



Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses

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Summary

This report discusses *Rothe Development Corporation v. Department of Defense*, a case involving a constitutional challenge to a minority contracting program authorized under Section 1207 of the Department of Defense (DOD) Authorization Act of 1987. This program allowed DOD to take 10% off the price of offers submitted by “small disadvantaged businesses” in determining which offer had the lowest price or represented the best value for the government. Section 1207 also incorporated a presumption that minorities are socially and economically disadvantaged.

On November 4, 2008, the U.S. Court of Appeals for the Federal Circuit struck down the DOD preference program, holding that Section 1207 was facially unconstitutional because Congress did not have sufficient evidence to conclude that there was racial discrimination in defense contracting when it reauthorized the program in 2006. Later, on February 27, 2009, the U.S. District Court for the Western District of Texas, San Antonio Division, to which the case had been remanded for entry of judgment, enjoined defense agencies from implementing other programs authorized by Section 1207 because these programs were “contingent” on the subsections containing the price preference and must “also fall” when they do. These programs included technical and infrastructure assistance for certain minority-serving institutions (MSIs) of higher education, including historically black colleges and universities (HBCUs), Hispanic-serving institutions (HSIs), Alaska Native- and Native Hawaiian-serving institutions (ANNHIs), and majority-minority institutions (MMIs). However, the 111th Congress enacted legislation (P.L. 111-84) that authorizes defense agencies to provide assistance similar to that authorized under Section 1207 to MSIs.

On September 9, 2011, the Obama Administration proposed amending the Federal Acquisition Regulation (FAR) in light of the decisions by the Federal Circuit and district court in *Rothe*. Among other things, the proposed changes would delete those provisions of the FAR which govern price evaluation adjustments to bids or offers submitted by small disadvantaged businesses for defense contracts, as well as relocate and amend those provisions of the FAR regarding monetary incentives and evaluation factors for subcontracting with small disadvantaged businesses.

The report examines the *Rothe* decision in detail; describes existing contracting programs for minority-owned and women-owned small businesses; and analyzes *Rothe*'s potential effect on these programs, including the Business Development Program under Section 8(a) of the Small Business Act. These programs were not at issue in *Rothe* and would not be substantively changed by the Obama Administration's proposed amendments to the FAR. However, as numerous commentators and the Small Business Administration (SBA) have recognized, the *Rothe* decision could have significant implications for other federal contracting programs for small businesses.

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Introduction

On November 4, 2008, the U.S. Court of Appeals for the Federal Circuit issued its decision in *Rothe Development Corporation v. Department of Defense*, a case involving a challenge to the constitutionality of a “small disadvantaged business” (SDB) program of the Department of Defense (DOD).¹ As part of the SDB program, DOD could apply a 10% price evaluation adjustment to the offers of small businesses owned and controlled by socially and economically disadvantaged individuals in pursuit of its goal of awarding 5% of its contract dollars to such businesses, among others.² In determining which small businesses were socially and economically disadvantaged, the SDB program relied upon Section 8(d) of the Small Business Act, which presumes that minorities are socially and economically disadvantaged, while also allowing non-minorities to demonstrate disadvantage.³ Rothe Development Corporation (RDC) challenged the constitutionality of the SDB program after losing a contract to a Korean-American-owned firm. RDC’s offer would have been lower had DOD not applied a 10% price evaluation preference to the Korean-American firm’s offer.⁴ RDC claimed that the SDB program was unconstitutional, both on its face and as applied, because the program denied it equal protection by treating minority and nonminority businesses differently.⁵ Prior litigation had resolved the as-applied challenge in RDC’s favor,⁶ and, in its decision, the Federal Circuit resolved the facial challenge in RDC’s favor as well. The Federal Circuit found that DOD’s SDB program was unconstitutional because, when re-enacting the program in 2006, Congress lacked a “strong basis in evidence” for concluding that race-conscious contracting was necessary to remedy discrimination in the defense industry.⁷

The Federal Circuit’s decision in *Rothe* was followed on February 27, 2009, by a decision of the U.S. District Court for the Western District of Texas, San Antonio Division, to which the case had been remanded for entry of judgment.⁸ This decision enjoined defense agencies from implementing other programs authorized by Section 1207 because these programs were “contingent” on the subsections containing the price preference and must “also fall” when those subsections did.⁹ These programs included technical and infrastructure assistance for certain minority-serving institutions (MSIs) of higher education, including historically black colleges and universities (HBCUs), Hispanic-serving institutions (HSIs), Alaska Native- and Native Hawaiian-serving institutions (ANNHIs), and majority-minority institutions (MMIs).¹⁰ However, the 111th

¹ *Rothe Dev. Corp. v. Dep’t of Defense*, 545 F.3d 1023 (Fed. Cir. 2008). The government did not seek certiorari from the Supreme Court.

² 10 U.S.C. § 2323(a)(1) (5% goal); 10 U.S.C. § 2323(e)(3)(A) (10% price evaluation adjustment).

³ 15 U.S.C. § 637(d)(3)(C)(ii) (“The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.”); 13 C.F.R. § 124.1002 (addressing requirements for proving social and economic disadvantage).

⁴ *Rothe Dev. Corp.*, 545 F.3d at 1029.

⁵ *Id.* at 1026.

⁶ *See Rothe Dev. Corp. v. Dep’t of Defense*, 324 F. Supp. 2d 840, 850 (W.D. Tex. 2004).

⁷ *Rothe Dev. Corp.*, 545 F.3d at 1049.

⁸ *Rothe Dev. Corp. v. Dep’t of Defense*, 2009 U.S. Dist. LEXIS 22029, at *12 (W.D. Tex. 2009).

⁹ *Id.* at *11-14.

¹⁰ 10 U.S.C. § 2323(c)(1)-(3).

Congress responded to the District Court's decision by enacting legislation authorizing defense agencies to provide assistance similar to that authorized under Section 1207 to MSIs.¹¹

On September 9, 2011, the Obama Administration proposed amending the Federal Acquisition Regulation (FAR) in light of the decisions by the Federal Circuit and the district court in *Rothe*. Among other things, the proposed changes would delete those provisions of the FAR which govern price evaluation adjustments to bids or offers submitted by small disadvantaged businesses for defense contracts, as well as relocate and amend those provisions of the FAR regarding monetary incentives and evaluation factors for subcontracting with small disadvantaged businesses.¹²

The report examines the *Rothe* decision in detail; describes existing contracting programs for minority-owned and women-owned small businesses;¹³ and analyzes *Rothe*'s potential effect on these programs, including the Business Development Program under Section 8(a) of the Small Business Act. These programs were not at issue in *Rothe* and would not be substantively changed by the Obama Administration's proposed amendments to the FAR. However, as numerous commentators and the Small Business Administration (SBA) have recognized, the *Rothe* decision could have significant implications for other federal contracting programs for small businesses.¹⁴ In particular, commentators wonder whether the government could demonstrate a "strong basis in evidence" for these programs, which include the subcontracting programs under Sections 8(a) and (d) of the Small Business Act, if they were challenged.¹⁵

Background

DOD's Small Disadvantaged Business Program

The *Rothe* case involved a constitutional challenge to one specific federal program for minority-owned small businesses: DOD's SDB program. This program was created by Section 1207 of the

¹¹ National Defense Authorization Act for FY2010, P.L. 111-84, § 252, 123 Stat. 2242-43 (Oct. 28, 2009).

¹² Dep't of Defense, Gen. Servs. Admin. & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses: Proposed Rule, 76 Fed. Reg. 55849 (Sept. 9, 2011).

¹³ Although not subject to strict scrutiny like race-conscious programs are, gender-based programs also receive heightened scrutiny from the courts. After the *Rothe* decision, the Small Business Administration (SBA) extended the comment period on a proposed rule on federal contracting programs for women-owned small businesses so that it could "review" how the evidence underlying its determinations regarding the industries in which women are underrepresented might fare under the standards set by *Rothe*. See U.S. Small Bus. Admin., The Women-Owned Small Business Federal Contract Assistance Procedures: Eligible Industries, 74 Fed. Reg. 1153 (Jan. 12, 2009). This proposed rule has since been withdrawn, and the Obama Administration has issued new regulations for the set-aside program for women-owned small businesses. U.S. Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule, 75 Fed. Reg. 62258 (Oct. 7, 2010).

¹⁴ See, e.g., Ruling Threatens 8(a) Program, Unless Congress Acts, *Set-Aside Alert*, Nov. 21, 2008; Elizabeth Newell, Decision in Defense Procurement Case Could Set Precedent, *GovExec.com*, Nov. 11, 2008, available at <http://www.govexec.com/dailyfed/1108/111108e1.htm> ("The 8(a) program is not dead yet but this decision, if allowed to stand, could really have an impact on the 8(a) program should another contractor try a similar challenge.").

¹⁵ A legal challenge to the 8(a) Program like that in *Rothe* is, in fact, pending in the U.S. District Court for the District of Columbia. See *Dynalantic Corp. v. U.S. Dep't of Defense*, 503 F. Supp. 2d 262 (D.D.C. 2007) (denying parties' motions for summary judgment).

Department of Defense Authorization Act of 1987, which was captioned “Contract Goal for Minorities.”¹⁶ Section 1207 established, as a goal for DOD, that 5% of DOD’s contract dollars for procurement, research and development, testing and evaluation, military construction, and operations and maintenance be awarded to “small business concerns ... owned and controlled by socially and economically disadvantaged individuals.”¹⁷ Section 1207 further required or allowed DOD to take certain steps in meeting this 5% goal. Among the steps DOD was required to take were (1) making advance payments¹⁸ and (2) providing “technical assistance,” such as advice regarding DOD procurement procedures and instruction in preparing proposals. DOD was also given discretion to “enter into contracts using less than full and open competitive procedures,” which included applying price evaluation adjustments¹⁹ of up to 10% to offers submitted by small disadvantaged businesses.²⁰ For purposes of the SDB program, “socially and economically disadvantaged” had the same meaning it has under Section 8(d) of the Small Business Act, which presumes that minorities are socially and economically disadvantaged but allows non-minorities to demonstrate disadvantage.²¹

Although Section 1207 originally applied only to DOD and only for FY1987 to FY1989, its re-enactments encompassed the National Aeronautics and Space Administration (NASA) and the Coast Guard, as well as all fiscal years between 1989 and 2009.²² These periodic re-enactments of Section 1207 to extend DOD’s “contracting goal for minorities,” illustrated by **Table 1**, ultimately determined the outcome in *Rothe* because, according to the Federal Circuit, Congress did not have sufficient evidence of racial discrimination in defense contracting when it re-enacted Section 1207 in 2006. The Federal Acquisition Streamlining Act (FASA) temporarily granted other federal agencies the same authority that DOD, NASA, and the Coast Guard had under Section 1207.²³ However, these provisions of FASA were not reauthorized when they expired at the end of FY2003.²⁴

¹⁶ P.L. 99-661, § 1207, 100 Stat. 3816, 3973-75 (Nov. 14, 1986) (codified at 10 U.S.C. § 2323).

¹⁷ *Id.* at § 1207 (a)-(b).

¹⁸ *Id.* at § 1207 (c) (technical assistance) & § 1207 (e)(2) (advance payments). Advance payments are non-interest-bearing loans made by government agencies to eligible small businesses to assist them in meeting the financial requirements of performing agency contracts. The government is generally prohibited from making advance payments to contractors. *See* 31 U.S.C. § 3324.

¹⁹ A price evaluation adjustment works as follows: when comparing a offer from a small disadvantaged business with one submitted by another business, the agency can subtract up to 10% of the price from the offer submitted by the small disadvantaged business in determining which offer has the lowest price or represents the best value.

²⁰ P.L. 99-661, § 1207 (e)(3).

²¹ *Id.* at § 1207 (a)(1). *See* 15 U.S.C. § 637(d); 13 C.F.R. § 124.1002 (addressing requirements for proving social and economic disadvantage). Among other things, evidence of disadvantage must include (1) at least one objective distinguishing feature, such as race, gender, physical handicap, or geographic isolation, that has contributed to social disadvantage; (2) personal experiences of substantial and chronic social disadvantage in American society; and (3) negative impact on entry into or advancement in the business world because of the disadvantage.

²² *See, e.g.*, 10 U.S.C. § 2323 (2006) (including NASA and the Coast Guard, as well as DOD); National Defense Authorization Act for Fiscal Year 2006, P.L. 109-163, § 842, 119 Stat. 3135, 3389 (Jan. 6, 2006) (extending the price evaluation adjustment authority under Section 1207 through September 2009).

²³ P.L. 103-355, § 7102, 108 Stat. 3243, 3368-69 (Oct. 13, 1994).

²⁴ *Id.*; DOD, General Services Administration, NASA, Expiration of the Price Evaluation Adjustment, 71 Fed. Reg. 20304 (Apr. 19, 2006).

Table I. Chronology of Section 1207

Dates of Enactment and Re-enactment

Year	Period of Extension
1986	3 years
1989	7 years
1999	3 years
2002	3 years
2006	3 years

Source: Congressional Research Service.

The 5% goal for contracting with small disadvantaged businesses under Section 1207 is not the only government-wide or DOD goal for contracting with such businesses. Sections 644(g)(1) and (2) of the Small Business Act require (1) that the federal government award at least 5% of all contract dollars to small disadvantaged businesses and (2) that DOD establish, in conjunction with the SBA, similar goals that “realistically reflect the potential of ... small business concerns owned and controlled by socially and economically disadvantaged individuals ... to perform such contracts and to perform subcontracts under such contracts.”²⁵ However, while 15 U.S.C. §644(g) establishes or requires goals for contracting with small disadvantaged businesses, such goals are purely aspirational. Section 644(g) does not authorize agencies to use price evaluation adjustments—or any other mechanism—to attain contracting goals. The constitutionality of § 644(g) was not challenged in *Rothe*, nor was that of any other federal contracting program benefiting minority-owned small businesses.

The Facts Underlying the *Rothe* Litigation

The constitutionality of Section 1207 was at issue in the *Rothe* case because DOD used its price evaluation adjustment authority under Section 1207 in awarding a contract to a competitor of the Rothe Development Corporation (RDC). Beginning in the late 1980s, RDC had a contract with the Department of the Air Force to maintain, operate, and repair computer systems at Columbus Air Force Base in Mississippi.²⁶ In the late 1990s, the Air Force decided to consolidate the contract that RDC had with a contract for communications services.²⁷ When doing so, it also decided to let the contract pursuant to Section 1207 and issued a solicitation for competitive bids.²⁸ RDC bid \$5.57 million.²⁹ However, RDC was not a small disadvantaged business, and International Computer and Telecommunications, Inc. (ICT), a minority-owned small business eligible for the price evaluation adjustment under Section 1207, bid \$5.75 million.³⁰ When 10% (or \$575,000) was subtracted from ICT’s bid, its bid was lowest, and the Air Force awarded the contract to it.

²⁵ The goals presently in 15 U.S.C. § 644(g)(2) were created first. See P.L. 95-507, § 221, 92 Stat. 1757, 1771 (Oct. 24, 1978). Those presently in 15 U.S.C. § 644(g)(1) were added later by the Business Opportunity Development Reform Act of 1988. See P.L. 100-656, § 502, 102 Stat. 3853, 3881 (Nov. 15, 1988).

²⁶ *Rothe Dev. Corp.*, 545 F.3d at 1030.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

RDC filed suit in U.S. District Court for the Western District of Texas, San Antonio Division, alleging that Section 1207 deprived it of equal protection under the U.S. Constitution both as applied and on its face.³¹ RDC's as-applied challenge focused upon Section 1207 in its 1992 re-enactment, which governed DOD's award of the contract to ICT, while RDC's facial challenge ultimately focused upon the 2006 re-enactment of Section 1207, which was in effect at the time when the Federal Circuit heard the appeal. DOD countered that Section 1207 "satisfies the strict scrutiny standard established by the United States Supreme Court in *Adarand v. Peña*."³² DOD did not contest whether Section 1207's presumption regarding race and disadvantage constituted a racial classification subjecting its SDB program to strict scrutiny.³³

The Constitutional Principles at Issue in *Rothe*

The claims and defenses of the parties to the *Rothe* litigation rested on the U.S. Constitution and case law interpreting it. The Fifth Amendment to the Constitution guarantees due process of law to individuals in their dealings with the federal government.³⁴ Due process under the Fifth Amendment includes equal protection, or the constitutional assurance that the government will apply the law equally to all people and not improperly prefer one class of people over another.³⁵ For this reason, consideration of race by the federal government, even when intended to remedy past discrimination, is constitutional only if it meets the so-called strict scrutiny test, which requires that a race-conscious government program be narrowly tailored to further a compelling government interest.³⁶ An alleged government interest qualifies as a compelling one, for due process or equal protection purposes, only when the government entity creating the racial classification (1) identified public or private discrimination with some specificity before resorting to race-conscious remedies and (2) had a "strong basis in evidence" to conclude that race-conscious remedies were necessary before enacting or implementing these remedies.³⁷ As regards the "strong basis in evidence" requirement, the government has the burden of producing statistical evidence sufficient to support an inference of discrimination.³⁸ Once the government has done this, the plaintiffs challenging the government's action have the burden of persuasion in refuting the government's evidence and establishing race-neutral explanations for any apparent racial disparities alleged by the government.³⁹ Plaintiffs can do this by, among other things, showing

³¹ *Rothe Dev. Corp. v. Dep't of Defense*, 49 F. Supp. 2d 937, 941 (W.D. Tex. 1999).

³² *Id.*

³³ Some courts had previously denied firms or individuals standing to challenge programs with racial presumptions like that underlying Section 1207 on the grounds that the would-be plaintiffs were denied the contract because of inability to demonstrate social and economic disadvantage, not because of race. *See, e.g., Interstate Traffic Control v. Beverage*, 101 F. Supp. 2d 445 (S.D. W.Va. 2000); *Ellsworth Assocs. v. United States*, 926 F. Supp. 207 (D.D.C. 1996).

³⁴ U.S. Const. amend. V.

³⁵ *See Bolling v. Sharpe*, 347 U.S. 497 (1954). Although the Fourteenth Amendment requires equal protection, it does not preclude the classification of individuals. The Supreme Court has noted that the Constitution does not require things which are "different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

³⁶ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). *See generally* CRS Report RL33284, *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues*, by (name redacted).

³⁷ *Shaw v. Hunt*, 517 U.S. 899, 909-10 (1996); *Concrete Works of Colorado, Inc. v. City and County of Denver*, 321 F.3d 950, 958 (10th Cir. 2003).

³⁸ *Concrete Works*, 321 F.3d at 958.

³⁹ *Id.*

that the government's statistics are flawed; demonstrating that the disparities shown by the government's statistics are not significant; or presenting contrasting statistical data of their own.⁴⁰

Prior Litigation in the *Rothe* Case

In applying the legal tests for equal protection to the facts of the case, the federal courts issued several opinions prior to the Federal Circuit's November 2008 decision. On April 27, 1999, the district court granted summary judgment to DOD, upholding the constitutionality of Section 1207 and denying RDC relief, because it found "no illegitimate purpose, no racial preference, and no racial stereotyping" at work in Section 1207.⁴¹ RDC appealed to the U.S. Court of Appeals for the Fifth Circuit, which transferred the case to the Federal Circuit because RDC asserted claims under the Tucker Act as well as under the U.S. Constitution.⁴² Tucker Act claims are within the exclusive appellate jurisdiction of the Federal Circuit.⁴³ It was because of this transfer of the case from the Fifth Circuit to the Federal Circuit that the Federal Circuit decided *Rothe* using Fifth Circuit law.⁴⁴ The Federal Circuit's reliance on Fifth Circuit precedent does not make *Rothe* precedent for the Fifth Circuit, however, because federal circuits are not bound by other circuits' interpretations of their law.⁴⁵ On November 8, 2000, the Federal Circuit vacated the district court's decision and remanded the case for further proceedings because the district court, in finding for DOD, had not applied strict scrutiny and impermissibly considered evidence of discrimination that arose after Section 1207 had been re-enacted.⁴⁶

On July 2, 2004, the district court issued a second opinion, holding that Section 1207 was unconstitutional as applied in 1998, but constitutional on its face.⁴⁷ In reaching this holding, the court found that while DOD failed to demonstrate that Congress had sufficient evidence of discrimination when it re-enacted Section 1207 in 1992, DOD had shown that Congress had such evidence when it re-enacted Section 1207 in 2002. RDC appealed to the Federal Circuit, which affirmed the district court on the as-applied challenge and remanded the case for consideration of the merits of the facial challenge.⁴⁸ When the district court again granted summary judgment to DOD on RDC's facial challenge,⁴⁹ RDC filed the appeal that that gave rise to the Federal Circuit's decision on November 4, 2008. The primary question at issue in the decision that would become "*Rothe VII*" was whether Section 1207 was unconstitutional on its face as re-enacted in 2006.⁵⁰

⁴⁰ *Coral Constr. Co. v. King County*, 941 F.2d 910, 921 (9th Cir. 1991).

⁴¹ *Rothe Dev. Corp.*, 49 F. Supp. 2d at 954 ("*Rothe I*").

⁴² *Rothe Dev. Corp. v. Dep't of Defense*, 194 F.3d 622 (5th Cir. 1999) ("*Rothe II*").

⁴³ 28 U.S.C. § 1295(a)(2).

⁴⁴ *Rothe Dev. Corp.*, 545 F.3d at 1035 ("*Rothe VII*").

⁴⁵ The Federal Circuit is a court of subject-specific, not territorial, jurisdiction, so there is no geographic region in which its decisions are precedent. The Fifth Circuit, in contrast, is a territorial jurisdiction.

⁴⁶ *Rothe Dev. Corp. v. Dep't of Defense*, 262 F.3d 1306 (Fed. Cir. 2001) ("*Rothe III*").

⁴⁷ *Rothe Dev. Corp. v. Dep't of Defense*, 324 F. Supp. 2d 840 (W.D. Tex. 2000) ("*Rothe IV*").

⁴⁸ *Rothe Dev. Corp. v. Dep't of Defense*, 413 F.3d 1327 (Fed. Cir. 2005) ("*Rothe V*").

⁴⁹ *Rothe Dev. Corp. v. Dep't of Defense*, 499 F. Supp. 2d 775 (W.D. Tex. 2007) ("*Rothe VI*").

⁵⁰ The Federal Circuit focused upon the 2006 re-enactment of Section 1207 in deciding the facial challenge because this was the re-enactment in effect when the Federal Circuit heard the case. In its earlier proceeding, the district court had considered the 2002 re-enactment of Section 1207 for the same reason.

Federal Circuit’s Decision Finding Section 1207 Unconstitutional

In its November 4, 2008, decision, the Federal Circuit found that Section 1207 was unconstitutional on its face because, when Congress re-enacted Section 1207 in 2006, it lacked a strong basis in evidence for concluding that race-conscious contracting was necessary to remedy discrimination in the defense industry.⁵¹ The district court, which had upheld the constitutionality of the challenged SDB program in “*Rothe VI*,” had found that six state and local disparity studies, along with other statistical and anecdotal evidence, constituted a strong basis in evidence for the re-enactment of Section 1207.⁵² The Federal Circuit disagreed.⁵³ It found that the six state and local disparity studies—which had been the “primary focus of the district court’s compelling interest analysis and of the parties’ arguments on appeal”⁵⁴—did not constitute a strong basis in evidence because they did not provide the “substantially probative and broad-based statistical foundation ... that must be the predicate for nationwide, race-conscious action.”⁵⁵

The Federal Circuit first found significant methodological flaws with all of the disparity studies. According to the Federal Circuit, two of the six studies failed to exclude unqualified businesses in calculating the number of minority businesses available for government contracts,⁵⁶ while five of the six studies failed to account for the relative capacity of minority-owned small businesses in contracting with the government.⁵⁷ These flaws, coupled with the fact that the studies’ findings addressed only six of the more than 3,000 counties and equivalent regions making up the United States, prompted the Federal Circuit to find that the studies were insufficient to constitute a strong basis in evidence for the nationwide SDB program.⁵⁸ The Federal Circuit also suggested, although it reached no final holding on the issue, that the studies were not “before Congress” when Section 1207 was reenacted because they were mentioned by name or discussed only in two floor speeches and Congress did not make any findings concerning them.⁵⁹

⁵¹ *Rothe Dev. Corp.*, 545 F.3d at 1049.

⁵² *Id.* at 1036-37. A disparity study is a “study attempting to measure the difference—or disparity—between the number of contracts or contract dollars *actually* awarded to minority-owned businesses in a particular contract market, on the one hand, and the number of contracts or contract dollars that one would *expect* to be awarded to minority-owned business given presence in that particular contract market, on the other hand.” *Id.* at 1037 (emphases in the original).

⁵³ *Id.* at 1046.

⁵⁴ *Id.* at 1037.

⁵⁵ *Id.* at 1040. *See also id.* at 1045 (“To be clear, we do *not* hold that the defects in the availability and capacity analyses in these six disparity studies render the studies wholly unreliable for any purpose.... But we hold that the defects we have noted detract dramatically from the probative value of these six studies, and, in conjunction with their limited geographic coverage, render the studies insufficient to form the statistical core of the ‘strong basis in evidence’ required to uphold the statute.”) (emphasis in the original).

⁵⁶ *Id.* at 1042.

⁵⁷ *Id.* at 1043.

⁵⁸ *Id.* at 1045-46.

⁵⁹ *Id.* at 1039-40 (noting that the studies had been mentioned by title, author, and date in two floor speeches—one by Senator Ted Kennedy and one by Representative Cynthia McKinney—but had been neither discussed in congressional hearings nor the subject of congressional findings). The Federal Circuit also suggested that the currency of the studies upon which Congress relies is relevant to the analysis of whether a strong basis in evidence exists. However, the Federal Circuit rejected RDC’s argument for a *per se* rule that studies more than five years old cannot constitute a strong basis in evidence. *Id.* at 1039. Instead, the Federal Circuit suggested that Congress can rely upon the most (continued...)

The Federal Circuit similarly found that other statistical data and anecdotes discussed by the parties and the district court were insufficient to constitute a strong basis in evidence for the SDB program.⁶⁰ The Federal Circuit discounted the remaining statistical evidence because it was mentioned only in floor speeches, without being the subject of congressional findings. In fact, the court noted that some of the purported evidence was not even “sufficiently described ... for [the Federal Circuit] to locate [it], let alone subject [it] to detailed, skeptical, non-deferential analysis.”⁶¹ It likewise discounted the anecdotal evidence, even though this evidence had been introduced at congressional hearings, because “anecdotal evidence is insufficient by itself to support *Section 1207*.”⁶² The Federal Circuit further noted that the anecdotal evidence, including that compiled by the district court, did not address “a single instance of alleged discrimination by DOD in the course of awarding a prime contract, nor a single instance of alleged discrimination by a private contractor identified as the recipient of a prime defense contract.”⁶³ The Federal Circuit found this lack of evidence of discrimination in DOD contracts significant because it suggested that the government could not prove “passive participation” in discrimination, as required under *City of Richmond v. Croson*, as a justification for DOD’s SDB program.⁶⁴ Under *Croson*, a government entity can resort to racial classifications in situations when it is not remedying its own prior discrimination if it can show it is a “passive participant” in a system of racial exclusion practiced by industry.⁶⁵

District Court’s Judgment Prohibiting Section 1207 Programs for Minority-Serving Institutions

At the end of its decision in *Rothe VII*, the Federal Circuit remanded the case to the U.S. District Court for the Western District of Texas, San Antonio Division, with instructions for the district court to enter a judgment declaring Section 1207, as re-enacted in 2006, facially unconstitutional and enjoining application of the current 10 U.S.C. § 2323.⁶⁶ The district court entered its judgment on February 27, 2009, prohibiting defense agencies not only from implementing price evaluation adjustments for offers from small disadvantaged businesses but also from implementing technical and infrastructure assistance programs for certain minority-serving institutions (MSIs) of higher education,⁶⁷ including historically black colleges and universities (HBCUs), Hispanic-serving institutions (HSIs), Alaska Native- and Native Hawaiian-serving institutions (ANNHIs), and majority-minority institutions (MMIs).⁶⁸

(...continued)

recently available studies so long as these studies are reasonably up-to-date. *Id.*

⁶⁰ *Id.* at 1046-49.

⁶¹ *Id.* at 1047.

⁶² *Id.* at 1048 (emphasis in original).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See *City of Richmond v. Croson*, 488 U.S. 469, 492 (1989).

⁶⁶ *Rothe Dev. Corp.*, 545 F.3d at 1050.

⁶⁷ *Rothe Dev. Corp.*, 2009 U.S. Dist. LEXIS 22029, at *12. See 10 U.S.C. § 2323(c)(1)-(3) (listing the groups eligible for certain programs under the authority of 10 U.S.C. § 2323). The government did not appeal this decision.

⁶⁸ The definitions for these institutions may be found at 20 U.S.C. § 1061 (HBCUs), 20 U.S.C. § 1101a (HSIs), 20 U.S.C. § 1059d (ANNHIs), and 20 U.S.C. § 1067k (MMIs). For more information on MSIs, see CRS Report RL32674, (continued...)

Although the government argued on remand that the judgment should be limited to subsections (a)(1)(A) and (e)(3) of Section 1207, which incorporated the price evaluation adjustment authority applicable to the offers of small disadvantaged businesses that had been the focus of the parties' arguments and the Federal Circuit's decision,⁶⁹ the district court disagreed.⁷⁰ It struck down the totality of Section 1207 as presently codified in 10 U.S.C. § 2323, including

1. Provisions in subsection (a)(1)(A)-(D) allowing awards to qualified HUBZone small businesses, HBCUs, HSIs, ANNHIs, and MMIs to count toward DOD's 5% goal;
2. Provisions in subsections (c)(1)-(4) authorizing DOD to provide technical assistance to entities counting toward its 5% goal, as well as infrastructure assistance to minority institutions;⁷¹
3. Provisions in subsection (e)(2) allowing DOD to make advance payments to qualifying entities; and
4. Provisions in sections (f)-(k) containing definitions and addressing implementation of DOD's SDB program.⁷²

In so deciding, the district court specifically rejected arguments that any preferences for HUBZone businesses are race neutral and that RDC lacks standing to challenge infrastructure assistance to colleges and universities.⁷³ The court's reasoning in doing so, and in issuing its judgment, was that the Federal Circuit struck down the totality of section (a) in its decision, and sections (b) through (k) are contingent upon section (a) and must "also fall" when section (a) does.⁷⁴

On March 10, 2009, the Under Secretary of Defense (Acquisition, Technology & Logistics) responded to the District Court's decision by directing that

... any activity, which includes but is not limited to the award of contracts and orders under contracts, advance payments, and the award of grants or scholarships or the addition of funds

(...continued)

Minority-Serving Higher Education Institutions: Analysis of Selected Institutional and Student Characteristics, by (name redacted) and James B. Stedman.

⁶⁹ *Rothe Dev. Corp.*, 2009 U.S. Dist. LEXIS 22029, at *7.

⁷⁰ *Id.* at *10.

⁷¹ Under Section 1207, "technical assistance" means information about the program, advice about agency procurement procedures, instruction in the preparation of proposals, and other similar assistance considered appropriate by the head of the contracting agency. *See* 10 U.S.C. § 2323(c)(2). Infrastructure assistance includes (1) establishing or enhancing undergraduate, graduate, or doctoral programs in scientific disciplines; (2) making DOD personnel available to advise and assist faculty; (3) establishing partnerships between defense laboratories and minority institutions; (4) awarding scholarships and fellowships, or establishing cooperative work-education programs, in scientific disciplines; (5) attracting and retaining faculty involved in scientific disciplines; (6) equipping and renovating laboratories; (7) expanding and equipping Reserve Officer Training Corps activities; and (8) providing other similar assistance. *See* 10 U.S.C. § 2323(c)(3)(A)-(H).

⁷² *Rothe Dev. Corp.*, 2009 U.S. Dist. LEXIS 22029, at *11-14.

⁷³ *Id.* at *7.

⁷⁴ *Id.* at *11-14. The District Court subsequently denied *Rothe Development Corporation's* request for attorney's fees under the Equal Access to Justice Act because the Department of Defense's legal position was reasonable given that DOD had previously prevailed in similar cases. *Rothe Dev. Corp. v. U.S. Dep't of Defense*, W.D. Tex., No. SA-98-CV-1011-XR, 8/11/09.

to existing grants and scholarships, that rely exclusively on the authority of 10 U.S.C. § 2323 should cease.⁷⁵

A subsequent memorandum from the Department of the Army clarified that, for purposes of Army programs, options under existing contracts “should be treated . . . as separate contract action[s] and the contracting organization should not exercise the option if the funding authority for the underlying contract stemmed solely from Title 10 U.S.C. Section 2323.”⁷⁶ The memorandum also stated that the Army’s goals for assistance to HBCUs remain in effect as aspirational goals and that pre-existing agreements with HBCUs could be continued until they lapse because the district court’s decision was prospective and governed only contracting and other actions initiated after February 26, 2009.⁷⁷

The 111th Congress responded to the district court’s decision, in part, by establishing a new program to assist HBCUs, HSIs, ANNHIs, MMIs, and other MSIs in performing “defense-related research, development, testing, and evaluation activities.”⁷⁸ Among the forms of assistance that defense agencies may provide under this program are grants, scholarships, fellowships, and the acquisition of research equipment and instrumentation.⁷⁹

Proposed Amendments to the FAR

On September 9, 2011, the Obama Administration proposed amending the FAR in light of the decisions by the Federal Circuit and the district court in *Rothe*.⁸⁰ The Administration proposes to delete those portions of the FAR which govern price evaluation adjustments to bids or offers submitted by small disadvantaged businesses for defense contracts, and which are rooted solely in Section 1207 of the Department of Defense Authorization Act of 1987 (i.e., Subpart 19.11 and the corresponding clause at FAR 52.219-23).⁸¹ It also proposes to relocate and otherwise amend those provisions of the FAR which govern monetary incentives and evaluation factors for subcontracting with small disadvantaged businesses, and which are rooted in the Small Business Act (i.e., Subpart 19.12 and corresponding clauses FAR 52.219-24, 52.219-25 and 52.219-26).⁸²

⁷⁵ Dep’t of Defense, Under Secretary of Defense (Acquisition, Technology & Logistics), Immediate Cessation of Activities Relying on 10 U.S.C. § 2323, Mar. 10, 2009, *available at* <http://www.acq.osd.mil/osbp/policy/USA001376-09%20Signed.pdf>.

⁷⁶ Dep’t of the Army, Under Secretary of Defense (Acquisition, Technology & Logistics (AT&L)) *Rothe* Memo—Immediate Cessation of Activities Relying on Title 10 United States Code (U.S.C.) Section 2323, May 22, 2009. Agencies were, however, instructed to exercise options that could be funded under other authority.

⁷⁷ *Id.*

⁷⁸ P.L. 111-84, § 252 (codified at 10 U.S.C. § 2362).

⁷⁹ *Id.* at § 252(c).

⁸⁰ 76 Fed. Reg. at 55849-58.

⁸¹ *Id.* at 55849.

⁸² *Id.* While the Federal Acquisition Regulatory Council (FAR Council) has indicated that it intends to consult with SBA regarding “the need for guidance in the FAR on the use of evaluation factors and subcontractors for subcontracting,” it has emphasized that “[n]othing in this rulemaking precludes an agency from using evaluation factors and subfactors for subcontracting during source selection.” *Id.* at 55849-50. In other words, the question to be addressed in the FAR Council’s consultation with SBA is whether the FAR provides guidance on the exercise of this authority, not whether agencies have this authority.

According to the Administration, the latter provisions “were not at issue in the *Rothe* decision, and therefore retain their legal status.”⁸³

Implications of the *Rothe* Decision for Federal Small-Business Contracting Programs

As numerous commentators and the SBA have recognized, the Federal Circuit’s decision in *Rothe* could have significant implications for the percentage of federal contract dollars awarded to minority-owned small businesses and for other federal contracting programs for small businesses.⁸⁴ The demise of DOD’s price evaluation adjustment authority under Section 1207 is not, in itself, necessarily all that significant, in part because other provisions of law have precluded DOD from exercising this authority for over a decade, as is discussed below. Potentially more serious is the effect that the *Rothe* decision could have on other programs for small disadvantaged businesses, which minority-owned small businesses are presumed to be. The *Rothe* decision arguably suggests grounds upon which potential plaintiffs might be able to successfully challenge these programs. The *Rothe* decision could also potentially leave programs for women-owned small businesses vulnerable to constitutional challenges. While not subject to strict scrutiny like the program for minority contractors at issue in *Rothe*, these programs are subject to heightened scrutiny rather than rational basis review, which is the most deferential form of judicial scrutiny.⁸⁵ Other programs for small businesses should be unaffected by the *Rothe* decision.

Will *Rothe* Lead to a Decline in Federal Contracting with Minority-Owned Businesses?

Many commentators concerned about the potential effects of the *Rothe* decision have noted that the decision could cause the percentage of federal contract dollars awarded to minority-owned small businesses to decrease because it bars DOD from making price evaluation adjustments to the offers of minority-owned small businesses.⁸⁶ This concern has some basis, both because of DOD’s prominent role in federal procurement activities and because Section 1207 was unique, among existing federal laws, in coupling contracting goals with authority to take specific steps in

⁸³ *Id.* at 55849. The Administration would also make minor changes to other provisions of the FAR, in order bring them into conformity with the revised Subparts 9.11 and 9.12. It would also amend Standard Form (SF) 294, which is used to report subcontracting with small disadvantaged businesses, by deleting references to the collection of subcontract award data for HBCUs and MIs.

⁸⁴ *See, e.g.*, Joe Davidson, Another Obstacle for Affirmative Action, and Congress Is Prepared to Fight, *Wash. Post*, Dec. 3, 2008, at D1 (noting the possible effects of the *Rothe* decision on other programs for small businesses); DOD Confused by Recent Court Decision on Affirmative-Action Rule, *The Front Runner*, Dec. 3, 2008 (worrying that *Rothe* could lead to a decline in federal contracting with minority-owned small businesses); U.S. Small Bus. Admin., *supra* note 13 (extending the comment period on a proposed rule relating to the contracting assistance program for women-owned small businesses).

⁸⁵ *See Craig v. Boren*, 429 U.S. 190, 197 (1976). In *United States v. Virginia*, the Court required the State of Virginia to provide an “exceedingly persuasive justification” for its policy of maintaining an all-male military academy. 518 U.S. 515 (1996). It is unclear whether this standard is in fact more strict than the intermediate scrutiny standard of review that has long applied to gender classifications.

⁸⁶ *See, e.g.*, DOD Confused, *supra* note 84.

attempting to meet these goals. DOD accounts for a larger share of federal contract spending than all other federal agencies combined. In FY2010, DOD spent \$367.1 billion on contract awards, or 68% of the \$537.9 billion that the federal government spent on such awards.⁸⁷ DOD's prominent role in federal contracting would make it difficult for the federal government to meet its contracting goals for minority-owned small businesses if DOD failed to meet its goals, and DOD's authority under Section 1207 was the sole means of ensuring that DOD could meet its minority-contracting goal. Section 1207 was, in fact, the only provision under current federal law giving agencies authority to take specific steps in meeting their contracting goals.⁸⁸ At various times in the past, other provisions of federal law gave other agencies similar price evaluation adjustment authority, or gave DOD and other agencies other authority to take specific steps to increase the percentage of federal contract dollars awarded to minority-owned businesses.⁸⁹ However, these authorities were gradually removed by judicial decisions, agency rule-making or congressional action, leaving only Section 1207.⁹⁰ In short, by precluding DOD from using its authority under Section 1207, the *Rothe* decision effectively removes the only mechanism that the agency responsible for the vast majority of federal contracting could rely upon to ensure awards to minority-owned small businesses in certain circumstances (i.e., when the offers of such businesses were within 10% of what would otherwise be the lowest-priced offer).

Despite the existence of such grounds for concern, however, the *Rothe* decision, in itself, does not necessarily portend an immediate decline in federal contracting with minority-owned small businesses. There are two related reasons for this. First, because of other provisions of law, DOD has not exercised its price evaluation adjustment authority under Section 1207 for over a decade. Section 801 of the Strom Thurmond National Defense Authorization Act for Fiscal Year 1999 barred DOD from granting price evaluation adjustments in any fiscal year directly following a fiscal year in which DOD awarded at least 5% of its contract dollars to small disadvantaged businesses.⁹¹ Because DOD met this goal in every fiscal year between 1997 and the present, Section 801 operated to keep DOD from granting price evaluation adjustments in every fiscal year between 1998 and 2009.⁹² Arguably, only if DOD failed to award at least 5% of its contract dollars to small disadvantaged businesses in a future fiscal year, or if Section 801 were repealed, would the full effects of *Rothe* on contracting with minority-owned small businesses be felt. Second, the 5% goal for contracting with small disadvantaged businesses established by Section 1207 is not DOD's only goal for contracting with such businesses. Similar goals are required under other provisions of law, most notably 15 U.S.C. § 644(g)(2), whose constitutionality was not at issue in *Rothe*.⁹³ For example, under 15 U.S.C. § 644(g)(2), DOD's goal for contracting

⁸⁷ Federal Contract Awards by Major Contracting Agency, *usaspending.gov*, last updated Sept. 16, 2011, available at http://usaspending.gov/explore?fiscal_year=2010&tab=By+Agency&fromfiscal=yes&carryfilters=on&Submit=Go.

⁸⁸ The primary federal statute pertaining to contracting goals is 15 U.S.C. § 644(g), which created purely "aspirational goals," or goals unaccompanied by authority to take specific steps in meeting them.

⁸⁹ See generally *Minority Contracting and Affirmative Action for Disadvantaged Small Businesses*, *supra* note 36, for a description of prior authorities and their removal.

⁹⁰ See *id.* Section 1207 does not appear to have been reauthorized when it expired in 2009.

⁹¹ P.L. 105-261, § 801, 112 Stat. 1921, 2080-81 (Oct. 17, 1998).

⁹² *Rothe Dev. Corp.*, 545 F.3d at 1028 (addressing DOD's authority in fiscal years 1998 to 2007); 48 C.F.R. § 19.11 (2008) (suspending DOD's price evaluation adjustment authority for FY2008); Dep't of Defense, Suspension of the Price Evaluation Adjustment for Small Disadvantaged Businesses, 74 Fed. Reg. 7671 (Feb. 19, 2009) (suspending DOD's price evaluation adjustment authority for FY2009).

⁹³ See also 22 U.S.C. § 2864(e) ("Not less than 10 percent of the amount of funds obligated for local guard contracts for Foreign Service buildings subject to subsection (c) of this section shall be allocated to the extent practicable for contracts with United States minority small business contractors."); 49 U.S.C. § 47113(b) ("Except to the extent that (continued...)

with minority-owned small businesses was 5.0% in FY2009, and DOD exceeded this goal.⁹⁴ The SBA's "Procurement Scorecards," which highlight agencies' achievements in contracting with various subcategories of small businesses, may help to keep agencies and the general public attuned to contracting goals and progress toward them.⁹⁵

What Effect Could *Rothe* Have on Other Minority Contracting Programs?

Even if the demise of price evaluation adjustment authority under Section 1207 does not trigger an immediate decline in federal contracting with minority-owned small businesses, however, the *Rothe* decision could still have profound implications for such businesses by suggesting possible grounds for constitutional challenges to other programs.⁹⁶ The loss of some of these programs, particularly the Business Development Program under Section 8(a) of the Small Business Act, could potentially have a much more significant impact on minority-owned small businesses than the loss of DOD's SDB program, especially given the limits already placed on DOD's exercise of its price evaluation adjustment authority by other legislation.⁹⁷

Overview of Existing Programs

There are currently several government-wide programs providing contracting assistance to small businesses at least 51% owned and unconditionally controlled by socially and economically disadvantaged individuals. These programs include

- aspirational goals for the percentage of prime contracts and subcontracts awarded to small disadvantaged businesses by the federal government, as a whole, and by individual federal agencies;⁹⁸
- subcontracting agencies' prime contracts to small businesses owned and controlled by socially and economically disadvantaged individuals through the SBA under the 8(a) Business Development Program;⁹⁹

(...continued)

the Secretary decides otherwise, at least 10 percent of amounts available in a fiscal year under section 48103 of this title shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals or qualified HUBZone small business concerns." Similarly, the 5% government-wide goal for contracting with small disadvantaged businesses under 15 U.S.C. § 644(g)(1) is a floor, not a ceiling. That is, the government-wide goal must be at least 5%, but could be higher.

⁹⁴ See U.S. Small Bus. Admin., Department of Defense: 2009 Small Business Procurement Scorecard, *available at* http://archive.sba.gov/idc/groups/public/documents/sba_program_office/scorecard_procure_dod_2009.pdf.

⁹⁵ See, e.g., U.S. Small Bus. Admin., Goaling Program, *available at* <http://archive.sba.gov/aboutsba/sbaprograms/goals/scorecard2009.html>.

⁹⁶ Cf. Ruling Threatens 8(a), *supra* note 14; Newell, *supra* note 14.

⁹⁷ For example, small businesses participating in the 8(a) Business Development Program received \$18 billion in revenue through the program in FY2010. See Small Business Goaling Report, Fiscal Year 2010, *available at* https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2010.pdf.

⁹⁸ 15 U.S.C. § 644(g)(1)-(2).

⁹⁹ 15 U.S.C. § 637(a).

- contract clauses and plans relating to subcontracting with small disadvantaged businesses that are incorporated into agencies' prime contracts and bind their prime contractors;¹⁰⁰
- use of evaluation factors and monetary incentives in awarding agencies' prime contracts so as to encourage agencies' contractors to subcontract with small disadvantaged businesses;¹⁰¹ and
- technical assistance and outreach programs for small disadvantaged businesses participating in the 8(a) Business Development Program.¹⁰²

Because all of these programs include presumptions that minorities are socially and, sometimes, economically disadvantaged like the presumption underlying DOD's SDB program,¹⁰³ they also arguably entail the same sort of "explicit racial classification" that DOD's SDB program did.¹⁰⁴

Potential Vulnerability of Existing Programs

Although all existing federal contracting assistance programs rely upon presumptions about disadvantage and race similar to that in Section 1207, not all of them may be equally vulnerable to constitutional challenges like that in *Rothe*. Some programs, such as those involving aspirational goals and technical assistance and outreach, are probably immune from successful constitutional challenges because of the type of assistance provided, as well as difficulties that potential plaintiffs could have in establishing standing to challenge such programs. In comparison, other programs, such as the subcontracting programs under Sections 8(a) and (d) of the Small Business Act or the FAR, may be more vulnerable because (1) standing often exists for bid protests and contract disputes and (2) *Rothe* could be precedent for the court hearing such cases. Even the comparatively more vulnerable programs could, however, potentially survive a constitutional challenge like that in *Rothe* depending upon the evidence of discrimination that was before Congress when it enacted or re-enacted the program.

Aspirational Goals

Aspirational goals encouraging the federal government or individual federal agencies to award certain percentages of their contract dollars to small disadvantaged businesses¹⁰⁵ are probably not

¹⁰⁰ 15 U.S.C. § 637(d).

¹⁰¹ 48 C.F.R. § 19.1202-3 (evaluation factors); 48 C.F.R. § 19.1203 (monetary incentives). Use of these authorities is limited to contracts involving industries where the Secretary of Commerce has found "substantial and pervasive evidence of persistent and significant underutilization of minority firms ... attributable to past discrimination and a demonstrated incapacity to alleviate the problem by using [other] mechanisms." 48 C.F.R. § 19.201(b)(1)-(2).

¹⁰² See, e.g., 15 U.S.C. § 636(j) (financial assistance to public or private organizations that provide various sorts of programs for 8(a) small businesses); 15 U.S.C. § 637(a)(10) (outreach to potential 8(a) businesses); 15 U.S.C. § 638(j)(2)(F) (outreach to increase the participation of 8(a) businesses in technological innovation); 13 C.F.R. § 124.520(b) (SBA's Mentor-Protégé program).

¹⁰³ See 15 U.S.C. § 637(a)(4) (presumption regarding social disadvantage underlying the 8(a) subcontracting program); U.S.C. § 637(d)(3)(C) (presumptions regarding social and economic disadvantage underlying the 8(d) subcontracting program); 48 C.F.R. § 19.201(b) (focusing on underrepresentation of minority firms in determining which industries are eligible for evaluation factors and monetary incentives under the Federal Acquisition Regulation (FAR)).

¹⁰⁴ See *Rothe Dev. Corp.*, 545 F.3d at 1035 ("Because Section 1207 incorporates an explicit racial classification—the presumption that members of certain minority groups are 'socially disadvantaged' for purposes of obtaining SDB status and the benefits that flow from that status under Section 1207 itself—the statute is subject to strict scrutiny.").

vulnerable to constitutional challenges like that in *Rothe*.¹⁰⁶ Although aspirational goals reflect classifications among small businesses based on the race or ethnicity of their owners, among other factors, the mere existence of such classifications is generally not problematic because such goals are voluntary, not mandatory, and thus do not constitute disparate treatment of small business owners by the federal government.¹⁰⁷ Broadly speaking, the government can set goals for itself as it wishes. Problems arise only when the government takes actions to realize its goals that result in the disparate treatment of individuals who are similarly situated, and aspirational goals do not authorize or allow actions that would cause disparate treatment. The situation would be different if agencies also had authority to take specific steps to meet their contracting goals for small disadvantaged businesses, such as DOD had under Section 1207. However, no agencies other than DOD, NASA, and the Coast Guard had such authority immediately prior to *Rothe*,¹⁰⁸ and *Rothe* precludes NASA and the Coast Guard, as well as DOD, from exercising this authority under Section 1207.¹⁰⁹

Technical Assistance and Outreach

Technical assistance and outreach programs for minority-owned small businesses are also unlikely to be vulnerable to constitutional challenges like that in *Rothe*, at least when they are not “contingent” upon other programs that are found unconstitutional.¹¹⁰ In considering such programs in 1996, in the aftermath of the Supreme Court’s decision in *Adarand Constructors v. Peña*, the Department of Justice (DOJ) noted that, “[a]s a general proposition, these activities are not subject to strict scrutiny” even when they are targeted to minorities.¹¹¹ DOJ did not articulate the rationale for this statement, but was probably relying on judicial precedents holding that minority outreach and recruitment efforts are not subject to strict scrutiny because they do not subject individuals to unequal treatment.¹¹² Moreover, a court’s opportunity to repudiate these precedents could be limited by the inability of potential plaintiffs to demonstrate standing to challenge technical assistance and outreach programs. The doctrine of standing requires that

(...continued)

¹⁰⁵ See, e.g., 15 U.S.C. § 644(g)(1)-(2).

¹⁰⁶ A challenge to the constitutionality of the federal government’s aspirational goals under 15 U.S.C. § 644(g) is pending, however. See *Dynalantic Corp. v. U.S. Dep’t of Defense*, 503 F. Supp. 2d 262.

¹⁰⁷ See, e.g., *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1181 (10th Cir. 2000) (permitting the constitutionality of aspirational goals in statutes, because such goals are not mandatory).

¹⁰⁸ The price evaluation adjustment authority that other agencies had under FASA expired at the end of FY2003. See *supra* note 24.

¹⁰⁹ See *Rothe Dev. Corp.*, 2009 U.S. Dist. LEXIS 22029 (enjoining application of the entirety of 10 U.S.C. § 2323).

¹¹⁰ See *id.* at *9. Technical and infrastructure assistance programs were among those struck down by the district court’s judgment in *Rothe*. The court included these programs not because they were unconstitutional in their own right, but because they were “contingent” upon other programs that had been found unconstitutional.

¹¹¹ Dep’t of Justice, Proposed Reforms to Affirmative Action in Federal Procurement, 61 Fed. Reg. 26041, 26048 (May 23, 1996).

¹¹² Courts have reasoned that “inclusive” activities, such as outreach, do not impose burdens or benefits, and do not subject individuals to unequal treatment, unlike “exclusive” activities such as quotas, set-asides, and layoff preferences. For this reason, they have concluded that “inclusive” activities are not subject to strict scrutiny, whereas “exclusive” activities are. See, e.g., *Duffy v. Wolle*, 123 F.3d 1026, 1038-39 (8th Cir. 1997) (“An employer’s affirmative efforts to recruit female and minority applicants does not constitute discrimination.”); *Allen v. Ala. State Bd. of Educ.*, 164 F.3d 1347, 1352 (11th Cir. 1999) (refusing to subject racially conscious outreach efforts to strict scrutiny); *Billish v. City of Chicago*, 962 F.2d 1269, 1290 (7th Cir. 1992) (characterizing aggressive recruiting as a “race-neutral procedure[.]”, *rev’d on other grounds*, 989 F.2d 890 (7th Cir.) (en banc)).

plaintiffs demonstrate (1) injury in fact, (2) causation, and (3) redressibility before a court hears the merits of their claims.¹¹³ Standing to challenge technical assistance or outreach programs targeted to minorities could be difficult to show, in part because plaintiffs' injuries would lie in their allegedly decreased ability to compete with minority firms that are better managed and better informed about agencies' contracting opportunities. Even if such remote injuries were recognized, it would be hard to show that plaintiffs' decreased ability to compete with minority firms was primarily due to the federal programs, or would be remedied by the programs' cessation. Courts generally do not recognize "taxpayer standing," so potential plaintiffs could not claim to be harmed by the government's spending their tax dollars on technical assistance and outreach programs for minority-owned small businesses.¹¹⁴

Subcontracting Programs: 8(a), 8(d), Evaluation Factors, & Monetary Incentives

The various programs relating to subcontracting on agency prime contracts—the programs under the authority of Sections 8(a) and (d) of the Small Business Act and the FAR—are probably the most susceptible to *Rothe*-type challenges of all federal contracting programs for minority-owned small businesses. This heightened susceptibility arises, in part, because these programs allow agencies to take more concrete steps to assist small disadvantaged businesses than are involved in seeking to "expand [their] participation" in agency procurement contracts.¹¹⁵ Furthermore, these programs could potentially be seen as subjecting individuals to different treatment by, for example, setting aside contracts for competitions limited to small businesses participating in the 8(a) Business Development Program. This heightened susceptibility is also due to the fact that these programs would likely be challenged in bid protests or contract disputes where potential plaintiffs often have standing and *Rothe* could be precedent. Various provisions of federal law provide that disappointed bidders or offerors, or would-be bidders or offerors, have standing to challenge agencies' procurement activities.¹¹⁶ Challenges could thus potentially be made to agencies' decisions to subcontract certain prime contracts through the 8(a) program; require certain percentages of subcontracts under 8(d) subcontracting plans; award a contract based on evaluation factors that include subcontracting with small disadvantaged businesses; or use monetary incentives for subcontracting with small disadvantaged businesses that could prompt a prime contractor to favor a minority-contractor over a nonminority one.¹¹⁷ Other provisions of federal law likewise provide incumbent contractors with standing to challenge agency actions in

¹¹³ See, e.g., *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982); *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

¹¹⁴ See, e.g., *Massachusetts v. Mellon*, 262 U.S. 447 (1923) (finding that the plaintiff lacked standing to challenge alleged "taxation for illegal purposes" because the administration of federal statutes "likely to produce addition taxation to be imposed upon a vast number of taxpayers" is essentially a matter of public, and not individual, concern).

¹¹⁵ See 15 U.S.C. § 644(g)(2).

¹¹⁶ See 31 U.S.C. § 3556 (allowing "interested parties" to bring bid protests before the U.S. Court of Federal Claims; the Government Accountability Office; or procuring agencies); 31 U.S.C. § 3551(2)(A) (defining an "interested party" as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by failure to award the contract.").

¹¹⁷ Although a prime contractor might have difficulty demonstrating standing to challenge a monetary incentive for subcontracting with small disadvantaged businesses, a subcontractor might be able to do so. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), for example, involved such a constitutional challenge by a subcontractor objecting to a monetary incentive for subcontracting with minority businesses.

contract disputes,¹¹⁸ such as could be triggered by terminating a contractor or imposing liquidated damages for failure to abide by an 8(d) subcontracting plan.¹¹⁹

In some of these cases, especially outside the 8(a) context, standing could potentially be hard to show because the injuries arguably become more remote—and less likely to be redressed by changes in government programs—when subcontractors allege that prime contractors did not select them due to aspects of federal programs that are arguably aspirational, not mandatory. Subcontracting plans under 8(d), for example, merely require agencies to “encourage subcontracting opportunities” for small disadvantaged businesses and call for such businesses to “have the maximum practicable opportunity to participate in the performance of contracts.”¹²⁰ The plans do not require or authorize agencies’ prime contractors to take any specific steps to meet their goals under the plans. However, assuming standing were shown, *Rothe* could serve as precedent for the court deciding the challenge for several reasons. First, the U.S. Court of Federal Claims and the Federal Circuit are the only judicial forums with jurisdiction to hear federal bid protests and contract disputes,¹²¹ and the Court of Federal Claims is subject to the precedents of the Federal Circuit.¹²² Second, even assuming the constitutional challenge arose outside of a bid protest or contract dispute, plaintiffs can generally select their forum and would have little incentive to avoid courts where *Rothe* is precedent because *Rothe* arguably works in favor of those challenging the constitutionality of federal contracting programs for minority-owned small businesses.

Even when standing exists and *Rothe* is precedent, however, the programs under Sections 8(a) and (d) of the Small Business Act, as well as the evaluation factors and monetary incentives under the FAR, are arguably distinguishable from the price evaluation adjustment authority at issue in *Rothe* in ways that could potentially enable them to survive constitutional challenges. While not a rigid quota setting aside a fixed percentage of DOD contract dollars for minority-owned businesses, the 5% goal in Section 1207 can be seen as quota-like when coupled with the price evaluation adjustment authority. None of the other federal programs combine aspirational goals with mechanisms to meet them. Neither Section 8(a) of the Small Business Act nor the FAR seeks to have any fixed percentage of subcontracts awarded to minority-owned small businesses. Section 8(a) merely gives agencies discretion to subcontract through SBA when they “determine[] such action is necessary or appropriate,”¹²³ while the FAR says only that agencies “may consider”

¹¹⁸ See 41 U.S.C. § 605 (allowing incumbent contractors to make claims arising during the course of contract performance against the government); 41 U.S.C. § 609 (providing for judicial review of contractor’s claims).

¹¹⁹ 15 U.S.C. § 637(d)(8) (breach); 48 C.F.R. § 19.705-7 (liquidated damages).

¹²⁰ 15 U.S.C. § 637(d)(3) & (4)(E).

¹²¹ The Administrative Dispute Resolution Act of 1996 provided that the jurisdiction of federal district courts over bid protests would terminate on January 1, 2001, leaving the Court of Federal Claims as the exclusive trial-level federal judicial forum for bid protests. P.L. 104-320, § 12(d), 110 Stat. 3869, 3870 (Oct. 19, 1996). Disputes between contractors and agencies under existing contracts are subject to the Contract Disputes Act (CDA) of 1978. The CDA provides that the Court of Federal Claims is the sole federal trial-level court that can hear post-award disputes involving government contracts. 41 U.S.C. §§ 606 & 609(a). Federal district courts have no such jurisdiction. 28 U.S.C. § 1346(a)(2).

¹²² Although the Federal Circuit applied Fifth Circuit law, not its own law, in deciding *Rothe*, *Rothe* can probably be viewed as precedent for both the Court of Federal Claims and the Fifth Circuit because the Federal Circuit relied upon its interpretations of Supreme Court decisions in reaching its holdings. See *Rothe Dev. Corp.*, 545 F.3d at 1035 n.5 (“We note that while we stand in the shoes of the Fifth Circuit, the bulk of relevant, controlling authority comes directly from the Supreme Court, and we have interpreted much of that authority in our prior opinions in this case.”).

¹²³ 15 U.S.C. § 637(a)(1). See also 15 U.S.C. § 637(a)(1)(A) (“In any case in which the [SBA] certifies to any officer of the Government having procurement powers that the [SBA] is competent and responsible to perform any specific (continued...)”).

prime contractors' performance in subcontracting with small disadvantaged businesses as an evaluation factor and "may encourage increased subcontracting opportunities ... by providing monetary incentives."¹²⁴ Similarly, while the subcontracting plans required under Section 8(d) of the Small Business Act include percentage goals and potential sanctions (e.g., breach, liquidated damages) for failure to meet these goals,¹²⁵ Section 8(d) does not require or authorize contractors to take any specific or concrete steps in meeting their contracting goals. In fact, contractors' failure to meet goals in their 8(d) subcontracting plans is excused, by law, so long as the contractors acted in good faith in attempting to abide by the plan.¹²⁶

Furthermore, evidence of discrimination sufficient to justify race-conscious programs might have been before Congress when it enacted, or re-enacted, one or all of these programs. The "strong basis in evidence" test focuses specifically upon the evidence that was before Congress when it decided to create a race-conscious remedy in response to purported discrimination. Each program is likely to have unique evidence underlying it, and the "failure" of the evidence underlying one program does not necessarily mean that the evidence underlying other programs would also prove inadequate. It is also possible that, even if Congress lacked a strong basis in evidence when enacting the statutes that authorize the evaluation factors and monetary incentives under the FAR, a sufficient basis for these programs was nonetheless created by the Secretary of Commerce's determinations about the industries in which these authorities may be exercised. By law, agencies can use evaluation factors and monetary incentives only when contracting in industries where the Secretary has found "substantial and pervasive evidence of ... persistent and significant underutilization of minority firms ... attributable to past discrimination and ... demonstrated incapacity to alleviate the problem by using [other] mechanisms."¹²⁷

What Effect Could *Rothe* Have on Contracting Programs for Women-Owned Small Businesses?

Shortly after the Federal Circuit issued its decision in *Rothe*, the Small Business Administration (SBA) extended the comment period on its proposed rule for the contracting assistance program for women-owned small businesses under Section 8(m) of the Small Business Act.¹²⁸ The SBA did so, in part, because government programs that classify people on the basis of gender also involve a suspect classification for purposes of equal protection review under the Constitution. Gender classifications are subject to intermediate scrutiny, which is less rigid than strict scrutiny but nonetheless requires the government to show that gender classifications are substantially related to important government objectives.¹²⁹ In extending the comment period, the SBA

(...continued)

Government procurement contract to be let by any such officer, such officer shall be *authorized in his discretion* to let such procurement contract to the [SBA] upon such terms and conditions as may be agreed upon between the [SBA] and the procurement officer." (emphasis added).

¹²⁴ 48 C.F.R. § 19.1202-3 (evaluation factors); 48 C.F.R. § 19.1203 (monetary incentives).

¹²⁵ See 15 U.S.C. § 637(d)(8)(breach); 48 C.F.R. § 19.705-7 (liquidated damages).

¹²⁶ 15 U.S.C. § 637(d)(4)(F)(ii).

¹²⁷ 48 C.F.R. § 19.201(b)(1)-(2).

¹²⁸ Women-Owned Small Business Federal Contract Assistance Procedures, *supra* note 13.

¹²⁹ See *supra* note 85.

indicated that it wanted to “review[.]” the evidence underlying its determinations that women are underrepresented in certain industries.¹³⁰

The SBA never finalized this proposed rule. However, on March 4, 2010, the SBA issued new proposed regulations for the set-aside program for women-owned small businesses.¹³¹ The SBA did not explicitly address *Rothe* in its introductory comments on these regulations. However, it noted that comments on earlier proposed rules indicated that the “disparity study analysis” conducted in identifying industries eligible for set-asides “is sufficient to satisfy the intermediate scrutiny standard that applies to the WOSB [women-owned small business] Program.”¹³² It also stated that:

The means chosen by Congress to implement the WOSB Program ensure that the Program is substantially related to its goals. Congress expressly limited application of the WOSB Program only to industries in which women are substantially underrepresented or underrepresented in contracting.¹³³

SBA later issued a final version of these proposed regulations, although without additional commentary on any constitutional issues raised by the women-owned small business set-aside program.¹³⁴

The SBA may or may not be correct in stating that the set-asides for women-owned small businesses would survive intermediate scrutiny if challenged. It is, however, probably correct in identifying the disparity studies underlying the determinations of eligible industries as a likely focus of any constitutional challenges.

What Effect Could *Rothe* Have on Other Contracting Programs for Small Businesses?

The *Rothe* decision should have no effect on other federal contracting programs for small businesses generally, or for small businesses owned by members of other demographic groups, including blind and handicapped individuals; Native Americans,¹³⁵ including Native Alaskans;

¹³⁰ Women-Owned Small Business Federal Contract Assistance Procedures, *supra* note 13, at 1153.

¹³¹ Women-Owned Small Business Federal Contract Program, *supra* note 13. Implementation of the set-asides for women-owned small businesses was also temporarily delayed by a provision of the Omnibus Appropriations Act, 2009, which precluded SBA from using funds appropriated under the act to implement a proposed rule on set-asides for women-owned small businesses issued by the SBA on October 1, 2008. However, the program was finally implemented in 2010-2011. *See generally* CRS Report R41945, *Small Business Set-Aside Programs: An Overview and Recent Developments in the Law*, by (name redacted) and (name redacted).

¹³² Women-Owned Small Business Federal Contract Assistance Procedures, *supra* note 13, at 10043.

¹³³ *Id.*

¹³⁴ *See* Small Bus. Admin., Women-Owned Small Business Federal Contract Program: Final Rule, 75 Fed. Reg. 62258 (Oct. 7, 2010).

¹³⁵ Although the classification of individuals as “Native Americans” might seem to be a racial one, courts have found that federal programs focused solely upon Native Americans living on or near a reservation do not constitute such a classification. *See, e.g.,* Morton v. Mancari, 417 U.S. 535, 548 (1973). Rather, such programs have been upheld by the Supreme Court under the Constitution based on the Government’s historical trust relationship with the Tribes and the “unique legal status [of] Indians” in matters relating to tribal affairs “on or near” the reservation. According to the accepted legal view, such “special treatment” constitutes neither “racial discrimination” nor “even a ‘racial’ preference.” It is based instead on a “criterion reasonably designed to further the cause of Indian self-government” which “as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal (continued...)”

veterans; service-disabled veterans; and individuals operating businesses in Historically Underutilized Business Zones (HUBZones).¹³⁶ Only programs that rely upon suspect classifications, such as race or gender, are subject to strict or intermediate scrutiny when their constitutionality is challenged. Programs based on non-suspect classifications—such as business size, military status, disability, geography, or poverty—are subject only to rational basis review, which is characterized by deference to legislative judgment. Under rational basis review, a challenged program will be found constitutional if it is rationally related to a legitimate government interest.¹³⁷ As a result, programs reviewed under this standard are generally upheld.¹³⁸

Congress’s Role in Establishing Future Programs

Currently, the extent to which the courts will apply the reasoning in *Rothe* to future legal challenges is unclear. As a result, it is difficult to provide clear guidance regarding the requirements that Congress must meet when enacting legislation that may be subject to equal protection review. However, a few points may be made.

First, if enacting race-conscious measures or other legislation that will be subject to strict scrutiny, Congress will be required to establish a “strong basis in evidence” to support the articulated compelling governmental interest. This requirement for a “strong basis in evidence” was originally introduced by the Supreme Court in *Wygant v. Jackson Board of Education*.¹³⁹ Over the years, subsequent court cases have provided some clarification of the meaning and nature of a “strong basis in evidence” by finding that such a basis existed,¹⁴⁰ or was lacking,¹⁴¹ in particular circumstances. As these cases suggest, the *Rothe* court, which required the government to show the same types of evidence of racial discrimination as were required in other cases and subjected this evidence to the same scrutiny other courts had given it, arguably did not depart significantly from precedent in its approach to the “strong basis in evidence” requirement.

(...continued)

entities....” *Id.* at 554.

¹³⁶ See, e.g., 15 U.S.C. § 637(d) (contracting plans and clauses relating to contracting with small businesses owned and controlled by veterans or service-disabled veterans); 15 U.S.C. § 637(m) (set-asides for small businesses owned and controlled by women); 15 U.S.C. § 644 (set-asides for small businesses generally); 15 U.S.C. § 644(c) (programs for the blind and “handicapped individuals”); 15 U.S.C. § 657a (set-asides and sole-source awards for Historically Underutilized Business Zone (HUBZone) small businesses); 15 U.S.C. § 657f (set-asides and sole-source awards for service-disabled veteran-owned small businesses).

¹³⁷ See, e.g., *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

¹³⁸ See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256 (1979) (holding that a Massachusetts law that gave veterans lifetime preference for state employment did not violate the equal protection clause); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973) (“[W]ealth discrimination alone [does not provide] an adequate basis for invoking strict scrutiny.”); *McGowan v. Md.*, 366 U.S. 420, 427 (1961) (holding that “the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite.”); *but see City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 442 (1985) (applying rational basis review in striking down a city ordinance that targeted mentally disabled individuals).

¹³⁹ 476 U.S. 267 (1986).

¹⁴⁰ *W. States Paving Co. v. Wash. State DOT*, 407 F.3d 983 (9th Cir. 2005); *Concrete Works of Colo. v. City & County of Denver*, 321 F.3d 950 (10th Cir. 2003); *Sherbrooke Turf, Inc. v. Minn. DOT*, 345 F.3d 964 (8th Cir. 2003).

¹⁴¹ *City of Richmond v. Croson*, 488 U.S. 469 (1989); *Eng’g Contrs. Ass’n v. Metropolitan Dade County*, 122 F.3d 895 (11th Cir. 1997); *Contractors Ass’n v. City of Philadelphia*, 91 F.3d 586 (3d Cir. 1996).

Nevertheless, *Rothe* appears to be the latest in a long line of cases that place an increasingly heavy evidentiary burden on Congress. In the immediate aftermath of the Court's landmark decision in *Adarand Constructors v. Peña*,¹⁴² which, for the first time, applied strict scrutiny to racial preferences in federal contracting programs, the federal courts generally stressed deference to congressional authority to conduct fact-finding and to enact remedial legislation pursuant to Section 5 of the Fourteenth Amendment. This deference to congressional authority has eroded over the years. As a result, Congress must now support any race-conscious measures it enacts by developing a strong record, as demonstrated in hearings and legislative findings, of methodologically sound, broad statistical evidence of discrimination capable of withstanding searching judicial inquiry.

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¹⁴² 515 U.S. 200, 237 (1995).

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