

Chapter 11

Affirmative Action in Public Contracting: The Final Years of the Clinton Administration

by Georgina Verdugo

I. *Adarand* and Its Aftermath

In 1995, the U.S. Supreme Court handed down *Adarand v. Peña*,¹ the landmark decision in which the Court chose to apply the most stringent level of judicial review — the strict scrutiny standard — to federal highway construction programs. This decision generated the most comprehensive review of federal affirmative action programs in history and led to the Clinton Administration’s “Mend it, don’t end it” policy.

Once again, the Court will consider *Adarand* in light of this strict scrutiny standard and could possibly impose the severest constraints on federal contracting programs in U.S. history. The impact of this decision could reach all federal affirmative action programs deemed “racial classifications” and could render them *fatal in fact*, thereby ending them. Thus, *Adarand v. Mineta* is the latest of a line of cases involving affirmative action in government procurement that could have far-reaching implications for programs designed to promote equal opportunity in employment, education, and other sectors as well.

In 1989, the Central Federal Lands Highway Division of the U.S. Department of Transportation (DOT) awarded the prime contract for a Colorado highway construction project to Mountain Gravel & Construction Company. Mountain Gravel solicited bids from subcontractors for the guardrail

segment of the contract. Adarand Constructors, Inc., a specialist in guardrail work, submitted the lowest bid. However, Gonzales Construction Company, a certified small business owned and controlled by socially and economically disadvantaged individuals, also submitted a bid. Under the DOT’s Subcontractor Compensation Clause (SCC), Mountain Gravel would receive a bonus if it hired subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals.

Adarand, a Colorado-based company owned by a Caucasian male, challenged the constitutionality of the SCC, alleging a violation of the Due Process Clause of the Fifth Amendment. Adarand sought declaratory and injunctive relief against any future use of the subcontractor clauses that he challenged. In *Adarand Constructors v. Skinner*² the District Court upheld the statutory provisions defining Disadvantaged Business Enterprise (DBE) and its goals program as constitutional, using the “intermediate level” of judicial review and relying upon *Fullilove v. Klutznick*³ and *Metro Broadcasting Inc. v. FCC*.⁴ The U.S. Court of Appeals for the 10th Circuit affirmed, using the intermediate scrutiny level of review and citing *Metro Broadcasting* and *Adarand Constructors v. Skinner*.⁵

The U.S. Supreme Court reversed the 10th Circuit’s decision, holding that “all racial classifications imposed by whatever federal,

state or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."⁶ The Court remanded the case to the lower court for a determination as to whether the SCC was narrowly tailored to serve a compelling governmental interest. The Court (O'Connor, J.) articulated three considerations to be used to analyze the constitutional sufficiency of the racial classification at issue: skepticism, consistency, and congruence. "Skepticism" requires any racial characteristic to be inherently suspect. "Consistency" mandates a standard of review to be applied regardless of the race of the persons benefited or burdened. "Congruence" requires that the equal protection analysis under the 14th Amendment and the 5th Amendment's Due Process Clause be the same.

In his dissent, Justice Stevens argued that controlling precedent required the application of the intermediate scrutiny standard, citing *Metro Broadcasting* and *Fullilove*. He also criticized the Court's failure to acknowledge a difference between invidious discrimination and the benign use of race to promote equality. He wrote:

There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the government's constitutional obligation to "govern impartially" . . . should ignore this distinction.⁷

The U.S. District Court for the District of Colorado, applying strict scrutiny, granted plaintiffs' motion for summary judgment.⁸ The U.S. Department of Transportation

appealed the decision of the district court, arguing that the court incorrectly found that the SCC program was not sufficiently narrowly tailored to a compelling governmental interest and therefore could not survive strict scrutiny. While the appeal of this decision was pending, the plaintiff filed suit against state officials, making the same arguments that the State of Colorado's use of the federal guidelines in certifying disadvantaged business enterprises violated the Constitution.⁹

The Colorado Department of Regulatory Agencies changed its certification program in response to the earlier district court decision and replaced it with a requirement that all applicants certify that each of their majority owners has experienced social disadvantage based on the effects of racial, ethnic, or gender discrimination. Using the revised standard, the agency certified Adarand as a DBE. Citing these events, the U.S. Court of Appeals held that the case was moot and vacated the district court's earlier decision.¹⁰ Adarand filed a petition for *certiorari* seeking Supreme Court review. The U.S. Supreme Court held that the case was not moot and remanded it back to the lower court to apply its strict scrutiny standard to the merits of the case.¹¹

On September 25, 2000, the court of appeals (Lucero, J.) upheld the DOT's program as revised, citing numerous congressional investigations and hearings as well as statistical and anecdotal evidence that showed that discrimination had prevented the formation of qualified minority business enterprises in the national subcontracting market. In so ruling, the court found that the federal government had a "compelling interest in not perpetuating the effects of racial discrimination in distributing federal funds or in remediating the effects of past discrimination in the government contracting markets created by its disbursements."¹² The court also found that while the SCC program in existence in

1996 was not narrowly tailored, the program as revised had removed the defects of the previous program and was narrowly tailored by requiring an individualized determination of economic advantage and eliminating the race-based presumption of economic disadvantage. The court considered other criteria as well, including the possible use of race-neutral means of facilitating participation, the limited duration of the race-conscious measures, program flexibility, the aspirational (vs. mandatory) nature of the goal, the burden on third parties, and whether the program was over- or underinclusive.

On March 26, 2001, the US Supreme Court granted *certiorari*, thereby agreeing to review the Circuit Court's decision. Oral argument will take place during the Court's 2001-2002 term beginning October 2001. The questions to be answered are: "1. Whether the court of appeals misapplied the strict scrutiny standard in determining if Congress had a compelling interest to enact legislation designed to remedy the effects of racial discrimination and 2. Whether the United States Department of Transportation's current Disadvantaged Business Enterprise program is narrowly tailored to serve a compelling governmental interest."

The Supreme Court will decide whether the DOT's DBE program, which was revised since the 1995 decision, is constitutional when the strict scrutiny standard is applied. This case has far-reaching implications. The Court could rule on narrow grounds and send the case back to the 10th Circuit court of appeals to reconsider its decision, or it could further narrow the boundaries of acceptable federal affirmative action programs involving "racial classifications" even when intended to remedy centuries of discrimination.

DBE programs are necessary to open the doors historically closed to minorities and women. The barriers to opportunity in the construction industry were well docu-

mented when Congress enacted the Transportation Equity Act for the 21st Century (TEA-21) in 1998. As the 10th Circuit court of appeals indicated, the congressional record supporting this legislation showed that "informal, racially exclusionary business networks dominate the subcontracting industry, shutting out competition from minority firms."¹³ For example, a Colorado Department of Transportation disparity study found that a disproportionately small number of women and minority-owned contractors participated in that state's highway construction industry; and more than 99% of contracts went to firms owned by white males.¹⁴

While minorities make up to 20% of the national population and own 9% of construction firms, they receive only 4% of construction receipts.¹⁵ Non-minority construction companies receive 50 times as many loan dollars as African American-owned firms that have identical equity. Minority-owned firms receive only 61 cents for every dollar of work that white male-owned firms receive; women-owned firms receive 48 cents. While Jim Crow laws have disappeared, transportation construction continues to rely on the "Old Boy Network," which, until the past decade, was almost exclusively white. This network perpetuates itself because it is based on business friendships and relationships established decades ago, before minority-owned firms were allowed to compete.¹⁶

A Denver-based study showed that African Americans were 3 times, and Hispanics 1.5 times, more likely than whites to be rejected for business loans. Minority businesses are viewed as bad risks and less desirable. Thus, the legitimate capital needs of such businesses are ignored.¹⁷ The average loan to a black-owned construction firm is \$49,000 less than the average loan to an equally matched non-minority firm, and in Denver minority construction firms are three times as likely to be rejected.

Discrimination by private contractors, unions, and lenders has impeded the formation of qualified minority businesses in subcontracting. Prime contractors also have been found to refuse to employ minority subcontractors due to the unwritten rule of the “Old Boys” network. Prime contractors that resist working with minority subcontractors have also gone so far as to refuse to accept low minority bids or to share low bids offered by minority firms with non-minorities in order to help them undercut the bid. This is called “bid shopping.”

A 1997 Urban Institute study found substantial disparity in government contracting.¹⁸ It found that minority-owned businesses receive approximately 57% of the amounts they would be expected to receive based on the number of available, i.e., “ready, willing and able,” minority-owned firms. These data apply for African American, Latino, Asian American and Native American groups and for women, who receive only 29% of the dollars they would be expected to receive based on their availability.¹⁹ Disparities are greater in localities where no affirmative action programs are in place.

When DBE programs are eliminated, there is usually a sharp drop in minority and female business participation. For example, when the State of Michigan terminated its DBE program, minority participation fell to zero, while the federal program was able to maintain 12.7% participation.²⁰ Other examples cited by the U.S. Department of Transportation include Louisiana; Hillsborough County, Florida; Arizona; Arkansas; Rhode Island; and Delaware; where DBE participation on construction projects plummeted once the programs were eliminated. Other jurisdictions included Nebraska, Missouri, Tampa and Philadelphia.²¹ In Colorado, after the federal district court held in *Adarand* that the DBE program was unconstitutional, significantly less highway construction work reportedly went to companies owned by minorities and women.

While companies owned by blacks received slightly more work (up from zero in 1998 to 0.5%) Hispanic-, women-, and Native American-owned firms experienced a significant decline in participation. As a result, the Colorado Department of Transportation announced that it is embarking on an “aggressive effort to bring those numbers back up.”²²

Contracting is a closed network, with prime contractors maintaining long-standing relationships with subcontractors; so minority-owned firms are rarely used as subcontractors on projects that lack affirmative action requirements. For the above reasons, the compelling state interest — a required element of the strict scrutiny standard of review — in enacting and implementing a DBE program on the federal level is beyond dispute.

The DBE program is intended to “level the playing field” for qualified female- and minority-owned firms, not taking away contracts from low bidders. Therefore, while some have argued that the DBE program “results in white male contractors not receiving the contracts they would otherwise expect to receive,” without those programs, minorities and women would lose the opportunity to compete.²³ According to congressional testimony, some non-minority contractors have accepted higher bids from other firms in order to avoid working with DBEs. Others testified that some general contractors “would rather lose money” than deal with female contractors.²⁴

The Department of Transportation’s regulations do not require prime contractors to accept higher bids from minority and female subcontractors. Moreover, the selection of subcontractors is not usually subject to low-bid requirements on the state and local levels. Other factors, including the experience of the prime contractor, the quality of the subcontractor’s work, and the reputation of the subcontractor are also considered.²⁵ The DBE regulations merely

require good faith efforts to achieve the DBE goals. Prime contractors do not have to ignore price or quality in the selection of minority or female subcontractors.

DOT's 10% goal in the DBE program is an "aspirational goal," not a quota or a "set-aside." The program specifically prohibits the use of quotas. The DBE goal is a national goal; it is not imposed on any state or locality. It is used to evaluate overall performance of the DBE program nationwide. If there is a precipitous drop in participation by DBEs, the department will evaluate its efforts to ensure nondiscrimination in DOT-assisted contracting opportunities. State agencies are allowed to waive goals when they cannot achieve the goal on a particular contract for a specific year.²⁶ The flexible goals contained in the DBE program are tied to the availability and capacity of firms in the local market. Lastly, the standard for compliance is *good faith effort*. As the 10th Circuit Court stated, race-neutral means to eliminate discrimination in this industry were used by Congress for years, and only after Congress continued to find discriminatory effects did it implement a race-conscious remedy. Hence, the goal included in the department's DBE program has ample justification, as a matter of both constitutional law and sound public policy.

While the program permits a presumption of economic disadvantage, the DOT added a net worth cap of \$750,000. Thus, regardless of one's race, gender, or the size of one's business, a person whose personal net worth exceeds \$750,000 is not deemed economically disadvantaged and is ineligible to participate in the program. Applicants will have to submit a personal net worth statement and supporting documentation with their applications.²⁷

The presumption of disadvantage contained in this revised program is based on well-documented history of racial and gender exclusion in the contracting industry and is therefore sustainable as a matter of

law. Non-minority males who can demonstrate that they are socially or economically disadvantaged may participate in the DBE program. Moreover, according to the DOT, businesses owned by white males have qualified for DBE status.²⁸ The presumptions of social and economic disadvantage are rebuttable, and if a state/recipient or third party demonstrates that there is a reasonable basis to conclude that an individual is not disadvantaged, the presumption may be removed.

The DOT's program is also narrowly tailored. As the 10th Circuit Court observed, the current regulations require that recipients (states) must "meet the maximum feasible portion" of their overall goal by using "race-neutral means of facilitating DBE participation." The DBE regulations list a number of race-neutral means available, including assistance with bonding and financing barriers, establishing a program to assist new start-up firms, assisting DBEs to develop their capacity to use emerging technology, and technical assistance.²⁹ Recipients are not required to have contract goals on each contract, but to use goals only for any portion of the overall goal that they cannot meet through race-conscious means.

The program has built-in flexibility; recipients set their own goals based on local conditions. Recipients also develop their own methods for setting goals and any contract may be waived entirely if the prime contractor shows that it made good faith efforts but could not meet the goal. The TEA-21 legislation also provided for an end date of 2004, unless reauthorized by Congress.

The DBE program affects a small percentage of total federal contracting dollars awarded by the Department of Transportation. In fiscal year 2000, only 7% of the prime contracts and only 2% of the federal dollars awarded went to DBEs.³⁰

As it was intended to remedy the effects of past discrimination, and as it is constructed, the program does not unduly impinge upon the rights of third parties. The revised regulations also require that DBEs not be so overconcentrated that they unduly burden the opportunity of non-DBEs to participate.³¹

II. The Importance of Minority Business: The Milken Report

The importance of minority and women business to the United States economy was documented in a report issued by the Milken Institute and the U.S. Department of Commerce's Minority Business Development Agency (MBDA) in September 2000. This report, "The Minority Business Challenge: Democratizing Capital for Emerging Domestic Markets," found that the economic growth of the nation cannot be sustained without the inclusion of minority business. It also found that "Absent broad-based institutional investor participation in minority and immigrant business communities — soon to be the new majority of businesses — continued growth in the American economy is impossible, affecting not just minority businesses but putting the nation's macro economy at risk."³² Minority firms are surpassing the growth of majority-owned firms and are growing at a rate of 17% a year, six times the rate for all firms. Minority firms' sales are also growing at a faster rate than majority firms: 34% per year or more than twice the rate of all firms.³³ However, minority firms receive only 2% of all private equity investments and 3% of all Small Business Investment Company investment funds.³⁴

This underinvestment in minority business also limits employment growth. Min-

orities account for 70% of the growth in the U.S. workforce and minority firms, as with other entrepreneurs, are an important source of job, income, and wealth creation. The report warns that without minority labor force participation, "labor shortages will become acute, further limiting productivity and growth." Access to capital for minority-owned firms is therefore vital for the healthy development of this growing sector of American businesses.³⁵

The role of minority entrepreneurs is also becoming increasingly important as demographic indicators suggest the growth of a disproportionately majority retired population, which will be dependent upon a workforce that is becoming increasingly diverse. As a result, minorities and women are becoming a critical segment of the economy and institutional investors must invest in firms owned by these groups in order to meet the high yield returns necessary to support the aging "Baby Boomer" population.³⁶ The report also suggests that investing in minority communities will also foster "bridgeheads" into the global markets.³⁷ The report recommended that there be "greater enforcement of minority procurement programs" as well as more innovative financial instruments to expand the pool of domestic and international capital investment in minority business, training and mentoring programs to create more minority venture capitalists and tax and other incentives for investment in minority businesses.³⁸

III. Conclusion

The Clinton Administration and the Department of Transportation, led by Secretary Rodney Slater, are to be commended for their valiant efforts to preserve affirmative action in federal contracting since the Supreme Court's decision in

Adarand v. Peña. Since the days when former Representative Parren J. Mitchell (D-Md.) attached an amendment to President Carter's \$4 billion Public Works Bill to set aside 10% of state, county, and municipal funds to hire minority companies as contractors and subcontractors, Congress and both Democratic and Republican administrations have tried to open the doors of opportunity to those historically excluded from federal contracting programs. The effort to integrate the construction industry, the last bastion of the proverbial "Old Boys" network that has profited handsomely from billions of dollars in federal aid projects, has met with relentless opposition since the 1970s. Organizations including Associated General Contractors of America are constantly challenging the legal standing of minority and women's DBE programs. One might ask, "Why the intense opposition to leveling the playing field? What are they afraid of?"

Surely there is enough federal highway construction money to go around. Moreover, the demographic data released by the Census Bureau tells us that America is quickly becoming more racially and ethnically diverse. If the federal government is to be able to serve the taxpayers' need for new highways, bridges, airports, and other transportation projects, it will have to reach out and include those men and women who have been systematically excluded from the construction industry. We simply cannot afford to have these projects remain the exclusive domain of the "Old Boys" club, which perpetuates itself by family and business relationships created long before minority and women-owned firms were allowed to compete. Perhaps these "Old Boys" are afraid of the future, but the future is here.

IV. Recommendations

The Bush Administration must continue the bipartisan legacy of protecting and advancing opportunities for minority and women-owned firms to contract with the federal government.

Standing alone, legislation that simply proscribes racial discrimination is an inadequate remedy, said the Clinton Justice Department.³⁹ Then-Senator Bob Dole once said that "one of the most important steps this country can take to ensure equal opportunity for its Hispanic, black and other minority citizens is to involve them into the mainstream of our free enterprise system."⁴⁰ In order to achieve this result, the government must continue to attack the deliberate, overt, and subtle barriers that have excluded minorities and women from obtaining contracting opportunities in both government and the private sector. Judge Lucero said, "Without affirmative action in its procurement, the federal government might well become a participant in a cycle of discrimination." The Bush Administration has indicated some support for the DOT's Disadvantaged Business Enterprise program as evidenced by its Supreme Court brief in the *Adarand* case.⁴¹ This is an encouraging first step. It is hoped that as the administration continues its first term, it will indisputably demonstrate its commitment to the law and principles of equal opportunity and affirmative action. Otherwise, this Bush Administration will simply be a passive participant, and "Affirmative Access" will have no meaning.

The administration must support and enforce laws that promote equal opportunity and affirmative action in employment and education as well as procurement.

As the Milken report stated, “America’s economic future is so inextricably linked with minority and immigrant groups that investment in these communities is essential.” Affirmative action, first embraced by former Vice President Nixon and by President John F. Kennedy, continues to be an important tool to remedy the effects of past discrimination, to promote equal employment opportunity, and to prevent discrimination in the future. Cases settled by the Equal Employment Opportunity Commission, the Department of Labor, the Depart-

ment of Education, the Justice Department, and other federal agencies during the Clinton Administration amply document the continuing problem of discrimination in employment and education, as well as in housing, health care, finance, and other aspects of life in the United States. The Bush Administration must examine the facts and embrace policies and programs that will ensure a truly integrated and diverse business community, workforce, and student body. America’s future depends upon it.

Endnotes

- ¹ 515 U.S.C. § 200 (1995).
- ² 790 Federal Supplement (1992).
- ³ 448 U.S.C. § 448 (1980).
- ⁴ 497 U.S.C. § 547.
- ⁵ 16 Federal Reporter 3d 1537 (1994).
- ⁶ 515 U.S.C. § 227.
- ⁷ *Id.* § 243.
- ⁸ *Adarand Constructors v. Pena*, 965 Federal Supplement 1556 (D. Colo. 1997).
- ⁹ *Adarand Constructors v. Romer*, Civil No. 97-K-1351 (June 26, 1997).
- ¹⁰ *Adarand Constructors v. Slater*, 169 Federal Reporter 3d 1292 (10th Circuit 1999).
- ¹¹ *Adarand Constructors v. Slater*, 528 U.S.C. § 216 (2000) (*per curiam*).
- ¹² *Adarand Constructors v. Slater*, 228 Federal Reporter 3d 1147 (2000).
- ¹³ 228 Federal Reporter 3d ____.
- ¹⁴ U.S. Department of Transportation, Office of Small and Disadvantaged Business Utilization website, <<http://osdbuweb.dot.gov/business/dbe/Background.html>>, at 12 (“Supplementary Information”).
- ¹⁵ *Id.*
- ¹⁶ *Id.* at 13.
- ¹⁷ *Id.*
- ¹⁸ Urban Institute, *Do Minority Businesses Get a Fair Share of Government Contracts?* (1997). The Urban Institute report was discussed at length in Citizens’ Commission on Civil Rights, *The Continuing Struggle: Civil Rights and the Clinton Administration*, at 111-113 (1997).
- ¹⁹ *Id.*
- ²⁰ Supplementary Information at 12.
- ²¹ *Id.*
- ²² “Getting Diversity Back on the Road,” RockyMountainNews.com, Apr. 19, 2001, at <<http://www.msnbc.com/local/rmn/drmn324174.asp>>.
- ²³ Supplementary Information at 9.
- ²⁴ *Id.* at 10.
- ²⁵ *Id.*
- ²⁶ *Id.* at 4.
- ²⁷ *Id.* at 7.
- ²⁸ *Id.* at 8.
- ²⁹ U.S. Department of Transportation, Office of the Secretary, Participation by Disadvan-

taged Business Enterprises in Department of Transportation Programs, Final Rule, 64 Federal Register 5,095, 5,132-33 (Feb. 2, 1999).

³⁰ General Accounting Office, *Disadvantaged Business Enterprises: Critical Information Is Needed to Understand Program Impact*, GAO-01-586, at 5 (June 2001).

³¹ 64 Federal Register 5,130.

³² Milken Institute and U.S. Department of Commerce, Minority Business Development Agency, *The Minority Business Challenge: Democratizing Capital for Emerging Domestic Markets*, at iii (Sep. 25, 2000).

³³ *Id.*

³⁴ *Id.* at iv.

³⁵ *Id.*

³⁶ *Id.* at v.

³⁷ *Id.*

³⁸ *Id.* at vii.

³⁹ U.S. Department of Justice, Federal Procurement, Proposed Reforms to Affirmative Action, Notice, 61 Federal Register 26,041, 26,053.

⁴⁰ *Id.* at 26,052, note 20.

⁴¹ *Adarand Constructors v. Mineta*, Brief for the Respondents (Aug. 11, 2001).