business plan prior to expiration of the program term. *Id.*

75. Ellsworth asserted that its rights to equal protection were violated. *Ellsworth*, 926 F. Supp. at 209.

76. *Id.* at 209-10.

77. *Id.* at 210.

tractor on a contract with the National Oceanic and Atmospheric Administration (NOAA) for computer support services. The contract expired on 31 January 1996. The government decided that the follow-on contract would be handled through the 8(a) program.⁷³ By including the follow-on contract in the 8(a) program, it excluded Ellsworth, which had graduated from the 8(a) program.⁷⁴ Ellsworth raised a constitutional challenge to the 8(a) program.⁷⁵

The court found that the plaintiff lacked standing to challenge the constitutionality of the 8(a) program under *Adarand*. “Because Ellsworth was ineligible to participate in the Program by virtue of the expiration of its eligibility rather than because of the alleged unconstitutionality of the regulation, the plaintiffs lacked standing to challenge the Program or its administration by the federal defendants.”⁷⁶ More specifically, Ellsworth’s inability to compete for the follow-on contract was not traceable to the NOAA’s actions. Ellsworth’s injuries stemmed from the fact that it was no longer eligible to compete in the program. That reason was unrelated to race.⁷⁷

McCrossan: *Holding the Line*

In *C.S. McCrossan Co. v. Cook*,⁷⁸ a federal district court finally addressed issues beyond that of standing.⁷⁹ In that case, the plaintiff, a commercial construction contractor operating in Minnesota, New Mexico, and Arizona, sought a preliminary

injunction challenging the constitutionality of the 8(a) program under *Adarand*.⁸⁰ The procurement involved construction work for the Army at the White Sands Missile Range.⁸¹

McCrossan was a large contractor with annual receipts in 1995 of between \$50-\$75 million. In denying McCrossan's motion for preliminary injunction, the court indicated that McCrossan was not likely to prevail on the merits.⁸² The court merely stated: "Defendants have submitted significant evidence that the 8(a) program may survive strict scrutiny as articulated in *Adarand*."⁸³ Unfortunately for the practitioner, the court did not explain the nature of the "significant evidence" it considered.

Cortez: An Equal Protection Approach

The last of the four cases was *Cortez III Service Corp. v. NASA*.⁸⁴ In that case, the plaintiff, a New Mexico based corporation, was awarded a contract by the NASA's Lewis Research Center in 1986 pursuant to the 8(a) program.⁸⁵ The contract was known as the Consolidated Logistics and Administrative Support Services (CLASS) Contract.⁸⁶ In 1990, the CLASS contract expired, and a new "CLASS II" was awarded under

full and open competition.⁸⁷ Cortez won the follow-on contract.

The CLASS II was scheduled to expire on 30 September 1996. In 1995, the NASA began to prepare for the second follow-on procurement, known as the Management and Operations Contract I (MOC I). The new procurement was to include all of the same services under the CLASS II procurement as well as extra services that had been awarded to smaller firms under the 8(a) program. Although the MOC I contract would be larger than the CLASS II, the NASA decided to offer the entire contract as an 8(a) contract.⁸⁸

Although Cortez originally qualified under the 8(a) program, it conceded that it no longer qualified for the 8(a) program. Cortez had grown and developed into a large, nonminority-owned business. Further, it completed the nine-year period under which a firm is eligible to remain in the 8(a) program.⁸⁹

Cortez contended that, in making the MOC I an 8(a) contract, the NASA violated Cortez's equal protection rights by "initiating a race-based program that was not narrowly tailored to a compelling government interest under *Adarand*."⁹⁰ The first issue the court addressed was standing. In a somewhat cur-

78. No. 91-1345-HB, 1996 WL 310298 (D.N.M. Apr. 2, 1996).

79. *Id.* at *3. In finding that McCrossan had standing to challenge the constitutionality of the 8(a) program, the court noted:

Although Defendants attempted to characterize this set-aside program [8(a) program] as one based on size and economic status of the owner, the fact remains that "economic disadvantage" requires a showing of "social disadvantage" which then implicates the race-based challenge. By restricting the bidding to 8(a) program participants, Defendants created a 100% set-aside program. Plaintiff is not seeking admission into the 8(a) program. It is challenging the government's preferential treatment towards 8(a) program participants in the bidding of the job order contract. Plaintiff claims that, although it is able and ready to bid on the job order contract, Defendants' policy of limiting bidders to 8(a) program participants prevents it from competing on an equal footing and thus violates the Equal Protection Clause of the Fifth Amendment.

Id.

80. *Id.* at *1.

81. *Id.*

82. A party seeking a preliminary injunction must establish the following four elements: (1) it will suffer irreparable injury unless an injunction is issued; (2) the threatened injury alleged outweighs whatever damage the proposed injunction will cause the defendants; (3) the injunction, if issued, would not be adverse to the public interest; and (4) substantial likelihood exists that it will eventually prevail on the merits. *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992).

83. *McCrossan*, 1996 WL 310298, at *9.

84. 950 F. Supp. 357 (D.D.C. 1996).

85. *Id.* at 358.

86. *Id.* The contract required the plaintiff to provide the Lewis Research Center with a wide range of services, from transportation to property disposal to video production.

87. *Id.* Full and open competition means that contractors of any size, or social or economic background, can compete for the contract.

88. *Id.* at 358-59.

89. *Id.* at 359. An individual or firm can participate in the 8(a) program only one time. After leaving the program for any reason, a business cannot reapply. 13 C.F.R. § 124.108 (1996).

sory treatment, the district court concluded Cortez did, in fact, have standing.⁹¹

Cortez did not challenge the facial constitutionality of the 8(a) program.⁹² Rather, it argued that the 8(a) program had been applied in an unconstitutional manner in the MOC I procurement.⁹³ The court noted that even though the 8(a) program is facially constitutional, it does not give the NASA or the SBA “carte blanche” to apply it without consideration of the limits of strict scrutiny.

In this regard, the court stated that, to comply with the equal protection requirements of the Fifth Amendment of the United States Constitution, federal agencies must employ an analysis similar to the one proposed by the DOJ in its guidance to agencies following the decision in *Adarand*.⁹⁴ The DOJ provided agencies with some questions that they should ask in determining whether a program satisfies *Adarand*.⁹⁵ The court specifically cited the following analysis:

If the program is intended to serve remedial objectives, what is the underlying factual predicate of discrimination? Is the program justified solely by reference to general societal discrimination [or] general assertions of discrimination in a particular sector or indus-

try? Without more, these are impermissible bases for affirmative action. If the discrimination to be remedied is more particularized, then the program may satisfy *Adarand*. In assessing the nature of the factual predicate of discrimination, the following factors should be taken into account . . . What is the nature of the evidence of [discrimination]? If it is statistical or documentary, are the statistics based on minority underrepresentation in a particular sector or industry compared to the general minority population? Or are the statistics more sophisticated or focused? For example, do they attempt to identify the number of qualified minorities in that sector or industry or seek to explain what that number would have looked like “but for” the exclusionary effects of discrimination . . . ?⁹⁶

The court specifically held that such an analysis is required to meet the narrowly tailored prong of the strict scrutiny test.⁹⁷ In reaching its conclusion, the court found that neither the NASA nor the SBA did “anything approaching” the kind of analysis proposed by the DOJ. Rather, they relied upon the facial constitutionality of the 8(a) program.⁹⁸ Accordingly, the

90. *Cortez*, 950 F. Supp. at 359-60. The plaintiff also contended that the NASA violated the Administrative Procedures Act (APA) by offering a contract under the 8(a) program that will eventually exceed the dollar limits for such contracts. To be eligible for the 8(a) program, a company must have annual sales of \$20 million or less. The NASA projected that MOC I would be worth \$20 million a year. The plaintiff contended that if MOC I meets its projections, after one year, the firm awarded the contract would no longer be eligible and would have to surrender the contract.

91. *Id.* at 360. The court applied a three prong analysis: (1) plaintiff must allege that it suffered some actual or threatened injury; (2) the injury must be traceable to the challenged conduct, and (3) there must be a substantial likelihood that the alleged injuries will be redressed by a judicial decision. *Jacobs v. Barr*, 959 F.2d 313, 315 (D.C. Cir. 1992). The court concluded that: if the MOC I is set aside the plaintiff would have standing because it would lose its right to compete for a valuable contract; the plaintiff’s injury is fairly traceable to the decision by the NASA and the SBA to offer the contract under the 8(a) program; and if the court determines that the NASA and the SBA violated the Constitution or the APA, it can take appropriate action to enable Cortez to compete for the MOC I contract. *Cortez*, 950 F. Supp. at 360.

92. *Cortez*, 950 F. Supp. at 361. The court, in dicta, addressed the constitutionality of the 8(a) program and stated:

The court agrees with the parties that facially, 8(a) meets constitutional muster. Congress first implemented the Small Business Act to combat serious unlawful discrimination in government contracting. In oversight and reauthorization hearings held since the implementation of the act, Congress has continued to find such discrimination. Without question, there is a compelling governmental interest in combating such discrimination where it exists. In the case of 8(a), the legislation and related regulations are narrowly tailored to the extent that they limit set asides to a minimum of five percent of government contract and create only a rebuttable presumption that minority contractors are eligible for the program. Furthermore, where necessary, Congress has amended the statute so that it may fulfill its purpose as swiftly and as fairly as possible.

Id.

93. *Id.*

94. Memorandum from Walter Dellinger, Office of Legal Counsel, U.S. Department of Justice, to Legal Counsel (June 28, 1995) (on file with the authors).

95. *Cortez*, 950 F. Supp. at 362.

96. *Id.* (emphasis added).

97. *Id.*

98. *Id.* A factor in the court’s decision to issue a preliminary injunction appeared, from the record, to be the manner in which the NASA handled the procurement. The court noted that the NASA’s first effort to offer the MOC I contract as a set aside was rejected by its own attorneys as a possible violation of the standards set forth in *Adarand*. Undeterred, the NASA turned to the SBA to include the procurement in the 8(a) program and to do a “passage around *Adarand*.” *Id.*

court found that a preliminary injunction should be issued on Cortez's equal protection claim.⁹⁹

The Proposed Regulatory Scheme

Against this backdrop, the United States government has toiled to construct a revised, defensible, affirmative action procurement program. In embarking upon this ambitious rule-drafting exercise, the DOJ summarized six principal factors that provide context for the narrow tailoring prong of strict scrutiny:

- (1) Whether the government considered race-neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action;
- (2) the scope of the program and whether it is flexible;
- (3) whether race is relied upon as the sole [or as one] factor . . . in the eligibility determination;
- (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool;
- (5) whether the duration of the program is limited and . . . subject to periodic review; and
- (6) the extent of the burden imposed on nonbeneficiaries¹⁰⁰

Although public comments may result in changes, this article addresses the contents of the recently published proposed Federal Acquisition Regulation (FAR) rule.¹⁰¹ The elements of the proposed rules, which primarily would be found in FAR

Part 19, are summarized in this article by addressing which contractors stand to benefit from the rule, how those contractors stand to benefit, and finally, what foundation underlies the proposed regulatory scheme.

Eligibility: A Broadened SDB Definition

Although addressed in the proposed FAR Subpart 19.3, eligibility will be controlled by the proposed rules recently published by the SBA.¹⁰² Under the proposed program, firms would demonstrate their SDB eligibility either by producing a certification from an SBA approved organization or, as discussed below, obtaining a determination from the SBA.

Disadvantaged status will depend upon two criteria: (1) social and economic disadvantage (which may or may not be presumed), and (2) ownership and control of the concern. Designated minority groups would retain a presumption of social and economic disadvantage. Offerors lacking a presumption of social and economic disadvantage could seek to obtain a determination of social and economic disadvantage from the SBA.¹⁰³ Contracting officers will be able to verify the SDB status of non-presumed firms through an SBA on-line central registry of firms holding such an SBA determination.

Critics have focused considerable interest on the use of the *preponderance of the evidence* standard for determining the social and economic disadvantage of individuals that do not qualify for a presumption of disadvantage.¹⁰⁴ The preponderance standard is distinguished from the clear and convincing

99. *Cortez* is currently pending appeal in the D.C. Circuit; the appeal, No. 97-5021, was filed on 28 January 1997. *Id.*

100. Although the proposed rules address all of the enumerated factors, not all are relevant in every situation. 61 Fed. Reg. 26,042 (1996).

101. See Federal Acquisition Regulation: Reform of Affirmative Action in Federal Procurement, 62 Fed. Reg. 25,786 (1997). The public comment period was extended from 8 July 1997 until 8 August 1997. 62 Fed. Reg. 37,847 (1997). See generally *Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences In Contract Actions*, 67 FED. CONT. REP. 547 (BNA May 12, 1997); *FAR Proposal Adopts Price Evaluation Adjustment to Benefit SDBs*, 39 GOV'T CONT. ¶ 240 (May 14, 1997).

102. Small Business Size Regulations: 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases Before the Office of Hearings and Appeals; Proposed Rule, 62 Fed. Reg. 43,583 (1997). See also Peter Behr, *SBA Program to Accept More White Women: Minority Firms Have Been Getting Most Aid*, WASH. POST, at A1 (Aug. 13, 1997); *Proposed FAR Rule Would Establish Benchmarks for Using SDB Preferences In Contract Actions*, 67 FED. CONT. REP. 547 (BNA May 12, 1997).

103. 62 Fed. Reg. 25,788 (1997). The proposed regulations do not alter the criteria for determining a contractor's status as a small business. See, e.g., GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 19.301 (Apr. 1, 1984) [hereinafter FAR]. Some commentators lamented that the proposed rules gave no consideration to firms owned by women "despite the fact that many women entrepreneurs had endured the effects of discrimination similar to that suffered by minorities." The DOJ explains that neither section 7102 of the FASA nor 10 U.S.C. § 2323 authorize affirmative action for women and that, as a result, the proposed rules are limited to implementing affirmative action for designated minority groups. Moreover, *Adarand* applied the strict scrutiny standard to race-based actions, while gender-based actions remain scrutinized by a lesser standard of review. The DOJ asserts, however, that the lowering of the standard of proof for non-minority firms as SDBs, discussed below, could create opportunities (for example, under the 8(a) program) for women-owned firms not owned by minorities. 62 Fed. Reg. 25,652-53 (1997).

104. The preface to the recently proposed SBA regulations explain that:

[R]edesignated Sec. 124.103(c) (present Sec. 124.105(c)) would be amended to require an individual who is not a member of a designated socially disadvantaged group to establish his or her social disadvantage by a preponderance of the evidence presented in the 8(a) BD application. This is a change from the current regulation which requires that an individual who is not a member of a designated group establish his or her social disadvantage on the basis of clear and convincing evidence.

62 Fed. Reg. 43,583, 43,587 (1997).

evidence currently required by the SBA for certification in the 8(a) program. The DOJ suggests that “[t]here is significant legal support for the use of the preponderance of the evidence [standard] when an agency is determining what is essentially a question of civil law” and notes that the Supreme Court has found that standard appropriate in civil litigation involving discrimination.¹⁰⁵ Despite comments to the contrary, the DOJ expects that the “SBA will review these applications rigorously” and that “[c]areful scrutiny of applications under proper standards will result in the rejection of undeserving applicants”¹⁰⁶

Any offeror, a contracting officer, or the SBA could challenge an individual firm’s SDB eligibility.¹⁰⁷ Even a party ineligible to protest—either due to timeliness or an absence of standing—can, in effect, protest an SDB’s eligibility by persuading the contracting officer (CO) to adopt the protest grounds.¹⁰⁸

Procurement Mechanisms—Preferences, Etc.

The proposed FAR rules employ three basic mechanisms to benefit SDBs. The three mechanisms available are: (1) a price evaluation adjustment or preference of up to ten percent; (2) a source selection evaluation factor or subfactor for planned SDB participation in the contract, primarily at the subcontract level; and (3) monetary incentives for subcontracting with SDBs.¹⁰⁹ These mechanisms would be adjusted annually and made available on an industry-by-industry basis, according to two-digit Standard Industrial Classification (SIC) Major Groups.¹¹⁰

The price evaluation adjustment or the source selection evaluation factor or subfactor for planned SDB participation in the contract (which can range from zero to ten percent):

will represent the maximum credit that each agency may use in the evaluation of [offers] from SDBs and prime contractors who commit to subcontracting with SDBs. *The size of the credit will depend, in part, on the extent of the disparity between the benchmark limitations and minority SDB participation in federal procurement and industry.* It also will depend upon an assessment of pricing practices within particular industries to indicate the effect of credits within that industry.¹¹¹

The monetary incentives for subcontracting with SDBs operate by contract clause. To receive the incentive, the contractor commits to try to award a certain amount (of the total dollars that it plans to spend on subcontracts) to SDBs in appropriate two-digit SIC codes. If the contractor exceeds the target, the contractor is eligible to receive a stated percentage (between one and ten percent) of the dollars in excess of the target. The CO, however, can deny the contractor this reward for a number of specified reasons, and the contractor cannot seek a remedy pursuant to the Disputes clause.¹¹²

The proposed regulations also reserve the right to employ more aggressive or, arguably, innovative tools. The proposed rule notes that the Commerce Department “is not limited to the SDB procurement mechanism identified” where it finds: (1)

105. *Id.* at 25,648-49, *citing* Price Waterhouse v. Hopkins, 490 U.S. 228, 252-55, 261 (1989) (preponderance standard), and *referencing* Herman & MacLean v. Hudleston, 459 U.S. 375, 389-90 (1983) (clear and convincing evidence standard should be limited to civil questions in which “particularly important individual interests or rights are at stake” such as “termination of parental rights, involuntary civil commitment, and deportation”).

106. 62 Fed. Reg. 25,648-49 (1997).

107. Prime contractor size protests are processed under FAR 19.302; subcontractor size protests are processed under FAR 19.703(b).

108. 62 Fed. Reg. 25,788 (1997) (proposed FAR 19.305).

109. The price evaluation adjustment language is applied to sealed bid procurements. *Id.* at 25,787 (proposed FAR 14.206, 14.502). The evaluation factor language is applied to the negotiated procurements. *Id.* (proposed FAR 15.605, 15.608, 15.1003). The proposed clause, 52.219-23, instructs evaluators to add a factor (to be determined) to the price of all offers except SDBs (that have not waived the adjustment) or otherwise successful offers (over the dollar threshold) of eligible products under the Trade Agreements Act. *See* FAR, *supra* note 103, 25.402.

110. The proposed general policy statement explains:

The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms, and their effective dates for new solicitations for the upcoming year.

62 Fed. Reg. 25,786-87 (1997).

111. 61 Fed. Reg. 26,047 (1996) (emphasis added).

112. 62 Fed. Reg. 25,793 (1997) (proposed FAR 52.219-26). The CO need not give the contractor the percentage if he or she determines that the excess SDB participation was not due to the contractor’s effort. For example, the contractor could forfeit its recovery if the participation was skewed due to an SDB subcontractor cost overrun, or if the contractor failed to disclose to the CO, during negotiations, its planned SDB subcontract awards.

“substantial and persuasive evidence” that there is a “persistent and significant underutilization” of SDBs in certain industries “attributable to past or present discrimination” and (2) that the three available mechanisms are incapable of alleviating the problem.¹¹³

Limitations on the Use of Mechanisms

The proposed regulations identify four types of acquisitions in which *price adjustments* shall not be used: (1) acquisitions at or below the simplified acquisition threshold; (2) contracts awarded under the 8(a) program; (3) acquisitions that are set aside for small business; or (4) acquisitions for long distance telecommunications services.¹¹⁴ Similar exemptions apply to the use of the *evaluation factor* for SDB participation. That mechanism is not to be evaluated for contracts awarded under the 8(a) program or acquisitions that are set aside for small business. Moreover, the evaluation factor mechanism is not to be evaluated in (a) lowest cost, technically acceptable, negotiated procurements or (b) contract actions that will be performed outside of the United States.¹¹⁵

Individual agencies are responsible for ensuring that the use of particular mechanisms does not cause specific industries “to bear a disproportionate share of the contracts awarded by a contracting activity of the agency to achieve its goal for SDB concerns.”¹¹⁶ If an agency identifies such a disproportionate share, the agency can seek a determination from the Commerce Department permitting the contracting activity to limit the use of the specific SDB mechanism.¹¹⁷

Benchmarking: The Key to Post-Adarand Strict Scrutiny

The proposed rules are intended to create a flexible system in which race-neutral alternatives should be used to the maximum extent possible. Race should become a factor “only when annual analysis of actual experience in procurement indicates that minority contracting falls below levels that would be anticipated absent discrimination.”¹¹⁸ The keystone for the future of the program, therefore, is the “benchmarks.” “Application of

the benchmark limits ensures that any reliance on race is closely tied to the best available analysis of the relative capacity of minority firms to perform the work in question—or what their capacity would be in the absence of discrimination.”¹¹⁹ The proposed general policy statement directs that:

The Administrator of the Office of Federal Procurement Policy (OFPP), based upon a recommendation by the Department of Commerce, will publish on an annual basis, by two-digit Major Groups as contained in the Standard Industrial Classification (SIC) Manual, and by region, if any, the authorized small disadvantaged business (SDB) procurement mechanisms, and their effective dates for new solicitations for the upcoming year.¹²⁰

The DOJ explains that the Commerce recommendation will “rely primarily on Census data to determine the capacity and availability of minority-owned firms.”¹²¹ The recommendation to the OFPP as to how to use the available procurement mechanisms will depend upon the benchmarks derived by the Commerce Department. The DOJ explains that:

[A] statistical calculation representing the effect discrimination has had on suppressing minority business development and capacity would be made, and that calculation would be factored into benchmarks Regardless of the outcome of that statistical effort, the effects of discrimination will be considered when utilization exceeds the benchmark and it is necessary to determine whether race-conscious measures in a particular SIC code should be curtailed or eliminated. Before race-conscious action is decreased, consideration will be given to the effects discrimination has had on minority business development in that industrial area, and the need to consider race to address those effects.¹²²

113. *Id.* at 25,787-88 (proposed FAR 19.201(b)).

114. *Id.* at 25,789 (proposed FAR 19.1102).

115. *Id.* at 25,790 (proposed FAR 19.1202-2).

116. *Id.* at 25,788 (proposed FAR 19.201(f)(1)); *see also*, 61 Fed. Reg. 26,047 (1996).

117. 62 Fed. Reg. 25,788 (1997) (proposed FAR 19.201(f)(1)).

118. 61 Fed. Reg. 26,049 (1996).

119. *Id.*

120. 62 Fed. Reg. 25,786-87 (1997).

121. *Id.* at 25,650. Much of the data will come from the Commerce Department’s Survey of Minority-Owned Business Enterprise.

The SDBs remain concerned that the proposed affirmative action measures can be curtailed or eliminated based upon the success of SDBs in obtaining government work within certain industries. The DOJ responded that:

Achievement of a benchmark in a particular SIC code does not automatically mean that race-conscious programs . . . will be eliminated in that SIC code. The purpose of comparing utilization of minority-owned firms to the benchmark is to ascertain when the effects of discrimination have been overcome and minority-owned firms can compete equally without the use of race-conscious programs. Full utilization of minority-owned firms in [an] SIC code may well depend on continued use of race-conscious programs like price or evaluation credits. Where utilization exceeds the benchmark, [OFPP] may authorize the reduction or elimination of the level of price or evaluation credits, but only after analysis has projected the effect of such action.¹²³

Nonetheless, the DOJ has articulated what some SDBs fear. "When Commerce concludes that the use of race-conscious measures is not justified in a particular industry (or region), the use of the bidding credit and the evaluation credit will cease."¹²⁴ Benchmarking, therefore, will undoubtedly tailor what previously was a broad, sweeping program. As at least one commentator articulated:

An important development that likely will come out of *Adarand* is an increased reliance on disparity studies. Although . . . disparity studies may be expensive and unwieldy, the fact that they need to be conducted on a local level means that the opportunity for input will be greater and the compelling government purpose will be clearer. Also, because the studies will be conducted in a focused manner, once the "compelling government

purpose" has been established, it will not require a quantum leap to get at a "narrowly-tailored" program.¹²⁵

The DOJ states that a compelling interest warranting race-conscious efforts in federal procurement remains.¹²⁶ The Urban Institute concluded that "minority-owned businesses receive far fewer government contract dollars than would be expected based on their availability."¹²⁷ So long as race-conscious means are needed to afford minority firms a fair opportunity to compete for federal contracts,¹²⁸ the DOJ's conclusion appears valid.

Considerations for the Practitioner

The DOJ intends for the final version of these proposed regulations to withstand the strict scrutiny discussed above. Unfortunately, looking at *Adarand* and the subsequent federal district court cases, which challenged either the constitutionality of the 8(a) program or the federal agencies' application of the 8(a) program, one cannot assume that the courts will universally defer to the new rulemaking. For the practitioner or the casual observer, numerous issues may merit examination.

First, standing is in the eye of the beholder. It is not easy to reconcile how a federal district court in New Mexico determined that *McCrossan*, a large, non-minority owned contractor, had standing to challenge the constitutionality of the 8(a) program under the equal protection guarantees of the Fifth Amendment, while the district court in the District of Columbia determined that a small, minority-owned firm lacks standing.

Second, each of the cases discussed above were addressed during the preliminary stages of the proceedings. Like *Adarand* itself, none of the cases addressed above had a complete record fleshing out the constitutional merits of the 8(a) program under a strict scrutiny analysis. Perhaps, there was such an analysis in *McCrossan*; however, the court simply gave the practitioner a cursory summation that the 8(a) program would likely survive strict scrutiny based upon the "significant evidence" submitted, without telling the practitioner what evidence it considered.¹²⁹

122. *Id.* at 25,650-51.

123. *Id.* at 25,652. Any such analysis would be the responsibility of the Commerce Department, rather than the OFPP.

124. 61 Fed. Reg. 26,047 (1996).

125. Margery Newman, *Affirmative Action and the Construction Industry*, 25 PUB. CONT. L.J. 433, 448 (1996).

126. For a more extensive analysis of the compelling interest, see the DOJ's *Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey*, 61 Fed. Reg. 26,042, 26,050 (1996).

127. 62 Fed. Reg. 25,653.

128. *Id.*

129. *C.S. McCrossan Co. v. Cook*, No. 91-1345-HB, 1996 WL 310298, at *3 (D.N.M. Apr. 2, 1996).

Third, the practitioner should watch the *Cortez* case closely for several reasons. It may be the first time a district court fully explores the application of the 8(a) program in the context of the *Adarand* strict scrutiny test. It may also provide some insight on the type of analysis that local counsel and contracting officers may be called upon to perform prior to submitting a procurement into the 8(a) program. Attorneys should ask themselves if, as a policy, they want federal courts guiding the appropriate analysis for the application of the strict scrutiny standard for their procurements. Many believe that federal courts will continue to fill that void until the DOJ and/or federal agencies adopt definitive guidance on the proper application of the strict scrutiny standard in federal procurements. Failure to address the problem means relinquishment of the solution to the courts—an unsatisfying approach.

Finally, implementing the procurement rules likely will take time and effort, and the results are not guaranteed. The DOJ was frank in its assessment of the hurdles to be overcome in promulgating its new regulations:

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 . . . 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.¹³⁰

Barring unexpected developments, the promulgation of final rules for affirmative action in Federal procurement can be expected soon. After all of the litigation, analysis, and policy debate, the new rules must be implemented, one procurement at a time, at the installation procurement office. Given the public scrutiny of these issues and the proven litigiousness of the interested parties, effort by contracting personnel to become familiar with these new rules will be time well spent.

130. 61 Fed. Reg. 26,050 (1996) (emphasis added).