A New Era in Federal Preferential Contracting? *Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*

*By George R. La Noue**

On Election Day, while the country's attention was otherwise engaged, the Federal Circuit Court of Appeals unanimously stuck down the racial preferences in Section 1207 of the National Defense Authorization Act (1987), the federal defense contracting program.[1] Although racial preferences in federal contracting began in the 1977 Public Works Employment Act (PWEA)[2] and have subsequently spread to dozens of other programs and agencies,[3] the *Rothe v. Department of Defense and Department of the Air Force* decision marks the first time a facial challenge to a federal preferential contracting program has ever been successful. *Rothe's* victory came after ten years of litigation that involved losing three trial court decisions[4] and then winning reversals and remands in two Circuit Court opinions in 2001 and 2005.[5] In its third encounter with the case, precedents had so tightened the evidentiary requirements for contracting preferences that the Federal Circuit finally found the 1207 program unconstitutional on its face."[6] Because of the unique status of the Federal Circuit Court of Appeals which can have national jurisdiction over federal contracting,[7] the *Rothe* decision has far more significance than a decision by another Circuit which would be enforceable only in that Circuit. The Bush Department of Justice opted not to seek en banc reconsideration and Obama's new team decided not to petition for certiorari, so the *Rothe* rules will have to be seriously considered as the Obama administration crafts its stimulus programs with expanded federal procurement.

I. Context of the *Rothe* Litigation

During the 1977 consideration of the PWEA which was also designed to use federal procurement to respond to a downturn in that era's economy, Congressman Parren Mitchell, chair of the Black Congressional Caucus, successfully amended the bill to include a provision that 10% of all contract dollars go to minority businesses. Minorities were defined by the Small Business Administration as African-Americans, Hispanics, Asian-Americans, and Native Americans and that is still the definition used in all federal minority business programs.[8] In 1986, Congress extended the concept of minority business preferences to defense procurement in the "Contract Goal for Minorities" Act, or Section 1207 of the National Defense Authorization Act, which covered, in addition to the Department of Defense (DOD), the Coast Guard and NASA. Designated minority firms were to receive 5% of all defense contracts dollars,[9] even though most of those dollars go to large publicly held firms such as Northrop Grumman, Lockheed Martin, General Dynamics, etc. In order to meet these goals, DOD could grant a price-evaluation adjustment (or "PEA") of up to 10% to minority firms, meaning that if a non-minority bid $10,000,000 for a contract and a minority bid $10,900,000, the non-minority firm bid could be increased up to 10%, or $11,000,000, so that the contract could be could be awarded to the minority firm.[10] There are no published reports on how much more taxpayers have been billed for superfluous military expenditures under this arrangement. Minority firms were also eligible for advance payments on contracts awarded. Congress extended these substantial advantages to minority firms several times between 1986 and 2006, but Congress rarely made specific findings about why there was a compelling interest for such race-based preferences in defense procurements. Once embedded in the DOD legislation or in the dozens of similar programs the Congressional Research Service has located, the minority provisions were routinely extended without much debate.

Such debate, however, has occurred in the courts. In 1980, in a 6-3 vote the Supreme Court upheld the PWEA 10% set-aside largely because the majority thought it appropriate to defer to Congress on a spending program.[11]

In the 1989 landmark *City of Richmond v. J. A. Croson* decision, the Supreme Court not only invalidated Richmond's preferential contracting program, but it established that strict scrutiny was the test that should apply to all such state and local racial classifications. To meet the compelling interest and narrow tailoring prongs of strict scrutiny, "proper findings" had to prove the preferences were a remedy for discrimination and not just legislative racial politics. To be narrowly tailored discrimination had to be identified in each locality and industry covered by the contracting program and that discrimination had to affect each of the specific groups preferred by the program. Those findings had to be primarily statistical. Justice O'Connor provided a specific test:

> Where there is a *significant* statistical disparity between the number of *qualified* minority contractors *willing and able to perform a particular service* and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion *could arise*.[12]

This tough standard has rarely been met and, after *Croson,* dozens of state and local minority and women preference programs have been terminated, substantially modified, or turned into race-neutral operations.

Similar federal contracting programs, however, generally have been immune from attack, despite the Supreme Court's 1995 *Adarand Constructors v. Pena* decision, which required that a single standard of strict scrutiny be applied to all race-based programs, regardless of the originating level of government.[13] After *Adarand*, the Clinton administration created a two-prong defense in 1996 to protect its "mend don't end" affirmative action policy in contracting. First, it attempted to buttress the compelling interest for preferences by conducting a federal disparity study by the Department of Commerce (the Benchmark Limits study), by asking the Urban Institute to create a meta-analysis of existing state and

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local disparity studies, and by creating a Department of Justice position paper, "The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey." Attached to the survey was "Appendix A," a 23 page compendium listing all the congressional documents and disparity studies the Justice Deparment could find to support its argument that pervasive discrimination existed in the economy.

In the short run, these strategies were successful. The three compelling interest documents created an evidentiary basis so voluminous that it overwhelmed the resources of plaintiffs who did not have the wherewithal to acquire the three reports' underlying data and then to conduct their own analyses of that data. Thus, the plaintiff's strategy of challenging the validity of individual disparity studies that has prevailed in a number of state and local cases could not be implemented in the federal cases. So, despite the fact that substantial criticisms were leveled at these reports,[14] they proved practically unchallengeable in litigation.

Second, the Clinton Administration changed the regulations governing some of its contracting programs to create more narrow tailoring.[15] For example, the 10% national Disadvantaged Business Enterprise (DBE) quota was abandoned in favor of requiring every state and local recipient of transportation funds to set its own goals based on local market availability of DBE and non-DBE firms and estimates about the effects of local discrimination, if any. DBEs are firms whose principal owner is entitled to the presumption of being socially and economically disadvantaged. After *Adarand*, an objective, though generous definition of "economic disadvantage" was added, but "social disadvantage" was automatically presumed to adhere to any minority or women business owner.

In the late 1980s, the Department of the Air Force contracted with Rothe Development Corporation, owned by a white woman, to maintain, operate, and repair the computer systems at Columbus Air Force base in Mississippi. Rothe was regarded as a contractor "with an excellent performance record,"[16] but the Air Force decided to consolidate Rothe's contract with a larger one for communication services and to award the contract under the Section 1207 program. After the bids were opened, Rothe was low at $5.57 million, while International Communications and Telecommunications, Inc. (ICT), a Small Disadvantaged Business (SDB),[17] owned by a Korean-American was second at $5.75 million. Under the 1207 preferential price adjustment (PEA) policy, the government recalculated Rothe's bid to $6.1 million and the contract was awarded to ICT now "fictionally"[18] the lowest bidder at a cost of about $150,000 more to the taxpayers for the same service.

Deprived of a contract on which it had successfully performed and now facing laying off its own workers and training ICT to do it works, Rothe decided to seek a preliminary injunction. Its attorney was David Barton of the Gardner Law Firm in San Antonio. Barton specialized in procurement law and coincidentally was a retired Air Force Judge Advocate Lieutenant Colonel, but had not been involved previously in major civil rights litigation.

II. *Rothe* I, II, and III

Rothe's motion for a preliminary injunction filed in November 1998 was quickly denied by District Court Judge Edward Prado. Consequently, an amended complaint was filed in February 1999 claiming that Section 1207 was unconstitutiona1 on its face and, therefore, that a permanent injunction should be issued prohibiting the award of the contract to ICT and that Rothe should be awarded bid preparation costs not to exceed $10,000 under the Little Tucker Act. Two months later, Judge Prado granted summary judgment to DOD upholding the constitutionality of Section 1207 and denying any relief to the plaintiff (*Rothe* I).[19] The court held that, since Section 1207 had no illegitimate purpose nor reflected any legislative racial animus, but "was designed to address a social ill identified by Congress on the basis of extensive evidence," the federal government had a compelling interest for the program.[20]

Rothe, then, appealed to the Fifth Circuit, but DOD moved to dismiss the appeal or to transfer it to the Federal Circuit of Appeals which has exclusive appellate jurisdiction over Tucker Act claims. In October, 1999, the Fifth Circuit agreed that jurisdiction belonged to the Federal Circuit, so the case was transferred there (*Rothe* II).[21]

The Federal Circuit heard oral arguments more than a year later and on August 20, 2001 issued an opinion accepting exclusive jurisdiction and vacating the District court ruling because that court," improperly applied a deferential legal standard rather than 'strict scrutiny' and "also impermissibly relied on post-reauthorization evidence to support [Section 1207's] constitutionality as reauthorized (*Rothe* III).[22]

In *Rothe* I, the District Court found compelling a 1975 Congressional report that showed minorities were 16% percent of the population, but owned only 3% of American businesses.[23] The plaintiffs argued that even if a generalized compelling interest existed, the government needed *Croson*-like evidence that related to the specific beneficiary groups, the specific industries, and the specific geographical areas relevant to the contract involved. Judge Prado had no difficulty sweeping aside the latter argument because Congress has national legislative responsibilities. The plaintiffs also attacked SDB's inclusion of Asian-Americans as a socially and economically disadvantaged group, because on many educational and income measures they exceed white attainment. Furthery, they challenged including Korean-Americans specifically because they are the leading ethnic group in business formation.[24] In rejecting the plaintiffs' group specific argument, the court relied on no government statistics, but Judge Prado said he was aided by the post-enactment evidence in amici briefs submitted by several of the Asian American legal defense organizations, insisting that their constituents still faced discrimination.[25]

Regarding the issue of whether to limit the preferences to industries in which there was some evidence of discrimination, the benchmark limits study had to be considered, since it was post-*Adarand* federal policy that preferences could only be applied to those industries where a disparity had been shown. Rothe believed that the benchmark ratios had been incorrectly calculated and demanded that the government provide the

underlying census data on which parts of the study were based or have the study excluded because its underlying data were not available. The Department of Commerce asserted that the statutory privilege regarding raw census data precluded its release and the court decided that it would not presume that the government was hiding data and that, since neither the plaintiffs nor the defense could get the underlying data, neither side was disadvantaged. In other words, the court would accept the government's word that the statistics in the benchmark study were accurate.

While Judge Prado was certain that Section 1207 met his standards, *Rothe* I was not clear about what kind of evidence the federal government needed to have before Congress had the compelling interest to create contracting preferences. To the contrary, the judge stated that, "if Congress is to be allowed a broad vision of the nation's problems, it seems only logical that it be allowed some measure of deference in addressing those problems."[26] He specifically declined to conduct a *Croson*-like analysis of the § 1207 program, arguing that *"Croson's* mandate that a local government make specific findings regarding specific minorities in specific industries" should not be applied "without alteration to acts of Congress."[27]

In its *Rothe* III review, the Federal Circuit Court of Appeals rejected the district court's deferential approach.[28] The Circuit determined that *Adarand* required that all racial classifications, regardless of the government making them, were subject to the strictest governmental scrutiny, [29] because "it would be unthinkable that the same Constitution would impose a *lesser* duty on the Federal Government than it does on a State to afford equal protection of the laws."[30] Since the Supreme Court had concluded that the Fourteenth Amendment's equal protection precedents applied when interpreting equal protection issues under the Fifth Amendment's due process clause, it followed that the *Croson* analysis was the standard to be applied to the §1207 program and other federal racial classifications as well.[31] In a major clarification of the law, the Circuit held Congress was entitled to no deference in either the compelling interest or narrow tailoring analysis required by strict scrutiny. On remand, the Circuit Court instructed that the district court "should undertake the same type of detailed, skeptical, non-deferential analysis undertaken by the *Croson* Court."[32]

The Circuit, then, addressed the problem of how the remand should treat compelling interest evidence. First was the controversial issue of post-enactment evidence. If a legislature needed to have a compelling interest to use racial classifications, then logically that evidence should be assessed prior to enactment. But some courts have permitted defendants to make their case for racial classifications with evidence gathered after the fact, even literally at trial. Such a judicial policy sanctions legislative lassitude, since the defense evidence can always be mobilized years later, if and when the race-based program is attacked. It also greatly intimidates potential plaintiffs, since they cannot estimate what the time and cost will be of challenging evidence they have never seen. After reviewing the divided case law, the Circuit determined that, while post-enactment evidence could be used to evaluate whether a program was narrowly-tailored in its operation, it could not be used determine whether there was a compelling interest in the first place. Consequently, the Circuit found that Judge Prado had impermissibly relied on the 1996 benchmark study and the Asian-American trial amici briefs to justify a compelling interest in the 1987 and 1992 1207 reauthorizations.

Second, the Circuit held that, while Congress could legislate on a national basis, a few isolated instances of discrimination would be insufficient to uphold a nationwide program and the district court should attempt draw that line. Third, the Court ruled that while Congress did not have the obligation to make findings regarding each subgroup (i.e., Korean-Americans), it should have evidence for each of the five major racial and ethnic groups preferred by the program.[33] Fourth, it found that the district court should determine whether discriminatory effects were experienced in specific industries and that court should determine the boundaries of "relevant industries."[34]

In short, *Rothe* III created a road map for reviewing congressional compelling interest contracting evidence that blended *Croson* with other appellate decisions in a far more explicit way than had previously existed. Among other things, it created a template that did not exist when the Clinton Administration's 1996 reports were created to buttress the compelling interest case for federal contracting preferences.

III. *Rothe* IV and V

It is one thing for a Circuit Court to remand with instructions and another thing to have those instruction promptly implemented by a district court. Three years later, Judge Xavier Rodriguez, who inherited the case when Judge Prado was elevated to the Fifth Circuit bench, responded in *Rothe* IV that the Circuit Court's road map had "quickly became obsolete."[35] First, Rothe was making a claim about the contract it lost, as well as for prospective injunctive and declaratory relief against the existing program. Therefore, the district court held that because Congress had reauthorized Section 1207 again, the case should be bifurcated into the evidence Congress had before the 1992 reauthorization and the evidence Congress had before it in the 2003 reauthorization. After lamenting the fact that Congress could not have known in 1992 that it must meet the standards the Supreme Court announced in *Adarand* (1995) and *Shaw* (1996),[36] and reviewing the pre-authorization evidence Congress did have, Judge Rodriguez agreed that Congress had no statistical evidence about Asian-Americans in any specific industry in 1992. Consequently, he found that the Section 1207 program as applied to Rothe's lost 1998 contract was unconstitutional.[37]

The district court then turned to whether the 1207 program was still unconstitutional on its face after the 2003 reauthorization. The Court evaluated the three Clinton post-*Adarand* documents and found them sufficient to create a compelling interest.

On appeal in 2005 (*Rothe* V),[38] the Circuit Court again vacated the district court's summary judgment for the government. The Circuit's principal concern was that the district court had impermissibly narrowed discovery and that it had not actually analyzed whether the 1996 studies were "before" Congress in the sense that there were hearings or debates about these documents during the routine reauthorization

process. At one point, DOD appeared to argue that there were no boundaries to the information on which it could be later inferred that Congress had relied on in finding a compelling interest. Further, the Circuit specifically rejected the district court's theory of Congressional "institutional memory" that would permit a finding of compelling interest based on an assumption that Congress in passing current legislation was relying on evidence about discrimination it remembered from some time in the past. Rothe argued that evidence might now be stale and no longer descriptive of the current discrimination or its effects and the Circuit Court agreed.

In short, in *Rothe* III the Circuit limited the use of post-enactment evidence for the purpose of establishing a compelling interest and in *Rothe* V it limited the use of pre-enactment evidence to information that was actually before a legislature and that was not stale. *Rothe* III and V, therefore, established two major evidentiary principles regarding compelling interest in Equal Protection cases. But the third remand was not to bring relief to the plaintiff for three more years.

IV. *Rothe* VI and VII

Following *Rothe* V, the plaintiffs moved in district court for a preliminary injunction to bar DOD use of any race-based procurement programs. This motion clarified Rothe's Section 1207 challenge to include: the subcontracting incentive programs, awards using less than full and open competition to designated groups (including some awards under the 8(a) program of the Small Business Act), advance payment and other assistance to SDBs, and the provision of SDB status to historically black colleges and universities.[39] The district court acknowledged that the clarification was within the parameters of the original complaint and directed the parties to present to the court any [non-stale] evidence about relevant discrimination that was before Congress during the 2006 Section 1207 reauthorization. After additional discovery, both parties moved for summary judgment and the district granted summary judgment to DOD on August 10, 2007.[40]

Because of the ruling that only non-stale evidence could support the 2006 reauthorization, the court first had to reconsider the three 1996 Clinton era reports which the Department of Justice had successfully proffered to support preferential contracting programs for years. This time, however, Judge Rodriguez found that the studies' data, some dating back to the mid-1980s, were too stale to serve as evidence for racial preferences reauthorized in 2006.[41] Since DOD did not challenge this finding on appeal, the Clinton-era studies have now been laid to rest as foundations for any contemporary compelling interest finding.

The court then turned to the newer evidence DOD produced: letters from various business owners describing their perceptions of discrimination in state, local, and private contracting, various anecdotes regarding discrimination mentioned by members of Congress in floor remarks,[42] some testimony by business owners before the House Small Business Committee in 2001 and 2004, three reports from the Small Business Administration, and most significantly six state (Virginia) and local (Cincinnati, Dallas, and New York, Alameda County, Cal. and Cuyahoga County, Ohio) disparity studies. Because the Benchmark study was considered stale, there was no longer any federal disparity study to consider.

On appeal, the Federal Circuit appeared to be growing tired of the pattern of remand in which its instructions were not always followed and decided to rule on the merits. It unanimously found the DOD Section 1207 program unconstitutional on its face. The Circuit focused its review on the District Court's acceptance of the six state and local disparity studies as a basis for the 1207 program. The plaintiffs argued that much of the data in those studies were also stale, noting that the United States Commission on Civil Rights suggested a five-year rule for determining whether statistical data were relevant to analyzing the existence of discrimination in a fast changing economy. But the Circuit Court was disinclined to set such a hard-and-fast rule and suggested, instead, that Congress "should be able to rely on the most recently available data so long as that data is reasonably up-to-date" and left the question of data staleness to trial courts to decide.[43]

Rothe also argued that the studies were never "before" Congress and therefore could not provide a compelling interest for the 2006 reauthorization. The district court had cited the fact that Senator Ted Kennedy and Representative Cynthia McKinney had made reference to these studies in floor speeches, but the Circuit noted that the studies were not "debated or reviewed by any member of Congress or by any witnesses."[44] The Circuit, while mindful of Congress' "broad discretion to regulate its internal proceedings," said that it would not conclude that mere floor mention of a statistical study sufficiently met Congress' "obligation to amass a strong basis in evidence for race-conscious action."[45]

In confronting the six disparity studies, Rothe made a tactical decision that it had neither the time nor money to acquire the studies' underlying data nor to depose their authors or to commission its own expert report. Instead, the plaintiff attached a critique of the studies to its brief. The district court held this critique was not in the proper form and accepted the studies as the compelling interest basis for the 2006 reauthorization. The Circuit replied that this was judicial error, since that district court had been instructed to undertake its own "detailed, skeptical, non-deferential analysis undertaken by the *Croson* Court" because "Congress is entitled to no deference in determining whether Congress had a compelling interest in enacting the racial classification."[46]

The Circuit then engaged in its own *Croson*-like review of the studies and found them all deficient. The Circuit was particularly concerned that the studies failed to measure firm capacity correctly. This is an endemic problem in disparity studies which typically attribute discrimination as the cause of differences in contract award sizes between minority and non-minority owned firms, even when there is evidence that non-minority owned firms, including those owned by stockholders, are larger and older than their minority counterparts. This problem has been noted by a number of courts and government agencies, but most disparity studies persist in this error. [47] In *Rothe* VII, however, the Circuit adopted an illustration provided by DOD expert Yale Professor Ian Ayres that even laymen

could understand. Ayres pointed out that a micro brewery and Budweiser are in the same business, but it would not be expected that they would have the same sales volume. Further, the Circuit found that it was not enough to establish a threshold for being able to bid on one contract to determine availability because that measure fails to account for "the relative capacity of businesses to bid *on more than one contract at a time.*"[48] This judicial requirement to measure the relative capacity of minority and non-minority firms in order to calculate valid disparity ratios may invalidate almost all existing disparity studies.

CONCLUSION

The *Rothe* decisions suggest federal racial contracting preferences must be addressed anew. The old supports are either obsolete or invalid. As Congress and the Obama administration ponder policy choices in using federal procurement to stimulate the economy, they will have a more difficult legal terrain than before, if the choice is to treat minority businesses preferentially.

In *Rothe*, courts have found that the 1996 reports are now "stale" data and the Department of Justice has conceded that point. Therefore, those studies will no longer be available to create a compelling interest for federal preferential programs. Of course, the Obama administration could attempt to replicate the Clinton strategy by creating new reports, but there are several difficulties with that approach. First, some of the economic stimulus programs will likely be put in place before any new reports can be completed. Second, after *Rothe* and *Western States*[49] new disparity studies will surely have to take into account the capacity and qualifications of minority and non-minority firms in a way the older studies did not. But, even the flawed Benchmark study found underutilization of minority firms in only 40 of the 74 SIC codes, so there is no guarantee that a new Obama administration study would support an across-the-board preferential program. Further, both *Rothe* and *Western States,* applying the *Croson* standard that relevant discrimination had to be found for each of the principal beneficiary groups, have undermined the old concept of treating minority firms in a single SDB or DBE category. Whenever group specific disparity ratios are calculated, almost invariably the results will show disparities for some groups but not others. This sort of patchwork result can create substantial political problems in putting together a pro preference coalition.

Another alternative would eschew a future disparity study whose results would be uncertain and to rely instead on Congressional hearings, reports, and floor statements whose outcome is quite predictable. Under Republican control the strategy was to avoid such opportunities by not holding hearings or creating reports on contracting discrimination, but in the 111th Congress Democrats will have the will and the power to create such a record.[50] That will leave courts with the uncomfortable choice of going back to the *Fullilove* standard of congressional deference or of engaging in a strict scrutiny review of whatever evidence Congress purportedly relied on to reach its judgment. If, under *Rothe,* a sort of stage-managed mention of six state and local disparity studies in the Senate and the House is not enough, what about twenty such studies whose text is appended to some Congressional document? It will be impossible, however, to locate very many studies which have made accurate measures of qualifications and capacity and have found any consistent pattern of discrimination. Nor does it seem likely that anecdotal testimony will be sufficient. Courts which are accustomed to the necessity of evaluating the stories witnesses submit under oath to them have proved reluctant to accept anecdotal surveys or individual testimony as a sufficient basis for a compelling interest finding.

Much of the new economic stimulus will use the mechanism of grants for assisting states and localities with new infrastructure projects, rather than direct federal contracts. Here the current transportation DBE programs will be the model. In these programs, each recipient sets its own goals for minority- and women-owned businesses, to be fulfilled largely by subcontracting. Quotas are barred by statute and race-neutral means are to be maximized in achieving the goals.[51]

These programs have largely survived constitutional challenges, but the 1996 compelling interest reports will no longer be considered relevant in future litigation. Furthermore, *Western States* raised substantial issues about the recipient's narrow tailoring responsibility in setting race conscious goals. Since DBE goals are to be set according to local availability and findings of discrimination, the Ninth Circuit asserted in *Western States* and the U. S. Departments of Justice and Transportation agreed that a recipient had to identify transportation contracting discrimination in its own market to justify the use of race conscious goals rather relying on wholly race neutral means. USDOT has concluded that meeting that judicial mandate probably will require disparity studies to utilize multiple regression analysis. Consequently, every state in the Ninth Circuit has begun or completed a disparity study. The finished disparity studies show very different patterns of disparities and thus have forced state DOTs to reach different policy choices than previously existed. For example, Nevada and Idaho have gone wholly race neutral, while California has proposed increasing its race neutral share and excluding Hispanic and subcontinent Asian contractors from its race-conscious portion. In short, though *Western States* currently applies only to Ninth Circuit states, its logic that local findings must be made to support locally set goals is unassailable and the Ninth Circuit required disparity studies are showing quite unpredictable outcomes.

Consequently, as the Obama administration and the 111th Congress confront the issue of continuing the practice of race-preferential federal contracting, they will discover that *Rothe* and *Western States* create substantial challenges to establishing that these programs have either a compelling interest or are narrowly tailored. The Obama Administration has promised to go through the federal budget line by line to eliminate programs that "we don't need, or what doesn't work."[52] The Section 1207 program, which adds to the cost of federal procurement solely for the purpose of redistributing contract awards from low bidders to firms owned by designated minorities, may be an example of "what doesn't work."[53] Administration staff may conclude that programs creating "fictional" low bidders are not consistent with a rational economic agenda in these hard times. Race-neutral business programs will prove a better vehicle

for assisting all small businesses and expanding the economy. But perhaps President Obama may see an even greater issue than fiscal prudence. One affirmation in his famous 2004 Democratic Convention speech and repeated throughout the 2008 campaign was, "There is not a black America and a white America and Latino America and Asian America—there's the United States of America." Awarding federal contracts based on skin color is not consistent with that vision.

Endnotes

1 10 U.S.C. sect 2323 ("Section 1207").

2 42 U.S.C. sect. 6701 et.seq.

3 The comprehensive list of federal preferential business programs shows such programs exist in almost every federal agency. Charles V. Dale and Cassandra Foley, "Survey of Federal Laws and Regulations Mandating Affirmative Action Goals, Set-asides, or Other Preferences Based on Race, Gender or Ethnicity." Congressional Research Service, 2004.

4 Rothe Dev. Corp. v. U.S. Dep't of Defense, 49 F. Supp. 2d 937 (W. D. Tx.1999) (*Rothe* I); 324 F. Supp 840 (W.D. Tx, 2004) *(Rothe* IV), and 499 F. Supp.2nd 775 (W.D. Tx, 2007) (*Rothe* VI).

5 Rothe Dev. Corp. v. U.S. Dep't of Defense, 262 F. 3d 1306 (Fed Cir. 2001) (*Rothe* III) and 413 F.3d 1327 (Fed Cir.2005) (*Rothe* V).

6 Rothe Dev. Corp. v. U.S. Dep't of Def., 545 F.3d 1023, 1027 (2008) (*Rothe* VII).

7 The Fifth Circuit, *Rothe II* , 194 F.3d 622, 625 (5th Cir.1999) and the Federal Circuit *Rothe* III 262 F.3d 1306, 1316, agreed that the Federal Circuit has exclusive jurisdiction over federal claims raised based in part on the Little Tucker Act. 28 U.S.C.S. sect.1346 (a) (2).

8 For a history of the Small Business Administration's decisions about which racial and ethnic groups should be considered by federal agencies as presumptively socially and economically disadvantaged see, George La Noue & John Sullivan, *Presumptions for Preferences: The Small Business Administration's Decisions on Groups Entitled to Affirmative Action*, 6 Journal of Policy History 4 (Fall 1994).

9 Section 1207, Subsection (e).

10 *Rothe* I at 942.

11 Fullilove v. Klutznick, 448 U.S. 448 (1980).

12 *Croson*, 488 U.S. 469, 509 (1989) (emphasis added).

13 515 U.S. 200 (1995)

14 "Disparity Studies as Evidence of Discrimination in Federal Contracting" A BRIEFING HELD BEFORE THE UNITED STATES COMMISSION OF CIVIL RIGHTS, Washington D.C. December 16, 2005. Edited with findings in May 2006. (hereafter USCCR report) For the author's critique of these three documents, see USCCR report, at 34-46.

15 "Proposed Reforms to Affirmative Action in Federal Procurement," 61 Fed.Reg. 26042-50, May 23, 1997.

16 499 F.Supp. 2d 775, 782 (W. D. Tx. 2007)

17 The presumptions and other eligibility criteria in the DBE and the SDB programs are quite similar, except that women-owned businesses are not preferred beneficiaries in the latter.

18 499 F.Supp. 2d at 782.

19 49 F. Supp. 2nd 937 (W. D. Tx., 1999).

20 *Id*. at 954.

21 194 F.3d 622 (5th Cir, 1999).

22 262 F.3d 1306, 1312 (Fed Cir. 2001).

23 49 F.Supp. at 946.

24 Robert W. Fairlie & Bruce D. Meyers, *Ethnic and Racial Self-Employment Differences and Possible Explanations*, 31 J. Hum. Resources 757 (1996).

25 49 F.Supp. at 947.

26 *Id*. at 949.

27 *Id*. at 953.

28 262 F. 3d 1306 (Fed Cir. 2001).

29 *Ibid,* 1319.

30 *Id.*

31 *Id*. At 1320.

32 *Id*. at 1321.

33 Courts have been inconsistent about the precision of group specific analysis. *Croson* singles out Richmond's lack of evidence for including Eskimos and Aleuts (at 506) for criticism, while *Western States* merely required evidence of discrimination for the six major DBE groups (at 999). For a discussion of this issue, see George R. La Noue & John Sullivan, *Gross Presumptions: Determining Group Eligibility for Federal Procurement Preferences*, 41 Santa Clara Law Review 1 (Winter 2000).

34 In the benchmark study, SIC 73 (business services) was closest category to the work Rothe performed, but the plaintiff argued that this SIC was overinclusive because computer maintenance was only a small fraction of the firms in SIC 73.

35 324 F.Supp. 840, 845 (W.D. Tx. 2004).

36 Shaw v. Hunt, 517 U.S. 899 (1969) (holding that evidence identifying discrimination must exist before a government uses a racial classification as a remedy).

37 424 F. Supp. at 850.

38 413 F. 3d 1327 (Fed..Cir. 2005).

39 *Rothe* VI, 499 F. Supp.2d 775, 814.

40 *Id*. at 818-25.

41 *Id*. at 875.

42 Judge Rodriguez seemed particularly impressed by a 2005 floor statement by Senator Obama, who voiced his strong support for the reauthorization of Sect.1207 program because it was designed to ensure that DOD contracting "does not support or subsidize discrimination." The Senator pointed out that in the aftermath of Hurricane Katrina minority-owned and economically disadvantaged companies have had a "near impossible time" trying to secure some of the billions of dollars of gulf coast reconstruction contracts, while some big multi-national firms were given no-bid contracts in the week immediately following the hurricane. (At 866)

43 545 F.3d at 1039. It is not clear what guidelines trial court should follow on staleness. Governments have annual data on which firms bid and receive contracts and dollar awards, so how long can a government wait to analyze that annual data before its compelling interest evidence is stale?

44 *Id*. at 1040.

45 *Id*. at 1039-40

46 *Id*., at 1040.

47 The Circuit cited *Eng'g Contractors Ass'n of South Florida v. Dade County* , 122 F.3d 895,917 ("in a perfectly non-discriminatory market, one would expect the (bigger) on average non-MWBE firms to get a disproportionately higher proportion of total construction dollars awarded than smaller MWBE firms."

48 *Id*. at 1044 (emphasis in original).

49 Western States Paving v. Washington Department of Transportation, 407 F.3d 985 (2005) holding that while the transportation DBE program was facially constitutional, recipients had the obligation to narrow tailor the use of race conscious measures if they were justified at all.)

50 Joe Davidson, *Another Obstacle for Affirmative Action, and Congress is Prepared to Fight*, Washington Post, Dec. 3, 2008, at D01.

51 For a discussion of the problems in DBE programs, see George R. La Noue,

Can the Federal Transportation DBE Program be Narrowly Tailored to Remedy Discrimination?, Engage, October 2007.

52 John Zelany & John Harwood, *Obama Promises Bid to Overhaul Retiree Spending*, N.Y. Times, Jan. 8, 2009, p. A1,A18.

53 In fy 2006, minority-owned firms won $15 billion in DOD contracts, but the portion of that amount that awarded on a race preferential or race neutral basis is unknown. Davidson, *op.cit*.