COMMENTS

Federal Efforts to Assist Minority Construction Contractors: The Need for Comprehensive Planning

Recent federal programs and executive orders designed to assist minority construction contractors have not been completely successful. After reviewing these efforts, this comment concludes that inadequate planning prior to program implementation is the primary reason for this lack of success and suggests guidelines for improving future programs.

INTRODUCTION

There are relatively few minority business enterprises (MBEs)[1] in the construction industry today,[2] and most of these

---

[1] A minority business enterprise is

> a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. . . . [M]inority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

42 U.S.C. § 6705(f)(2) (Supp. I 1979).

[2] The construction industry has been characterized as the most fascinating, hazardous and complex business in the United States. Dykhouse, quoted in S. TAYLOR, CATCHING UP: A STUDY OF BEHAVIOR AND EXPERIENCES OF MINORITY CONSTRUCTION CONTRACTORS IN NINE AMERICAN CITIES 15 (1973) (report for the Charles F. Kettering Foundation). "Federal contracting plays a significant role in the economy, purchasing an amount equal to 4.8% of the gross national product in fiscal year 1972." U.S. COMM. ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 2 (1975) [hereinafter cited as CIVIL RIGHTS COMM. REP.].

In 1972 only 4.3% of the total number of firms in the construction industry

are small in size.[3] While the federal government has instituted

---

were MBEs. Only 2.3% of the heavy construction industry consisted of minority-owned firms, and these firms received only 0.3% of the total receipts. *1978 Amendments To The Local Public Works Capital Development And Investment Act and the Public Works And Economic Development Act, Hearings Before the Subcomm. on Economic Development of the House Comm. on Public Works and Transportation*, 95th Cong., 2d Sess. 173-74 (1978) [hereinafter cited as *1978 Hearings*]. While minorities comprise over 15% of the nation's population, only 3% of United States businesses are owned by MBEs. 122 CONG. REC. 13866 (1976) (remarks of Sen. Javits). In 1977 less than one percent of the federal contracts awarded went to minority businesses. 123 CONG. REC. S3910 (daily ed. Mar. 10, 1977) (remarks of Sen. Brooke).

[3] R. GLOVER, MINORITY ENTERPRISE IN CONSTRUCTION 30 (1977). The problems faced by MBEs stem from numerous causes. Congress and a number of federal courts have acknowledged that past racial discrimination has deprived minorities of their "fair share of the action." In November 1976 the House Committee on Small Business described the problems encountered by minority enterprises in the following way:

> The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business . . . overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating . . . to perpetuate these past inequities.

HOUSE COMM. ON SMALL BUSINESS, SUMMARY OF ACTIVITIES, H.R. REP. NO. 1791, 94th Cong., 2d Sess. 182 (1977). *See* H.R. REP. No. 468, 94th Cong., 1st Sess. 1-2 (1975); H.R. REP. No. 1615, 92d Cong., 2d Sess. 3 (1972). *See also, e.g.*, United States v. International Union of Elevator Constructors, 538 F.2d 1012 (3d Cir. 1976); Associated Gen. Contractors of Mass. v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 959 (1974); Southern Ill. Builders Ass'n v. Ogilvie, 471 F.2d 680 (7th Cir. 1972); Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971).

A lack of essential management and business skills has also limited the ability of many MBEs to establish and maintain viable businesses. *See* S. TAYLOR, *supra* note 2, at 41; CIVIL RIGHTS COMM. REP., *supra* note 2, at 24; R. GLOVER, *supra*, at 21; H.R. REP. No. 1615, 92d Cong., 2d Sess. 3-4 (1972). The Civil Rights Commission Report noted that MBEs are frequently unaware of future bidding opportunities, have inadequate marketing staff, are unfamiliar with government contracting regulations and submit inadequate or untimely bids and proposals. CIVIL RIGHTS COMM. REP., *supra* note 2, at 24; 116 CONG. REC. 1888-889 (1970) (remarks of Sen. Bayh); M. HALL & O. SCOTT, MINORITY ENTERPRISE AND PUBLIC POLICY 24-30 (June 9, 1977) (publication for the Congressional Research Service, Library of Congress).

An additional reason for limited MBE participation in federal contracting is the lack of initial equity capital. This together with the reluctance of lending institutions to extend capital to minority businesses without sufficient equity,

several programs in the past decade to increase MBE involvement in federal construction contracting, these programs have had mixed results. Despite producing slight increases in the number of minority contractors and the amounts of their gross receipts,[4] these federal programs have suffered from inefficiency, delay and poor performance.[5]

The limited success of past and present federal programs is the result of inadequate planning prior to program development and implementation. There is no unified plan to coordinate the various programs designed to assist minority businesses. As a

---

causes existing MBEs to remain small, undercapitalized and unable to compete effectively in the market. S. TAYLOR, *supra* note 2, at 25; CIVIL RIGHTS COMM. REP., *supra* note 2, at 24-25; R. GLOVER, *supra*, at 35; M. HALL & O. SCOTT, *supra*, at 24-25; H.R. REP. No. 1615, 92d Cong., 2d Sess. 3 (1972).

Many MBEs are also unable to obtain adequate bonding. S. TAYLOR, *supra* note 2, at 31-39; R. GLOVER, *supra*, at 35; Note, *Minority Construction Contractors*, 12 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 694-95 (1977); 115 CONG. REC. 19383 (1969) (remarks of Sen. Bayh); 116 CONG. REC. 18888 (1970) (remarks of Sen. Bayh); CIVIL RIGHTS COMM. REP., *supra* note 2, at 24. Separate evaluation standards by surety-bonding companies are a major cause. 116 CONG. REC. 18886-89 (1970) (remarks of Sen. Bayh). Minority businesses are further handicapped in their effort to secure bonding by the absence of an adequate "track-record." CIVIL RIGHTS COMM. REP., *supra* note 2, at 23-27; H.R. REP. No. 1615, 92d Cong., 2d Sess. 3 (1972).

Economic conditions also limit the ability of minority businesses to obtain contracts. Higher costs for supplies, money and wages reduce the competitive position of MBEs during inflationary times. During recessionary periods these firms experience additional difficulties in acquiring financing while increases in costs restrict their ability to compete. M. HALL & O. SCOTT, *supra*, at 29.

The Civil Rights Commission Report found that minority firms are disadvantaged by pre-selection before the formal advertising process and that MBEs also suffer from abuses of discretion by government procurement officers. CIVIL RIGHTS COMM. REP., *supra* note 2, at 16-28.

[4] Between 1969 and 1972 the number of minority-owned construction firms increased 34%, and gross receipts rose 84%. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1977 SURVEY OF MINORITY OWNED BUSINESS ENTERPRISE (1977), cited in Fullilove v. Kreps, 443 F. Supp. 253, 258 (S.D.N.Y. 1977), *aff'd* 584 F.2d 600 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 100 S.Ct. 2758 (1980). Between 1969 and 1972 the receipts of construction firms owned by persons of Spanish origin increased 125%. U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1972 SURVEY OF MINORITY OWNED BUSINESS ENTERPRISES 2 (1975).

[5] CIVIL RIGHTS COMM. REP., *supra* note 2, at 59, 84; U.S. COMPTROLLER GEN., GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS: QUESTIONABLE EFFECTIVENESS OF THE 8(a) PROCUREMENT PROGRAM 32 (1975) [hereinafter cited as 8(a) PROGRAM REP.].

consequence, this series of fragmented programs has not substantially increased the viability of MBEs or strengthened their competitive position in the construction industry.[6]

The Department of Labor (DOL) instituted the Philadelphia Plan to increase minority representation in the skilled trades.[7] The Plan, however, was based on a series of faulty assumptions.[8] For example, it was assumed that a contractor could commit himself to hiring minority workers up to the annual rate of job vacancies within the industry without adverse impact upon the existing labor force.[9] These faulty assumptions have made the Plan less than completely successful.

The Small Business Administration (SBA) used the section 8(a) set-aside program to funnel as many government contracts as possible to minority-owned small businesses.[10] But the SBA did so without adequate regard for the potential viability of these businesses.[11] The SBA apparently operated the program with the belief that an increase in the number of contracts given to minority businesses would result in the expansion of those businesses.[12] In fact, however, the overwhelming majority of MBEs participating in the program have not expanded and have

---

[6] The Small Business Administration (SBA) §8(a) program, for example, has created a relationship between the federal government and MBEs which is characterized by economic dependency rather than cooperation. S. REP. NO. 1070, 95th Cong., 2d Sess. 1-9 (1978). *See* Section II, "THE SBA SECTION 8(a) PROGRAM," *infra*.

[7] The Philadelphia Plan required federal construction contractors to hire specified percentages of minority crafts workers. The range of minority group employment goals is reprinted in Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 164 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). *See* Section I, "THE PHILADELPHIA PLAN," *infra*.

[8] A discussion of these assumptions is found in Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 739-49 (1972).

[9] *Id.* at 742.

[10] The § 8(a) set-aside program required that certain government subcontracts be let exclusively to socially or economically disadvantaged firms. *See* Section II, "THE SBA SECTION 8(a) PROGRAM," *infra*. As used in this comment, "set-aside" denotes employment positions, contracts or privileges reserved exclusively or primarily for members of socially or economically disadvantaged groups or for enterprises owned, operated or controlled by racial minorities.

[11] A general discussion of the problems on the § 8(a) program is found in S. REP. No. 1070, 95th Cong., 2d Sess. 1-9 (1978).

[12] *Id.* at 8-9.

required additional government contracts to remain solvent.[13]

Recent presidential orders have also sought to assist MBEs.[14] Although these orders focus national attention on the problems faced by MBEs, orders alone cannot solve these problems. The bold proclamations must be supplemented by a unified program designed to coordinate a governmental response for assisting MBEs.

The MBE requirement of the Public Works Employment Act (PWEA)[15] has suffered from problems similar to those affecting earlier programs. No executive department study, congressional hearing or committee report considered the impact of the requirement before the PWEA was enacted. Although many project contracts have been awarded to MBEs under this program, these firms continue to require federal assistance in order to achieve self-sustaining growth.[16]

This comment assumes that federal assistance to minority business enterprises is itself desirable. The unimpressive results of these various federal programs, however, highlight the need for development of a unified plan designed to coordinate federal efforts to assist minority workers and MBEs. As federal funds for social projects become more limited in recessionary periods, the need for competent program planning and coordination will become even more urgent.

This comment surveys federal efforts to increase minority participation in the construction industry. Initially, this comment discusses the purposes and history of the Philadelphia Plan. The problems of the SBA section 8(a) program are then considered. This is followed by a review of recent major executive orders designed to increase minority contractor participation in federal construction programs. After examining the MBE requirement

---

[13] *Id.*

[14] Four recent executive orders sought to assist MBEs by establishing the Office of Minority Business Enterprise (OMBE) to provide business assistance and by declaring national policies encouraging minority business development. *See* Section III, "EXECUTIVE ORDERS," *infra.*

[15] The MBE requirement mandated that non-minority contractors participating in public works projects which received certain federal grants utilize MBEs for work totaling at least ten percent of the grant amount. *See* Section IV, "THE MBE REQUIREMENT OF THE PUBLIC WORKS EMPLOYMENT ACT," *infra.*

[16] U.S. ECONOMIC DEVELOPMENT ADMIN., DEP'T OF COMMERCE, INTERIM REP. ON 10 PERCENT MINORITY BUSINESS ENTERPRISE REQUIREMENT 24 (1978) [hereinafter cited as INTERIM REPORT].

of the PWEA, this comment analyzes the Supreme Court's decision in *Fullilove v. Klutznick*[17] upholding the constitutionality of the MBE requirement. Finally, this comment suggests some guidelines for a unified plan to coordinate federal efforts in this area.

I. The Philadelphia Plan

The Philadelphia Plan required contractors in the Philadelphia metropolitan area to make good faith efforts to achieve specified minority employment levels in their work forces.[18] The government established these ranges by examining then current minority participation in the trade involved, the availability of minorities for employment in that trade, the need for training programs in the geographical area, the need to assure employment demand for those in existing training programs and the impact of the program on the existing labor force.[19]

The DOL did not reveal the scope of the contractors' obligation when it instituted the Plan. The DOL also implemented the Plan before determining the degree of employment discrimination in the construction crafts.[20] As one commentator has said, the DOL decreed discrimination first and found it later.[21] The

---

[17] 100 S. Ct. 2758 (1980).

[18] The Philadelphia Pre-Award Plan existed prior to the Philadelphia Plan. The Philadelphia Federal Executive Board put the Pre-Award Plan into effect on November 30, 1967. The Pre-Award Plan required that the apparent low bidder on federally assisted construction contracts institute an affirmative action program to assure minority group representation in the skilled trades as a precondition to receiving a construction contract or subcontract. The Pre-Award Plan was suspended as a result of a Comptroller General opinion letter concluding that the Plan violated principles of competitive bidding. 48 Comp. Gen. 326 (1968).

The Secretary of Labor instituted the Philadelphia Plan in 1969 pursuant to a delegation of power in Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e (1976). This order required applicants for federal assistance to include in their construction contracts provisions for fair employment practices.

Executive Order 11246 also provided the impetus for a number of state plans to increase minority participation in the construction industry. *See* notes 53-54 and accompanying text *infra*. The Cleveland Plan, the Illinois-Ogilvie Plan and the Commonwealth of Massachusetts Plan were all established pursuant to Exec. Order No. 11246. *See* Comment, *supra* note 8, at 740-41.

[19] *Id.*

[20] *Id.*

[21] *Id.*

DOL finally fixed the contractors' obligation three months after the Plan was first announced.[22]

A DOL report found that a "substantial" number of qualified minority workers were available for employment, though considerable training might be necessary.[23] The report said that contractors could begin minority hiring up to the annual rate of job vacancies for each trade without adverse impact on the existing labor force.[24] It concluded that the suggested goals could be met by filling vacancies and new positions on the basis of approximately one minority craftsman for each nonminority craftsman.[25]

The viability of the Plan was soon questioned. A Senate subcommittee criticized the DOL figures for vacancy rates in the crafts and the availability of qualified minority workers.[26] The DOL's vacancy rate computations counted those workers who left the industry for any reason but made no allowance for returning workers. Those estimates were also based on a predicted continued growth in the building crafts—an assumption which time has shown to be unwarranted.[27] Moreover, the DOL made no findings that hiring minorities and nonminorities on a one-to-one ratio accurately reflected the proportions of minorities and non-minorities in the unskilled labor workforce.

The Contractors Association of Eastern Pennsylvania challenged the Philadelphia Plan as an invalid exercise of the power of social legislation,[28] receiving unexpected assistance from one official within the federal executive branch.[29] The district court rejected the argument that the Plan violated Title VII of the

---

[22] *Id.*

[23] Implementation Order, § 3(b)-(c) (on file at the U. C. Davis L. Rev.).

[24] *Id.* § 3(d).

[25] *Id.* § 3(f).

[26] *Hearings on the Philadelphia Plan and S. 931 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 62-64 (1969).

[27] Comment, *supra* note 8, at 743 n.109.

[28] Contractors Ass'n of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971).

[29] The U.S. Comptroller General considered the Philadelphia Plan unconstitutional on the ground that it established preferential quotas in violation of Title VII of the Civil Rights Act of 1964. 49 Comp. Gen. 59 (1969). The U.S. Attorney General, however, believed the Plan to be constitutional. 42 Op. Att'y Gen. 405 (Sept. 22, 1969).

1964 Civil Rights Act.[30] In affirming the district court decision, the Third Circuit Court of Appeals found the Philadelphia Plan to be a valid action within the executive power, proscribed by neither Title VI or Title VII of the 1964 Civil Rights Act nor the fifth amendment to the constitution.[31]

---

[30] Contractors Ass'n of E. Pa. v. Secretary of Labor, 311 F. Supp. 1002, 1010 (E.D. Pa. 1970), *aff'd*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). Title VII of the 1964 Civil Rights Act provides, in pertinent part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condition, or privileges or employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities . . . because of such individual's race, color, religion, sex, or national origin. . . .
>
> (d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining . . . to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

42 U.S.C. § 2000e-2 (1976).

[31] Contractors Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159, 171, 173-74, 177 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). Title VI provides that

> [n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d (1976). The pertinent provisions of Title VII are set out in note 30 *supra*. The court took judicial notice of prior union exclusionary practices, 442 F.2d at 173, and of the federal government's "vital interest" in having available the largest pool of qualified manpower possible. *Id.* at 171. The court also ruled that the plaintiffs had waived any possible challenges to the accuracy of the DOL findings. *Id.* at 177. Although the Supreme Court denied certiorari, Justice Powell's opinion in University of California Regents v. Bakke, 438 U.S. 265 (1978), cited the case with approval. *Id.* at 301-02 n.40.

All of the other state programs based on Exec. Order No. 11246 were upheld against challenges. *See* Percy v. Brennan, 384 F. Supp. 800 (S.D.N.Y. 1974) (New York Plan); Associated Gen. Contractors of Mass., Inc. v. Altshuler, 361 F. Supp. 1293 (D. Mass. 1973) (Massachusetts Commonwealth Plan); Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971) (Illinois-Ogilvie Plan); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) (Newark Plan); Weiner v. Cuyahoga Community College Dist., 249 N.E.2d 907 (Sup. Ct. Ohio

The DOL and the Office of Federal Contract Compliance Programs (OFCCP) recently made a proposal to expand the Philadelphia Plan nationwide.[32] Proposed comprehensive goals for affirmative action minority utilization would cover the entire construction industry for the first time.[33] The national plan would require that the goals be included in all federal or federally assisted construction contracts and subcontracts in excess of $10,000.[34] The proposed plan, unlike the Philadelphia Plan, established the contractors' obligation prior to the implementation of the program. But while the potential scope of the contractors' obligation is known, the methodology, plans and assumptions used in computing the figures are subject to question.[35] It is therefore difficult to predict either the cost of compliance or whether the proposed national plan will produce positive results.

The Philadelphia Plan marked the federal government's first large-scale effort to increase the number of minority workers in the construction industry. While the plan may have increased the number of minorities employed,[36] this increase must be considered against the difficulty of complying with its

---

1969) (Cleveland Plan).

[32] 44 Fed. Reg. 52283-84 (1979).

[33] The proposed plan divides the nation into numerous Standard Metropolitan Statistical Areas (SMSAs) and Economic Areas (EAs). Each SMSA and EA has separate proposed goals for the utilization of minority workers. The goals range from a low of 0.4% to a maximum of 87.3% and are applicable to a contractor's aggregate on-site construction workforces. 44 Fed. Reg. 52348, 52348-64 (1979).

[34] *Id.* at 52349.

[35] The DOL may be repeating the errors it made with the Philadelphia Plan by establishing a national plan on the basis of erroneous assumptions. The DOL/OFCCP proposal states that "every effort has been made to construct goals on the basis of a rational, reliable, valid and uniform information base," *id.* at 52348, yet the proposed goals are based on 1970 Bureau of the Census statistics. The OFCCP has stated that the advantages of using dated information "far outweigh the use of any available information which may have been collected more recently." *Id.* The proposal does not establish compliance timetables because it assumes that current minority workforce participation levels at least meet the 1970 workforce figures. *Id.*

[36] According to Donegan, *The Philadelphia Plan: A Viable Means of Achieving Equal Opportunity In The Construction Industry Or More Pie In The Sky?*, 20 KAN. L. REV. 195, 206 (1972), the Philadelphia Plan was designed to increase the number of minorities employed in the Philadelphia construction industry by 2,500 workers. The actual success of the plan has not been documented.

requirements.[37]

II. The SBA Section 8(a) Program

Since its creation in 1953, the SBA has had authority to obtain government procurement contracts and to let them to small businesses.[38] While section 8(a) of the Small Business Act of 1958 extended the SBA's power,[39] it was not until 1968 that the SBA began applying section 8(a) to assist businesses owned or controlled by minorities. Since then the SBA has obtained contracts from other governmental departments and agencies and has subcontracted their entire performance to socially or economically disadvantaged firms.

The application of the section 8(a) program was held to be constitutional in *Ray Baillie Trash Hauling v. Kleppe*. The district court had held that the SBA's operation of the program for

---

[37] Comment, *supra* note 8, at 741.

[38] H.R. Rep. No. 494, 83d Cong., 1st Sess. 1 (1953).

[39] *Compare* Pub. L. No. 536, § 8(a), 72 Stat. 389 (1958) (codified at 15 U.S.C. § 637(a) (1976)), *with* Pub. L. No. 163, ch. 282, §§ 207(c), (d), 208, 67 Stat. 235 (1953) (codified at 15 U.S.C. §§ 631-647 (1976)). Section 8(a) of the Small Business Act of 1958 extended the SBA's power to subcontract government contracts to qualified small business concerns. 15 U.S.C. § 637 (1976). A qualified small business must be owned and controlled by socially or economically disadvantaged persons. 13 C.F.R. § 124.8-1(b) (1978).

A brief history of the SBA § 8(a) program helps illuminate Congress' concern with minority-owned small business. As a result of limited participation by small businesses in the industrial mobilization for World War I and the Korean War, Congress passed several statutes empowering wartime agencies to procure government contracts and to let them exclusively to small business concerns. Defense Production Act Amendments of 1951, Pub. L. No. 96, ch. 275, 65 Stat. 131 (1951) (codified at 50 U.S.C. §§ 2061-2102 (1976)); Federal Property and Administrative Services Act of 1949, Pub. L. No. 152, ch. 288, 63 Stat. 377 (1949) (codified in scattered sections of 15, 40, 41, & 44 U.S.C. (1976)); Act of June 11, 1942, Pub. L. No. 603, ch. 404, 56 Stat. 351 (1942) (codified in scattered sections of 12, 15 & 50 U.S.C. (1976)).

After the Korean War, Congress decided that the needs of small businesses would be better served by a peacetime agency. In 1953 it passed the Small Business Act of 1953, Pub. L. No. 163, ch. 282, §§ 201-223, 67 Stat. 230 (1953) (codified at 15 U.S.C. §§ 631-647 (1976)), creating the SBA as a temporary agency. The SBA functioned as a temporary agency from 1953 through 1958. In 1958 Congress enacted legislation revising the Small Business Act of 1953 and converting the SBA into a permanent independent agency. Small Business Act, Pub. L. No. 536, 72 Stat. 389 (1958) (current version at 15 U.S.C. §§ 631-647 (1976)). *See* Note, *supra* note 3, at 695-706 for a more complete discussion of the history of the § 8(a) program.

the benefit of "socially or economically disadvantaged persons" was not authorized by the provisions of the Small Business Act. The court had also found that the program lacked objective criteria for the consideration of applications.[40] The circuit court reversed. It held that section 8(a)—standing alone—provided sufficient authority and that the SBA had broad discretion to decide what firms should receive subcontracts and the terms of those subcontracts.[41]

The section 8(a) program, like the Philadelphia Plan, has been the subject of intense criticism.[42] Investigations by Congress[43] and the General Accounting Office (GAO)[44] reveal a general failure of the program as a means of enhancing the viability of minority-owned businesses.[45] The SBA itself had admitted that the

---

[40] 334 F. Supp. 194 (S.D. Fla. 1971), *rev'd*, 477 F.2d 696 (5th Cir. 1973), *cert. denied*, 415 U.S. 914 (1974). Although the Supreme Court has never expressly found the SBA § 8(a) program to be constitutional, a plurality of the Court cited the program with approval in Fullilove v. Klutznick, 100 S. Ct. 2758, 2767-68 (1980).

[41] Ray Baillie Trash Hauling, Inc. v. Kleppe, 334 F. Supp. 194, 202 (S.D. Fla. 1971), *rev'd*, 477 F.2d 696 (5th Cir. 1973). The plaintiff had contended that the program was unauthorized because it was not specifically mentioned in the statute.

[42] *Id.* It found that " 'whites' are not eligible for the program benefits, except on a token basis" and that the program as administered was "invalid and illegal in that it lacks objective criteria other than those of race, color or ethnic origin for the identification of those persons who are deemed to be 'socially or economically disadvantaged.' " *Id.*

[43] Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 703-05 (5th Cir. 1973). The Court spoke primarily to the plaintiff's statutory arguments and gave little consideration to the constitutional issues. Neither did the Court question the limited participation of nonminority owned firms in the program. The Court avoided these issues by holding that the plaintiff lacked standing to raise these issues because it did not apply for participation in the program. *Id.* at 710.

[44] *See generally* Hopkins, *Contracting With The Disadvantaged, Sec. 8(a) and The Small Business Administration*, 7 PUB. CONT. L.J. 169 (1975); H.R. REP. No. 468, 94th Cong., 1st Sess. 28-30 (1975); S. REP. No. 1070, 95th Cong., 2d Sess. 1-13 (1978); 8(a) PROGRAM REP., *supra* note 5; CIVIL RIGHTS COMM. REP., *supra* note 2.

[45] S. REP. No. 1070, 95th Cong., 2d Sess. 8 (1978). According to SBA statistics, since fiscal year 1968 $2.2 billion in federal contracts had been let through the § 8(a) program to 3,726 businesses. S. REP. No. 1070, 95th Cong., 2d Sess. 8-12 (1978). Only 149 of those 3,726 businesses had "graduated" from the program (a business graduates when it possesses the requisite skills necessary to survive in an unprotected market). The SBA had located only 67 of the 149 companies. Dun and Bradstreet had financial information on only 41 of those

program has historically focused on directing contracts to socially and economically disadvantaged firms without regard to their potential viability as stable businesses at the end of the contracting period.[46] Thus, the history of the program does not inspire confidence in its ability to substantially increase the number of viable minority-owned businesses.

Congress sought to correct this situation in 1978 by extensively amending the Small Business Investment Act of 1958.[47] The section 8(a) program now places a greater emphasis on business growth and development.[48] This shift in emphasis may assist a few businesses to achieve self-sustaining growth. It cannot by itself, however, overcome the substantial problems facing minority businesses.[49]

III. Executive Orders

While Congress sought to increase MBE involvement in federal construction contracting through legislative programs, recent presidents have used executive orders to the same end. Various executive orders have proclaimed goals of increasing MBE involvement in federal contracting programs. But these orders have had little practical impact, and minority business enterprises still do not enjoy substantially increased participation in federal construction contracting.[50]

---

businesses—five were bankrupt, two were experiencing serious financial difficulties and only 33 showed a positive net worth. *Id.* at 8.

[46] *Id.* The approach of the program has tended to relegate minority firms to a segment of the construction industry offering little opportunity to enter the mainstream of the industry. *1978 Hearings, supra* note 2, at 92 (statement of Robert Hall, Assistant Secretary for Economic Development). Many of the contracts awarded by the SBA are for kitchen work or janitorial services at government facilities. *Id.* at 91.

[47] Pub. L. No. 507, 92 Stat. 1757 (1978) (codified at 42 U.S.C. §§ 6701-6710 (Supp. I 1979).

[48] S. Rep. No. 1070, 95th Cong., 2d Sess. 9-10 (1978). The amendment creates a high-level advisory committee to monitor and encourage placement of subcontracts with minority small businesses and a small business capital ownership development program.

[49] These problems include the lack of essential business management skills, difficulties in obtaining bonding, and inadequate financing. S. Taylor, *supra* note 2, at 21, 29, 40-45; R. Glover, *supra* note 3, at 21-51; M. Hall & O. Scott, *supra* note 3, at 24-30. *See also* note 3 *supra.*

[50] In fiscal year 1972, firms owned by minorities and women received less than one percent of the total dollar value of all government contracts. Civil

The executive branch's active involvement with minority employment and MBE participation in government contracting programs began in 1964 with Executive Order 11246. Order 11246 prohibited discrimination by contractors performing under federal contracts.[51] The Order also required applicants for federal assistance to include provisions in their construction contracts compelling contractors not to discriminate against employees and prospective employees.[52]

In 1969, President Nixon announced a national program to foster minority business ownership and development.[53] In order

---

RIGHTS COMM. REP., *supra* note 2, at vii. In fiscal year 1977, the federal government directed approximately 1.1% of all government contracts to minority businesses. U.S. COMPTROLLER GENERAL, GEN. ACCOUNTING OFFICE, REPORT TO THE CONGRESS: MINORITY FIRMS ON LOCAL PUBLIC WORKS PROJECTS—MIXED RESULTS 9 (1979) [hereinafter cited as GAO REP.].

[51] 3 C.F.R. 339 (1964-1965 Compilation), *reprinted in* 42 U.S.C. § 2000e (1977), as amended by Exec. Order No. 11375, 3 C.F.R. 320 (1967), *reprinted in* 42 U.S.C. § 2000e (1977), and Exec. Order No. 11478, 3 C.F.R. 462 (1971), *reprinted in* 42 U.S.C. § 2000e (1977). The Order provided that

> (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.
>
> (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

Id.

[52] *Id.*

[53] 5 Weekly Comp. of Pres. Doc. 371 (March 5, 1969). President Nixon issued Exec. Order No. 11458, 3 C.F.R. 779 (1966-1970 Compilation), as part of his program to encourage minority capitalism. This order led to the establishment of the Office of Minority Business Enterprise (OMBE) within the Department of Commerce. Exec. Order No. 11625, 3 C.F.R. 616 (1971-1975 Compilation), *superseding* Exec. Order No. 11458. The OMBE provided business assistance services to prospective and existing minority owned businesses. For an unfavorable review of OMBE effectiveness, *see* H.R. REP. No. 468, 94th

to maximize opportunities for participation of minority firms in government contracting as subcontractors and suppliers, the Minority Subcontracting Program (MSP) was created.[54] The MSP required that certain federal contracts include clauses compelling the utilization of minority contractors or subcontractors by federal prime contractors.[55]

Additional executive orders called for increased representation of the interests of small business concerns—especially minority-owned businesses—within the federal government.[56] As part of this goal of increased MBE participation in federal contracting, executive agencies were required to increase MBE representation and to develop comprehensive plans and programs to encourage minority-owned business enterprises.[57]

Despite the laudable goals of these executive orders, MBEs participate in federal contracting programs only to a limited degree.[58] This lack of success is traceable to the fact that executive

---

Cong., 1st Sess. 26-28 (1975).

[54] 41 C.F.R. § 1-1.1310-2(a) (1979).

[55] A minority business utilization clause was required to be included in all contracts which exceeded $10,000. *Id.* When a contract exceeded $500,000 and offered "substantial subcontracting opportunities," the prime contractor was required to develop an affirmative action plan to ensure fair consideration of minority firms as subcontractors. *Id.* § 1-1.1310-2(b).

[56] President Nixon issued Exec. Order No. 11518, 3 C.F.R. 535 (1971), on March 21, 1970.

President Carter has also sought increased MBE participation in federal contracts. In his Message to Congress on National Urban Policy, President Carter requested that all federal agencies include goals for MBEs in their contract and grant-in-aid programs. He also directed all federal agencies to triple federal contracting to MBEs by the end of fiscal year 1979. 14 Weekly Comp. of Pres. Doc. 577-81 (March 27, 1978). As part of his national urban policy, President Carter proposed a three-year Labor Intensive Public Works program which would have contained an MBE requirement. The legislation incorporating that proposal failed in 1978. *See* S. 3186, 95th Cong., 2d Sess., 124 CONG. REC. S8845 (daily ed. June 8, 1978); H.R. 12993, 95th Cong., 2d Sess., 124 CONG. REC. H5062 (daily ed. June 6, 1978).

[57] Exec. Order 11625, 3 C.F.R. 616 (1971-1975 Compilation), *superseding* Exec. Order No. 11458, 3 C.F.R. 779 (1966-1970 Compilation).

[58] S. REP. No. 1070, 95th Cong., 2d Sess. 8-10 (1978). The district court in Constructors Ass'n of W. Pa. v. Kreps, 441 F. Supp. 936 (W.D. Pa. 1977), found that, while minorities comprise 17% of the population, they control only 4% of business and account for less than 1% of the national gross business receipts and total business assets. *Id.* at 951. Professor Robert Glover has said, "[I]t appears that the promotion of minority capitalism has benefitted a few of the larger contractors but has left the bulk of firms in relatively the same posi-

orders failed to coordinate the various federal programs seeking to assist minority businesses.

IV. The MBE Requirement Of The Public Works Employment Act

The MBE requirement of the PWEA may be viewed as a congressional response to the executive branch's inability to appreciably increase MBE participation in federal contracting programs.[59] However, the moderate success of the MBE requirement has been accompanied by increased administrative difficulties in assisting minority businesses.

The PWEA was an amendment[60] to the Local Public Works Capital Development and Investment Act of 1976 (LPW),[61] which established a federal public works program to stimulate the national economy. The PWEA authorized additional funding for another round of the LPW. It also required the Economic Development Administration (EDA) to institute program changes to reduce first round funding inequities among different areas and to more accurately target federal funds to areas of highest unemployment.[62]

---

tion they occupied before it all began." R. Glover, *supra* note 3, at 31.

[59] The federal government's commitment to increasing MBE participation is evident in several other new developments as well. For example, Congress recently amended the SBA § 8(a) program to more clearly benefit racial minorities. Pub. L. No. 507, 92 Stat. 1757, 1762 (1978) (codified at 15 U.S.C. §§ 683-693 (Supp. II 1979)). *See* notes 49-50 and accompanying text *supra*. The Department of the Interior (DOI) has issued new rules to increase MBE participation in DOI projects. 41 C.F.R. §§ 14-1.1300-1.1351 (1979). In addition, the Environmental Protection Agency has proposed a program to encourage MBE participation in the construction of wastewater treatment works. 43 Fed. Reg. 60220 (1978). The Department of Transportation (DOT) has proposed a program requiring MBE participation clauses in all of its contracts over $10,000. Use of minority firms as subcontractors would be required in DOT contracts for construction of public facilities over $1 million. 44 Fed. Reg. 28928-44 (1979). The Railroad Revitalization and Regulatory Reform Act of 1976 established a Minority Resource Center to encourage MBE participation in programs to revitalize railroad lines. *See* 49 C.F.R. § 265 (1979).

[60] Pub. L. No. 28, 91 Stat. 116 (1977) (codified at 42 U.S.C. §§ 6701-6710 (Supp. II 1979)).

[61] 42 U.S.C. §§ 6701-6710 (Supp. II 1979). The LPW directed the Secretary of Commerce, through the Economic Development Administration (EDA), to make grants to state and local governments for the total costs of public works projects. H.R. Rep. No. 20, 95th Cong., 1st Sess. 3-4 (1976).

[62] H.R. Rep. No. 20, 95th Cong., 1st Sess. 3 (1977).

The MBE requirement arose as a proposed amendment to the PWEA.[63] The amendment provided that no grant could be made under the PWEA for any public works project unless at least ten percent of the dollar amount of each contract was set aside for MBEs.[64] The sponsor of the amendment, Representative Parren Mitchell (Md.), said that the requirement would provide minorities with a "fair share of the action" in public works.[65] Mitchell noted the failure of previous programs to assist MBEs and emphasized that the MBE requirement was the only way to get minority businesses into the mainstream of the industry.[66]

The House eventually adopted a version of the amendment that allowed the Secretary of Commerce to grant waivers of the MBE requirement in appropriate cases.[67] The Senate adopted a

---

[63] *See* 123 Cong. Rec. 5097 (1977) (remarks of Rep. Mitchell). *See also* Note, *The Public Works Employment Act of 1977 And Minority Contracting*, 28 CATH. U.L. REV. 121 (1978).

[64] The proposed amendment stated, in pertinent part:

> (2) Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project *unless at least 10 per centum of the dollar volume of each contract shall be set aside for minority business enterprises and, or* unless at least 10 per centum of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in case of publically owned businesses, at least 51 percent of the stock of which is owned by minority group members. For purposes of the preceeding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id. at 5327 (emphasis added).

[65] *Id.*

[66] *Id.* During the debate, several other congressmen expressed arguments similar to Rep. Mitchell's. *See, e.g., id.* at 5330-31 (remarks of Rep. Conyers); *id.* at 5331 (remarks of Rep. Biaggi).

[67] The text of the amendment reflects the compromise between Rep. Mitchell and Rep. Rowe (N.J.) to allow for a waiver of the requirement in appropriate cases:

> *Except to the extent that the Secretary determines otherwise,* no grant shall be made under this Act for any local public works project unless the applicant gives satifactory assurance to the Secretary that at least 10 percent of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group mem-

somewhat different MBE provision without debate.[68] The House-Senate Conference Committee, called to resolve the conflict between the House and Senate versions of the PWEA, adopted the House version,[69] which was later enacted.[70] The requirement marked the first attempt by the federal government to use express racial quotas in federal construction contracts.[71]

---

bers or, in case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceeding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Id. at 5329 (emphasis added).

[68] Senator Edward Brooke (Mass.) authored the Senate version of the set-aside requirement. The Brooke amendment is similar to the House version except that it expressly provides that projects with less than ten percent MBE participation will still receive federal funding where minorities comprise less than five percent of the local population. The amendment states:

> Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the articles, materials, and supplies which will be used in such projects are procured from minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceeding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.
>
> This section shall not be interpreted to defund projects with less than 10 percent minority participation in areas with minority population of less than 5 percent. In that event, the correct level of minority participation will be predetermined by the Secretary in consultation with EDA and based upon its lists of qualified minority contractors and its solicitation of competitive bids from all minority firms on those lists.

Id. at 7156.

[69] H.R. REP. No. 230, 95th Cong., 1st Sess. 11 (1977).

[70] 42 U.S.C. § 6705(f)(2) (Supp. II 1979).

[71] The previous executive orders suggested the use of general guidelines but did not impose express racial quotas. Until the United States Supreme Court found the MBE requirement to be constitutional in Fullilove v. Klutznick, 100 S. Ct. 2758 (1980), only two of the Court's modern cases had upheld the constitutionality of racial classifications. Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

Recently the California District Court of Appeal upheld a 20% set-aside for subcontracts exceeding $250,000 for work on the Capitol Restoration Project.

A recent GAO Report found that approximately 6,200 MBEs have received nearly 12,500 contracts for various projects under the PWEA.[72] The Report noted that, while the program increased MBE participation, additional problems were encountered, such as increased use of ineligible businesses and higher construction costs.[73] The program also suffered from abuse. Reviews by the EDA of the authenticity of minority supply companies and construction firms resulted in disqualification rates of 19.5 and 12.9 percent, respectively.[74] The EDA reached the conclusion that most of the MBEs which began to develop or expand under the PWEA program would continue to need similar support under other federally financed programs if they were to eventually achieve self-sustaining growth.[75] Such support would require continued preferential treatment of minority firms.

Department of Gen. Serv. v. Sup. Ct., 85 Cal. App. 3d 273, 147 Cal. Rptr. 422 (3d Dist. 1978).

[72] INTERIM REP., *supra* note 16, at iv.

[73] The most important problem involved the receipt of project funds by ineligible firms. In addition, some MBEs experienced problems meeting bonding requirements and construction deadlines. Furthermore, because of its commitment to the goals of the program, the EDA granted waivers to only 589 grantees unable to meet the ten percent MBE requirement. Implementing and monitoring the requirement increased administrative costs, and the EDA needed supplementary appropriations to administer the program. Minority business involvement also resulted in increased construction costs due to minority firms' higher prices. Finally, contractors in some part of the country experienced difficulties in locating sufficient numbers of qualified MBEs. GAO REP., *supra* note 50, at i-iii.

[74] INTERIM REP., *supra* note 16, at 8. Many firms were disqualified because of insufficient minority participation in the firm's management or because the firm was established as part of the prime contractor in order to meet the ten percent requirement. GAO REP., *supra* note 50, at 27. A CBS News Report focused on minority-fronts—businesses ostensibly owned or operated by minorities, with control, operation and profits remaining largely with non-minority partners—established to bilk the LPW program. CBS Television Network, 60 Minutes Transcript, "MINORITY FRONTS" 22 (Dec. 17, 1978). The Report quoted an unidentified source within the EDA who claimed that four out of every ten dollars in the set-aside program went to minority fronts. *Id.* An EDA special investigation of 1,386 minority firms found that nearly one-third were unable to meet all or a portion of the MBE requirements. GAO REP., *supra* note 50, at 25.

[75] INTERIM REP., *supra* note 16, at 24.

V. The Supreme Court's Decision in *Fullilove v. Klutznick*

The United States Supreme Court recently upheld the constitutionality of the MBE requirement in *Fullilove v. Klutznick*.[76] The petitioners[77] sought declaratory and injunctive relief to enjoin enforcement of the MBE requirement. They alleged that enforcement of the requirement had caused them to suffer economic injury and that the requirement on its face violated the equal protection clause of the fourteenth amendment, the equal protection component of the due process clause of the fifth amendment and several antidiscrimination statutes.[78]

---

[76] 100 S. Ct. 2758 (1980). The MBE requirement has been previously subjected to numerous judicial challenges. Cases upholding the constitutionality of the requirement include Indiana Constructors, Inc. v. Kreps, No. 77-602 (S.D. Ind. Jan. 4, 1979); Associated Gen. Contractors of America, Inc., Alas. Chapter v. Kreps, No. 78-1 (D. Alas. Oct. 10, 1978); Frank Coluccio Const. Co. v. Kreps, No. 78-9 (D. Alas. Oct. 5, 1978); Associated Gen. Contractors of Kan. v. Secretary of Commerce, No. 77-4218 (D. Kan. Feb. 9, 1978); Rhode Island Chapter, Associated Gen. Contractors of America, Inc. v. Kreps, 450 F. Supp. 338 (D.R.I. 1978). Decisions adverse to the constitutionality of the statute include Montana Contractors Ass'n v. Secretary of Commerce, 460 F. Supp. 1174 (D. Mont. 1978) (unconstitutional as applied); Wright Farms Construction, Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977) (unconstitutional as applied); Associated Gen. Contractors of Cal., Inc. v. Secretary of Commerce, 411 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded for consideration of mootness*, 438 U.S. 909 (1978), *on remand*, 459 F. Supp. 766 (C.D. Cal. 1978), *sub nom.* Armistead v. Associated Gen. Contractors of California, No. 78-1107 (U.S. S. Ct. Jan. 15, 1979) (unconstitutional on its face).

The majority of courts considering the MBE requirement have denied requests for injunctions enjoining enforcement on several grounds. *See, e.g.*, Michigan Chapter, Associated Gen. Contractors of America, Inc. v. Kreps, No. 77-165 (W.D. Mich. Jan. 4, 1978); Virginia Chapter, Associated Gen. Contractors of America, Inc. v. Kreps, 444 F. Supp. 1167 (W.D. Va. 1978); A. J. Raisch Paving Co. v. Kreps, No. 77-3977 (N.D. Cal. Dec. 15, 1977); Florida E. Coast Chapter, Associated Gen. Contractors of America v. Secretary of Commerce, No. 77-8351 (S.D. Fla. Nov. 3, 1977); Carolinas Branch, Associated Gen. Contractors of America v. Kreps, 442 F. Supp. 392 (D.S.C. 1977). The usual grounds stated for denying injunctive relief were an inability to demonstrate a probability of success on the merits, and the extreme burden placed on the government by issuance of an injunction. *See, e.g.*, Ohio Contractors Ass'n v. Economic Development Administration, 452 F. Supp. 1013 (S.D. Ohio 1977), *aff'd*, 580 F.2d 213 (6th Cir. 1978).

[77] The petitioners were several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work.

[78] 42 U.S.C. §§ 1981, 1983, 1985, 2000d, 2000e (1976). The plurality opinion dealt with the petitioners' statutory arguments in a footnote, saying only that

The United States District Court upheld the constitutionality of the requirement and denied injunctive relief.[79] The Second Circuit Court of Appeals affirmed, finding the MBE requirement constitutional under even the most exacting standard of review.[80] The circuit court reviewed prior governmental efforts to remedy past racial and ethnic discrimination and said that it was difficult to imagine any purpose for the program other than to remedy the continuing effects of racial and ethnic discrimination.[81]

Chief Justice Burger, speaking for a plurality of the Supreme Court,[82] also reviewed the ongoing federal efforts to assist minority and socially disadvantaged businesses.[83] In light of the vast number of existing legislative and administrative programs, the

---

it perceived no inconsistency between the requirements of Title VI of the 1964 Civil Rights Act and the MBE requirement. Even if any inconsistency could be asserted, the plurality said, the MBE provision would control because Congress had enacted it after Title VI and because it was more specific than Title VI. Fullilove v. Klutznick, 100 S. Ct. 2758, 2782 n.77 (1980). Justice Powell, *id.* at 2794 n.15, and Justice Marshall, *id.* at 2795 n.1, also found that the requirement did not violate Title VI in separate concurring opinions. Both the district court and the circuit court of appeals had also rejected petitioners' various statutory arguments without extended discussion. 443 F. Supp. 253, 262 (S.D.N.Y. 1977); 584 F.2d 600, 608 n.15.

[79] 443 F. Supp. 253, 262-63 (S.D.N.Y. 1977), *aff'd*, 584 F.2d 600 (2d Cir. 1978), *aff'd sub nom.* Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[80] 584 F.2d 600, 603 (2d Cir.), *aff'd sub nom.* Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

[81] *Id.* at 604. The court said, "[T]he classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors. . . . It is also beyond dispute that the set-aside was intended to remedy past discrimination." The court also said that its decision was influenced by the narrow focus of the MBE requirement and prior holdings of other courts upholding the requirement. *Id.* at 608-09.

[82] Justices White and Powell joined the plurality opinion. Justice Powell also wrote a separate concurring opinion. Justice Marshall, joined by Justices Brennan and Blackmun, concurred in the judgment. Justices Stewart, Rehnquist and Stevens dissented.

[83] 100 S. Ct. 2758, 2767 (1980). This is particularly important since the legislative history of the requirement is scant. The plurality opinion gave substantial weight to a House Subcommittee Report which said, *"The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system."* *Id.* at 2768 (emphasis in original).

Chief Justice said that it was inconceivable that members of Congress were not aware of the objectives of the requirement and the policies underlying its enactment.[84]

He then employed a two-part analysis to review the constitutionality of the MBE requirement. For the requirement to be constitutional, the Chief Justice said, its objectives must be within the power of Congress, and the racial and ethnic criteria used must be a permissible means to further those objectives.[85] He said that the enactment of the PWEA was a proper object of the congressional spending powers, which were as broad as Congress' regulatory powers.[86] That is, if Congress could have furthered the objectives of the MBE requirement through the exercise of its regulatory powers, it could also achieve them through the exercise of its spending powers.[87] Since Congress could legislate to assist minority business through the exercise of the commerce clause, the Chief Justice held, Congress had equivalent power through the exercise of the spending power.[88]

Chief Justice Burger then considered the propriety of using racial quotas to further the congressional objectives. He found that Congress had sufficient evidence from which to conclude that minority businesses had been denied adequate participation in public contracting opportunities by practices which perpetuated the effects of prior discrimination.[89] The Chief Justice said

---

[84] *Id.* at 2769. The plurality found that the legislative and administrative background of the requirement indicated that Congress had designed the requirement to ensure that participating grantees would not employ practices which perpetuated the prior effects of discrimination. *Id.* at 2772.

[85] *Id.* The plurality acknowledged that a requirement based on racial or ethnic criteria must receive a "most searching examination" to ensure that it does not conflict with constitutional guarantees. *Id.* at 2781.

[86] *Id.* at 2772-73. The plurality opinion noted that Congress could utilize its spending powers to further broad policy objectives by conditioning the receipt of federal funds on compliance with federal regulations. *Id.*

[87] *Id.* at 2773.

[88] *Id.* at 2773-75. The plurality found the objectives of the requirement to be essentially similar to those previously approved in Lau v. Nichols, 414 U.S. 563 (1974). In *Lau* the Court upheld a federal statute which prohibited school districts receiving federal funds from utilizing criteria or administrative methods which "substantially impair[ed the] accomplishment of the objectives of the [educational] program as respect[ing] individuals of a particular race. . . ." *Id.* at 568. The Court ordered the San Francisco School District to take affirmative steps to correct a language barrier which effectively excluded non-English-speaking Chinese students from the educational system.

[89] Fullilove v. Klutznick, 100 S. Ct. 2758, 2774-75 (1980).

that the MBE requirement represented constitutionally permissible means, since Congress need not act in a color-blind manner to remedy past discrimination.[90] This conclusion was aided by the fact that the program contained measures to assure legitimate participation by disadvantaged minority businesses while providing for the issuance of waivers in appropriate situations.[91]

Although the plurality afforded Congress great latitude in establishing a new way to achieve equality of economic opportunity,[92] it cautioned that future congressional programs must be narrowly tailored to achieve their objectives, be subject to continuing evaluation and be administered in a flexible manner.[93] While the Chief Justice refused to adopt the formulas of analysis articulated in *University of California Regents v. Bakke*,[94] he said that the MBE requirement would nevertheless survive judicial review under either of the Bakke tests.[95]

Justice Powell, in a concurring opinion, reviewed the MBE requirement under a strict scrutiny analysis because it employed an express racial classification.[96] Despite the limited congressional history, he found the requirement to be a constitutional method for furthering the compelling governmental interest of remedying the present effects of past discrimination.[97] He said

---

[90] *Id.* at 2776-77.

[91] *Id.* at 2779-80.

[92] *Id.* at 2780-81. This may be because the plurality viewed the requirement as a pilot project which was of limited scope and duration and subject to congressional review and reevaluation before any extension or reenactment.

[93] *Id.* at 2781.

[94] 438 U.S. 265 (1978). In the *Bakke* case, Justice Powell found the U.C. Davis medical school admissions program void under a strict scrutiny analysis. In a concurring and dissenting opinion, Justice Brennan found the program constitutional under an intermediate standard, requiring only that the program be substantially related to an important government objective. Justice Marshall, in a separate opinion, also found the program constitutional under the intermediate standard of review.

[95] Fullilove v. Klutznick, 100 S. Ct. 2758, 2781 (1980).

[96] *Id.* at 2784.

[97] *Id.* He noted that, while racial preference can never constitute a compelling governmental interest, the constitution did not absolutely prohibit all racial classifications. *Id.* Justice Powell also discussed the tension created by the government's use of racial classifications in governmental programs:

> Although this record suffices to support the congressional judgment that minority contractors suffered identifiable discrimination, Congress need not be content with findings that merely meet constitutional standards. Race-conscious remedies . . . almost invariably

Congress had the authority to identify unlawful discriminatory practices, to prohibit those practices, and to prescribe remedies to eliminate their continuing effects.[98] He looked beyond the immediate legislative history of the PWEA for evidence that Congress had enacted the requirement to remedy the present effects of past discrimination.[99] After reviewing the record of recent federal efforts to assist minority businesses, he concluded that a court must accept the conclusion that discrimination contributed significantly to the limited participation by minority businesses in the federal contracting program.[100] Since Congress has authority to enact laws aimed at remedying the present effects of discrimination, Powell said the selection of a particular remedy should be upheld if the means employed are equitable and reasonably necessary to redress the discrimination.[101] He found

---

> affect some innocent persons. . . . Respect and support for the law, especially in an area as sensitive as this, depend in large measure upon the public's perception of fairness. . . . It therefore is important that the legislative record supporting race-conscious remedies contain evidence that satisfies fair minded people that the congressional action is just.

Id. at 2789 n.8.

[98] *Id.* at 2787. He based this conclusion on the implications of the Court's decision in Katzenbach v. Morgan, 384 U.S. 641 (1966), *i.e.*, that Congress had the authority to find and did find that minorities had suffered prior governmental discrimination. Justice Powell also acknowledged that the Court in Fullilove was reviewing an act of Congress and not a decision of a school board or a federal judge. 100 S. Ct. 2758, 2785 (1980).

[99] Fullilove v. Klutznick, 100 S. Ct. 2758, 2787 (1980).

[100] *Id.* at 2788-89. Powell noted that the congressional history of the PWEA indicated that Congress had considered that discrimination contributed to the limited minority participation in federal programs. This might have prompted his conclusion that a court should uphold a reasonable congressional finding of discrimination. He thought that a more stringent standard of review would impinge upon Congress' ability to properly address problems resulting from discrimination. *Id.* at 2788, 2791.

[101] *Id.* at 2791. Powell reviewed the factors which courts of appeals have previously employed in reviewing race conscious remedies. The factors are (1) the efficacy of alternative remedies, (2) the expected length of the remedy, (3) the relationship between the percentage of minority workers to be employed and the percentage of minorities in the relevant population and (4) the availability of a waiver if the hiring goals could not be achieved. *Id.* at 2791-92. The MBE requirement complied with these factors, according to Powell, because Congress knew that other remedies had failed to ameliorate the present effects of past discrimination in the construction industry, the requirement was of limited duration and was not a permanent part of the federal contracting proce-

no constitutional reason to void the MBE requirement since Congress had determined that minority businesses were victims of discrimination and had selected a reasonable means to correct the present effects of past discrimination.[102]

Justice Marshall's concurring opinion analyzed the requirement under the intermediate standard of review announced in his *Bakke* opinion[103] and found it constitutional.[104] He agreed with the plurality, and Justice Powell that Congress had enacted the requirement to remedy the present effects of past racial discrimination.[105] He said this reason constitutes a sufficiently important governmental interest to justify the use of racial classifications.[106] He also found the means used to implement the set-aside to be substantially related to its remedial purpose.[107] He said that Congress had carefully tailored the set-aside to remedy racial discrimination and not to stigmatize its beneficiaries.[108]

In a vigorous dissent, Justice Stewart argued that the equal protection clause absolutely prohibited invidious racial discrimination by the government.[109] He said that racial discrimination was invidious by definition.[110] Stewart also said that, since the MBE requirement discriminated on the basis of race by denying nonminority contractors the opportunity to compete for a percentage of the contract funds, it denied equal protection of the law and was thus unconstitutional.[111]

Justice Stevens was very critical of the MBE requirement's

---

dure, the ten percent figure chosen by Congress was within the scope of congressional discretion, and a waiver provision existed and was used relatively frequently. *Id.* at 2791-93. *But see* notes 128-29 and accompanying text *infra*.

[102] *Id.* at 2794.

[103] University of Cal. Regents v. Bakke, 438 U.S. 265, 387-402 (1978).

[104] Fullilove v. Klutznick, 100 S. Ct. 2758, 2796 (1980).

[105] *Id.* In language similar to that used by Justice Powell, Marshall concluded that Congress, unlike the courts, had a broad mission of framing general social rules rather than adjudicating individual disputes. *Id.*

[106] *Id.* at 2796.

[107] *Id.* at 2797.

[108] *Id.* Justice Marshall cited with approval Justice Blackmun's observation in *Bakke* that "[i]n order to get beyond racism, we must first take account of race. There is no other way." University of Cal. Regents v. Bakke, 438 U.S. 265, 407 (1978).

[109] Justice Stewart argued that the government may not act to the detriment of any individual because of that individual's race. Fullilove v. Klutznick, 100 S. Ct. 2758, 2798-99 (1980).

[110] *Id.* at 2799.

[111] *Id.* at 2799-800.

legislative history.[112] Even if Congress found that some minority businesses were victims of racial discrimination, he said, the requirement should be void because it was not closely enough tailored to its objectives.[113] He held Congress responsible for proving that any racial preference was justified by a characteristic which is jointly shared by all the beneficiaries of the class affected.[114]

The *Fullilove* decision affirmately answers the question of whether the federal government can consider race in awarding federal construction contracts. But the decision leaves unanswered a host of other important questions.[115] At its narrowest interpretation, the *Fullilove* decision accords federal constitutional protection only to certain carefully tailored, racially defined federal statutes. These statutes must give only a limited and reasonable preference to particular minority groups which have historically been discriminated against in the award of federal program benefits. The decision may, however, have broader implications for two reasons. First, a solid majority of the Court, although applying different tests,[116] found constitutional a ra-

---

[112] *Id.* at 2804-05. He found the legislative history especially incomplete as to the reasons why only six particular racial and ethnic groups were favored and why the 10% figure applied equally to all groups. *Id.* at 2805.

[113] *Id.* at 2813. He argued that the Court should not uphold any racial classification unless Congress clearly articulated the need for and the basis of such a classification and carefully tailored the classification to its justification. *Id.* at 2809-10.

[114] *Id.* at 2813-14.

[115] For example, what circumstances make a set-aside constitutionally permissible? If a set-aside is permissible, what percentage is appropriate? Can other federal or state agencies create similar racially defined set-asides? Which groups are to benefit from the set-aside? Which groups are to be burdened by the set-aside? How long can a set-aside program continue? What findings are necessary to justify a set-aside?

Perhaps some of these questions may be resolved by two cases which are now before the Court. *See* Minnick v. California, 95 Cal. App. 3d 506 (1st Dist. 1979), ___ Cal. Rptr. ___, *cert. granted,* 48 U.S.L.W. 3855 (No. 79-1213) (challenge by two white male corrections officers to an affirmative action plan designed to increase the number of women and minorities among prison guards), and Johnson v. Board of Educ., 604 F.2d 504 (7th Cir.), *cert. granted,* 48 U.S.L.W. 3855 (No. 79-1356) (action by several black students against the Chicago School Board, which imposed a ceiling on the number of black students admitted to two public high schools to "stabilize" racial composition in transitional neighborhoods).

[116] *See* notes 96 & 103 and accompanying text *supra.*

cially defined set-aside which Congress had passed without substantial study and debate. Second, the Court seemed to take a broad view of the phrase "closely tailored to a remedial purpose," apparently leaving Congress substantial leeway in future programs.

V. Suggestions For Improving Assistance To MBEs

The problem of assisting minority business enterprises does not lend itself to a prompt and easy solution. To properly address this issue, Congress must recognize that minority contractors are often not adequately prepared to manage and operate a business in the construction industry.[117] Merely distributing government contracts to businesses which are unable to effectively compete on their own in the industry will not produce viable MBEs. Congress, therefore, should develop federal programs which provide for the extensive upgrading of the managerial skills of minority contractors to pave the way for self-sustaining minority business expansion.[118] Adequate funding of these programs for the time necessary for a thorough upgrading of skills will reduce the amount of federal money needed for "survival" programs in the future.

Independent studies have concluded that minority businesses are often out of the mainstream of the construction industry.[119] Combined government and industry support for the creation and expansion of minority contractors' associations would increase minority business visibility and involvement in the construction industry.[120] These associations could serve as clearinghouses for information regarding project opportunities and governmental assistance programs. The heightened visibility of the MBEs would accelerate their entry into the mainstream of the industry.

Several commentators have suggested the increased use of

---

[117] S. Taylor, *supra* note 2, at 41; R. Glover, *supra* note 3, at 21; M. Hall & O. Scott, *supra* note 3, at 26.

[118] S. Taylor, *supra* note 2, at 72.

[119] S. Taylor, *supra* note 2, at 30-31; R. Glover, *supra* note 3, at 20-21. Minority businesses often do not belong to contractors' associations and are thus unaware of employment or educational opportunities. These firms work primarily on low profit projects which fail to build working capital and bonding capacity. S. Taylor, *supra* note 2, at 30.

[120] R. Glover, *supra* note 3, at 115-17.

joint ventures between non-minority and minority firms as a vehicle for allowing the former to enter the minority community while permitting the latter to upgrade their skills.[121] The federal government should also take the initiative in encouraging greater joint venture participation in federal contracting programs. Although there is the possibility of abuse and manipulation,[122] the increased use of joint ventures would allow MBEs the opportunity to participate in projects larger than they could accomplish alone. The work on larger projects would allow the MBEs the opportunity to develop the "track-record" necessary to secure increased bonds, loans and financing.[123]

Notwithstanding these efforts, Congress may still determine that a racially defined set-aside is necessary to increase MBE participation in federal programs. If so, major problems may be minimized in future public works programs in several ways. Congress passed the MBE requirement hastily and without adequate study of potential problems in implementation.[124] Future problems in project implementation would be reduced by the use of extensive congressional hearings supplemented by executive department reports. These hearings and reports should focus on clarifying the objectives of a program and detailing the means of attaining such objectives. Alternatives and expected problem areas in administration, funding and fraud prevention should also be thoroughly discussed.

The use of more flexible deadlines would reduce the adminis-

---

[121] *See* S. TAYLOR, *supra* note 2, at 70; R. GLOVER, *supra* note 3, at 117; Note, *supra* note 3, at 710-24.

[122] The dangers inherent in such a proposal include the use of "minority fronts" by unscrupulous contractors and the use of MBEs on projects or portions of projects where they exercise little control over decision making or management. *See* note 74 and accompanying text *supra*.

[123] *See* note 3 *supra*.

[124] The situation existing when Congress passed the MBE requirement should be different from the situation with regard to future programs. When Congress considered the PWEA, no viable alternative existed to a set-aside because Congress wanted the public works program to have a significant impact on the economy as soon as possible. The speed with which Congress wanted to force federal funds into the economy was evident from the brief processing and construction start-up periods. Future programs should allow for more extensive planning, analysis and consideration of alternative proposals so as to achieve maximum program benefits. A mandatory percentage set-aside requirement for MBEs might not be the most advantageous alternative for future programs.

trative problems encountered by the EDA in requiring project grantees to secure acceptable contractors and subcontractors within a brief period of time. Relaxation of application processing deadlines would relieve the administrative burden imposed on the EDA and allow additional time for detailed scrutiny of grant applications. Similarly, allowing an extended preparation period before actual construction is to begin would allow grantees to more carefully place subcontracts and provide for maximum program benefits.

The EDA granted relatively few waivers of the MBE requirement in the PWEA.[125] While this rigid application of procedural requirements probably increased overall MBE participation in the program, it resulted in cost increases in certain project areas and induced some contractors to refuse to participate in the program.[126] Future projects should include provisions which reduce the difficulties associated with obtaining a waiver.[127] Although waivers should be more easily obtainable, the aggregate number of waivers granted should not be such that it reduces the effectiveness of the MBE requirement. Proper administrative guidelines and supervision will be necessary to limit instances of abuse.

---

[125] INTERIM REP., *supra* note 16, at iv, 18.

[126] GAO REP., *supra* note 50, at 36-38.

[127] U.S. ECONOMIC DEVELOPMENT ADMIN., DEP'T OF COMMERCE, LOCAL PUBLIC WORKS PROGRAM, ROUND II, GUIDELINES FOR 10% MINORITY BUSINESS PARTICIPATION IN LPW GRANTS (1978) 13-15, noted that the

> EDA will only approve a waiver under exceptional circumstances. The Grantee must demonstrate that there are not sufficient relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBEs. The request must indicate the specific MBE's which were contacted and the reasons each MBE was not used . . . . Only the Grantee can request a waiver . . . .

The plurality opinion in Fullilove v. Klutznick, 100 S. Ct. 2758 (1980), found that a waiver or partial "waiver [would be] justified, and by implication would be granted, to avoid subcontracting with a minority business enterprise at an unreasonable price, *i.e.*, a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination. *Id.* at 271. Unfortunately the plurality never explained how it, the Congress, the EDA or any contractor—minority or nonminority—can be expected to calculate the present effects of disadvantage or discrimination with any degree of precision.

Future project participation requirements should be based on flexible floating standards rather than on an absolute participation percentage.[128] Although the ten percent participation requirement was a reasonable figure, it did not adequately take into account geographical areas where there were few qualified MBEs.[129] The use of a floating percentage with an overall project objective would take better account of communities with few minorities.[130]

A partial solution to the problem of ensuring that project funds go to bona fide MBEs and not to ineligible firms is to require MBEs to secure a certification of legitimacy before receiving any project funds.[131] Such a federal certification would be subject to periodic review and renewal by the EDA or similar governmental agency. If a prior certification program proves impractical, Congress must then budget sufficient funds necessary for effective field review of MBEs. The GAO has proposed a more punitive solution to the problem of fraud or abuse in situations where an MBE serves as a front for an ineligible firm. The GAO has recommended that Congress impose a sanction, such as future disbarment from participation in other federally funded programs, on contractors or subcontractors who intentionally establish ineligible firms to circumvent project goals.[132] Congress should also consider imposing substantial fines on contractors who establish minority fronts. At the very least, Congress should direct the responsible executive agencies to vigorously seek a return of funds received by ineligible firms.

These suggestions should inject a greater level of flexibility and manageability into future programs which include MBE requirements. But these suggestions will be effective only if Con-

---

[128] *See* GAO REP., *supra* note 50, at 41.

[129] *See* Wright Farms Const. Co. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977) where the district court found no evidence of discrimination in the state against the statutorily defined class of minorities.

[130] Waivers of the requirement would be available in circumstances where it was impossible for businesses to achieve even the minimum percentage participation requirement. For example, President Carter's plan for a Labor Intensive Public Works Program provided for a national set-aside of ten percent of grant funds for MBEs, with a flexible range between two and fifteen percent for individual communities depending upon the availability of minority group members. *See* H.R. 11610, 95th Cong., 2d Sess., 124 CONG. REC. H2184 (daily ed. Mar. 16, 1978).

[131] *See* GAO REP., *supra* note 50, at 41.

[132] *Id.* at 42.

gress and the responsible executive agencies examine the goals of the proposed program and integrate these suggestions into a comprehensive plan for developing the competitive viability of MBEs.

CONCLUSION

A fragmented series of federal programs has not effectively and efficiently achieved the goal of increased minority business participation in government contracting. Insufficient study prior to program implementation has been the primary stumbling block of prior federal programs and orders. The lack of program coordination has also restricted success. Only a policy decision on the part of Congress can answer the question of how best to increase MBE participation in the construction industry.[133] A detailed study of how best to coordinate the various programs into a national program to develop both the number and the competitive ability of MBEs should be a prerequisite to further congressional action. The study should clarify the goals of the plan and determine the best means of achieving these goals. The intended beneficiaries of the plan should be clearly identified, and an analysis of the problems should be included. Only after a detailed study of this nature has been completed will the government succeed in helping minority contractors enter the mainstream of the construction industry.

Mark Raymond Raftery

---

[133] The Supreme Court's decision in *Fullilove* endorsed the constitutionality of the MBE requirement. It is now the responsibility of the Congress, as the policy-making branch of government, to determine whether a racially defined set-aside is the best or the only means of increasing the future competitive vitality of MBEs.