Todd Stern

In case you hadn't already seen this letter — John Emerson asked me to get it to you. John said that it's a big issue for CA & should somehow be incorporated into the President's briefing for his trip to Japan.

Call me with questions.

Thanks!

Sky Gallegos
x62896

THE WHITE HOUSE

file copy

04/12
Todd,

This came in early this evening and was put in your POTUS in box. I found it when I was cleaning up.

It's a letter that Sky Gallegos says should be incorporated into POTUS brfg book for Japan trip.

s

Sent to NSC on sat per Todd
4/13/96

GOVERNOR PETE WILSON

April 11, 1996

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

As Governors from states with extensive commercial aviation assets, we encourage you to protect the rights of U.S. carriers to participate in the trans-Pacific and Asian air transportation markets during your upcoming summit meeting with the Prime Minister of Japan.

Even excluding Japan, Asia represents the most rapidly expanding aviation market in the world. A 1952 Civil Air Transport Agreement first authorized U.S. airlines to fly directly to Japan, and Article Five of this accord guarantees the "fifth freedom" rights of American operators to schedule regular flights throughout Asia from their existing Japanese gateways. In the interest of shielding their domestic carriers from international competition, the Japanese remain eager to restrict or eliminate these rights so critical to both the regional operations of U.S. airlines and the growing number of U.S. travelers who need affordable access to the Pacific Rim.

The trans-Pacific and Asian markets should stay open for American airlines that want to enter or expand to them. Furthermore, the Japanese government must know that the U.S. will not surrender current or potential fifth freedom rights as the price for any revision of the 1952 Agreement. If we can convey these clear messages, Japan will understand America's resolve to ensure that our bilateral aviation regime favors consumer choice and broad competition.

Sincerely,

PETE WILSON

JOHN ENGLER

TOMMY THOMPSON

EVAN BAYH

STATE CAPITOL · SACRAMENTO, CALIFORNIA 95814 · (916) 445-2841

THE WHITE HOUSE
WASHINGTON, D.C. 20500

DATE: 4/13/96

TO: Leon Panetta
George Stephanopoulos

FROM: **Staff Secretary**

For your information.

rec'd 4/12/96
4/12/96 161344

THE WHITE HOUSE

WASHINGTON

April 12, 1996

MEMORANDUM FOR THE PRESIDENT
THE VICE PRESIDENT

FROM: JACK QUINN JQ
ALEXIS HERMAN AH/KSG
KUMIKI GIBSON KSG

SUBJECT: AFFIRMATIVE ACTION: STATUS OF WORK

Set forth below is a summary of the status of our affirmative action efforts, which we will discuss with you in greater detail when the you return from your trip.

I. Procurement

The Department has developed a proposal for the reform of affirmative action programs in Federal procurement. Justice's plan is designed to ensure that our Federal procurement programs will comply with strict judicial scrutiny, as required by Adarand Constructors, Inc. v. Pena, while preserving a commitment to enhancing equal opportunity in this area. (Attached is a copy of the proposal.)

A. Scope of Reforms

The Justice proposal affects direct procurement programs designed to assist small firms owned by individuals who are disadvantaged socially (subject to racial or cultural bias) and economically (where bias has led to decreased economic opportunities), commonly referred to as SDBs. The guidelines outlined in the Justice's proposal will apply to SBA's 8(a) program, which is designed to assist the development of businesses owned by individuals who are socially and economically disadvantaged. In addition, since the suspension of the Defense Department's "Rule of Two" set-aside, Justice has been working with Defense on devising appropriate ways to fill the gap left by the suspension of the Rule-of-Two.

B. Summary of the Proposed Process

As the Supreme Court made clear in Adarand, the use of race in Federal procurement programs must be narrowly tailored to meet a compelling government interest. The Justice plan responds to the Adarand requirements while promoting equal opportunities to the maximum allowable extent.

Specifically, the proposal is based on the development of a set of guidelines to limit, where appropriate, the use of race-conscious measures in specific areas of Federal procurement. The Department of Commerce (in consultation with GSA and SBA) will establish appropriate limits -- or "benchmarks" -- for each industry. Each industry benchmark will represent the level of minority contracting that one would reasonably expect to find in a market absent discrimination or its effects.

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

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

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

II. Employment

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

III. Other Affirmative Action Programs

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

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

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

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

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

IV. Next Steps

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

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

Attachment

DRAFT OF 4/12/96

PUBLIC NOTICE REGARDING PROPOSED REFORMS TO AFFIRMATIVE ACTION IN FEDERAL PROCUREMENT

DEPARTMENT OF JUSTICE

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

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

13 CFR 124
Minority Small Business and
Capital Ownership Development Assistance

AGENCY: Department of Justice

ACTION: Public notice and invitation for reactions and views.

SUMMARY: The proposal set forth herein to reform affirmative action in federal procurement has been designed to ensure compliance with the constitutional standards established by the Supreme Court in Adarand Constructors, Inc. v. Peña 115 S. Ct. 2097 (1995). The proposed structure, which has been developed by the Justice Department, will form a model for amending the affirmative action provisions of the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement. These guidelines may also form a model for implementing section 7102 of the Federal Acquisition Streamlining Act, Pub. L. 103-355 (1994).

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

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

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

INTRODUCTION

In Adarand, the Supreme Court extended strict judicial scrutiny to federal affirmative action programs that use racial or ethnic criteria as a basis for decisionmaking. In procurement, this means that any use of race in the decision to award a contract is subject to strict scrutiny. Under strict scrutiny, any federal programs that make race a basis for contract decisionmaking must be narrowly tailored to serve a compelling government interest.

Through its initial authorization of the use of section 8(a) of the Small Business Act to expand opportunities for minority-owned firms and through reenactments of this and other programs designed to assist such businesses, Congress has repeatedly made the judgment that race-conscious federal procurement programs are needed to remedy the effects of discrimination that have raised artificial barriers to the formation, development and utilization of businesses owned by minorities and other socially disadvantaged individuals. In repeated legislative enactments, Congress has, among other measures, established goals and granted authority to promote the participation of Small Disadvantaged Businesses (SDBs) in procurement for the Department of Defense, NASA and the Coast Guard. It also enacted the Surface Transportation Assistance Act of 1982, the Surface Transportation and Uniform Relocation Assistance Act of 1987 and the Intermodal Surface Transportation Efficiency Act of 1991, each of which successively authorized a goal for participation by Disadvantaged Business Enterprises. Congress also included similar provisions in the Airport and Airway Improvement Act of 1982 with respect to procurement regarding airport development and concessions. Under Section 15(g) of the Small Business Act, 15 U.S.C. 644(g), Congress has established goals for SDB participation in agency procurement. Finally, in 1994, Congress enacted the Federal Acquisition Streamlining Act (FASA), which extended generally to federal agencies authority to conduct various race-conscious procurement activities. The purpose of this measure was to facilitate the achievement of goals for SDB participation established for agencies pursuant to Section 15(g) of the Small Business Act.

Based upon these congressional actions, the legislative history supporting them, and the evidence available to Congress, this congressional judgment is credible and constitutionally defensible. Indeed, the survey of currently available evidence conducted by the Justice Department since the Adarand decision, including the review of numerous specific studies of discrimination conducted by state and local governments throughout the nation, leads to the conclusion that, in the absence of affirmative remedial efforts, federal contracting would unquestionably reflect the continuing impact of discrimination that has persisted over an extended period. For purposes of these proposed reforms, therefore, the Justice Department takes as a constitutionally justified premise that affirmative action in federal procurement is necessary, and that the federal government has a compelling interest to act on that basis in the award of federal contracts.[1]

Subject to certain statutory limitations (that are discussed below), Congress has largely left to the executive agencies the determination of how to achieve the remedial goals that it has established. The Court in Adarand made clear that, even when there is a constitutionally sustainable compelling interest supporting the use of race in decisionmaking, any such programs must be narrowly tailored to meet that interest. We have focused, therefore, on ensuring that the means of serving the congressionally mandated interest in this area are narrowly tailored to meet that objective. This task must be taken very seriously. Adarand made clear that Congress has the authority to use race-conscious decisionmaking to remedy the effects of past and present discrimination but emphasized that such decisionmaking must be done carefully. This Administration is committed to ensuring that discriminatory barriers to the opportunity of minority-owned firms are eliminated, and the maximum opportunities possible under the law are maintained. Our focus, therefore, has been on creating a structure for race-conscious procurement that will meet the congressionally determined objective in a manner that will survive constitutional scrutiny.

In giving content to the narrow tailoring prong of strict scrutiny, courts have identified six principal factors: (1) whether the government considered race neutral alternatives and determined that they would prove insufficient before resorting to race-conscious action; (2) the scope of the program and whether it is flexible; (3) whether race is relied upon as the sole factor in eligibility, or whether it is used as one factor in the eligibility determination; (4) whether any numerical target is reasonably related to the number of qualified minorities in the applicable pool; (5) whether the duration of the program is limited and whether it is subject to periodic review; and (6) the extent of the burden imposed on nonbeneficiaries of the program. Not all of these factors are relevant in every circumstance and courts generally consider a strong showing with respect to most of the factors to be sufficient. This proposal, however, responds to all six factors.

The Department of Defense (DoD), which conducts a substantial majority of the federal government's procurement, was the focus of initial post-Adarand compliance actions by the federal government. In particular, DoD, acting pursuant to

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

authority granted by 10 U.S.C. § 2323,[2] had developed through regulation a practice known as the "rule of two." Pursuant to the rule of two, whenever a contract officer could identify two or more SDBs that were qualified to bid on a project at a price within 10% of fair market price, the officer was required to set the contract aside for bidding exclusively by SDBs. Under section 2323, firms owned by individuals from designated racial minority groups are presumed to be SDBs.[3] Others may enter the program by establishing that they are socially and economically disadvantaged. After consultation with the Department of Justice, DoD suspended use of the rule of two in October 1995.

Congress in 1994 extended the affirmative action authority granted DoD by section 2323 to all agencies of the federal government through enactment of the Federal Acquisition Streamlining Act (FASA), Pub. L. No. 103-355, sec. 7102, 108 Stat. 3243, 15 U.S.C. 644 note.[4] Because of Adarand and the effort to review federal affirmative action programs in light of that decision, regulations to implement the affirmative action authority granted by FASA have been delayed. See 60 Fed. Reg.

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[2] Section 2323 establishes a five percent goal for DoD contracting with small disadvantaged businesses ("SDBs") and authorizes DoD to "enter into contracts using less than full and open competitive procedures * * * and partial set asides for [SDBs]." Section 2323 states that the cost of using such measures may not exceed fair market price by more than ten percent. It authorizes the Secretary of Defense to adjust the applicable percentage "for any industry category if available information clearly indicates that nondisadvantaged small business concerns in such industry category are generally being denied a reasonable opportunity to compete for contracts because of the use of that percentage in the application of this paragraph."

[3] 10 U.S.C. 2323 incorporates by explicit reference the language of section 8(d) of the Small Business Act, which states that members of designated racial or ethnic groups are presumed to be socially and economically disadvantaged. Participants in the 8(a) program are also presumed to be SDBs.

[4] FASA states that in order to achieve goals for SDB participation in procurement negotiated with the Small Business Administration, an "agency may enter into contracts using -- (A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and (B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation."

448258, 48259 (Sept. 18, 1995). This proposal provides the basis for those regulations.

The proposed structure will necessarily affect a wide range of measures that promote minority participation in government contracting through race-conscious means. Taking DoD as an example, approximately one-sixth of contracting with minority-owned firms in 1994 resulted from use of the rule of two. The majority of dollars to minority firms was awarded by DoD through other means: direct competitive awards, the Small Business Administration's (SBA) section 8(a) program, subcontracting pursuant to section 8(d) of the Small Business Act, and a price credit applied pursuant to section 2323. With the exception of direct competitive awards (which do not take race into account), activities pursuant to all of these methods will be affected by the proposed reforms.[5]

The 8(a) program merits special mention at the outset. This program serves a purpose that is distinct from that served by general SDB programs. The 8(a) program is designed to assist the development of businesses owned by socially and economically disadvantaged individuals. To this end, the program is targeted toward concerns that are more disadvantaged economically (e.g. the standard for economic disadvantage for entry into 8(a) is an owner's net worth of $250,000 compared to $750,000 for SDB programs). Participants in the program are required to establish business development plans and are eligible for technical, financial, and practical assistance, and may compete in a sheltered market for a limited time. Each of these aspects of the program is designed to assist the business in developing the technical and practical experience necessary to become viable without assistance. By contrast, the general SDB program is a procurement program, designed to assist the government in finding firms capable of providing needed services, while, at the same time, helping to address the traditional exclusion of minority-owned firms from contracting opportunities.

The operation of the 8(a) program will become subject to the overall limitations in the measures described below. In addition, the SBA is working to strengthen safeguards against fraud and to ensure that the 8(a) program serves its purpose of

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[5] This proposal addresses only affirmative action in the federal government's own direct procurement. It does not address affirmative action in procurement and contracting that is undertaken by states and localities pursuant to programs in which such entities receive funds from federal agencies (e.g., the Disadvantaged Business Enterprise program that the Department of Transportation administers pursuant to the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240, section 1003(b), 105 Stat. 1919-1922, and the Airport and Airway Improvement Act of 1982, 49 U.S.C. 47101, et seq.).

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

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

OVERVIEW OF STRUCTURE

The SDB reform outlined herein involves five major topics: (1) certification and eligibility; (2) benchmark limitations; (3) mechanisms; (4) the interaction of benchmark limitations and mechanisms; and (5) outreach and technical assistance. The proposed structure incorporates these elements into a system that furthers the President's commitment to ensuring equal opportunity in contracting, responds to the courts' narrow tailoring requirements, and is faithful to statutory authority.

I. Eligibility and Certification

At present, while a concern must have its eligibility certified by the SBA to participate in the 8(a) program, there is no similar certification requirement for participation in SDB programs. Under current practice, firms simply check a box to identify themselves as SDB's when bidding for federal contracts or 8(d) subcontracts. Reform of this certification process is needed to assure that programs meet constitutional and statutory objectives. While the basic elements of eligibility under these programs are statutorily determined, agencies have discretion to impose significant additional controls and to establish mechanisms to assure that the statutory criteria are in fact met.

The SBA will continue as the sole agency with authority to certify firms for the 8(a) program. The following discussion, therefore, concerns only certification of SDB's that are not participants in the 8(a) program.

Each bid that an SDB submits to an agency, or to a prime contractor seeking to fulfill 8(d) subcontracting obligations, will have to be accompanied by a form certifying that the concern qualifies as a small disadvantaged business under eligibility standards that will be published by the SBA. The standards and certification form will allow 8(a) participants to qualify automatically for SDB programs. Others will be required to establish their eligibility by submitting required statements and documentation.

When a concern has been certified by an agency as eligible for SDB programs, its name will be entered into a central on-line register to be maintained by SBA. That certification will be valid for a period of up to three years during which time registered firms will have only to complete a portion of the form confirming the continued validity of that certification to participate in SDB programs at any agency. A full application will have to be submitted to an agency every three years to maintain eligibility.

A. **Social and Economic Disadvantage**

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

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

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

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[6] Both FASA and 10 U.S.C. 2323 incorporate by explicit reference the definition of social and economic disadvantage contained in section 8(d) of the Small Business Act. Pursuant to section 8(d), members of designated groups are presumed to be both socially and economically disadvantaged. By contrast, for the 8(a) program, members of identified groups are presumed to be socially disadvantaged, but must establish that they are economically disadvantaged.

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