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Minority and Disadvantaged Business Enterprise Requirements in Public Contracting

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs", for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by Orrin F. Finch. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

The Problem and its Solution

State Highway Departments and transportation agencies need to keep abreast of operating practices and legal elements relating to the disadvantaged business enterprise provisions of the Surface Transportation Act of 1982 and the minority and female business enterprise programs. This paper deals with the development and implementation of these programs as well as the legal issues related to highway and transportation departments' compliance with Federal requirements for public contracts.

This paper deals with the history and development of the minority and women business enterprise programs in public contracting and reviews the treatment these programs have received in the courts including an extensive discussion of the United States Supreme Court regarding affirmative action. It concludes with a practical discussion regarding the certification process in dealing with potential fronts and appeals regarding certifications.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of eight existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are; the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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Minority and Disadvantaged Business Enterprise Requirements in Public Contracting

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INTRODUCTION

The power of government to contract for public works and procurement carries with it the power to introduce social and economic change. In the Great Depression public works were undertaken to increase employment and to establish "prevailing wages" for workers through contracts for public works. The magnitude and effectiveness of this power has increased in recent decades with the growth of the federal procurement and construction programs and the growth of federal-aid and grants to state and local governments.

By the time of enactment of the Civil Rights Act of 1964 Blacks and other minorities had made rapid economic and social advancement against discrimination and segregation. However, lack of similar progress in the construction and building trades was most apparent. Construction activity by its nature is highly visible, and industry practice is to rehire new work forces with each project. Minorities were hired in representative numbers for unskilled laboring classes but because of unionization and hiring hall practices admission into skilled classifications was bleak. Unions were organized to afford maximum protection to their existing membership, and as long as a contractor was obligated by collective bargaining to use the hiring hall no violation of nondiscrimination contract provisions could be asserted against the contractor.[2]

The "remedy" resulted from converting language of "nondiscrimination" to "affirmative action" and eventually expanding the concept to include minority and women businesses as well as workers. This result should not have been surprising. What was surprising is that it was all accomplished without legislation. Whether the executive action had legislative authority is for the most part probably moot today, but new affirmative action plans (AAPs)[3] are being created by executives and local entities without congressional direction.

What remains are serious questions regarding authority to create AAPs and claims of reverse discrimination. Affirmative action and its elements of goals, quotas, set-asides, and preferences by their nature are designed to discriminate against nonminorities. The Supreme Court has been both cautious and badly splintered in setting the boundaries between acceptable AAPs in public construction contracts and unconstitutional discrimination. Only by careful analysis of the many opinions from the four Supreme Court cases discussed in this paper can one hope to extrapolate what will or will not be constitutionally acceptable.

This paper will review the origins of the minority business enterprise (MBE) program arising from the equal employment opportunity (EEO) policy to its transformation into the current disadvantaged business enterprise (DBE) program as developed by the United States Department of Transportation (USDOT) from the Small Business Administration (SBA) DBE program. Most importantly, we will examine some of the practical and legal issues confronting state transportation officials as well as bidders, prime and subcontractors, federal administrators and civil rights officials involved in implementing the various programs. This will require an historical review of the origins of the regulatory implementation of AAPs and the legislative authority for those plans.

We must, of course, examine the few Supreme Court decisions ruling on AAPs to discern what constitutional boundaries may or may not exist for determining the validity of an AAP. Later we shall examine the more numerous lower court decisions dealing more exclusively with AAP in construction contracts. Lastly, we will review some of the more specific legal issues concerned with certifications, awards, and appeals relating to the current USDOT disadvantaged business enterprise (DBE) program mandated for federally assisted transportation projects.

EXECUTIVE ORDER 11246 AND ITS PROGENY

Provisions for "nondiscrimination" in public contracts present few constitutional issues. In fact, they reinforce the requirements of the fifth and fourteenth amendments as well as congressional statutes designed to effectuate those constitutional provisions. Presidents as well have issued many executive orders mandating contract provisions for nondiscrimination in public contracts. But like the Ten Commandments their promulgation was more noteworthy than their adherence.

Somewhere along the way nondiscrimination gave way to the affirmative action mandate. No longer would mere signatures or promises on contract documents be sufficient. Affirmative proposals with monitored achievement goals were the new order of public contracting. These AAPs were designed to redress the lingering effects of past discrimination and necessarily gave rise to significant constitutional questions.[4]

The Equal Employment Opportunity Program

Equal Employment Opportunity (EEO), affirmative action, the MBE and DBE programs all have a common origin in Executive Order 11246. As early as 1941 President Roosevelt under the War Manpower Act ordered that provisions of nondiscrimination be included in all federal defense contracts. The rationale was that nondiscrimination would ensure a large work force in the wartime effort. This order was continued in effect by all succeeding presidents and led directly to Executive Order 11246 issued September 24, 1965 by President Johnson. This order expanded the 1941 edict to apply to all federally assisted construction contracts and mandated that contractors and subcontractors take affirm-

ative action to ensure that no applicant for employment was discriminated against by reason of race, color, religion, sex, or national origin. The Department of Labor was made responsible for the administration of the EEO program and was authorized by the President to adopt rules and regulations necessary to implement the terms of the order. This new obligation of affirmative action was obviously something more than a prohibition against discrimination. It called for the establishment of goals and the monitoring of achievement.

This developed into the establishment of several AAPs by various communities which received approval of the Department of Labor. These became known as "hometown plans,"[5] named individually after the city of origin, such as the "Philadelphia Plan."

Each bidder on a federally assisted contract was required to submit an affirmative action plan with a schedule of goals to be achieved in employing minority workers for several trades involved in the construction. Each AAP had to receive Department of Labor approval before the low bidder could be awarded the contract. However, a convenient alternative developed whereby the bidder or the specifications could incorporate any of the several "hometown plans" approved by the Department of Labor for the community involved.

Hometown plans were frequently referred to as tri-partite plans involving the contractors, the unions, and the minority community. The concept was that if the three groups could come together to work cooperatively to eliminate discrimination, the problem would eventually be solved. The Department of Labor therefore only established goals and timetables for those geographic areas without hometown plans. A contractor who participated in an approved hometown plan did not need to meet the specific goals as long as he accepted referrals from the hometown plan committee.

The effectiveness of the affirmative action incorporated into the EEO program depended on the ability to change the exclusionary practices of the various trade unions regarding membership, referrals, recruitment, and apprenticeships. The success of the hometown plans therefore depended in large part on the ability of the community leaders to work with the unions and the local contractors' associations to obtain mutual concurrence in a plan acceptable to the Department of Labor.

Enforcement was and remains largely dependent on payroll audits and audit of various reports filed by contractors and unions regarding ethnic employment and membership. But the commitment to meet the goals is not absolute. Thus, a contractor is given an opportunity to demonstrate that every good faith effort was made to achieve the goal even if he fails to do so.

One of the first legal challenges to the program to reach an appellate court for review involved the "Philadelphia Plan" in *Contractors Ass'n. of Eastern Pa. v. Secretary of Labor.*[6] For the first time the authority of the federal executive to impose an affirmative action program upon the states as a condition for federal funds was reviewed in a reported decision. The challenge was that the Phildelphia Plan was social legislation of local application enacted by the federal executive without the benefit of congressional or constitutional authority. On the surface this certainly appeared to be a correct statement on the issue presented. Moreover, the contractors' association noted that the plan would impose upon the successful bidder on a state project record keeping and hiring practices which would violate Pennsylvania's Human Relations Act.

The court disposed of the latter issue on a "take it or leave it" rationale in citing the federal government's unrestricted power to fix terms and conditions upon which it will deal with others. This included state recipients of federal-aid. But the case authority relied on was based on conditions imposed by Congress, not the Executive. Thus, the final decision of the court rested upon the power of the President to impose fair employment conditions incident to the power to contract.

In searching for Supreme Court guidance the opinion relied heavily upon Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer.*[7] This case passed on President Truman's authority to seize the steel mills by Executive Order. The Supreme Court ruled (6–3) that the seizure order was not within the constitutional power of the President. But no two justices could agree upon a single majority opinion. As will be seen later, this was to become characteristic of the Supreme Court in dealing with subsequent discrimination and affirmative action decisions.

In the Philadelphia hometown plan the appellate court found guidance in Justice Jackson's opinion for supporting the authority of Executive Order 11246. Justice Jackson pragmatically divided presidential authority into three arbitrary categories that can best be labeled "good," "maybe," and "bad." The first category would include presidential acts responding to an express or implied authorization of Congress. The third category would include measures inconsistent or incompatible with the expressed or implied will of Congress. The in-between or "twilight zone" represents actions taken in the absence of either congressional grant or denial of authority, express or implied.

The importance of the Jackson opinion to the circuit court was that the resolution of this "zone of twilight" took into account three interrelated features: (1) the possibility of concurrent authority; (2) Congressional acquiescence in conferring executive authority; and (3) that the test of authority may depend more on the imperatives of events and contemporary imponderables than on theories of law.

Armed with the Jackson propositions the Third Circuit traced the development of the Executive Order 11246 from the original 1941 Executive Order requiring nondiscrimination covenants in all defense contracts.

From this historical analysis the court concluded that the executive action was a valid exercise of contract authority within Justice Jackson's "twilight zone." This conclusion was fortified by acquiescence of Congress, since it had for many years continued to appropriate funds for both federal and federal-aid projects with knowledge of the preexisting executive orders.

Plaintiffs did set forth strong arguments that Executive Order 11246 was in direct conflict with provisions of the Civil Rights Act of 1964. Section 703(j) of Title VII provided that the statute not be "... inter-

preted to require any employer . . . [or] labor organization . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or groups . . ." because of a racial imbalance compared with the available work force in the community.

Rectifying such imbalances was precisely what the Philadelphia Plan was directed to achieve. Moreover, Congress also expressly provided that it would not be an unlawful employment practice under the Civil Rights Act for an employer to use different standards of compensation and other privileges based on seniority or merit. However, it declared the failure or refusal to hire an individual because of race to be an unlawful practice.

The court did not read these provisions of the Civil Rights Act as an intention of Congress to have them apply beyond the application of the Civil Rights Act itself. Congress would have to act more directly if it intended to foreclose remedial action afforded by the well-established Executive Order program dating back to 1941. This rationale was later adopted by a majority of the Supreme Court in *United Steel Workers of America v. Weber,*[8] discussed *infra.*

The court saved for last the critical question whether the specific goals specified in the plan were racial quotas which would be in violation of the equal protection provisions implied from the fifth amendment. This was disposed of in one sentence that totally summarized the decision.

> . . . The Philadelphia Plan is valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. . . .[9]

We will see that this decision set the pattern in many ways for the development of various plans and programs under executive authority to correct racial imbalances in employment and in business enterprises.[10]

Advent of the Minority Business Enterprise Program

The EEO program was designed to promote affirmative action in the employment of construction workers. Affirmative action for minority and women owned businesses in construction developed more slowly than EEO but had more dramatic impact on the industry and state and local governments.[11]

Section 8(a) of the Small Business Act of 1953[12] authorized the Federal Small Business Administration (SBA) to contract directly with small businesses on behalf of various federal procurement agencies. Through its regulatory authority the SBA developed a set-aside program for socially or economically disadvantaged small businesses. Minorities were presumed to be socially or economically disadvantaged. The absence of congressional authority for this preferential program was challenged in a number of equal protection cases, but these challenges were largely unsuccessful for lack of standing based on the plaintiffs' inability to show that they would otherwise qualify for certification and participation under the Small Business Act.[13]

However, in 1978 Congress supplied any lacking legislative authority. Eligibility for 8(a) status was changed by Congress to require both social *and* economic disadvantage. Socially disadvantaged persons were defined as those ". . . who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group . . ." including but not limited to Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities. Economic disadvantage must also be proved. It is defined in the statute as impaired ability to compete ". . . due to diminished capital and credit opportunities." This involves an examination of the individual's total net worth. While the individual must qualify socially and economically, it is the business entity, whether sole proprietorship, partnership or corporation, that receives the certification. But to qualify for certification, the business entity must also be at least 51 percent owned *and* controlled by socially and economically disadvantaged individuals and qualify as a "small" business. As will be seen later, USDOT later adopted these legislative definitions in developing its own DBE program.

The constitutionality of the SBA 8(a) program has not been reviewed by the Supreme Court. However, the closely decided decision in *Fullilove v. Klutznick,*[14] to be discussed in detail later, would suggest that the SBA program would pass constitutional muster as that court is currently constituted.[15] The same cannot be assured for the MBE program developed by USDOT for its federal-aid highway construction contracts.

Initially, USDOT promulgated regulations in 1975 requiring each state highway and transportation agency (recipient) to take affirmative action to increase the participation of minority firms in construction activities. The only specific mandate was a requirement that bidders intending to subcontract certify in their proposals that they have affirmatively sought and contacted minority subcontractors. As with previous certification requirements for nondiscrimination, dramatic changes in subcontracting habits were not observed.

The dramatic change came on March 31, 1980. On that date the Carter administration issued a comprehensive and complex MBE/WBE program for all recipients of federal transportation funds administered by USDOT. In addition to the Federal Highway Administration (FHWA) this program included also the Federal Aviation Administration (FAA), the Urban Mass Transit Administration (UMTA), and the Federal Railroad Administration (FRA). The program was not initiated in response to any congressional direction but was founded and justified upon Executive Order 11246 and several transportation statutes containing general provisions directing federal agencies to prevent discrimination.

The MBE/WBE program was unique in several major respects. First of all, each recipient highway or transportation agency was directed to prepare "overall" annual goals for federal approval and to establish specific goals for minorities and women businesses for each construction contract. Secondly, traditional award to the lowest responsible bidder was significantly modified. Award was now to involve a two-step bidding process. First, bids are opened to determine prices and then those bidders desiring to remain in competition are to submit their MBE/WBE participation by a stated date and time. Award then is to be made to the lowest responsible and responsive bidder with a "reasonable price" meet-

ing the specified MBE/WBE goals. If none, award was then to go to the bidder with the highest MBE/WBE participation and a "reasonable price." A "reasonable price" is the highest price at which the agency would award the contract if there were a single bidder. A corollary rule was added that if any bidder with a reasonable price was able to achieve the specified contract goal, then it was conclusively presumed that all other bidders not meeting the goals did not use good faith efforts and would be ineligible for award.

The regulation also permitted "set-asides" where authorized by state law and found necessary for the state to meet its annual goal. A further condition for use of set-asides provided that there must be at least three capable MBEs identified as available to bid on the contract. This devise has been employed by some states but mainly to achieve WBE goals.

The reaction of most states to this program was far from enthusiastic. Numerous lawsuits were filed all across the country challenging the regulations. The first to be decided was *Central Alabama Paving, Inc. v. James,*[16] a published opinion of the federal district court in Alabama. Relying upon its analysis of the five separate opinions filed in the Supreme Court case of *Fullilove v. Klutznick* the judge concluded that USDOT was acting beyond the bounds of congressional authority in promulgating the MBE/WBE regulations. Also, as found by the Supreme Court in *Regents of the University of California v. Bakke,*[17] the district court concluded that USDOT had not determined prior to issuing the regulations whether prior discrimination had occurred against the minority groups and women favored by the program.

Good Faith Efforts and the DBE Program

The impact of the Carter regulations and the results of the *Central Alabama Paving* case were largely blunted by two subsequent events, one administrative and the other congressional. First, the Reagan administration arrived on the scene and promptly issued "interim" regulations eliminating the two-step bidding process and the conclusive presumption and replaced it with a good faith effort standard for contract award. This now permitted the states to award to the low bidder even if the MBE or WBE goal was not met, provided the bidder could demonstrate that it made good faith efforts to secure minority or women subcontractors but was unable to achieve the goal.

Secondly, Congress passed the Surface Transportation Assistance Act (STAA) of 1982 before the Reagan administration was able to issue its comprehensive review and revision of the Carter regulations as indicated in the interim regulation. A last minute amendment to the STAA included a one-sentence provision in Section 105(f):

> Except to extent the Secretary [of Transportation] determines otherwise, not less than ten percentum of the amounts authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act [15 U.S.C.637(d)] and relevant subcontracting regulations promulgated pursuant thereto.[18]

As a practical consequence of these events FHWA abandoned its appeal of the *Central Alabama Paving* case, and all other pending actions challenging the Carter regulations were also either dropped or mooted.[19] Interestingly, the WBE program remains unchallenged even though it would appear to suffer from the same deficiencies expressed by the court in the *Central Alabama Paving* case, i.e., lack of congressional authority and failure of necessary findings.[20]

This new disadvantaged business enterprise program was obviously patterned by Congress after the Public Employment Works Act (PEWA) which the *Fullilove* case held constitutional. With this bare bones directive from Congress it was up to USDOT to provide the necessary working substance. Its final regulations were issued July 21, 1983.[21] Outside of a change of acronym from MBE to DBE there was little impact on the existing program for those states already achieving or exceeding a ten percentage recipient goal. Many states, however, found two and three percentage goals workable and tolerable under the prior program but felt the impact of the new higher standard. Administrative waivers are available, but FHWA appears determined to hold a firm line on all such waiver requests.[22]

The new regulations followed the lead of the SBA regulations and provided a rebuttable presumption that the members of designated minority groups (Blacks, Hispanics, etc.) are socially and economically disadvantaged. A wealthy Black business owner might be considered ineligible because he was not economically disadvantaged. Theoretically at least a nonminority could be certified as socially and economically disadvantaged, as with Appalachians. As a practical matter the DBE program has been restricted to those identified with a minority group and those with SBA Section 8(a) certifications. The regulations mandate that the state recipients honor all SBA Section 8(a) certifications. Most nonminority applicants, such as the handicapped, women, Appalachians, Jews, Portuguese, etc., who are not members of a designated minority group, will probably be referred by the states to the SBA for certification under its 8(a) program.

The good faith or "best efforts" interim regulations of the Reagan administration did not however escape challenge by industry. *M. C. West, Inc. v. Lewis*[23] was filed challenging the Carter conclusive presumption regulations. After the Reagan administration promulgated the interim good faith regulations the parties by stipulation permitted the court to decide the case based on the amended regulations. In the action industry representatives sought to restrain state and federal officials from enforcing the goals of 2½ percent for MBEs and 1 percent for WBEs. The contractors contended that the regulations were unconstitutional as a denial of equal protection, were adopted without authority, and were in violation of the antidiscrimination provisions of the Civil Rights Act of 1964.[24]

The district court judge in a published opinion refused to follow the conclusion of *Central Alabama Paving* that only the Congress has authority to adopt valid race-conscious preferences. This court did not interpret *Fullilove* to preclude a court or the executive from adopting

measures regarding affirmative action provided they are not incompatible with the expressed or implied will of Congress. However, the judge conceded that an administrative agency cannot act on its own without express congressional authority or nonconflicting executive authority.

The opinion acknowledges that the "chain of authority is not pristine" and that it was not totally satisfied with the authority recited in the regulation itself. The court observed that the Secretary's reliance on the Airport and Airway Development Act, The Railroad Revitalization Act, etc. as authority for promulgating the regulations had nothing to do with highway funding. Likewise the court had difficulty interpreting the nondiscrimination language of the Civil Rights Act into compulsory race-conscious affirmative action. Nevertheless, the court was satisfied that a direct line of authority for the regulations could be traced from the SBA and the various presidential executive orders.

However, the judge did struggle with the new good faith efforts concept. Neither the state nor the federal defendants could agree which had the final authority to decide if a particular low bidder had met the standard. Nevertheless, the court seemed satisfied that the Secretary of Transportation had detailed sufficient guidance in an appendix to the regulation as to the various types of efforts to be reviewed by the states in assessing a bidders good faith achievement.

Before delving into the legal and practical issues encountered in the administration of the DBE program, one needs to examine more closely the constitutional authority justifying these programs as passed on by the Supreme Court.

SPLIT SPLINTERED AND STRUGGLING SUPREME COURT

The Supreme Court volumes are filled with historical opinions attempting to define that elusive and fine constitutional line between tolerable "benign" discrimination and repugnant racism.[25] Since the landmark case of *Brown v. The Board of Education*[26] and the Civil Rights Act of 1964[27] the Supreme Court has faced the task of applying those old constitutional principles to a new concept: the affirmative action plan (AAP).

To date that court has chosen to review only four affirmative action cases: *Bakke, Weber, Fullilove,* and *Stotts,* which we will examine in some detail. *Bakke* struck down an AAP incorporated into an admissions policy for university medical students. *Weber* approved a voluntary, private AAP to provide training for unskilled plant workers. *Fullilove* upheld the constitutionality of an MBE program established by Congress for public construction for economically depressed communities, and *Stotts* restricted the application of a judicially mandated AAP favoring minority firemen regarding layoffs in favor of seniority. The Court not only has passed up other opportunities to rule on significant AAPs but has dismissed at least two other cases following argument.[28] Considering the fundamental nature of the issue, the numerous applications of AAPs in construction and employment, and the magnitude of their impact, it is surprising that our highest court has not been able to provide prompt guidance. The Court has been sharply divided on each case with rarely more than two justices agreeing upon a single opinion. The result is that each case has been largely restricted to its own facts, which has permitted the lower courts to go their own direction selecting whichever opinion fits their conclusion best.

The Bakke Case

The Supreme Court's first attempt to deal with reverse discrimination arising from an AAP was, of course, the well-recognized case of *The Regents of the University of California v. Bakke.*[29] No attempt will be made here to add to the existing wealth of articles that already disect and analyze each of the several opinions published in this case and in the other three Supreme Court cases herein reviewed.[30] For our purposes it is significant that a majority of the Justices concluded that the special admissions program at the Davis Campus of the University resulted in reverse discrimination. The inability of a majority to decide whether it was a statutory or constitutional violation is unimportant for our analysis.[31]

The Davis medical school was a relatively new school when Bakke first applied for and was denied admission. Davis had previously developed and adopted a special admissions program for "economically and/or educationally disadvantaged" applicants. The affirmative action program set aside 16 out of 100 admission slots for the special admissions program. Any applicant with less than a 2.5 grade average was automatically rejected except for special admissions applicants. Bakke applied for admission twice, and in both years admissions were granted to others under the special admissions program with grade point averages, test scores, and interview ratings significantly lower than his. The University conceded that he would have been admitted except for the special admissions program.

For our purpose in analyzing an AAP the case is significant in holding that the "strict scrutiny" test applied to protect minorities against discrimination would apply equally to protect any and all members of society including nonminorities from discrimintion. Although the Supreme Court affirmed the California Supreme Court's judgment invalidating the admissions program it also reversed the judgment in so far as it precluded the University from taking race into account in its admissions decisions.[32]

What then was wrong with the University's affirmative action policy? A number of specific factors are apparent which in the aggregate, or even possibly singularly, determined its fate. First of all, the program has every indication that it was designed and applied as a set-aside or quota for minorities. Nonminorities could not compete for the 16 designated admission slots. More than that, it was a floor without a ceiling for minorities because they could also compete equally with nonminorities for regular admission. Secondly, the set-aside was based solely on race, even though it was characterized as a "disadvantaged" program. Thirdly, there was no evidence of past discrimination by either Bakke or the medical school because it was a relatively new institution. Admittedly minorities were underrepresented in the medical field but this could not

be attributed to either Bakke or to the University. Lastly, and perhaps most importantly, the University lacked authority—legislative, judicial or executive—to adopt an AAP based on race which discriminated against nonminorities. Also lacking were the requisite findings to justify the imposition of such a program. This requires competent findings of past discrimination, the need for an affirmative action program, and the adoption of a plan that employs the least intrusive means to rectify the results of past discrimination with the least harm to others who were not responsible for the results of the past.

The Kaiser Steel Workers and the Weber Case

One year later, almost to the day, the Supreme Court handed down its second AAP case entitled *United Steelworkers of America v. Weber.*[33] Contrasted with Bakke this case is viewed as vindication of a private rather than a public AAP. This also was a closely decided case holding that a privately bargained for AAP between Kaiser Steel and its labor union setting aside 50 percent of its craft training positions for Black employees did not violate the antidiscrimination provisions of the Civil Rights Act of 1965.

Justice Brennan with three colleagues delivered the opinion of the Court. Justice Blackmun concurred but acknowledged certain misgivings as expressed by Justice Rehnquist in his dissent. The Chief Justice also dissented, and Justices Powell and Stevens who were with the majority in *Bakke* did not participate. Thus, a very close and tenuous majority of 5 voted for the judgment with 2 dissents and 2 abstentions.

Blackmun's misgivings were that the majority opinion was founded on an admission of past discriminatory practices by Kaiser against its Black workers. The potential for damages and its chilling effect on the ability to secure other private AAP of a voluntary nature concerned him. To avoid this he developed an "arguable violation" concept of Title VII as sufficient justification to avoid findings and admissions of past discrimination. At the same time he was troubled by the strong legislative history of Title VII set forth in Rehnquist's dissent. However he concluded that "... additional considerations, practical and equitable, only partially perceived, if perceived at all, by the 88th Congress, support the [majority] conclusion reached by the Court...."[34]

The Kaiser plan provided that selection of trainees was to be based on seniority with a provision that at least 50 percent of the selectees were to be Blacks until the percentage of Black skilled workers approximated the percentage of Blacks in the local labor force. This plan was challenged by a White worker denied admission who had greater seniority over the most senior Black selected. In general, the AAP resulted in junior Black employees receiving preference to more senior white workers. The circuit court in a divided ruling had held that the employment preference based on race violated the prohibition of Title VII.

In reversing the judgment the Supreme Court majority emphasized at the outset the narrowness of its opinion: The Kaiser plan does not involve state action and therefor does not present an Equal Protection Clause issue under the fourteenth amendment:

> The only question before us is the narrow statutory issue of whether Title VII *forbids* private employers and unions from voluntarily agreeing upon bon fide affirmative action plans that accord racial preferences in the manner and for the purpose provided in the Kaiser—USWA plan.[35]

It was argued that Congress intended to prohibit all race-conscious AAPs. The majority acknowledged the force of the argument but relied heavily upon an intention of Congress to facilitate the integration of Blacks into the mainstream of American society and that the result sought by the Respondents would be at variance with that purpose of the statute. Section 703(j) was added to Title VII by Congress to gain passage of the measure by assuring its opponents in Congress that the Act would not be used to correct racial imbalances:

> Nothing contained in [Title VII] shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of race ... of such individual or group on account of any imbalance which may exist [in the employer's work force].[36]

There is little doubt that this amendment was intended to provide assurance that the Act would not be interpreted to require employers with racially unbalanced work force to grant preferential treatment to minorities. The court, however, relies heavily upon the voluntary nature of the program and the use of the term "require" rather than "permit" in the above quoted provision. Thus, the Court reasoned, Congress did not choose to forbid all voluntary race-conscious AAPs.

Justice Rehnquist in what must be described as a blistering dissent thoroughly analyzed the legislative debates and history of the Act and seriously challenged the majority's assumption that this was a voluntarily negotiated AAP. He concluded that "[b]y going not merely *beyond,* but directly against Title VII's language and legislative history, the Court has sown the wind. Later courts will face the impossible task of reaping the whirlwind."[37]

By all outward appearances the "set-aside" or "quota" features of this case seem more flagrant than in *Bakke.* Yet there are many factual features of this case that differentiate it significantly from *Bakke* and perhaps are significant in themselves in deciding whether a given AAP is valid or not.

Foremost is the emphasis of the majority that this was a private program limiting the scope of review to statutory violations. Had this involved "state action" a constitutional review would have been necessary. Next in importance, distinguishing this from *Bakke* is the presumed voluntary adoption of the plan as a result of an employer-union collective bargaining agreement. Thirdly, the plan applied totally to "in house" training to provide upward mobility to higher skilled jobs as opposed to initial recruitment as in *Bakke.* Fourthly, the training program was specifically created to provide upward mobility on a seniority basis and no pre-existing "rights" were involved. Lastly, the plan was viewed as temporary, not intended to maintain a particular racial balance, but simply to eliminate a manifest racial imbalance.[38]

Fullilove v. Klutznick: Congressional AAP

Another year passed and on July 2, 1980 the Supreme Court announced its decision in the *Fullilove* case.[39] This involved an AAP created by Congress rather than by executive order or administrative action. This case later served as the basis for adding Section 105(f) of the Surface Transportation Assistance Act of 1982 establishing the DBE program for federal-aid highway appropriations.

In May 1977 Congress enacted the Public Works Employment Act (PWEA) appropriating $4 billion for federal grants to state and local governments for local public works projects. The main objective of the Act was to alleviate widespread unemployment. It included an MBE provision requiring that "... no grant shall be made under this Act for any local public works project unless the applicant gives satifactory assurance ... that at least 10 percentum of the amount of each grant shall be expended for minority business enterprises" with provision for administrative waiver by the Secretary of Commerce.[40] Regulations issued by the Secretary required competitive bidding and award by local entities to prime contractors responsive to the MBE requirements. Waiver of the 10 percent MBE goal could be obtained by demonstrating that MBE subcontractors were not available at a reasonable price. Otherwise, it was expected that the award would go to another bidder.

The judgment of the Supreme Court was that the objectives of the MBE provisions of the Act were within the proper exercise of the powers of Congress and passed constitutional muster. However, a total of 5 separate opinions were filed resulting in a 3–3–3 split. The Chief Justice wrote the opinion of the Court joined by Justices White and Powell (none of whom agreed with one another in the *Bakke* decision); Justice Marshall filed an opinion joined by two other justices concurring in the judgment but not in the Court's opinion; and Justices Stewart, Rehnquist, and Stevens dissented.[41]

The Court's opinion concluded that the MBE provision fell within the broad constitutional authority and objectives of Congress and that the means selected with the use of racial and ethnic criteria as fashioned in the legislation and implemented by the regulations did not violate constitutional guarantees of nonminorities.

The single most controlling feature in this case was that the AAP was the direct result of congressional action:

> Here we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and the President.
> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the constitution with the power to 'provide for the ... general Welfare ...' and 'to enforce by appropriate legislation' the equal protection guarantees of the Fourteenth Amendment.[42]

Secondly, the absence of findings or establishment of a specific record, absent also in *Bakke,* was not required of Congress. The Court's review of the legislative history of the PEWA was sufficient to support a congressional conclusion that minorities had been denied effective participation in public contracts.

Thirdly, the Court was obviously influenced by the "nonmandatory" nature of the AAP which has reference to the waiver provisions implemented by the regulations. With this feature the AAP was able to avoid the "quota" stigma and probable disqualification.

Fourthly, the Court was impressed by the competitive bidding features mandated by the implementing regulations. This was viewed as generating incentives to prime contractors to meet their MBE obligations to qualify as responsive bidders and to seek out the most competitive, qualified, and bona fide minority subcontractors.

Finally, the Court also emphasized the features previously noted as to other AAPs regarding its narrowed focus, short duration, and minimal impact on nonminorities innocent of past discriminatory practices.

Justice Powell filed a concurring opinion to emphasize his "most stringent level of review" standard and to differentiate the results in *Fullilove* from *Bakke* in applying that standard. In *Bakke,* no authority existed to impose a race-conscious remedy nor were findings made. "Unlike the Regents of the University of California, Congress properly may—and indeed must—address directly the problem of discrimination in our society."[43]

Justice Powell was impressed by two features that caused him to conclude that Congress' selection of the race-conscious remedy would pass his strict scrutiny test: The first was the emergency nature of the Act to distribute quickly funds to alleviate unemployment and prevent perpetuation of past experiences of discrimination where minorities did not share in the appropriation of such funds except to a very minor extent. This measure was designed to permit their admission into the construction trades and contracting business. Secondly, Powell concluded that a race-conscious remedy should not be approved without considering the impact of the set-aside on innocent third parties. Here he was impressed by calculations indicating that the 10 percent ($400 million) set-aside for minorities only represented 0.25 percent of all construction work in the United States for the benefit of 4 percent of the nation's minority contractors. This leaves 99.75 percent of construction funds for the remaining 96 percent of the contractors.

Justices Marshall, Brennan, and Blackmun who voted to uphold the *Bakke* AAP filed a concurring opinion concluding that the 10 percent minority set-side was "plainly constitutional."

The three dissenters asserted that any official action by government that provides differential treatment based on race is presumptively invalid, and that even assuming congressional authority to remedy current effects of past discrimination it must first establish that in the past it has engaged in racial discrimination in its disbursement of federal contract funds.

The importance of this case cannot be overemphasized. It did not provide the final answers but paved the way for Congress to fashion the DBE plan for the federal-aid highway program. It also led to the vol-

untary dismissal of most of the pending lawsuits challenging the administratively created MBE program which will be discussed later.[44]

The Firefighters Local Union v. Stotts

The fourth, and to date the latest, Supreme Court review of an AAP pertinent to our inquiry is *Firefighters Local Union v. Stotts*[45] issued June 12, 1984. The three previous decisions involved administrative, private, and congressional actions creating the AAP. *Stotts* involved a judicially tailored plan created by a consent decree with continuing court jurisdiction.

In settlement of a civil rights class action the City of Memphis and its fire department entered into the consent decree approved by the federal district court regarding the City's hiring and promotional practices regarding Blacks. The decree included provisions to promote certain individuals and provided a goal regarding future promotions to ensure that 20 percent of future promotions in each job classification would be given to Blacks. There was no provision regarding layoffs or reductions in rank.[46]

In the year following issuance of the decree the City announced layoffs to avoid budget deficits. The layoffs and demotions were to be based on seniority, thus resulting in "last hired, first fired." It was estimated that 40 of the least senior employees would be laid off of which 25 were White and 15 Black.

The district court responded to a petition by enjoining the City from laying off or reducing the rank of any Black employee. The court acknowledged that the consent decree was silent on the subject of layoffs and that the City was acting in response to its established seniority system which was not adopted with an intent to discriminate. Nevertheless he concluded that the proposed layoffs would have a racially discriminatory effect. As a result, certain nonminorities with greater seniority than minority employees would be laid off or demoted. The Sixth Circuit on appeal held that the City's seniority system was "bona fide" but affirmed relying alternatively upon the inherent authority of the district court to modify the decree for new and unforeseen circumstances.

Justice White writing for the Supreme Court was joined by the Chief Justice and Justices Powell, Rehnquist and O'Connor. Justice Stevens concurred in the judgment.

The judgment of the Court was that the district court had exceeded its powers in requiring that White employees be laid off when an otherwise applicable seniority system would have called for laying off Black employees with lesser seniority. Section 703(h) of Title VII of the Civil Rights Act provides that it is not an unlawful employment practice to apply different standards of compensation or different conditions or privileges of employment pursuant to a bona fide seniority system provided that such differences are not the result of an intention to discriminate because of race. Based on this language the Supreme Court concluded that if individual members can demonstrate that they have been actual victims of discriminatory practice they would be entitled to competitive seniority and ". . . given their rightful place on the seniority roster."[47]

Justice Stevens could not join with the majority because he did not believe that the case was governed by Title VII. However in his mind sufficient justification for modification of the decree based on changed circumstances was lacking.

Besides the statutory provision permitting bona fide seniority systems, the important factors present here are that there was no intent to discriminate; that the seniority system was bona fide and in place at the time of issuance of the consent decree; that the union representing the fire fighters was not a party to the original class action but through intervention sought here to preserve the seniority system; that there was no evidence that the layoffs of Blacks were the result of a discriminatory practice; and, perhaps most significant, that the laid off White employees with greater seniority were themselves the subject of judicially created discrimination based on race without a remedy, whereas the Black firemen could gain competitive seniority status based on proof of individual acts of discrimination.

It would appear from the *Stotts* decision that the Supreme Court is not going to afford judicially sanctioned AAPs the same latitude it was willing to afford congressional and private plans.

The Supreme Court Score Card

In these four cases the Supreme Court twice upheld the AAP (*Webber* and *Fullilove*) and twice struck them down (*Bakke* and *Stotts*). In all four cases Justices Blackmun, Brennan, and Marshall would have upheld the plans. With almost the same consistency Justices Rehnquist, Stevens, and Stewart (replaced by Justice O'Connor in the *Stotts* case) voted to disqualify all the plans. The three remaining Justices, Powell, Burger, and White, voting as a block, have provided the swing votes determining the judgment of the Court. The only exceptions were Powell's nonparticipation in *Weber*, White's vote opposing the *Bakke* judgment, and Burger's dissent in *Weber*. Justice Powell is the only one to have consistently voted with the majority except for his nonparticipation in *Weber*.

The score card itself looks something like this:

JUSTICE	BAKKE	WEBER	FULLILOVE	STOTTS
BLACKMUN	+	+	+	+
BRENNAN	+	+	+	+
MARSHALL	+	+	+	+
REHNQUIST	−	−	−	−
STEVENS	−	0	−	−
STEWART	−	+	−	−*
POWELL	−	0	+	−
BURGER	−	−	+	−
WHITE	+	+	+	−
JUDGMENT	−	+	+	−

\+ Vote to uphold the affirmative action plan.
− Vote against the affirmative action plan.
0 Did not participate.
* O'Connor replaced Stewert.

From this chart it is most apparent that the Court is split in three directions, causing ultimate decisions to rest on close issues. In turn, these close issues can be influenced by individual facts, features, and concerns such as those mentioned in relation to the discussion of each of the four cases. Further guidance and direction are needed, and with five of the justices over 75 years of age the ultimate result may be decided by an entirely different Court.

Missed Opportunities

Fullilove narrowly upheld an MBE program specified by Congress. Before and since that case the Supreme Court has sidestepped opportunities to decide whether other branches of government, federal, state and local may voluntarily adopt similar programs without congressional authorization.[48] The most recent opportunity was its denial of *certiorari* in *South Florida Chapter of the Associated General Contractors of America, Inc. v. Metropolitan Dade County.*[49]

This case involved the constitutionality of a county ordinance granting preferential treatment in its contract bidding process by permitting "set-asides" for bidding limited to Black contractors in addition to provisions for Black subcontracting goals. The federal district court ruled the set-aside provision unconstitutional based on the Equal Protection Clause of the fourteenth amendment, but upheld the subcontracting goal provisions. The Eleventh Circuit held both provisions valid.

As a result of racial disturbances in the community, the county commission had adopted a resolution recognizing that past discrimination had "to some degree" impaired the competitive position of Black-owned businesses, and it adopted a general policy of intent to develop a program to alleviate the current problem. On July 20, 1982, the commission adopted the ordinance in question, establishing the AAP with the set-asides and MBE goals. The very next day the county opened bid proposals on a $6 million subway station project situated in the predominately Black neighborhood. Peter Kiewit Sons' Company, a nonminority contractor, was the lowest bidder. The next lowest bidder was a Black prime contractor. All bids were rejected ostensibly because all bids exceeded the engineer's estimate. It was then recommended to the commission that the station contract be reviewed for inclusion in the set-aside program authorized by the newly enacted ordinance.

The station project was readvertised with bidding restricted to only Black contractors. An MBE subcontracting goal of 50 percent was also included.

Both the district court and the circuit court of appeals concluded that the county commission could lawfully waive competitive bidding requirements under provisions of its Charter when acting in the best interests of the county. The diversity between the two opinions rests with their differing interpretations of *Fullilove*. The district court relied heavily on Chief Justice Burger's and Justice Powell's emphasis on a statute passed by Congress and Justice Powell's reiteration of his *Bakke* views requiring a strict scrutiny standard of review in dealing with standards based on race alone. The circuit court relied on the intermediate standard of review expressed by Justices Marshall, Brennan, and Blackmun, noting that "[i]n light of the diversity of views on the Supreme Court, determining what 'test' will eventually emerge from the Court is highly speculative. . . ."[50] The circuit court was content that the AAP had been adopted by a governmental body with authority to pass such legislation; that adequate findings had been adopted to ensure that they were remedying the present effects of past discrimination; and that the racial classification extends no further than the established need for remedying the effects of past discrimination.

Again, one should not ignore certain special features present in this case that could individually be critical regarding the final result and perhaps even more critical in regard to the denial of *certiorari*.

Significantly, Dade County operates under a Home Rule Charter providing it with authority to waive competitive bidding and to enact remedial legislation. In addition the set-aside was restricted to situations where at least three Black prime contractors are certified as available to bid, and the commission must specifically authorize each set-aside contract and approve all subcontracting goals. One also should not ignore that the station project was situated within the Black community itself. The statistics relied upon showed that the station contract represented less than 1 percent of the county's contract expenditures compared with a population of 17 percent Blacks in the county with fewer than 1 percent Black contractors. This supports the conclusion that the AAP was not disproportionate and had minimal impact on nonminority contractors. Lastly, the court left the judicial door ajar for the plaintiffs in noting that they can renew their challenges if the program is not constitutionally administered in future contracts.

The Associated General Contractors (AGC) were obviously confident that the Supreme Court would review this case and were disappointed by its refusal. The AGC president was quoted as stating that this refusal was ". . . merely a postponement of the inevitable because the racism inherent in special-preference procurement programs will ultimately have to be addressed."[51] Confirming its belief in this statement AGC promptly filed a new action in Federal District Court, Northern California District, against the City and County of San Francisco challenging its procurement AAP.[52]

The San Francisco ordinance established set-asides of 10/2 percent respectively for MBE/WBE prime contractors; 5 percent preferential bidding advantage to women minorities, and local businesses with a maximum 10 percent for a local minority or woman business; and MBE/WBE subcontracting goals of 30/10 percent respectively. In November 1984, the judge denied both temporary and preliminary injunction petitions. The denials have been appealed and cross motions for summary judgment have been filed and are scheduled for oral argument. Granting of either of these motions will probably result in an additional appeal. The eventual ruling of the Ninth Circuit should provide the Supreme Court with yet another opportunity.[53]

AFFIRMATIVE ACTION IN THE LOWER COURTS

With the Supreme Court in dissarray over the constitutionality of AAPs the lower courts have "enjoyed" the freedom to choose their own particular Supreme Court authority, opinion, or rationale. The unfortunate result has been more confusion with results more dependent on the leanings of a particular judge or appellate panel. However, in sorting through these contract cases perhaps we can detect some general themes and distinctions worth emphasizing whether one is defending or attacking a given AAP.

Initially it should be observed that judicial review can be initiated at different time stages in the implementation of an AAP. As in *Fullilove* the court may be asked to prevent implementation of the program without regard to a specific contract or project. With reference to a specific project the court may be asked to enjoin advertisement or bid opening. Also, award or execution of the contract documents can be challenged or the challenge can relate to enforcement of a specific contract provision during contract performance.

In very broad terms one can conclude that the earlier and less specific the attack the greater is the prospect that the plan will be upheld as constitutional. Stated another way, the courts have shown a reluctance to hold an AAP unconstitutional *per se* even though it is based on race-conscious standards. At the same time the courts have tended to reserve judgment regarding how a given AAP may be implemented in a specific instance. This observation is borne out by the four Supreme Court decisions previously reviewed. *Fullilove* was the most general and non-specific attack. It did not bring into focus a specific project, contract, bidder, or individual and the plan was upheld. *Weber*, was more specific than *Fullilove*, but did not involve loss of entitlement to upward mobility training. At the most, individual rights were delayed. *Bakke* and *Stotts* were specific attacks involving identifiable individuals deprived of something they would otherwise have secured.

Fullilove Applied By the Lower Courts

Most of the lower court cases have been of the general variety and most have upheld the constitutionality of the AAP. For example, in *Michigan Road Builders Ass'n. v. Milliken*[54] a Michigan state statute established a procurement policy with goals for minority and women owned businesses. Ruling on a summary judgment motion the federal district court held that the legislation did not create set-asides, preferences, or quotas but merely established goals and expected levels of effort as approved in *Fullilove*.

The State of Washington Supreme Court reviewed a unique AAP adopted by county ordinance for county public works contracts which was taken from Washington State's highway specifications. Contracts were to be awarded to the lowest responsive bidder who meets the MBE and WBE goals or demonstrates good faith efforts to do so. Good faith efforts were quantified by a formula set forth in the specifications. Should the low bidder not meet the goal, good faith efforts will be deemed satisfied if the achievement level is at least the average attained by all bidders. In this case entitled, *Southwest Washington Chapter, National Electrical Contractors Ass'n. v. Pierce County,*[55] the Washington court dismissed the declaratory relief action relying heavily on *Fullilove* and Justices Burger's and Powell's opinions.

In November 1980, the Ohio General Assembly passed an MBE statute for all state construction contracts. It included a 5 percent set-aside for minority prime contractors, a 5 percent MBE subcontracting provision, a 7 percent minority suppliers provision, and a 15 percent set-aside on state purchases. A federal district court found the statute unconstitutional for lack of legislative findings and as not being the least intrusive means for rectifying the effects of any past discrimination.

On appeal in a split decision reported in *Ohio Contractors Ass'n. v. Keip,*[56] the Sixth Circuit reversed. The majority concluded that the lower court had applied *Fullilove* too literally. It opined that Congress is not to be viewed as the exclusive body competent to eliminate the effects of past discrimination with race-conscious remedies. The fourteenth amendment granted equal authority to the states to deal with the denial of equal protection. The majority recognized no material distinction between Ohio's 5 percent set-aside and Fullilove's 10 percent MBE program. "This is a difference in method only, not in result."[57] Nor did the majority conclude that legislative findings were necessary. The district court felt that findings were essential to determine whether less intrusive means would have been effective in achieving its remedial goals. The circuit court premised its position on the basis that there is no requirement that the least restrictive means be chosen.

In another Ohio state court action entitled *State Ex. Rel. Connors v. Dept. of Transportation,*[58] the trial court was asked to review a new ODOT specification that "imposed an absolute requirement that two percent of the awarded value of such contracts be subcontracted to minority contractors qualified to bid with ODOT" subject to default termination for failure to achieve the stated percentage. The trial court dismissed for lack of standing on the basis that only competing bidders could challenge the requirements. This was reversed and remanded by the appellate court without reaching the merits of the action.

The Inconsistent Ninth Circuit

The Ninth Circuit also concluded that an AAP adopted by a school district was valid in the case of *Schmidt v. Oakland Unified School District.*[59] By statute California requires school districts to award all construction contracts in excess of $12,000 to the lowest responsible bidder. The school district in this case adopted a policy requiring that at least 25 percent of the dollar value of the work on each contract be performed by minority contractors for the bidder to qualify as a "responsible bidder" with provisions for numerous discretionary exceptions.

On a bid for refurbishing a school the low bidder listed one minority subcontractor for 16 percent of the work claiming that he had taken every possible measure to meet the 25 percent goal but was unable to do so. The board rejected the proposal and awarded to the second bidder,

a joint venture composed of 65 percent ownership by a White contractor and 35 percent by a Black.

The displaced low bidder sought a temporary restraining order from the state court to prevent the award. This was denied by the trial court and affirmed by the state appellate court without opinion. This federal court action was then instituted seeking damages for denial of equal protection and violation of the Federal Civil Rights Act.

The Ninth Circuit viewed this AAP as being identical with *Fullilove.* with one crucial exception. The AAP in *Fullilove* was mandated by Congress and the Chief Justice had pointedly observed as follows:

> Here we pass, not on a choice made by a single judge or a school board, but on a considered decision of the Congress and the President.[60]

Because of this statement the Ninth Circuit in its opinion did not rely solely on *Fullilove* to decide the case. Rather it independently reviewed the formation and bases for the school district's AAP and concluded that under all of the various standards of review the Oakland plan was justified; that the state had not precluded local school districts from adopting AAPs in connection with contracting activities; and that the board's findings were competent and supported by the facts.

A different panel of three judges from the same Ninth Circuit had previously invalidated a similar AAP adopted by the San Francisco Board of Education in *Associated General Contractors of California v. San Francisco Unified School District.*[61] The San Francisco plan required that bidders on school construction be minority contractors or that they utilize minority subcontractors for at least 25 percent of the contract work.

In interpreting California law the court of appeals in the San Francisco School District case concluded that the AAP violated the competitive bidding requirements mandated by the State Education Code. It relied upon the leading California Supreme Court case on competitive bidding entitled *Inglewood-Los Angeles County Civic Center Authority v. Superior Court.*[62] This case held that a statute requiring award to the "lowest responsible bidder" did not embody a concept of "relative superiority" which would permit award to a higher bidder as being "more qualified" than the low bidder. From this case the panel concluded that in California for purposes of contract award the school district would be precluded from considering any factor other than price, the minimum skills and financial qualifications of the bidder, and the quality of the bidders past performance. In addition this panel concluded that the San Francisco plan was also unconstitutional as it was applied. This opinion predated *Fullilove* but relied upon *Bakke.* The opinion described the AAP as generating a "stacked deck" rather than a "reshuffle." "Reshuffle" programs as used in the numerous school desegregation cases were permissible but not quotas which this court denominated as "stacked decks."

In the *Oakland Unified School District* case the Court of Appeals conceded that the prior San Francisco AAP was "very similar to the Oakland plan." However, it noted several important distinctions which in its opinion warranted a contrary result: The San Francisco district had made no finding of past discrimination; administrative waivers were not apparent from the opinion; plaintiffs in the San Francisco case sought only nonmonetary relief; there is some indication in the Oakland situation that the California courts would approve the Oakland AAP (by reason of the prior denials of a temporary restraining order); and finally the panel questioned whether under California law damages would be available for violation of a competitive bidding statute since plaintiff was seeking only monetary damages in federal court.

The Ninth Circuit in the Oakland action then chose not to assert pendent jurisdiction regarding the state law damage issue:

> We think the prudent course in this case would be to refrain from deciding the state law issues. . . . In the interests of comity, we choose to defer to the views of the California courts.[63]

The United States Supreme Court then granted *certiorari* in the Oakland School district action and in a *per curiam* opinion chastised the Ninth Circuit panel for not coming to grips with the pendent state law issue and the prior Ninth Circuit opinion involving the San Francisco school district:

> . . . . Although the Court of Appeals acknowledged that under one of its prior decisions, the plan at issue might be invalid under state law, it declined to decide the state-law question since it was a sensitive matter and petitioner could present it to the state courts.
>
> If the affirmative action plan is invalid under state law, the Court of Appeals need not have reached the federal constitutional issue. Nevertheless, the Court of Appeals declined to resolve the pendent state-law claim. Under *Hagans v. Lavine* 415 U.S. 528, 546, 94 S.Ct. 1372, 1383, 39 L.Ed. 2d 577 (1974) . . . this was an abuse of discretion in the circumstances of this case.[64]

The judgment was accordingly vacated and the matter remanded for further proceedings. In the absence of further reported proceedings the conflicting authorities of the Oakland and San Francisco opinions are left with serious doubt as to which view currently prevails in the Ninth Circuit. Nor did the Supreme Court seem willing to tackle the issue at this time.

Effect of Affirmative Action on Competitive Bidding

One competitive bidding issue was overlooked in both Ninth Circuit opinions. The AAP in each instance required award of the contract to a minority prime contractor or to a prime utilizing minority subcontractors for at least 25 percent of the work. Competitive bidding is based on a principle of equality of position in bidding and the absence of advantage or favoritism.[65] An AAP based on providing subcontracting opportunities arguably provides an equality of bidding in the sense that no one bidder has gained an advantage over others. In requiring that either the prime contractor be a minority or provide a certain percentage of minority subcontractors a bidding advantage is given to contractors who choose to joint venture with a minority for the purpose of achieving

the goal. This device was used in the Oakland situation providing the bidder with automatic qualification without the necessity to expend effort or money involved in seeking out qualified minority subcontractors. This was precisely what the low bidder complained about in the *Oakland* case. He asserted that he had made good faith efforts to locate qualified MBEs and was unable to meet the goal. The successful but higher bidder having secured a minority joint venturer for a percentage sufficient to achieve the goal assured himself of meeting the goal without having to seek out and encourage minority subcontractors and at the same time deprived his competitors of equal access to this minority as a possible subcontractor.

Generally AAPs, including the congressional DBE plan established in the STAA of 1982, are designed to encourage the emergence of small minority business enterprises into the mainstream of the construction industry. The plans are designed to promote subcontracting opportunities for minorities. They usually apply only to the larger contracts with numerous subcontracting opportunities. Apart from competitive bidding concerns it would seem to be good policy and practice to decide whether a given program is to be designed to promote minority participation at the prime contractor level with the use of set-asides, or at the subcontractor level. Except in areas of certain specialty work it could be assumed that successful MBEs would eventually advance in size and expertise to become general contractors and compete with other prime contractors.

Yet, federal agencies such as FHWA in their administration of the DBE program permit the states to include joint ventures with minorities in counting goal achievement. Of course, the joint venture must be created for a legitimate purpose consistent with industry practice and the minority co-partner must perform a commercially useful function as a prime in control of an identifiable portion of the contract performance.

Arrington v. Associated General Contractors[66] followed the authority of the *San Francisco School District* case in concluding that a Birmingham city ordinance establishing a 10 percent MBE program violated both the state competitive bidding requirements and the constitutional standards of *Fullilove*. The Alabama Supreme Court acknowledged that the city council had legislative powers that were lacking in reference to the San Francisco school district, but ruled that the city council had no more authority than an agency to initiate programs that violated state law or policy.

The Georgia Supreme Court relied on the *Arrington* and the *Inglewood-Los Angeles County* cases in arriving at a similar conclusion in *Georgia Branch, Associated Gen. Contractors v. City of Atlanta*.[67] By city ordinance most of the city's construction contracts were to require 20–35 percent MBE participation. The city charter requires award to the "lowest and/or best bidder." On appeal from denial of a summary judgment motion the court concluded that the competitive bidding requirements of the charter did not permit the city to enact the AAP.

Resolving AAP Issues by Summary Judgment

A somewhat unique AAP was developed by the Delaware Authority for Regional Transit (DART) to qualify for UMTA financial assistance. The bidding specifications required that all prospective general contractors include a minimum of 15 percent MBEs to perform portions of the work or identify portions of the work in an equal amount to be set-asides for MBEs. Where set-asides are proposed by the bidder DART would formally advertise for competitive subbids from prospective MBEs.

Pettinaro Construction submitted the lowest bid for construction of a transit operations center, but allocated less than 1 percent to MBEs. In response to an inquiry the bidder acknowledged the failure to achieve the specified goal but asserted its intention to secure more participation as the work progressed. Following rejection of this proposal as nonresponsive the bidder filed an action in federal court charging reverse discrimination and challenged the validity of the AAP as establishing a quota.

In *Pettinaro Construction Co. v. Delaware Authority*[68] the trial court concluded that it could not decide on summary judgment whether DART had authority to adopt the AAP under *Bakke* or whether the provisions were supported by sufficient findings as required by *Fullilove*.[69]

Similarly the California District Court of Appeal in *Department of General Services v. Superior Court*[70] ruled that the AAP could not be decided on summary judgment. The trial court had invalidated a 20 percent MBE provision for all major subcontracts on the State Capitol Restoration Project. The trial judge had concluded that the provision was in conflict with the competitive bidding requirements of the State Contract Act. The appellate court reversed on the basis that the project was under the jurisdiction of the Legislature and that the State Contract Act did not apply. However, the matter was remanded for further proceedings to determine the adequacy of legislative findings to support the AAP created for this project. The opinion does set forth in precise terms the nature and importance of supporting findings:

> . . . Thus we note that minority preferences in employment have been upheld only where there has been a legislative or administrative finding of prior constitutional or statutory violations resulting in discrimination by the affected industry or employer, and an appropriate remedy formulated to rectify it. [Citing the *Bakke* case] Such findings are of vital constitutional significance. They provide the basis for determining that 'the government interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively or administratively defined. Also the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.' [Quoting from Justice Powell's opinion in *Bakke*][71]

AAP APPLICATIONS AND BID DISPUTE LITIGATION

Certifications and Substitutions

It was previously noted that in many of the cases involving AAP applications the litigants do not challenge the constitutionality of the plan. Instead, they assert entitlement to the award within the terms of the AAP as set forth in the bidding specifications.

For example, in the case of *Regional Scaffolding v. City of Philadelphia*[72] the low bidder was not permitted to substitute for an uncertifiable MBE. The specifications for bidding required that the listed MBE be certified before the time of award to be counted toward the goal. It also provided that failure to submit a completed schedule of MBE/WBE participation or request for waiver with the proposal would result in rejection of the bid as nonresponsive. In addition, the listing of a minority or female was to constitute a representation that the listed subcontractor is available and capable of completing the work with its own forces.

Two of the low bidder's substitutions, listed as an MBE and as a WBE, were not certified at the time of bidding and failed to obtain certification in time for the award. The regulations applicable to the program permitted substitutions after award where the subcontractor withdraws from the project. The low bidder here requested the right to substitute before award. This request was denied by the city and the court concluded that the city's consistent "no substitution" policy was not arbitrary or capricious. It is probably significant that the city rejected all bids rather than award to the next bidder whose price was considered unreasonable.

The Supreme Court of Minnesota in *Holman Erection Co. v. Orville E. Madsen & Sons*[73] held that the prime contractor's listing of a nonminority subcontractor in its winning bid did not result in a binding subcontract and that the contractor was free to use a different subcontractor to fulfill its MBE obligations. Also in *J. J. Associates v. Fall River Housing Authority,*[74] the Massachusetts court ruled that a listed MBE subcontractor could be substituted out at the direction of the Housing Authority in order to save sufficient money to permit an award. The court had little difficulty in concluding that neither the prime contractor nor the Authority was bound to employ the subcontractor but it did have difficulty resolving the conflict of legislative policies between competitive bidding to secure the lowest price and the legislative intent to promote affirmative action:

> It is apparent that there is some conflict among various legislative objectives and that some statutory objectives remain essentially voluntary as to local housing authorities and perhaps other public entities. The provisions of G.L. c.149, sec. 44F, carry out a part of one statutory policy designed to keep down the cost of public construction by competitive bidding and give principal weight to price considerations. That policy, however, has not been adjusted fully to the different legislative objective of affording special opportunities for MBE/WBE participation in public construction contracts.... The area appears to be one where the risk of confusion would be reduced greatly by a more complete and explicit expression of legislative intention....

In *Great Neck Electric Inc. v. City of New York*[75] the city adopted a policy requiring each bidder to submit with its proposal an affirmative action plan reporting the ethnic and female composition of its own work force. The city had modified its prior practice of permitting submittal after bid openings to avoid delays and difficulties in obtaining the reports. Rejection of the low bid in this case and award to another was upheld again on the basis that the requirement was not arbitrary or capricious.

In the case of *Owen of Georgia, Inc. v. Shelby County,*[76] the mayor of Shelby county rejected the low bid and awarded the contract to the second low bidder. The mayor's decision was based on the facts that the affirmative action report submitted by the bidders reflected that the second bidder employed a higher proportion of minorities; that the low bidder was an out-of-state firm; and that the second low bidder had agreed to reduce the contract price to that of the low bidder. In a split decision the Sixth Circuit ruled that the mayor could not reject a bid based on unannounced criteria and that the provision reserving the right to reject any bid required good cause which was lacking here. No restraining order had been obtained to prevent the award and the work was nearly completed. The low bidder was permitted, however, to recover damages in this action against the county based on promissory estoppel.

Presumably certification issues are not relevant in an award dispute since the Federal Regulations provide that the denial of certification by the recipient is final for all contracts being let by the recipient.[77] Reapplication can only be for future contracts.

Supplemental AAP Information After Bid Opening

Failure to submit the required MBE information as specified will result in a nonresponsive bid provided that the requirement is unambiguous and valid. In *James Luterbach Const. Co., Inc. v. Adamkus*[78] the district court held that contract instructions on an EPA-funded project by the Village of East Troy, Wisconsin, directing bidders to supply certain information regarding their efforts to comply with a 10 percent MBE goal and warning that failure to submit information "may" cause rejection of the bid as nonresponsive did not unambiguously state that bids would be rejected. Therefore, the court ruled that EPA had a reasonable basis for concluding that the Village acted improperly in rejecting the low bid setting forth "0" participation but in its explanation stated that it intended to achieve the goal. Supplemental information offered by the bidder stated that the "0" was inadvertent and confirmed that 10 percent would be achieved.[79]

The low bidder in another case, *Leo Michuda & Son Co. v. Metropolitan Sanitary Dist. of Greater Chicago,*[80] failed to list MBEs necessary to achieve the specified 10 percent goal but submitted the following statement: "No firm contractual commitments at this time, but we will use every available means to obtain the services of Minority Business Enterprises in performing this work."

Subsequently, the low bidder submitted a second "Goal Disclosure Form" identifying MBEs who had agreed to perform 18 percent of the dollar value of the work. The District accepted this submittal and

awarded to the low bidder. The court ruled that the low bid was not responsive and ordered recision of the award. Following the order for recision the District rejected all bids rather than award to the second bidder. The trial court held this to be an abuse of discretion. This portion of the trial court judgment was reversed by the appellate court.

A somewhat similar situation with a different result occurred in *City of Rochester v. U.S. Environmental Protection Agency*.[81] With EPA funding the city advertised for bids on a waste water treatment plant. The bid specifications established a 10 percent MBE goal with a good faith efforts alternative. The low bidder submitted with his bid evidence of a goal achievement of 2.7 percent. Following bid opening the city requested evidence of his "positive efforts" to meet the 10 percent goal. The bidder responded with documentation of its efforts to meet the goal and subsequently filed substantial additional data including an increase in participation to 7.45 percent with an expectation that this would be increased further by the time of completion of the work.

The city concluded that good faith or "positive efforts" had been met, but several bidders challenged any award based on documentation received after bid opening. The city council rejected the protests and an appeal was made to the EPA regional administrator who concluded that the "positive efforts" had been made after bid opening and should not be considered. However, the EPA administrator acknowledged that the specifications were ambiguous on this point and ordered the city to reject all bids.

The city and the low bidder challenged the authority of EPA to order the rejection of all bids by filing the above noted action in federal court. The judge agreed with the plaintiffs, finding that the EPA action was an abuse of discretion. The specifications had been approved by EPA and were not ambiguous. The judge further concluded that the bidder had satisfied the requirements of the specifications in acknowledging a commitment to exercise positive efforts to attain the goal. Further, there was no language in the specifications indicating that a bid would automatically be rejected for failure to submit a positive efforts statement with the proposal since provision was included for additional documentation.

One might criticize the failure of the court, apart from the looseness of the specification language, for not recognizing the difference between positive efforts expended before bid opening, in preparation of the bid, as opposed to those efforts made after bid opening to secure the award. An effective AAP should require all bidders to seek out and secure minority commitments in advance of bid preparation and not await bid opening. Otherwise the low bidder is provided with the option of "bid shopping" for MBE subcontractors to meet the goal or be disqualified for the award as he chooses. Also this practice tends to lead to negotiations between the low bidder and the awarding authority over what further efforts and participation will be accepted as a condition for award.

Very pertinent to this issue is a United States Comptroller General opinion dated April 6, 1984, entitled *Matter of A. Metz, Inc.*[82] An Indiana Department of Highways contract called for bidders to submit with their proposal either evidence of 15 percent participation or documentation of good faith efforts to achieve the goal. The state's practice approved by the Comptroller General was to permit additional documentation of good faith efforts to be submitted after bid opening but restricted the documentation to efforts expended by the bidder prior to the bid opening. The Comptroller General justified this position on the basis that MBE requirements are a matter of responsibility rather than responsiveness. Responsiveness is to be judged from the bid documents themselves, but in considering responsibility issues subsequent information can be solicited and considered by the awarding authority in considering the award. Many contract provisions and case authorities view affirmative action participation as a matter of responsiveness and not responsibility. The importance of the distinction goes mainly to questions of due process and necessity for a hearing before rejecting a bid or bidder.

One legitimate concern of public agencies is that subsequent submittals of information can provide the low bidder with an option for the award. By withholding the documentation the bid becomes nonresponsive, or the bidder not responsible, providing an escape from the proposal should the bidder so elect. California has attempted to dampen any propensity for bidders to use this device by making such action subject to a bond forfeiture:

> It is agreed that the bidder's security furnished under the provisions of Section 2-1.07, 'Proposal Guaranty,' of the Standard Specifications shall also be security for the bidder's compliance with the DB and WBE information requirements in Section 3-1.01A, 'DB and WBE information,' herein. It is further agreed that if the bidder fails to submit the required DB and WBE information by the times specified in said Section 3-1.01A, such failure shall be deemed to be a failure to execute the contract and shall be just cause for the forfeiture of the security of the bidder.[83]

In a very recent Washington State case entitled *Land Const. Co., Inc. v. Snohomish County*,[84] the court held that the bidder could not substitute a certified WBE after bid opening where it would provide the bidder with a substantial advantage over other bidders. The specifications required each bidder to list with its proposal only certified MBE and WBE subcontractors. The low bid was rejected because the WBE listed was not on the Washington DOT list of certified WBEs and no substitution was permitted.

The court recognized that the awarding authority could waive an irregularity if not material. "The test of whether a variance is material is whether it gives a bidder a substantial advantage or benefit not enjoyed by other bidders." The conclusion was that substitution would be a material variation in the terms of bidding:

> . . . Land Construction would enjoy a 'substantial advantage' over other bidders if permitted to submit the low bid with a non-certified WBE and then substitute a certified WBE after the bids are opened in that it could refuse to make such a substitution if it discovered that its bid was too low. Because it is the acceptance, not the tender, of a bid for public work which constitutes a contract [citation omitted] Land Construction would

have no obligation to perform under a bid containing a non-certified WBE. Before its bid is accepted, Land Construction could not be compelled to substitute a certified WBE. Snohomish County could not accept this low bid until it contained a certified WBE. If Land Construction was permitted to make this substitution after the bids are opened, control over the award of public work contracts would pass from the municipality involved to the low bidder.

Because Land Construction's bid contained a material variance from the call for bids, it was not responsive to the call for bids, and Snohomish County had 'good cause' under [the statute] to reject it.

Generally, as reflected in the foregoing cases, the courts have permitted bidders to submit information regarding MBE participation after bid opening unless precluded by the terms of the bidding specifications or practice of the awarding agency. However, earlier cases dealing with EEO requirements generally went the other way, but with notable exceptions.

The leading EEO case on this point is *Rossetti Constructing Co., Inc. v. Brennan.*[85] This 1975 case held that bidders on federally assisted contracts could not amend their EEO submissions after bid opening. This involved a failure to certify in the proposal a commitment to abide by the Chicago hometown plan. A similar result was reached in *Northeast Construction Co. v. Romney.*[86] A different result was reached in *Centric Corp. v. Barbarossa & Sons, Inc.*[87] where seven out of ten bidders failed to attach the required affirmative action plan to their proposals. The bid specifications had been modified for this project in the mistaken belief that EPA required the EEO plans with the bid. The Wyoming Supreme Court concluded that the failure to file on time was a minor, inconsequential and technical omission which the board should have waived because it afforded the low bidder no advantage over others.

REGIONAL BUSINESS AND EMPLOYMENT GOALS

To complete the topic of AAPs regarding their validity and enforcement one needs to be aware of certain variations that exist to the MBE theme. This includes the regional or local business enterprise and employment goals. Characteristically these programs limit employment and contractors to those from a particular city, region, or state. Usually the restriction applies to a minority or high unemployment core area.

The most recent and controlling case on this subject is the United States Supreme Court case of *United Building and Construction Trades Council v. The Mayor and Council of the City of Camden,*[88] decided in February 1984. By municipal ordinance the City of Camden, New Jersey, required that at least 40 percent of the employees and subcontractors on city construction projects be Camden residents, with a one-year residency requirement. This city action was taken in response to state legislation establishing a comprehensive AAP in the awarding of public works contracts. The Supreme Court of New Jersey ruled the ordinance valid and not in violation of the Privileges and Immunities Clause of Article IV of the U.S. Constitution or the fourteenth amendment's Equal Protection Clause. Nor did it find it in violation of the Commerce Clause because the state was acting as a "market participant" rather than as a "regulator."

The U.S. Supreme Court granted a hearing, and while the matter was pending three significant changes occurred. First, the city's AAP was amended to change the 40 percent residency requirement from a strict quota to a goal requiring developers and contractors to make "every good faith effort" to comply. Secondly, the city dropped the one-year residency requirement. It was sufficient that an employee or subcontractor reside in the city to be counted toward the goal. Lastly, the U.S. Supreme Court decided *White v. Massachusetts Council of Construction Employers,*[89] holding that an executive order of the Mayor of Boston requiring that at least 50 percent of all jobs on city-funded projects be filled by city residents did not violate the Commerce Clause of the U.S. Constitution.

This left only the issue of whether Camden's AAP as modified violated the Privileges and Immunities Clause. The Court with Justice Blackmun dissenting ruled that the plan did discriminate against residents of other states. The Court's opinion, written by Justice Rehnquist, had no difficulty in disposing of the arguments that the Privileges and Immunities restriction applied only to state action taken against residents of other states and that out-of-State residents enjoyed the same disadvantage as New Jersey residents residing outside of the City of Camden.

Although the AAP did not violate the Commerce Clause, it was in violation of the Privileges and Immunities Clause:

> In sum, Camden may, without fear of violating the Commerce Clause, pressure private employers engaged in public works projects funded in whole of in part by the city to hire city residents. But that same exercise of power to bias the employment decisions of private contractors and subcontractors against out-of-state residents may be called to account under the Privileges and Immunities Clause. . . .[90]

However, like many constitutional provisions the Privileges and Immunities restriction is not absolute:

> . . . [The Privileges and Immunities Clause] does not preclude discrimination against citizens of other States where there is a 'substantial reason' for the difference in treatment. '[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them.' . . . As part of any justification offered for the discriminatory law, nonresidents must somehow be shown to 'constitute a peculiar source of the evil at which the statute is aimed.'[91]

The Court was unable to determine from the record whether the Camden AAP was justified or not, and remanded the case for a factual determination. By way of guidance the opinion quoted generously from some of its earlier opinions, particularly from *Hicklin v. Orbeck,*[92] where the Supreme Court struck down the "Alaska Hire" statute containing

a resident hiring preference for employment related to the development of the state's oil and gas resources:

> . . . The Alaska Hire statute . . . swept within its strictures not only contractors and subcontractors dealing directly with the State's oil and gas; it also covered suppliers who provided goods and services to those contractors and subcontractors. We invalidated the Act as 'an attempt to force virtually all businesses that benefit in some way from the economic ripple effect of Alaska's decision to develop its oil and gas resources to bias their employment practices in favor of the State's residents.' . . . No similar 'ripple effect' appears to infect the Camden ordinance. It is limited in scope to employees working directly on city public works projects.[93]

Even though the *White* case, involving the City of Boston, held that residential preferences do not violate the Commerce Clause as long as the local agency is acting as a market participant and not a regulator, this may not hold true if USDOT funds are involved. In a significant footnote 9 to that opinion, Justice Rehnquist writes as follows:

> Respondents have asserted in this Court that the executive order also applies to funds the city receives from the Department of Transportation. . . . There is, however, nothing in the record to indicate that DOT funds are affected by the order. . . . Without support in the record for a contrary conclusion, we decide this case as though DOT funds are not involved. . . .[94]

Turning to other cases, the Illinois Supreme Court in April 1984 invalidated its State Preference Act in *People Ex Rel. Bernardi v. Leary Construction Co.*,[95] based on the *Alaska Hire* decision. The Illinois statute required that its contractors on public works employ only Illinois laborers unless none were available and so certified and approved by the contracting officers. At about the same time (March 1984), the Seventh Circuit released an opinion in *W.C.M. Window Co., Inc. v. Bernardi*,[96] holding this same statute to be in violation of both the Commerce and Privileges and Immunities Clauses.

Earlier the Washington Supreme Court struck down a Washington State statute requiring that contractors and subcontractors on public works contracts employ 90 percent to 95 percent Washington residents, the exact percentage dependent on the number of employees. The Court in *Laborers Local Union No. 374 v. Felton Construction Co.*[97] held that the statute violated the Privileges and Immunities Clause and failed to pass the two-point test to permit discrimination against nonresidence: (1) that the non-citizens constitute the peculiar source of the evil at which the statute is aimed and (2) a reasonable relationship exists between the danger represented by the non-citizens and the discrimination practiced upon them.

Very recently the Wyoming Supreme Court in *State v. Antonich*[98] ruled that the State's Preference for State Laborers Act did not violate the Privileges and Immunities Clause of the United States Constitution. This statute requires contractors to employ available Wyoming laborers for public works projects in preference to nonresident workers, with provision for certification by the State employment office if local resident employees possessing the necessary skills are not available.

Analyzing the *City of Camden* and the "Alaska Hire" cases the court concluded that the preference did discriminate against nonresidents regarding a fundamental right. At the same time it viewed the statute as narrowly tailored to address a valid state goal of ensuring employment of its citizens. In upholding the statute the court placed added significance to the fact that the preference statute confined its discriminatory practice to projects constructed with public funds.

PRI Pipe Supports v. Tennessee Valley Authority[99] involved a different kind of preference which was also held valid. The bid specifications in this case stated that bids are solicited from companies agreeing to perform at least 50 percent of its manufactured work in "labor surplus areas" identified by the Department of Labor. The low bidder, PRI, indicated that none of its manufacturing would occur in an eligible area and the bid was rejected as nonresponsive. The court disposed of the case because the bidder had no standing to sue under the federal Administrative Procedure Act but ruled alternatively that ". . . TVA is at liberty to place conditions on its bid invitations, and to reject bids which do not conform to such conditions."

The Mayor of New York attempted to create a local business enterprise (LBE) plan requiring that at least 10 percent of all contracts awarded and 10 percent of all subcontracts were to go to local businesses. The Appellate Division of the New York Supreme Court in *Subcontractors Trade Ass'n. v. Koch*[100] invalidated the Executive Order as an exercise of legislative authority and as ". . . another undisguised attempt on the part of the Executive branch to mandate unconstitutional 'quotas.' "

A further variation on the preferential theme is found in *Swengel-Robbins, Inc. v. Gayle Contracting, Inc.*[101] Under an Arizona statute a 5 percent bidding preference is given on public contracts to those who have satisfactorily performed prior public contracts, and have paid state and county taxes for at least two successive years prior to bidding. In this action the court prohibited an award to the low bidder based on the preferential statute. Both the low and second bidder had satisfactorily performed prior public contracts and both were Arizona contractors. However, the low bidder had not paid state and county taxes for the past two years.

For a more exhaustive discussion of other cases in this area refer to a very recent annotation entitled "Validity of State Statute or Local Ordinance Requiring, or Giving Preference to, the Employment of Residents by Contractors or Subcontractors Engaged in, or Awarded Contracts for, the Construction of Public Works or Improvements."[102]

CERTIFICATIONS: FRONTS, FRAUDS, FAKES, AND APPEALS

The Current Threat

By all appearances fictitious DBEs and WBEs are on the increase. News accounts of charges, complaints, and indictments involving the MBE and DBE programs are becoming more commonplace. Unfortunately, one can expect to read and hear more of the same in the future.

The increase in federal expenditures for highways and mass transit facilities resulting from the 1983 tax increase of 4 cents a gallon on gasoline means that over $70 billion of federal moneys will be expended

by the end of 1988. This same legislation, The Surface Transportation Assistance Act (STAA) of 1982, increased minority participation across the Nation to not less than 10 percent of these funds.[103] The result is that significantly larger amounts of money must go to minority firms even though in many places legitimate minority firms have not increased proportionately in size or numbers to satisfy this generated demand. At the same time transportation officials are required to increase the percentage goals far above what was previously required to qualify for federal funds.

On April 4, 1985, the *Wall Street Journal* ran a front page expose on storefront operations employed by contractors to satisfy DBE and WBE requirements. The article captioned "Phony Firms Riddle U.S. Program Set Up to Aid Minority Contractors" quotes one Black highway contractor as saying that the STAA program is creating more fronts than legitimate Black contractors. PennDOT's Inspector General stated that "This program invites fraud." With high goals it should be expected that bidders and their estimators will seek out any advantage they can over their competition. The ability of one contractor to find a loophole or devise an ingenious arrangement to secure the goal will be picked up immediately by the competition. It is no longer sufficient to be the low bidder. One must also either demonstrate sufficient minority participation to meet the goal or prove good faith efforts.

Generally fronts are created in one of three ways: (1) A prime contractor may establish a new but captive specialty enterprise setting up a trusted minority or female employee or relative as owner. (2) An established nonminority subcontractor, recognizing the additional business opportunities of minority certification, may ostensibly transfer controlling ownership of his business to his wife or trusted minority employee, friend, or relative. (3) Alternatively, the established subcontractor may choose to create a separate but parallel organization placing the wife or trusted minority in charge as apparent owner. Often these parallel DBEs or WBEs are operated out of the same location and share the same equipment and employees.

In addition, contractors can devise numerous ways to use properly certified minority or female firms to "front an operation." This involves the appearance that the minority firm is performing the work when in fact it is performed by a nonminority.

Who is to police the program? Many states probably view this purely as a federally imposed program. The states usually have only limited investigatory resources and must rely on outside complaints and federal investigations to disclose fraudulent schemes that get through the certification process. The result admittedly is less than perfect.

The Federal Regulations

Where are the states to go for guidance and answers? The starting place must, of course, be the Federal Regulations establishing this program. The final rules for the DBE program were issued July 21, 1983, in Vol 48 Federal Register No. 141 pp. 33432 *et seq.* They can also be located in 49 C.F.R. Part 23, Subpart D, commencing with Section 23.61. As with the earlier MBE regulations the preamble commentary and the section-by-section analysis far exceed the official rules in both quantity and quality of explanation. USDOT had the foresight to include the section-by-section analysis in Appendix A to the 49 C.F.R. Part 23 regulations. This is most helpful. However, ten pages of commentary set forth in the preamble to the final rule should not be overlooked. This can be of equal value in resolving a certification, award, or compliance issue and can only be found in the Federal Register reference. Those dealing with DBE issues on a continuing basis, particularly attorneys, should attempt to secure a copy of the final regulation and the Notice of Proposed Rulemaking issued February 28, 1983, in 48 Fed. Reg. 40 at 8416 *et seq.*, issued in immediate response to the passage of Section 105(f) of the STAA of 1982.

A final rule involving DBEs was also issued on April 11, 1983, in 48 Fed. Reg. 70 at 15476 *et seq.*, to take care of certain interim issues until the final rules were published and adopted. It covers interim recipient goals and clarification that the WBE program will continue unaffected by Section 105(f) of the STAA of 1982. It also set forth two warnings: goals will be significantly increased for most states and waivers cannot be expected to be granted in the future because of the impact of higher goals:

> The interim steps FHWA and UMTA have taken to implement the statute are intended to make recipients aware that it is likely that many recipients will have to significantly increase their MBE participation from levels originally projected for FY 1983. It is clearly important for recipients to begin increasing their efforts to obtain MBE participation.
>
> . . . Beginning with FY 1984, the Department does not intend to consider the need for transition to a ten percent goal to be a significant factor in reviewing waiver requests.[104]

One further note. The regulations were not intended to create a uniform nationwide program. FHWA views the regulations as "minimum requirements," and with its consent the states may impose their own bidding and contract requirements provided they do not weaken the intent or effectiveness of the program. For example, some states like Washington require that all DBE information be supplied by all bidders with their bids. Other states like California require all such information only from the two lowest bidders, as provided for in the regulations, by the second Friday following bid opening. However, California in its specifications allows bidders to use only DBEs certified as of the date of bid opening. This is to avoid inherent delays that can occur in making an award awaiting sufficient information from an indicated subcontractor to establish its eligibility for certification.

The Certification Process

Certification of DBEs and WBEs is a state function subject to review by USDOT on appeals taken by applicants denied certification or by third parties challenging a certification. But what does the state certify? Specifically, that the applicant is (1) a small business entity, (2) owned

and (3) controlled by, (4) an economically and (5) socially disadvantaged person.

Each word in this definition is critical. First, the applicant is a "concern" or "entity" which may be a corporation, partnership, or sole proprietorship. This entity, as opposed to the qualifying individual or individuals, must be a "small business concern" as defined in Section 3 of the Small Business Act and as implemented in the SBA regulations. Currently this means that the business concern or entity seeking certification has gross receipts of not more than $17 million as an average for the prior three years. Different figures and formulas apply as to certain specialty firms and manufacturers.[105]

Next, the entity must be owned and controlled by a qualifying disadvantaged individual or individuals.[106] Ownership means that 51 percent or more of the business must be owned by eligible individuals, and control means that the eligible business owners themselves control and direct the firm's management and daily business operations. These appear as straightforward propositions, but in closely held business arrangements it may be difficult to distinguish between actual conditions and appearances.

For example, in *American Combustion, Inc. v. Minority Business Opportunity Commission*,[107] ACI had been certified as an MBE under the District of Columbia's Minority Contracting Act. ACI submitted the lowest bid on the Convention Center mechanical construction contract bidding in joint venture with a nonminority firm. However, ACI's certification had expired and it was given an opportunity to reapply. Another bidder protested ACI's minority status. Following a hearing by the Commission the reapplication was denied. Stock in ACI was supposedly owned by two minorities and three Whites with controlling ownership held by the minorities. The hearing revealed that the stock ownership of the Black owners was actually in the form of "options" because the stock was purchased with little or nothing down and the balance was to be paid from bonuses and profits with no risk of financial loss to the minorities. Thus, it was concluded that no bona fide transfer had taken place, and the court refused to enjoin award of the contract to the second bidder or to reinstate ACI's MBE certification.

Presumably state law prevails as to both the legality of particular business arrangements and as to how control of a business is managed.[108] For example, if a qualifying minority owns controlling interest in a close corporation, but control is in a four-person board of directors, a majority of three is required for corporate action. It then would appear that the minority is not in control. However, if state law permits a by-law amendment delegating total control to the minority owner with controlling interest, the requirement would appear to be satisfied if that individual actually is in control.

No interstate reciprocity requirement exists, obligating one state to honor certifications of another state. USDOT was concerned that a reciprocity requirement urged by certain minority contractors and their congressional representatives would lead to "forum shopping" by ineligible businesses. At the same time USDOT urges the states to accept certifications by other recipients:

> ... However, the [U.S.] Department of Transportation urges recipients to use their existing authority under 49 CFR Part 23 to accept the certification of firms by other recipients in whose certification decisions they have confidence. . . .[109]

Determining Social and Economic Disadvantage

The individual or individuals qualifying the business concern for certification as a DBE must be found to be both socially and economically disadvantaged. Certain defined minorities are rebuttably presumed to be socially and economically disadvantaged. This includes Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, and Asian-Indian Americans as particularly defined in Section 23.62 of the DOT regulations. In addition, other minorities or individuals found to be disadvantaged by the SBA under Section 8(a) of the Small Business Act are included. Presumably this covers individuals from nonspecified minority groups who can establish with SBA that they are in fact socially and economically disadvantaged. The states must accept and cannot challenge an 8(a) certification except through SBA.

Apart from 8(a) certifications, the specified minorities are presumed to be economically and socially disadvantaged. Therefore, a wealthy minority may not be economically disadvantaged. Likewise, the qualifying individual must, in fact, be a member of one of the defined minority groups to establish social disadvantage. Appendix C to the section-by-section analysis concludes that a minority individual may not be able to establish social disadvantage if he or she is not a recognized member of the minority group:

> ... If an individual has not maintained identification with the group to the extent that he or she is commonly recognized as a group member, it is unlikely that he or she will in fact have suffered the social disadvantage which members of the group are presumed to have experienced. If an individual has not held himself or herself out to be a member of one of the groups, has not acted as a member of a community of disadvantaged persons, and would not be identified by persons in the population at large as belonging to the disadvantaged group, the individual should be required to demonstrate social disadvantage on an individual basis.[110]

As to eligible minorities who are presumptively disadvantaged, the states are not burdened with the obligation of inquiring into the actual social and economic situation to make determinations for every firm seeking certification. Disadvantaged status is presumed. However, if a third party challenges this status the state must follow the challenge procedures and make a determination from the facts presented by all sides.[111]

The states, however, are authorized to make individual determinations of social and economic disadvantage regarding individuals who are not part of a presumptive group. This applies to women contractors, Portuguese-Americans, handicapped veterans, Appalachian White males,

Hasidic Jews, and any other person who can establish a case for social and economic disadvantage.

In establishing the SBA 8(a) program Congress gave the Administrator broad discretion to determine which firms would qualify as economically or socially disadvantaged. Early in the program many charges of abuse were made which resulted in several congressional and presidential directives. As an example, in *Human Resources Management, Inc. v. Weaver,*[112] plaintiff had been certified as economically disadvantaged by reason of his "chronic economic problems" resulting from the poverty of his parents and aggravated by service in the Army during the Vietnam conflict. Plaintiff's certification was terminated as a result of a recertification program generated by congressional concern over abuses. Plaintiff contended that the recertification program was being administered to give discriminatory preference to minority groups. This charge was rejected by Judge Sirica on the pleadings except that he held that the agency had failed to articulate the precise criteria on which the question of economic disadvantage was being reviewed. Pending an articulation of these standards the action was stayed.

Appendix C attached to Subpart D of 49 C.F.R. Sections 23.61 *et seq.* provides guidance and standards for making social and economic disadvantage determinations. Five elements are to be considered in determining social disadvantage. Briefly they include (1) social disadvantage arising from color, national origin, gender, physical handicap or long-term isolation from mainstream American society; (2) demonstration that the individual personally suffered the social disadvantage and that it is not imputed from membership or association with a nondesignated minority group; (3) the social disadvantage is rooted in the individual's experience in American society and not in other countries; (4) the disadvantage must be chronic, long-standing, and substantial; and (5) the disadvantage must have negatively affected the individual's entry into or advancement in the business community.

Evidence of social disadvantage to establish these points can include denial of equal access to employment opportunities, credit or capital or equal access to educational opportunities including entry into business or professional schools.

Economically disadvantaged individuals are usually socially disadvantaged as well because of their limited capital and credit opportunities. Therefore, the guidelines direct that a determination first be made as to social disadvantage based on factors other than economic considerations. If social disadvantage is found in accordance with the described elements, an economic determination is made.

The test to determine economic disadvantage is even more subjective. The comparison is to be made between the relative economic positions of the socially disadvantaged individual and the nondisadvantaged. Arguably even the wealthy but socially disadvantaged individual could establish that without the social stigma there would have been even greater wealth:

> . . . Recipients are expected to make a basic judgment about whether the applicant firm and its socially disadvantaged owner(s) are in a more difficult economic situation than most firms (including established firms) and owners who are not socially disadvantaged.[113]

The Captive DBE/WBE and the Mentor-Protege Program

One of the most troublesome areas of enforcement for state highway agencies is the "captive" DBE or WBE. Often a prime contractor will aid, assist, or encourage a female or minority member of the contracting firm to establish another contracting business in order to take on subcontracting work for the prime contractor. Usually the individual has gained competence and experience in the prime contractor's business and is assured of future continuing business from the mentor. Characteristically these new firms become closely identified with the prime contractor. Equipment, workers, and even working capital may be supplied by the prime contractor's and the prime contractor will often own a financial interest in the fledgling firm.

Such arrangements are on their face value suspect. Yet they can be legitimate and beneficial business arrangements where the minority or female protege is in full control of the operations of the new firm. State highway agencies often find it difficult to establish the facts necessary to support a conclusion that a particular MBE or WBE is operating as a front. At the same time competitors and members of the minority community may be unwilling to accept these arrangements as legitimate because of the preexisting close association. The state agency on the other hand is reluctant to deny a certification based on inference, suspicion, or circumstantial evidence.

FHWA has recognized that these arrangements can be beneficial to the program to bring new minorities and women into the mainstream of construction contracting. This assumes that they are not used as fronts but are permitted to grow in independence as they gain business experience to supplement their technical competence. With this in mind FHWA recently finalized guidelines for the mentor-portege development program. It permits established firms to assist fledgling firms in providing specialized assistance to satisfy a mutually beneficial special need.[114]

The mentor and the protege must enter into a written development plan to be approved by the state highway agency. The mentor and the DBE or WBE must remain separate and independent; the mentor can provide various types of assistance including technical and managerial expertise, rental of equipment, a small portion of its personnel needs, and initial bonding and financial assistance including limited ownership interests. The protege firm, however, must remain responsible for management of the new firm, and the two firms must remain separate and independent business entities.

The development plan must be of limited duration and contain developmental benchmarks that the portege should achieve at successive stages of the plan. This is to permit proper monitoring of the development of the MBE or WBE firm to be certain that progress is being achieved toward a goal of complete independence. The agreement is to be terminable by mutual consent or by the state if progress is not made or if it

appears that the protege is not likely to achieve the objectives of the agreement.

An obvious side benefit to a state in implementing this concept is that civil rights officials will have an opportunity to offer the mentor-protege plan to one who cannot satisfy the requirements for an unqualified certification.

Certification Denials, Challenges, and Appeals

No agreement exists as to the depth to which an applicant is to be scrutinized for certification. Most states probably do not go much beyond or behind the information required in the Schedule A or B application. Some argue that the states charged with the responsibility for the certifications are naturally biased toward approval of applications since a greater number of certifications will ease the task in reaching its recipient goal. Therefore, they contend that it is necessary to investigate both form and subsistance of each applicant in depth.

Most states probably rely on challenges, complaints, and spot checks. The regulations are not specific and the only reference is found in the preamble commentary to the regulations dated March 31, 1980. This leaves the issue for each state to decide for itself:

> . . . While the regulation does not specify the depth of investigation, the recipient is obliged to ensure that the MBEs in its program are eligible. The recipient is best situated to determine how much scrutiny is necessary, but this determination is ultimately subject to DOT review.[115]

Section 23.53 sets forth the eligibility standards that were previously discussed.[116] It provides that the denial of certification shall be final for all contracts being awarded unless eligibility is temporarily reinstated by the Secretary of USDOT pending investigation of an appeal. A reapplication after attempting to correct deficiencies in ownership or control will apply only as to future contracts.

Any firm that believes that it was wrongfully denied certification must file its appeal with USDOT within 180 days after denial of certification unless the time period is extended by USDOT. USDOT is required to conduct a prompt investigation and either grant or deny certification with a written decision and reasons.

There is no requirement that the recipient conduct formal hearings to decide certification issues. Some have established review panels for questionable applications, but their proceedings are usually *ad hoc* informal fact gathering bodies. Legal concepts of minimum procedural due process as well as a desire to be certain that all the facts are being properly interpreted strongly suggest that the applicant be notified in writing of any perceived deficiencies in advance of any denial. Many recipients at this stage invite either written and/or oral responses.

In *M.B.E. v. Minority Business Opportunity Commission*[117] an appeal was taken by a decertified firm to the court which found that the Commission's action was supported by evidence of a wilful violation of the District of Columbia's Minority Contracting Act. However, the matter was remanded to the Commission because informational reports had been received from two other agencies including Maryland DOT asserting that the firm was a "minority front" and this information was not made available in advance of the Commission's hearing. The evidence established that the firm was owned by four directors of which two were minorities while the application listed three directors of which two were minorities. Although this was a wilful violation the court ruled that it had to remand the matter because it has discretion to impose a sanction less drastic than revocation of its certification.

When the DBE regulations were finalized on July 21, 1983,[118] Section 23.69 was added to the existing MBE/WBE certification procedure requiring that each state establish a challenge procedure to permit third parties to dispute the socially or economically disadvantaged status of any certified firm other than an 8(a) certification which must be challenged with the SBA. Upon receipt of a challenge the state agency shall determine whether there is reasonable cause to believe that the DBE is not disadvantaged. If none is found, that terminates the proceeding. If there is reasonable cause the state shall notify the DBE of the challenge and require information from the DBE sufficient to evaluate its disadvantaged status.

From its evaluation of the challenge and the response the state is to prepare and send to each side a copy of its proposed determination including reasons. An opportunity for an informal hearing is to be offered following which the state shall make its final determination. Appendix C to the regulations sets forth guidelines regarding evidence, presumptions, and standards to be followed in making these determinations.[119] After decision by the state either the DBE or the challenger can file an appeal to USDOT.

Decertification procedures were not included in the regulations *per se*, but an extensive discussion regarding decertification and an advisory procedure is discussed in Appendix A as part of the section-by-section analysis:

> The Department wants to take this opportunity to reemphasize the importance of scrutiny of all firms seeking to participate in DOT-assisted programs. We believe strongly that recipients should take prompt action to ensure that only firms meeting the eligibility criteria of 49 CFR Part 23 participate as MBEs, WBEs, or disadvantaged businesses in DOT-assisted programs. This means not only that recipients should carefully check the eligibility of firms applying for certification for the first time, but also that they should review the eligibility of firms with existing certifications in order to ensure that they are still eligible. . . .
>
> 49 CFR Part 23 does not, as presently drafted, prescribe any particular procedures for actions by recipients to remove the eligibility of firms that they have previously treated as eligible. When a recipient comes to believe that a firm with a current certification is not eligible, the Department recommends that the recipients take certain steps before removing the firm's eligilibity. The recipient should inform the firm in writing of its concerns about the firm's eligibility, give the firm an opportunity to respond to these concerns in person and in writing, and provide the firm a written explanation of the reasons for the recipient's final decision. This process may be brief and informal. . . . Proeedures of this kind are

not a regulatory requirement, but the Department believes that, as a matter of policy, that they are advisable for recipients to use.[120]

Contract Awards: Goals and Good Faith

Contract award is to be made to the lowest responsible bidder meeting the specified DBE and WBE goals or demonstrating good faith efforts in its attempt to meet the goals. To bidders, what was a simple arithmetic calculation to determine the winning bid has been shrouded in a mystery of subjective analysis leaving suspicions of favoritism and fears of corruption. Such suspicions and fears are, of course, the very things that competitive bidding sought to avoid.

It is not just the good faith efforts that give rise to such concerns. Occasionally, a bidder will submit DBE or WBE participation that appears to meet the goal but for one reason or another falls short. We will examine some of those situations.

The most obvious error may be a simple miscalculation in adding up minority or female participation or in calculating the percentage of participation. Minority and female participation is calculated at the actual subcontract price, not at the bid price.[121] In some states like California only DBEs and WBEs certified at the time of bid opening will be counted. A subcontract with a firm owned and controlled by both minority males and nonminority females is counted toward both goals in proportion to the relative percentage of ownership. Minority and female suppliers are limited to 20 percent credit of the value of the materials. Participation by a certified female minority can be credited toward either goal but not both.[122] This probably means that the participation cannot be split or duplicated. Credit can be only toward one goal or the other.[123] Probably it could be split between separate distinct items of work on the same contract. A misunderstanding or error by a bidder regarding any one of these rules could unexpectedly place the bidder's DBE or WBE percentage participation in jeopardy.

Prime contractors bidding jointly with minority contractors (but apparently not female contractors) can be credited with that portion of the joint venture that represents the ownership and control of the minority.[124] Thus, with a goal of 15 percent a joint venture which includes a minority ownership equal or in excess of that amount will achieve the goal. Recognize, however, that the minority joint venturer must actually perform, manage, and supervise a distinct and definable portion of the work, as would be the case with a minority subcontractor.

A contractor may count toward the goal its entire expenditure to a certified minority manufacturer.[125] However, if it is a supplier rather than a manufacturer, only 20 percent of the expenditures will be counted.[126] Even for the 20 percent credit it must be established that the minority performs a commercially useful function in the supply process and is not a mere conduit to gain participation credit.[127] Some states like California view minority and female brokers of owner-operated trucks as suppliers unless minority truckers are employed or it can be classified as a true subcontract. This requires that the trucking subcontractor have its own truck fleet with only incidental use of nonminority owner-operators.

A most troublesome concern can involve the application of Section 23.47(d) of the Regulations. This requires that each minority or female subcontractor perform a "commercially useful function ... consistent with normal industry practices." What this means is that a bidder cannot use a DBE or WBE who will, in turn, subcontract out all or a larger portion of the work than would normally be expected:

> ... If an MBE contractor subcontracts a significantly greater portion of the work of the contract than would be expected on the basis of normal industry practices, the MBE shall be presumed not to be performing a commercially useful function. The MBE may present evidence to rebut this presumption to the recipient. The recipient's decision on the rebuttal of this presumption is subject to review by the [USDOT].

By way of example a civil rights officer in examining a bid proposal might well exclude post-tensioning work subcontracted to a minority falsework or concrete finishing subcontractor on the basis that post-tensioning is specialty work normally performed by specialists in that field and that in a normal situation the prime contractor would deal directly with such a specialist. On the other hand, where the entire bridge structure is subcontracted out to a minority, it may well be consistent with industry practice for the bridge subcontractor to deal with all specialties employed in connection with that structure.

From this brief recital of the potential pitfalls to attaining the specified goal it should be apparent that having the "numbers" alone may not prove sufficient to secure the contract. This, of course, has equal application to the second and other bidders should the low bid be unacceptable. If for any reason the low bidder fails to achieve *either* the DBE or WBE goal, the good faith efforts expended prior to bid opening will be examined. This means that it is important insurance for the low bidder (and other bidders if requested) to supply information regarding its efforts along with evidence of minority and female participation even where the bidder is confident that the goals have been secured.

In submitting its DBE information the bidder is required to include a Schedule A affidavit which is an application for certification for any firm not already certified, unless, of course, the specifications restrict participation to DBE/WBEs certified at the time of bid opening. Schedule B is to be submitted for joint venture applications. Should an applicant not be certified in time for award, the contractor is to be permitted to propose a substitute DBE or WBE but in the process it may not increase its participation beyond that originally indicated.

Failing, for whatever reason, to achieve the goal the low bidder will receive the contract only if good faith efforts are demonstrated to the satisfaction of the awarding authority. One point of possible confusion needs to be clarified. Nothing prevents the low bidder from securing minority or female participation after bid opening and prior to submittal of its affirmative action information. However, in determining good faith efforts it is only those efforts made in advance of bid submittal that are

to be considered. All too often bidders wait until they learn that their proposals are the lowest before expending the efforts that should have been made in advance of bidding.

The *Metz* opinion of the Comptroller General of the United States, previously noted, contains an excellent discussion of this distinction between efforts before and after bid opening.[128] The Indiana Department of Highways (IDOH) had advertised a project with a 15 percent MBE goal. Each bidder was required to list the MBEs with which it had tentatively agreed to subcontract portions of the work. The low bidder with 9.9 percent participation was unable to meet the goal at the time of bid submittal. In accordance with the specifications, evaluation of good faith efforts was to be made by the MBE Review Committee as follows:

> . . . The 'MBE Review Committee' will review and evaluate all pertinent information relative to the solicitation of MBEs (WBEs) including, but not limited to, copies of correspondence, verbal and written, with responses and copies of all submitted bids on the items which MBEs (WBEs) did bid. Documentation shall be received from prime bidder within five (5) days. Inexcusable delay in submission may be cause to consider bidder nonresponsive.

The low bidder submitted to the Committee information as to the extent of its good faith efforts made before bid opening. In addition, it provided the names of additional potential MBE subcontractors sufficient to satisfy the 15 percent goal. The Committee recommended award to the low bidder.

The second low bidder who had met the goal with its bid challenged the award in court and this advisory opinion was requested from the Comptroller General. The opinion recognizes that the low bidder's MBE participation percentage cannot be increased and that its good faith efforts are to occur in advance of bid opening. However, the Committee did not specify whether its recommendation was based solely on subsequent satisfaction of the goal or whether it was also based on good faith efforts in advance of bid opening. Both the hearing officer appointed by the Director of IDOH and the Comptroller concluded that sufficient evidence was presented to the Committee to support a conclusion that the low bidder had expended sufficient good faith efforts in advance of bid opening to receive the award. The opinion recites that while the MBE information cannot be augmented, there is nothing improper in allowing "elaboration" on the manner it proposed to perform.

From these examples it should not be surprising that bidders, subcontractors, and state officials are perplexed in dealing with these complex and subjective challenges where once all was judged by comparative prices.

Assuming a low bidder has failed to make the goal with its bid, what will it take to satisfy the good faith efforts standard? In *M. C. West, Inc. v. Lewis*,[129] previously discussed; we noted that the trial court struggled with the good faith efforts concept required by the regulations but finally accepted as sufficient the guidance set forth in Appendix A to the regulations.[130] This appendix offers a list of nine "kinds of efforts that recipients may consider" which can be paraphrased as follows: (1) attendance at any pre-bid MBE meetings; (2) advertisements placed by the contractor in pertinent publications; (3) written notice to specific minorities; (4) follow-up to ascertain minority interest in bidding; (5) selection of portions of the work to increase the likelihood of minority interest; (6) supplying adequate information to minorities regarding the project and specifications; (7) good faith negotiations on price with minorities without rejection as unqualified unless investigated; (8) assistance in obtaining bonds, credit, or insurance; and (9) effective use of available minority assistance organizations.

Any analysis of good faith efforts must be as against this standard although other factors, positive or negative, can legitimately be considered when included in the bidding specifications. For example, a bidder is not obligated to accept a minority whose price is "unreasonable."[131] This means that it is not sufficient that all the lowest subcontract prices were accepted and none were minorities. It must be demonstrated by the bidder that good faith negotiations were conducted with minorities and that their prices were unreasonable. Probably it is not sufficient, in and of itself, that their prices were higher than nonminority subcontractors or higher than the cost for the bidder to perform with its own forces.

Is a bidder obligated to subcontract out work that it normally performs with its own workers? Good faith item 5, above, requires a selection and set aside of portions of the work where there is a likelihood for minority participation. If the goals were properly established, the project should contain adequate subcontracting opportunities and the particular style of a bidder not to subcontract or insist upon its usual nonminority subcontractors will not suffice.

California has inserted the following provision in its specifications to alert bidders to their obligation to make sufficient portions of the work available to subcontractors:

> It is the bidder's responsibility to make a sufficient portion of the work available to subcontractors and suppliers and to select those portions of the work or material needs consistent with the available DB and WBE subcontractors and suppliers, so as to assure meeting the goals for DB and WBE participation. . . .[132]

Objective standards for judging good faith efforts are wanting. The chore imposed on state highway agencies is to analyze all the relevant facts and apply its best judgment. The natural course of action for an agency is to attempt to save a low bid where possible. The exercise of its discretion will probably be upheld unless a clear abuse of discretion can be proved. These agencies should not rely on the latitude of its discretionary authority solely to save the low bid. As other bidders and minority contracting entities become more sophisticated in dealing in this new competitive atmosphere more legal challenges and disruptions to the process could be the result. The best course of action is to have all the standards set forth in the bid specifications and then apply them as uniformly as possible.

The contract is awarded based on the contractor's representation of specific DBE and WBE subcontractor participation. Contract compliance involves monitoring each project to be certain that the contractor continues with its good faith efforts to achieve the contract goals. Central to this monitoring responsibility of each highway agency is a requirement that no minority or female subcontractor or supplier be substituted without prior state approval. The regulations, however, are rather brief on this particular issue:

> Recipients shall require their prime contractors to make good faith efforts to replace any MBE subcontractor that is unable to perform successfully with another MBE. The recipient shall approve all substitutions of subcontractors before bid opening and during contract performance, in order to ensure that the substitute firms are eligible MBEs.[133]

The section-by-section analysis published with the March 31, 1980[134] issuance of the original MBE regulations is much more elaborate on the substitution requirements, but it was not reprinted in the Code of Federal Regulations as was the subsequent regulation analysis. First of all, this analysis emphasized that the contractor is to notify the state highway agency immediately of the inability of a minority to perform its work and the intention to substitute another. Secondly, it strongly implies that default or inability to perform by the subcontractor is the only basis for substitution. Thirdly, it indicates that the state's approval of a substitute is approval of the minority's eligibility for certification and not to other attributes such as ability to perform. Lastly, the analysis volunteers that if extra costs or time are incurred by the contractor in securing a replacement minority, additional costs or time for completion can be allowable project costs for reimbursement by USDOT at the appropriate funding ratio.

This last statement of the commentary to the regulations has and will continue to generate controversy. It reads as follows:

> . . . Nothing in this rule is intended to preclude a recipient from modifying or renegotiating a contract in order to compensate the contractor or allow additional time for the completion of the contract. Reasonable extra expenses incurred by the recipient in such a situation are intended to be allowable project expenses reimbursable by DOT in the appropriate funding ratio.

This seems to ignore a basic contracting principle. The prime contractor has been and should remain primarily responsible for the selection of its subcontractors and suppliers including responsibility for their ability to perform timely in a workman-like manner. Affirmative action was not designed or intended to change that basic concept. Competitively speaking, contractors are to remain free to choose with whom they wish to subcontract. Their only obligation should be to thoroughly investigate the availability of minorities and women firms; to encourage their participation in bidding; and be satisfied as to their ability to perform quality work as subcontractors.

The uncertain language of the commentary regarding extra compensation actually does not authorize, direct, or mandate such payments. It merely does not preclude them. Absent a mandate to pay such costs each state highway agency must examine its own laws to determine whether such costs are an obligation of the state under its contract or are otherwise compensable. If they are not compensable under the contract or state law, they cannot be made compensable by federal regulation unless mandated. A mandated reimbursement becomes payable as a condition for qualifying for federal funds.

The comments do correctly restate the view that certification and acceptance concern only DBE or WBE eligibility. The contractor in proposing its minority subcontractors, in effect, certifies to their ability and availability to perform. The prime contractor can require bonding and in theory would have a cause of action against the subcontractor or its surety for failure or refusal to perform without justification. To view this otherwise is to encourage the more reprehensible competitors to secure marginal minority subcontractors solely for the purpose of obtaining the contract award with the expectation of substitution and extra compensation.

Another troublesome question as to substitution concerns the situation where no minority substitute at a reasonable price or perhaps at any price can be located. The contractor's principal obligation here is to secure a minority replacement at a reasonable price. To require otherwise would not only ignore the "goals" concept and convert it into a "quota," but could give rise to legal defenses such as impossibility of performance and commercial frustration.

An unanswered question is whether the contractor can offer or the state insist on a substitution of a minority as to a different item of work. In other words, can the contractor be required to substitute minority dollars of work rather than the same items of work? Again reasonable bounds must be respected, but certainly either side could offer or suggest such possibilities as a part of the continuing good faith efforts to achieve the goal during performance.

Minority participation is to remain a goal and not a requirement. The importance of controlling substitutions is that it is the key to monitoring contract compliance regarding continuing good faith efforts to achieve the contract goal. If the contractor has identified with its bid the DBEs and WBEs and the work they are to perform, monitoring that performance should ensure compliance.

From its inception FHWA has insisted that at least 50 percent of the contract work is to be performed directly with the contractor's own forces (with FHWA permission this may now be reduced to 30 percent). Highway agencies have therefore always been obligated to approve subcontractors and to monitor the 50 percent subcontracting limitation. Only approved subcontractors are to be permitted on the project site. There would be no obligation to pay for unauthorized work performed by an unapproved subcontractor without the knowledge or acquiescence of the resident engineer. This applies equally to minority subcontractors. Of course the prime contractor and other approved subcontractors do have

authority to be on the worksite, and the same rationale may not apply to the same extent as where an unapproved subcontractor is brought in to perform work assigned to a minority subcontractor. To clarify this issue California added the following language to its specifications:

> 5-1. _____PERFORMANCE OF DB AND WBE SUBCONTRACTORS AND SUPPLIERS.—The DBs and WBEs listed by the Contractor in response to the requirements in the section of these special provisions entitled 'Submission of DB and WBE Information, Award, And Execution of Contract', which are determined by the Department to be certified DBs and WBEs, shall perform the work and supply the materials for which they are listed unless the Contractor has received prior written authorization to perform the work with other forces or to obtain the materials from other sources.
>
> The Contractor shall not be entitled to any payment for such work or material unless it is performed or supplied by the listed DB or WBE or by other forces (including those of the Contractor) pursuant to prior written authorization of the Engineer.[135]

Some organizations and states have advocated the use of liquidated damage provisions as an enforcement device to ensure goal achievement. This has the appearance of a convenient and effective means to ensure results.[136] But several deficiencies should be noted. Liquidated damages have worked well for owners and contractors in controlling timely completions of the work. They have not worked well in other areas, such as in real estate, to compel performance. All too often they are challenged successfully as unenforceable penalties except where actual out-of-pocket damages are apparent. As applied to AAPs the result would be to jeopardize the goal concept and at the same time lose the ability to collect the penalty, because the goal could be viewed as a quota and the liquidated damage clause as an unenforceable penalty. Additionally, a stipulated damage provision in the contract for failure to achieve the goal could be used by a contractor as an invitation to incur the penalty and include its cost in the bid price rather than employ the good faith efforts that were promised.

As a side note, minorities themselves have been held in violation of the Sherman Antitrust Act in forming combinations to achieve a monopoly position in minority contracting. In *Compact v. Metro. Government of Nashville & Davidson County*[137] all the minority architects formed a joint venture firm to eliminate competition between themselves and increase their bargaining strength in an effort to achieve greater involvement in public contracts. White firms dominated the market, but on public contracts they were required to satisfy certain minority goals. The court found that as a matter of law the MBE set-aside share of public contracts represents a discrete submarket for architectual services in which only minority firms may compete and that the conspiracy was *per se* illegal.

The Federal compliance provisions are provided for the USDOT regulations. Section 23.68 contains provisions for sanctions against state recipients regarding Subpart D implementing Section 105(f) of the STAA for the DBE program. Subpart E covers all other compliance and enforcement provisions in this particular USDOT regulation. Again these concern devices and procedures to coerce recipient highway agencies into compliance with the program. It contains only a single reference to sanctions against contracting firms. This is found in Section 23.87 and incorporates the enforcement provisions of other regulations for debarment and Department of Justice prosecution for willfully providing incorrect information or in making a false statement.

By regulations published April 18, 1984, USDOT adopted for the first time a department-wide procedure to suspend or debar contractors for misconduct involving USDOT financial assistance contracts without the necessity for a prior conviction or indictment for a criminal offense.[138] Among the kinds of misconduct to which this applies are fraud, deceit, or other actions indicating serious lack of business integrity or honesty with respect to the eligibility of firms to participate in the DBE, WBE, or MBE programs. Commentary to a recent amendment specifies the types of activities included:

> . . . For example, a firm may be suspended or debarred if it acts as or knowingly makes use of a 'front' company (i.e., a firm which is not really owned and controlled by minority, disadvantaged individuals or women, but poses as such in order to participate as a minority, disadvantaged, or women's business enterprise in a DOT-assisted program). Even in the absence of a specific false statement that would subject a party to criminal liability under 18 U.S.C. 1001 (the Federal 'false statements' statute), a firm which acts as or uses a 'front' may justifiably be viewed as acting so as to indicate a serious lack of business integrity or honestry.[139]

To clarify that the debarment and suspension provisions of the DOT regulations apply to the MBE/DBE/WBE programs, this same technical amendment referred to above amended Section 23.87 to read as follows:

> Section 23.87 Suspension and Debarment; Referral to the Department of Justice.
>
> (a) If, at any time, any person has reason to believe that any person or firm has willfully and knowingly provided incorrect information or made false statements, or otherwise acted in a manner subjecting that person or firm to suspension or debarment action under 49 CFR Part 29, he or she may contact the appropriate DOT element concerning the existence of a cause for suspension or debarment, as provided in 49 CFR 29.17.
>
> (b) Upon the receipt of information indicating a violation of 18 U.S.C. 1001, or any other Federal criminal statute, the Department may refer the matter to the Department of Justice for appropriate legal action.[140]

In addition, FHWA also has authority within its own regulations, apart from USDOT regulations, to take administrative action against federal and state personnel and against contractors and their personnel for fraud, bribery, collusion, and conspiracy without the necessity for a prior conviction or judgment.[141] The evidence must be clear and convincing and it will result in immediate temporary suspension or debarment pending an investigation. After investigation and hearing if the contractor is found to be at fault, debarment can be imposed for a period of 3 months to 3 years. Where an irregularity is established by admission,

conviction, or judgment of a court for fraud, bribery, collusion, conspiracy, or other criminal offense committed in connection with any federal-aid highway project against a contractor or its personnel, they shall be debarred for at least 6 months up to 3 years.

Such violations may also result in potential criminal action and/or debarment by the state involved. However, if the violation pertains to the federal MBE/DBE/WBE program, it is more likely to involve only a federal debarment unless the state has by statute also adopted or duplicated the federal program. To the extent that DBE violations also transgress state criminal statutes, independent or concurrent remedies could exist.[142]

This was recently demonstrated in two actions filed in federal court by the Secretary of Labor who was charged in state court for MBE violations arising from a New York transit project constructed prior to his federal appointment. Two prior investigations by a special federal prosecutor concluded that there was no basis for federal prosecution. In *Schiavone Construction Co. v. New York City Transit Authority,*[143] the federal district court concluded that prior federal investigations of a particular transaction do not preclude the state from investigating alleged criminal conduct arising out of the same transaction. In seeking to enjoin the state investigation and issuance of any indictments the plaintiffs relied on the need for interpretation and application of the USDOT regulations that should in the first instance rest with USDOT. In addition plaintiffs cited 49 C.F.R. Section 23.87 requiring the state and others to report MBE violations to USDOT.

The specific facts were that Schiavone Construction in joint venture with another firm competitively obtained a $186 million transit construction contract funded 80 percent with UMTA funds. As required by USDOT regulations this contract provided that 10 percent of the contract price be paid to MBE subcontractors. Secretary Donovan for a number of years prior to his appointment had been a principal owner and executive vice president of Schiavone. The specific allegations are that Donovan and 11 co-defendants defrauded the Transit Authority by falsely representing that one of its subcontractors was genuine and independent when it was actually a sham created by Schiavone Construction Co.

The federal court refused to enjoin the state investigation and following issuance of the indictments, the Secretary of Labor sought to remove the criminal action to federal court which was also denied.[144]

CONCLUSION

By relative standard the DBE program is still in its adolescence. Further changes should be expected, but what direction these changes will take is anyone's guess. In theory at least, the USDOT DBE program will terminate with the expiration of funding under the STAA of 1982. Realistically, however, one can anticipate that the DBE provisions will be extended in the next STAA appropriation. Currently there is even speculation that the WBE program will be given congressional recognition with mandated goals in the next STAA appropriation.

Constitutional justification for AAPs is based on the temporary or nonpermanent imposition of race-conscious standards to alleviate the present effects of past racial discrimination in the highway construction industry. Our hope should be that these effects will be eliminated within a reasonable period of time and that achievements will be recognized as they occur. Otherwise, the DBE and WBE programs will remain as a permanent part of public contracting.

[1] The author of this paper has specialized in construction contract law for more than 25 years with Caltrans. This article is based on his knowledge and views of the subject matter and does not necessarily represent the views or position of the Department, the Legal Division, or Caltrans administration.

[2] The Supreme Court *in* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 102 S.Ct. 3141 (1982) ruled that absent a finding of discriminatory intent by contractors and their trade association, liability could not be vicariously imposed upon them based on the discriminatory conduct of the union or the joint apprenticeship training committee appointed by the union and the contractors.

[3] The acronym "AAP" is usually associated with minority employee work-plans but is used in this paper in a broader context to include all types of contractually imposed affirmative action provisions.

[4] *See* Note, Exec. Order No. 11246: Anti-Discrimination Obligations in Government Contracts, 44 N.Y.U. L. Rev. 590 (1969).

[5] For a history of the development of the home town plan theories *see* Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. Chi. L. Rev. 723 (1972); Leiken, *Preferential Treatment in the Skilled Building Trades: An Analysis of the Philadelphia Plan,* 56 Cornell L. Rev. 84 (1970); and Jones, *The Bugaboo of Employment Quotas,* 1970 Wis. L. Rev. 341 (1970).

[6] 442 F.2d 159 (3d Cir. 1971), *cert. den.* 404 U.S. 854.

[7] 343 U.S. 579, 72 S.Ct. 863 (1952).

[8] 443 U.S. 193, 99 S.Ct. 2721 (1979).

[9] 442 F.2d at 177.

[10] In Local Union No. 35 of Elect. Workers v. City of Hartford, 625 F.2d 416 (2d Cir. 1980), *cert. den.* 453 U.S. 913, the city adopted an AAP by ordinance calling for good faith efforts to achieve 15 percent employment of minorities and women on the city's major construction contracts. This ordinance was passed after a period of negotiations among union leaders, contractors, civil rights leaders, and the mayor. Only a few of the unions subscribed to the plan that was adopted and later included in the ordinance. In this declaratory relief action brought by an electrical union the court held that the AAP did not violate constitutional or statutory provisions.

[11] See Levinson, *A Study of Preferential Treatment: The Evolution of Minority Business Enterprise Assistance Programs,* 49 Geo. Wash. L. Rev. 61 (1980).

[12] 15 U.S.C. § 637(a) (Supp. III 1979).

[13] *See e.g.,* Fortec Constructors v. Kleppe, 350 F. Supp. 171, 173 (D.D.C. 1972), where the contractor on phase I of a project being completed challenged the award of phase II for placing it under the SBA set-aside program to benefit disadvantaged small contractors. The court ruled that the SBA had authority to designate projects for SBA subcontract awards and that plaintiff could not challenge the award without alleging denial of a right and opportunity to compete under the 8(a) certification program, i.e., that it was entitled to and was denied 8(a) status.

[14] 448 U.S. 448, 100 S.Ct. 2758 (1980).

[15] *See* Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696 (5th Cir. 1973) and Drabkin, *Minority Enterprise Development and the Small Business Administration's 8(a) Program: Constitutional Basis and Regulatory Implementation,* 49 Brooklyn L. Rev. 433 (1983).

[16] 499 F.Supp. 629 (M.D. Ala. 1980).

[17] 438 U.S. 265, 98 S.Ct. 2733 (1978).

[18] Pub. L. No. 97-424.

[19] M. C. West, Inc. v. Lewis, 522 F.Supp. 338, 339, note 1 (M.D. Tenn. 1981).

[20] Under the constitution, sex-based classifications are subject to only an intermediate level of scrutiny; therefore, any program satisfying the more stringent requirements of *Fullilove* satisfies this test as well. *See* Plyler v. Doe, 457 U.S. 202,

102 S.Ct. 2382, 2395 note 16. Washington State also had adopted the Equal Rights Amendment (ERA) as part of its state constitution which the Washington Supreme Court in Southwest Washington Ch., Nat'l Elect. Contractors Ass'n. v. Pierce County, 667 Pac.2d 1092, 1102, 100 Wash.2d 109 (1983) ruled did not invalidate AAPs designed to create equality:

> . . . The ERA absolutely prohibits discrimination on the basis of sex and is not subject to even the narrow exceptions permitted under traditional 'strict scrutiny'. [Citations omitted] The ERA mandates equality in the strongest of terms and absolutely prohibits the sacrifice of equality for *any* state interest, no matter how compelling, though separate equality may be permissible in some very limited circumstances [citation omitted].
>
> This absolute mandate of equality does not, however, bar affirmative governmental efforts to create equality in fact. . . .
>
> As long as the law favoring one sex is intended solely to ameliorate the effects of past discrimination it simply does not implicate the ERA. . . .

[21] 48 F.R. 33432 (July 21, 1983).

[22] ". . . Beginning with FY 1984, the Department does not intend to consider the need for transition to a ten percent goal to be a significant factor in reviewing waiver requests." 48 F.R. 15476 (April 11, 1983).

[23] 522 F.Supp. 338 (M.D. Tenn. 1981).

[24] 42 U.S.C. §§ 2000a *et seq.*

[25] See McFarlane, *The Nine Racial Classifications: A Guide for Transportation Attorneys*, 19 U. RICH. L. REV. 29.

[26] 347 U.S. 483, 74 S.Ct. 686 (1954).

[27] 42 U.S.C. §§ 2000a *et seq.*

[28] Prior to *Bakke* a similar issue was presented to the court in DeFunis v. Odegaard, 416 U.S. 312, 94 S.Ct. 1704 (1974). After the case had been briefed and orally argued a 5–4 majority dismissed the action for mootness. It did so on the basis that the plaintiff had been admitted to law school and was entering his final quarter with an agreement that he would be allowed to finish even if the case were decided against him. The Court ordered the parties to brief the issue of mootness and dismissed, even though both sides agreed it was not moot. See Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 U. PA. L. REV. 907, 910, and note 45 *infra*. Also in Schmidt v. Oakland Unified School Dist., 457 U.S. 594, 102 S.Ct. 2612 (1982), the Supreme Court in a *per curiam* opinion declined to pass on the merits or constitutionality of a school district's AAP for construction contracts because of an inconsistent prior opinion from the same circuit and a refusal to grant pendent jurisdiction on the issue of damages. See *infra* under heading "The Inconsistent Ninth Circuit" for further discussion of events concerning this case.

[29] 438 U.S. 265, 98 S.Ct. 2733 (1978).

[30] See Jacobs, *Justice Out of Balance: Affirmative Action After Bakke*, 17 Urban Lawyer 1 (1985); Plevin, *The Constitutionality of Affirmative Action in Public Employment: Judicial Deference to Certain Politically Responsible Bodies*, 67 VA. L. REV. 1235 (1981); Van Benthuysen, *Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge*, 45 ALBANY L. REV. 1139 (1981); and Levinson, *A Study of Preferential-Treatment: The Evolution of Minority Business Enterprise Assistance Programs*, 49 GEO. WASH. L. REV. 61 (1980).

[31] Until World War II most racial classifications were judged by the "rational relationship" test meaning that the classification had to be rationally related to the achievement of a specific governmental purpose. With the Japanese internment case, Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193 (1944), the Supreme Court announced that equal protection claims based on racial classifications would be "immediatedly suspect" and subject to "the most rigid scrutiny" though it upheld the internment action. Later the Warren Court formulated a two-tiered analysis for determining whether a classification would be subject to the rational basis or strict scruting test. Governmental classifications impinging on fundamental constitutional rights will be subject to the strict scrutiny test, and will be upheld only where found necessary to achieve a compelling governmental objective. See Van Benthuysen, *Minority Business Enterprise Set-Aside: The Reverse Discrimination Challenge*, 45 ALBANY L. REV. 1139 (1981).

[32] Three years after the *Bakke* decision the California Supreme Court in DeRonde v. University of California, 28 Cal.3d 875, 625 P.2d 220 (Cal. 1981), again had before it an admissions policy of the University of California. This time the issue concerned admission to its Davis Campus law school. Relying on *Bakke*, particularly on Justice Powell's opinion, the majority (4–3) concluded that the race conscious admissions policy would pass muster on the basis that ". . . the primary and obvious defect in the quota system in *Bakke* was that it precluded individualized consideration of every applicant without regard to race." Even though the statistics indicated that entering classes had averaged 33 percent minorities, the court concluded that statistics alone do not establish discrimination claims against more qualified Caucasians: "DeRonde's statistics may indicate that the University has placed considerable weight upon racial or ethnic factors in determining the composition of its entering law classes. Yet nothing in *Bakke* prohibits such a practice, so long as individualized personal consideration is given to the varied qualifications of each applicant. . . ."

[33] 443 U.S. 193, 99 S.Ct. 2721 (1979).

[34] 443 U.S. 209, 99 S.Ct. 2730.

[35] 443 U.S. 200, 99 S.Ct. 2726.

[36] § 703(j) of Title VII, 78 Stat. 257; 42 U.S.C. §§ 2000e-2(j).

[37] 443 U.S. 255, 99 S.Ct. 2753.

[38] In Uzzell v. Friday, 592 F.Supp. 1502 (M.D.N.C. 1984), on remand from the Supreme Court following three Fourth Circuit *en banc* opinions, the trial judge invalidated a University of North Carolina provision in the student constitution requiring the appointment of up to two minority race students to the campus governing council if a representative number were not elected. The Supreme Court remand in Friday v. Uzzell, 438 U.S. 912, 98 S.Ct. 3139 (1978), directed that the case be decided in light of its then recent *Bakke* decision.

[39] Fullilove v. Klutznick, 448 U.S. 448, 100 S.Ct. 2758 (1980).

[40] 91 Stat. 116, 42 U.S.C. (1976 ed., Supp II) § 6705(f)(2).

[41] The *Fullilove* action originated in the district court for the Southern District of New York which denied a requested temporary restraining order at 443 F.Supp. 253 (S.D.N.Y. 1977). The Second Circuit affirmed at 584 F.2d 600 (2d Cir. 1978). Two previous district courts had split on this issue. Contractors Assoc. of Western Pa. v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), held the PEWA AAP valid. Associated Gen. Contractors of Calif. v. Secty. of Commerce, 441 F. Supp. 955 (C.D. Cal. 1977), ruled the provision unconstitutional.

[42] 448 U.S. at 473, 100 S.Ct. 2772.

[43] 448 U.S. at 499, 100 S.Ct. 2785.

[44] "The removal of the [conclusive] presumption, according to the Government, resulted in the settlement of all cases challenging this regulation except the instant case." M. C. West, Inc. v. Lewis, 522 F. Supp. 338, 339, n. 1 (M.D. Tenn. 1981).

[45] — U.S. —, 104 S.Ct. 2576 (1984).

[46] Previously, in Guardians Ass'n. v. Civil Service Commission of the City of N.Y., — U.S. —, 103 S.Ct. 3221, laid-off minority members of the New York City police department sought damages under Title VI of the Civil Rights Act of 1964 for past discrimination regarding examinations and tests scores causing them to be hired later and layed-off sooner than similarly situated Whites. Title VI forbids discrimination in any program receiving the use of federal funds. Justice White writing for the 5–4 majority ruled that Title VI included unintentional as well as deliberate racial discrimination. However, the remedy for unintentional discrimination was for the local entity to correct the discrimination or lose its federal funding. No private action for damages would exist without findings of intentional discrimination.

[47] — U.S. at —, 104 S.Ct. at 2588.

[48] Even prior to the *Bakke* decision the Supreme Court gave evidence of its reluctance to pass on the constitutionality of AAPs. In Defunis v. Odeguard, 416 U.S. 312, 94 S.Ct. 1704 (1974), certain minorities were given a preference for admission into the University of Washington Law School with a goal of achieving 15 to 20 percent minority enrollment. Defunis was denied admission even though 37 minority applicants were admitted under the AAP and all but one had averages below Defunis. The trial court held the policy unconstitutional and ordered his admission. Thus he began his studies while the case was appealed. The Washington Supreme Court reversed, and the United States Supreme Court granted *certiorari* while he was in his second year of law school. At the time of oral argument he was in the final term of his last year. The court ordered the parties to brief the issue of mootness. Both sides contended it was not moot. Following oral argument it was dismissed as being moot. *See* Mishkin, *The Uses of Ambivalence: Reflections on the Supreme Court and the Constitutionality of Affirmative Action*, 131 UNIV. PA. L. REV. 907, 910.

[48] 723 F.2d 846 (11th Cir. 1984), *cert. den.* 105 S.Ct. 220.

[50] 723 F.2d at 851.

[51] *Engineering News Record*, p. 58, (Oct. 11, 1984).

[52] Associated General Contractors of Calif., Inc. v. City and County of San Francisco, No. C 84-6899 TEH (Dist. Ct. N.D. Cal.).

[53] Also to be considered as missed opportunities of the Supreme Court are its *per curiam* opinions in Schmidt v. Oakland Unified Sch. Dist., 457 U.S. 594, 102 S.Ct. 2612 (1982), and Defunis v. Odeguard, 416 U.S. 312, 94 S.Ct. 1704 (1974). *Certiorari* was granted in both cases. The Oakland case was remanded back to the Ninth Circuit to determine whether the AAP violated state law per a prior Ninth Circuit decision (discussed *infra* under heading "The Inconsistent Ninth Circuit"). In the *Defunis* case noted earlier, *supra* note 48, the Supreme Court after oral argument and rebriefing dismissed the case (5–4) for mootness because the plaintiff law student was assured of graduation even if he lost his case with the Supreme Court.

[54] 571 F.Supp 173 (E.D.Mich. 1983). A more specifically tailored action was recently filed by several landscape subcontractors in the United States District Court, Eastern District of North Carolina, Raleigh Division (Civil No. 85-527-CIV-5), entitled Carpenter v. Dole, against administrators and officials of USDOT and the North Carolina Department of Transportation. The action seeks to declare the STAA of 1982 Section 105(f) and the federal regulations unconstitutional insofar as they are applied to deprive landscape subcontractors and others similarly situated of the meaningful opportunities to participate in federal-aid projects. The contention is that the STAA and the regulations have resulted in a disproportionate impact on nonminority landscape subcontractors and on certain other segments of the highway construction industry.

[55] 667 P.2d 1092 (Wash. 1983).

[56] 713 F.2d 167 (6th Cir. 1983).

[57] 713 F.2d at 173.

[58] 455 N.E.2d 1331 (Ohio App. 1982).

[59] 662 F.2d 550 (9th Cir. 1981), *vacated* 457 U.S. 594, 102 S.Ct. 2612.

[60] 448 U.S. at 473, 100 S.Ct. at 2772.

[61] 616 F.2d 1381 (9th Cir. 1980), *cert. den.* 449 U.S. 1061, 101 S.Ct. 783.

[62] 7 Cal. 3d 861, 500 P.2d 601, 103 Cal. Rptr. 689 (Cal. 1972).

[63] 662 F.2d at 560.

[64] Schmidt v. Oakland Unified Sch. Dist., 457 U.S. 594 at 595, 102 S.Ct. 2612–13 (1982).

[65] *See* Baldwin-Lima-Hamilton Corp. v. Superior Court, 208 Cal.2d 803, 25 Cal. Rptr. 798 (Cal. App. 1962), where the awarding authority was prohibited from awarding a contract containing invalid buy-American provisions even though the low bidder in its proposal acknowledged that the provisions were unenforceable and offered a lower alternate bid based upon its ability to use foreign made materials.

[66] 403 So.2d 893 (Ala. 1981). *See also*, S. N. Nielsen Co. v. Public Bldg. Com'n., 410 N.E. 2d 40, regarding a unique bidding formula used to factor in affirmative action achievement on a competitive basis. The specifications set forth a detailed "canvassing formula" that was to be used to adjust bid prices for award determination purposes only by giving each bidder credits for the percent of hours worked by minority workers up to 50 percent of the total hours worked on a given project. Nielsen was the monetary low bidder, but after adjustments according to the formula the third bidder, Del Webb Corporation, was declared the lowest responsible bidder. This was approved by the Illinois Supreme Court on the basis that the housing commission had the authority to establish standards of responsibility and that the bidders had a commitment to affirmative action and therefore this was a proper subject of bidder responsibility.

[67] 321 S.E.2d 325 (Ga. 1984). *See also*, J. J. Associates v. Fall River Housing Authority, 471 N.E.2d 400 (Mass. App. 1984).

[68] 500 F.Supp 559 (D.Del. 1980).

[69] In an unpublished opinion entitled Perini Corp. v. Mass. Bay Transp. Auth., U.S. District Court, District of Massachusetts, Civil No. 77-2340-MC, the judge ruled (Memo and Order dated Sept. 22, 1980) that MBTA's AAP of 30 percent MBEs was invalid. As in the *Pettinaro* case, *supra* note 62, the program cannot be based solely on findings prepared by UMTA or by others.

[70] 85 Cal. 3d 273, 147 Cal. Rptr. 422 (Cal. App. 1978).

[71] 85 Cal.3d at 283.

[72] 593 F.Supp 529 (E.D.Pa. 1984).

[73] 330 N.W.2d 693 (Minn. 1983).

[74] 471 N.E.2d 400 (Mass. App. 1984). *See also*, Southeast Grading, Inc. v. City of Atlanta, 324 S.E.2d 776 (Ga. App. 1984), where the court stated the rule as follows: "The mere fact that S & M submitted bid documentation to the city listing Southeast as a 'potential' sub-contractor does not demonstrate that S & M assented to the terms set forth in Southeast's . . . bid." (At 779)

[75] 473 N.Y.S. 2d 686 (Sup. Ct. 1984).

[76] 648 F.2d 1084 (6th Cir. 1981)

[77] 49 C.F.R. § 23.53(g) which reads as follows: "Except as provided in sec. 23.55, the denial of a certification by the Department or a recipient shall be final, for that contract and other contracts being let by the recipient at the time of the denial of certification. MBEs and joint ventures denied certification may correct deficiencies in their ownership and control and apply for certification only for future contracts." *See also*, Warwick Corp. v. Dept. of Transp., 486 A.2d 224 (Md. App. 1985), and Metro. Atlanta Rapid Transit v. Wallace, 254 S.E.2d 822 (Ga. 1979), which make reference to appeals to USDOT in regard to the issue of standing to challenge an award. These cases, however, involved certification challenges rather than award challenges.

[78] 577 F.Supp 869 (E.D.Wisc. 1984).

[79] *See* H. K. Porter Co. v. Metropolitan Dade County, 650 F.2d 778 (5th Cir. 1981), where the bidder left the MBE participation forms blank. Following a compliance hearing for award the contracting officer determined that the bid was nonresponsive. In the district court action the contractor contended that the MBE requirements exceeded the government's statutory authority. The district court refused to issue a preliminary injunction. On appeal from the denial the appellate opinion held that the injunction issue was moot and remanded it for trial on the merits. *See also*, Noel J. Brunell & Son, Inc. v. Town of Champlain, 407 N.Y.S.2d 447 (App. 1978), where the low bidder failed to complete its bid documents by filling in its MBE participation to achieve the 10 percent goal. The Town refused to award on the basis that it was an incomplete, nonresponsive bid. The contractor contended it was not required because the specifications stated that within 5 days the low bidder would be notified to supply detailed information regarding each MBE to be employed on the project. The court ruled for the bidder with a strong dissent.

[80] 422 N.E.2d 1078 (Ill. App. 1981).

[81] 496 F.Supp 751 (D.C. Minn. 1980).

[82] B-213518, April 6, 1984.

[83] State of California, Department of Transportation Special Provisions Section 3-1.01, dated September 17, 1984.

[84] 698 P.2d 1120 (Wash. App. 1985).

[85] 508 F.2d 1039 (7th Cir. 1975).

[86] 485 F.2d 752 (D.C. Cir. 1973).

[87] 521 P.2d 874 (Wyo. S.Ct. 1974).

[88] __ U.S. __, 104 S.Ct. 1020 (1984).

[89] __ U.S. __, 103 S.Ct. 1042 (1983).

[90] __ U.S. at __, 104 S.Ct. at 1029.

[91] __ U.S. at __, 104 S.Ct. at 1029.

[92] 437 U.S. 518, 98 S.Ct. 2482, (1978).

[93] __ U.S. at __, 104 S.Ct. at 1030.

[94] __ U.S. at __, 103 S.Ct. at 1047 n.9.

[95] 464 N.E.2d 1019 (Ill. S.Ct. 1984).

[96] 730 F.2d 486 (7th Cir. 1984).

[97] 654 P.2d 67 (Wash. S.Ct. 1982).

[98] 694 P.2d 60 (Wyo. S.Ct. 1985).

[99] 494 F.Supp 974 (N.D. Miss. 1980).

[100] 465 N.E.2d 840 (N.Y. Ct.App. 1984).

[101] 654 P.2d 17 (Ariz. App. 1984).

[102] 36 A.L.R. 4th 941.

[103] According to FHWA records, the amounts and percentages of funds going to minority businesses have steadily increased. In 1975, when FHWA began recording MBE participation, they were receiving $32.5 million, or about 0.5 percent, of the nation's highway contract funds. By 1982 MBEs' receipt of funds had increased to $415.5 million, or about 5 percent, and in 1983, when STAA Section 105(f) took effect, DBEs received nearly $800 million, or 9.8 percent, of the nation's highway contract funds. Report by the U.S. General Accounting Office, "Information on the Federal Highway Administration's Disadvantaged Business Enterprise Program," dated March 15, 1985, p. 4.

[104] 48 F.R. 15477-8.

[105] See 49 C.F.R. Part 23, Subpart D, Appendix B, and 13 C.F.R. Part 121, regarding determinations of business size.

[106] *See* Lane Constr. Corp. v. Hennessy, 414 N.Y.S.2d 268 (App. 1979), where a firm with a majority of its stock owned by women sought to compel the state transportation commission to place its name on the MBE/WBE registry. In denying the application the court held that majority ownership alone was not sufficient.

[107] 441 A.2d 660 (D.C. App. 1982).

[108] Issues concerning WBE ownership in community property states can be troublesome. In community property states a woman is considered to be owner of 50 per-

cent of all property and assets acquired during marriage unless acquired by gift, bequest, or descent. Thus, a husband could transfer by gift a controlling interest in a community property business to his wife by transmuting at least 51 percent of the business into his wife's separate property. A recent opinion from FHWA's Chief Counsel, dated December 19, 1984, responding to an inquiry from New Mexico approved the following tests: (1) require that the woman prove that she acquired her interest either prior to the present marriage or from resources of her own that existed prior to the marriage or came to her independent of the marital relationship; or (2) where she has acquired her interest in the business during marriage require that she prove that her husband transferred his communal interest in the company in return for some tangible property of equivalent value from the wife. The remaining inquiry, of course, is whether the management and daily business operations of the company are controlled by the woman owner.

[109] 48 F.R. 33440 (July 21, 1983).

[110] 49 C.F.R. Part 23, Subpart D, Appendix C.

[111] 48 F.R. 33435 (July 21, 1983).

[112] 442 F.Supp 241 (D.C. D.C. 1977).

[113] 49 C.F.R. Part 23, Subpart D, Appendix C.

[114] FHWA Technical Advisory Memorandum, Sept. 23, 1983.

[115] 45 F.R. 21182 (March 31, 1980).

[116] 49 C.F.R. § 23.53.

[117] 485 A.2d 152 (D.C. App. 1984).

[118] 48 F.R. 33432 at 33444; 49 C.F.R. § 23.69.

[119] 49 C.F.R. Part 23, Subpart D, Appendix C.

[120] 49 C.F.R. Part 23, Subpart D, Appendix A.

[121] 49 C.F.R. § 23.47(a).

[122] 49 C.F.R. § 23.47(b).

[123] The recipient state can have the participation of a certified female minority credited toward either its state-wide DBE or WBE annual goal without regard to how the contractor elected to take the credit. See 49 C.F.R. § 23.47(a).

[124] 49 C.F.R. § 23.47(c).

[125] 49 C.F.R. § 23.47(e)(1).

[126] 49 C.F.R. § 23.47(e)(2).

[127] 49 C.F.R. § 23.47(d)(1).

[128] See note 82 *supra*.

[129] 522 F.Supp. 338 (M.D. Tenn. 1981).

[130] 108. 49 C.F.R. Part 23, Subpart C, Appendix A.

[131] 48 F.R. 33441-2, July 21, 1983, preamble commentary.

[132] State of California, Department of Transportation Special Provisions § 2-1.03, dated Sept. 17, 1984.

[133] 49 C.F.R. § 23.45(f)(2).

[134] 45 F.R. 21178 (Mar. 31, 1980).

[135] State of California, Department of Transportation Special Provisions § 2-1.03, dated July 3, 1984.

[136] The case of DiMambro-Northend Assoc. v. Blanck-Alvarez, 309 S.E. 2d 364 (Ga. 1983), indicates that the city of Atlanta has employed a liquidated damage provision which, in this case, provided for a penalty of $3,000 per day for a contractor who, in bad faith, fails to maintain at least 25 percent MBE participation during performance. To satisfy the MBE requirement a 75/25 percent joint venture was formed with a minority contractor. Disputes arose between the joint-venture partners during performance, and the city withheld $3,000 per day because of the absence of the MBE joint venturer who left the project. This action was between the partners regarding an arbitration issue but indicated that the city did drop its withhold in settlement of a different action brought against it by the joint venture.

[137] 594 F.Supp 1567 (M.D. Tenn. 1984).

[138] 49 C.F.R. Part 29; 49 F.R. 15197.

[139] 50 F.R. 18493 (May 1, 1985).

[140] 50 F.R. 18493 (May 1, 1985).

[141] 23 C.F.R. § 16.4.

[142] Legislation has been introduced in the Congress (H.R. 1961) to amend Section 16(a) of the SBA by increasing the maximum fine for fraud in obtaining SBA benefits from $5,000 to $50,000 and the maximum prison term from two to five years. The bill also extends the penalty provisions to any contract or subcontract programs that employ the SBA Section 8(d) provisions defining social and economic disadvantage. This would make the penalties applicable to all contracts with STAA funding.

[143] 593 F.Supp 1257 (S.D. N.Y. 1985). *See also*, United States v. Bynum, 634 F.2d 769 (4th Cir. 1980), where a criminal conviction involving the use of fronts was reversed by reason of a jury selection issue. The case was that the construction companies were qualified under the SBA and MBE programs and used as fronts for another company to secure government contracts.

[144] *Application of Donovan*, 601 F.Supp 574 (S.D. N.Y. 1985).

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, contractors, federal administrators, civil rights officials, and others involved in implementing affirmative action plans and the disadvantaged, minority, and female business enterprise programs. Officials are urged to review their practices and procedures to determine how this research can effectively be incorporated in a meaningful way. Attorneys should find this paper especially useful in their work as an easy and concise reference document in Federal requirements for public contracts.