"Disadvantaged" Small Businesses: Definitions and Designations for Purposes of Federal and Federally Funded Contracting Programs

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Summary

Three primary categories of "disadvantaged" small businesses are currently eligible for various contracting programs under federal law: (1) small businesses participating in the Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program) (8(a) participants); (2) "small disadvantaged businesses" (SDBs); and (3) "disadvantaged business enterprises" (DBEs). All programs are based in statute. Section 8(a) of the Small Business Act authorizes the 8(a) Program; Section 8(d) of the Small Business Act, the SDB program; and various transportation statutes, the DBE program. However, many of the specific requirements pertaining to these programs derive from agency regulations.

8(a) firms, SDBs, and DBEs are all characterized as "disadvantaged" because they are at least 51% owned and controlled by one or more socially and economically disadvantaged individuals or groups. However, social and economic disadvantage is defined somewhat differently for each program. Members of certain racial and ethnic groups are presumed to be socially disadvantaged for purposes of the 8(a) and SDB programs, while women are also presumed to be socially disadvantaged for purposes of the DBE program. Similarly, individuals' net worth must be $250,000 or less for entry into the 8(a) Program, while net worth can be as high as $750,000 for newly designated SDBs and $1.32 million for newly designated DBEs.

The programs for the various types of firms also differ in their operation. The 8(a) Program is open only to firms that have been certified by SBA, and firms and individual owners may generally participate in the 8(a) Program for a maximum of nine years. 8(a) participants are eligible for set-aside or sole-source contracts, as well as other assistance from the SBA. All 8(a) firms qualify as SDBs. Non-8(a) firms must be certified as SDBs by procuring agencies, private certifying entities, or state or local governments to qualify for federal programs for SDB prime contractors, although they may self certify for similar programs for SDB subcontractors. SDB certification, when required, generally lasts three years, but could last longer and apparently be renewed. There are government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to SDBs. Additionally, certain prime contractors must have "plans" for subcontracting with SDBs as terms of their contracts. Agencies may also use past performance in subcontracting with SDBs as an evaluation factor in source selection decisions, or give prime contractors "monetary incentives" for subcontracting with SDBs. DBEs must be certified by the state of the funding recipient. Certifications generally last "until and unless revoked," and there is no apparent limit on the number of times firms may be recertified. There is a national goal that 10% of federal funding for certain transportation-related projects be awarded to DBE contractors and subcontractors. Funding recipients must generally set similar goals, including on individual contracts.

Contracting opportunities for disadvantaged small businesses have recently been of interest to some Members and committees of Congress because of small businesses' widely asserted role in job creation. There has also been concern that the recession of 2007-2009 disproportionately affected disadvantaged small businesses, and that such businesses have been slow to recover. A separate report, CRS Report R43573, *Federal Contracting and Subcontracting with Small Businesses: Legislation in the 113th Congress*, by Kate M. Manuel, discusses recently enacted and introduced legislation pertaining to the 8(a) and SDB programs.

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This report discusses what constitutes a "disadvantaged" small business for purposes of federal and federally funded contracting programs and how firms are certified or otherwise designated as such. Three primary categories of disadvantaged small businesses are currently eligible for various contracting programs under federal law: (1) small businesses participating in the Small Business Administration's (SBA's) Minority Small Business and Capital Ownership Development Program (commonly known as the 8(a) Program) (8(a) participants); (2) "small disadvantaged businesses" (SDBs); and (3) "disadvantaged business enterprises" (DBEs).[1] These firms are characterized as "disadvantaged" because they are at least 51% unconditionally owned and controlled by socially and economically disadvantaged individuals or groups.[2] Members of certain racial and ethnic groups are presumed to be disadvantaged, and other individuals can prove personal disadvantage by a preponderance of the evidence. Veterans and persons with disabilities are not presumed to be disadvantaged for purposes of these programs. However, there are separate contracting programs for them.[3] Disadvantaged groups include Indian tribes, Alaska Native Corporations, Native Hawaiian Organizations, and Community Development Corporations.[4] In FY2013, the federal government awarded $30.6 billion in contacts or subcontracts to SDBs,[5] including $13.9 billion in contracts to 8(a) participants.[6] DBEs reportedly received about $4 billion through state and local governments in one recent fiscal year.[7]

Contracting opportunities for disadvantaged small businesses have recently been of interest to Members and committees of Congress because of small businesses' widely asserted role in job creation.[8] There has also been concern that the recession of 2007-2009 disproportionately affected disadvantaged small businesses, and that such businesses have been slow to recover.[9] A separate report, CRS Report R43573, *Federal Contracting and Subcontracting with Small Businesses:*

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[1] There are other federal programs for SDBs and DBEs, in particular, that are agency-specific and smaller in scale, such as the Environmental Protection Agency's DBE program. *See* 40 C.F.R. §§33.101-33.503. Such programs are not addressed in this report. Also not addressed in this report are programs for "minority business enterprises" (MBEs), as defined by the Department of Commerce's Minority Business Development Agency (MDBA). MBEs need not be "small," and their owners can be either socially *or* economically disadvantaged. 15 C.F.R. §1400.2(a). MBEs are not certified for purposes of federal programs, and there are currently no federal or federally funded contracting programs for MBEs that are not also 8(a) participants, SDBs, or DBEs. *But see* Expanding Opportunities for Main Street Act, H.R. 2551, §205, 113th Cong. (proposing to establish a set-aside program for MBEs).

[2] *See* 13 C.F.R. §124.105 (8(a) participants); 13 C.F.R. §124.1002(b)(2) (SDBs); 49 C.F.R. §26.5 (DBEs).

[3] *See* 15 U.S.C. §§657b-657c (programs for veteran-owned small businesses); 15 U.S.C. §657f (programs for service-disabled veteran-owned small businesses); 41 U.S.C. §§8501-8506 (program to benefit "the blind and severely disabled"). The latter program is commonly known as the Javits-Wagner-O'Day Program (JWOD).

[4] *See generally* archived CRS Report R40855, *Contracting Programs for Alaska Native Corporations: Historical Development and Legal Authorities*, by Kate M. Manuel and Jane M. Smith.

[5] *See* Small Business Goaling Report: Fiscal Year 2013, *available at* https://www.fpds.gov/downloads/top_requests/FPDSNG_SB_Goaling_FY_2013.pdf. The goaling report for FY2014 has not yet been compiled.

[6] Not all contracts awarded to 8(a) firms are awarded through the 8(a) Program. 8(a) firms can also be awarded contracts under the general contracting authorities.

[7] *See* Government Accountability Office, Disadvantaged Business Enterprise Program: Assessing Use of Proxy Data Would Enhance Ability to Know if States Are Meeting Their Goals, GAO-12-78, October 2011.

[8] *See, e.g.*, Mark Trumbull, Why Obama Job Creation Plan Focuses on Small Business, *The Christian Science Monitor*, December 8, 2009, *available at* http://www.csmonitor.com/USA/Politics/2009/1208/why-obama-job-creation-plan-focuses-on-small-business (noting that small businesses are reported to have created 65% of all new jobs in the United States over the past 15 years).

[9] *See, e.g.*, Small Bus. Admin., The Small Business Economy: A Report to the President 3 (2009), *available at* http://archive.sba.gov/advo/research/sb_econ2009.pdf ("The credit freeze in the short-term funding market had a devastating effect on the economy and small firms.").

Legislation in the 113th Congress, by Kate M. Manuel, discusses recently enacted and introduced legislation pertaining to the 8(a) and SDB programs.

Categories of Disadvantaged Small Businesses

8(a) Participants

Small businesses that are at least 51% unconditionally owned and controlled by "socially and economically disadvantaged individuals" or groups are eligible for the Minority Small Business and Capital Ownership Development Program.[10] Implemented by the SBA under the authority of Sections 7(j) and 8(a) of the Small Business Act, as amended,[11] this program is commonly known as the 8(a) Program, and participants in it are often called 8(a) participants or 8(a) firms.

Social Disadvantage

Owners of 8(a) firms must be "socially disadvantaged," or have been subjected to "racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities."[12] Members of the following racial and ethnic groups are presumed to be socially disadvantaged:

> Black Americans; Hispanic Americans; Native Americans (Alaska Natives, Native Hawaiians, or enrolled members of a Federally or State recognized Indian Tribe); Asian Pacific Americans (persons with origins from Burma, Thailand, Malaysia, Indonesia, Singapore, Brunei, Japan, China (including Hong Kong), Taiwan, Laos, Cambodia (Kampuchea), Vietnam, Korea, The Philippines, U.S. Trust Territory of the Pacific Islands (Republic of Palau), Republic of the Marshall Islands, Federated States of Micronesia, the Commonwealth of the Northern Mariana Islands, Guam, Samoa, Macao, Fiji, Tonga, Kiribati, Tuvalu, or Nauru); Subcontinent Asian Americans (persons with origins from India, Pakistan, Bangladesh, Sri Lanka, Bhutan, the Maldives Islands or Nepal); and members of other groups designated from time to time by SBA ....[13]

Persons who are not members of these groups must establish individual social disadvantage by a preponderance of the evidence, including (1) at least one objective distinguishing feature

[10] 13 C.F.R. §124.101. Eligibility for the 8(a) Program is further limited to firms that demonstrate "potential for success" and whose owners are U.S. citizens and possess "good character." *Id*. Detailed regulations govern each of these requirements. *See* 13 C.F.R. §124.105 (ownership); 13 C.F.R. §124.106 (control); 13 C.F.R. §124.107 (potential for success); 13 C.F.R. §124.108(a) (good character). The Office of Legal Counsel at the Department of Justice has opined that the SBA regulations limiting eligibility for the 8(a) Program to citizens do not deprive resident aliens of due process in violation of the Fifth Amendment to the U.S. Constitution. *See* U.S. Dep't of Justice, Office of Legal Counsel, Constitutionality of 13 C.F.R. §124.103 Establishing Citizenship Requirement for Participation in 8(a) Program, March 4, 1996, *available at* http://www.justice.gov/sites/default/files/olc/opinions/1996/03/31/op-olc-v020-p0085.pdf .

[11] *See* 15 U.S.C. §636(j); 15 U.S.C. §637(a).

[12] 13 C.F.R. §124.103(a). Such prejudice or bias must also be due to circumstances beyond the individuals' control. *Id*.

[13] 13 C.F.R. §124.103(b)(1). This presumption may be overcome by "credible evidence" to the contrary, and individuals relying on the presumption must demonstrate that they held themselves out and are currently identified by others as members of the group. 13 C.F.R. §124.103(b)(2)-(3). The SBA relies upon a group petition process in recognizing additional groups. *See* 13 C.F.R. §124.103(d)(1)-(4).

contributing to social disadvantage, such as race, ethnic origin, gender, or physical handicap; (2) personal experiences of substantial and chronic disadvantage in American society; and (3) negative impact on entry into or advancement in the business world because of this disadvantage.[14]

Economic Disadvantage

Owners of 8(a) firms must also be "economically disadvantaged" in that their "ability to compete in the free enterprise system has been impaired due to diminished credit and capital opportunities as compared to others in the same or similar line of business who are not socially disadvantaged."[15] Economic disadvantage is not presumed for any individual owners.[16] Rather, all individuals upon whom an 8(a) firm's eligibility is based must describe their economic disadvantage in a narrative statement and submit personal financial information to the SBA.[17] This information generally includes, among other things, income for the past three years, personal net worth, and the fair market value of all assets.[18] An individual's net worth, excluding ownership interest in the 8(a) firm and equity in his or her primary personal residence, must be less than $250,000 at the time of application to the 8(a) Program, and less than $750,000 thereafter.[19] The value of retirement accounts was historically not excluded when the net worth of prospective 8(a) participants was calculated, but the SBA amended its regulations in February 2011, allowing the value of retirement accounts to be excluded in certain circumstances.[20]

Formerly, the SBA also compared the financial condition of firms applying to the 8(a) Program to the financial profiles of small businesses in the same primary industry classification,[21] or similar line of business, that were not owned by socially and economically disadvantaged individuals when determining economic disadvantage.[22] However, in the February 2011 amendments, the SBA removed this provision from its regulations on the grounds that the provision caused "confusion," although the SBA noted that it would continue to review the financial condition of 8(a) applicants in determining whether they have "potential for success."[23]

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[14] 13 C.F.R. §124.103(c)(2)(i)-(iii). In assessing the third factor, the SBA will consider all relevant evidence produced by the applicant, but must consider the applicant's education, employment, and business history to see if the totality of the circumstances shows disadvantage. 13 C.F.R. §124.103(c)(2)(iii).

[15] 13 C.F.R. §124.104(a).

[16] Certain group-owners are, however, deemed to be economically disadvantaged. *See* 43 U.S.C. §1626(e)(1) (Alaska Native Corporations deemed economically disadvantaged); Small Disadvantaged Business Certification Application: Community Development Corporation (CDC) Owned Concern, OMB Approval No. 3245-0317 (copy on file with the author) (Community Development Corporations deemed economically disadvantaged).

[17] 13 C.F.R. §124.104(b)(1).

[18] 13 C.F.R. §124.104(c).

[19] 13 C.F.R. §124.104(c)(2). SBA regulations further provide that "[a]n individual will generally not be considered economically disadvantaged if the fair market value of *all* his or her assets (including his or her primary residence and the value of the applicant/Participant firm) exceeds $4 million for an applicant concern and $6 million for continued 8(a) [Program] eligibility." 13 C.F.R. §124.104(c)(4) (emphasis added).

[20] Small Business Administration, Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 76 *Federal Register* 8222, 8229-31 (February 11, 2011) (codified at 13 C.F.R. §124.104(c)(2)(ii)-(iii)).

[21] Businesses are classified by North American Industry Classification System (NAICS) codes. A firm's primary industry is that in which it earns the majority of its revenue.

[22] 13 C.F.R. §124.104(c) (2010).

[23] 76 *Federal Register* at 8229.

Applications to the 8(a) Program

Firms must apply to participate in the 8(a) Program and generally may not receive contracting or other federal assistance based upon 8(a) status until the SBA approves their application.[24] The application form requires submission of various materials including, but not limited to, financial statements, federal personal and business tax returns, and personal history statements.[25]

Once accepted into the 8(a) Program, firms must inform the SBA in writing of any changes in circumstances that adversely affect their eligibility.[26] Each firm must also complete an annual review, which requires submission of (1) certifications that the firm meets the eligibility requirements and no changes in circumstances adversely affect its eligibility; (2) personal financial information for each disadvantaged owner; and (3) a financial statement for the firm, among other things.[27] Depending upon the firm's annual gross receipts, its financial statement may need to be audited by an independent public accountant,[28] as **Table 1** illustrates.

Table 1. Auditing Requirements Based on Firms' Annual Gross Receipts

Amount of Revenue	Auditing Requirements
Under $2 million	Annual statement prepared in-house, or a compilation statement prepared by a licensed independent public accountant, verified as to accuracy by an authorized officer, partner, limited liability member, or sole proprietor of the concern within 90 days of close of the concern's fiscal year
Between $2 million and $10 million	Reviewed annual financial statement prepared by a licensed independent public accountant within 90 days of close of the concern's fiscal year
Over $10 million	Audited annual financial statement prepared by a licensed independent public accountant within 120 days of the close of the concern's fiscal year

Source: Congressional Research Service, based on 13 C.F.R. §124.602(a)-(c).

Maximum Nine-Year Term in the 8(a) Program

Firms may participate in the 8(a) Program one time, for a period of no more than nine years.[29] Once a firm has exited the program after participating in it for any period of time, it is generally ineligible for further participation.[30] Additionally, socially and economically disadvantaged

[24] 13 C.F.R. §124.2.

[25] *See* 13 C.F.R. §124.203; 8(a) Business Development Program Application, OMB Control No: 3245-0331, *available at* http://www.sba.gov/sites/default/files/SBA%20Form%201010_0.pdf.

[26] 13 C.F.R. §124.112(a).

[27] 13 C.F.R. §124.112(b)(1)-(10); 13 C.F.R. §124.602.

[28] 13 C.F.R. §124.602(a)-(c).

[29] 13 C.F.R. §124.2. Firms may be terminated or subjected to early graduation from the 8(a) Program before nine years have passed. 15 U.S.C. §636(j)(15) (nine-year term); 13 C.F.R. §124.301 (leaving the 8(a) Program); 13 C.F.R. §124.302 (graduation and early graduation); 13 C.F.R. §124.303 (termination from the Program).

[30] 13 C.F.R. §124.108(b) ("Once a concern or disadvantaged individual upon whom eligibility was based has participated in the 8(a) ... program, neither the concern nor that individual will be eligible again."). When at least 50% of the assets of one firm are the same as those of another firm, the firms are considered identical for purposes of (continued...)

individuals may confer eligibility for the 8(a) Program upon only one firm over their lives.[31] In contrast, disadvantaged groups (i.e., Indian tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs)) may confer eligibility upon multiple 8(a) firms, which may participate in the 8(a) Program concurrently (subject to certain limitations on the primary industries in which they operate), or at different times.[32]

Contracting and Related Assistance for 8(a) Participants

Federal agencies "set aside" certain contracts for 8(a) firms by conducting procurements in which only 8(a) firms may compete.[33] They can also award contracts to 8(a) firms on a sole-source basis, sometimes in circumstances in which they could not otherwise make sole-source awards.[34] Federal agencies reportedly spent $13.9 billion on competitive or sole-source contracts or subcontracts with 8(a) participants in FY2013.[35] However, 8(a) participants are not assured of receiving federal contracts,[36] and only 44% of 8(a) firms not owned by Alaska Native Corporations reportedly received contracts in one recent fiscal year.[37]

8(a) firms are also eligible for (1) direct and guaranteed loans from the SBA; (2) transfer of technology and surplus property owned by the United States; and (3) management and technical assistance, including training in financing, management, accounting, bookkeeping, marketing, the operation of small businesses, and the identification and development of new business opportunities.[38] Additionally, the SBA sponsors a mentor-protégé program for eligible 8(a) participants.[39] Mentors are established firms that provide their 8(a) protégés with technical or management assistance; financial assistance in the form of equity investments or loans;

(...continued)

eligibility for the 8(a) Program. 13 C.F.R. §124.108(b)(4).

[31] 15 U.S.C. §636(j)(11)(B)-(C); 13 C.F.R. §124.108(b).

[32] 13 C.F.R. §124.109 (firms owned by ANCs and Indian tribes); 13 C.F.R. §124.110 (firms owned by NHOs); 13 C.F.R. §124.111 (firms owned by CDCs).

[33] 13 C.F.R. §§124.501-124.520.

[34] *See, e.g.*, 13 C.F.R. §124.506(a)(2)(iii) (permitting sole-source awards to 8(a) participants owned by ANCs and Indian tribes even when there is a reasonable expectation that at least two 8(a) firms will submit offers at a fair market price). However, Section 811 of the National Defense Authorization Act for FY2010 requires contracting officers to justify and obtain approvals for sole-source awards valued in excess of $20 million (base plus all options) made under the authority of Section 8(a) of the Small Business Act. *See* P.L. 111-84, §811, 123 Stat. 2405-06 (October 28, 2009).

[35] *See* Small Business Goaling Report, *supra* note 5.

[36] *See* 13 C.F.R. §124.501(c) ("Admission into the 8(a) ... program does not guarantee that a Participant will receive 8(a) contracts.").

[37] Office of the Inspector General, U.S. Small Business Administration, Participation in the 8(a) Program by Firms Owned by Alaska Native Corporations, at 5 (July 10, 2009), *available at* http://www.sba.gov/sites/default/files/oig_reptbydate_july9-15_0.pdf. In contrast, 63% of 8(a) firms owned by Alaska Native Corporations received contracts in FY2008.

[38] 13 C.F.R. §124.404(a)-(c); 13 C.F.R. §124.405; 13 C.F.R. §§124.701-704. 8(a) firms are also eligible for certain other assistance from SBA because they are small businesses, not because they are participants in the 8(a) Program. *See, e.g.*, 15 U.S.C. §694b (surety bond guarantees for small businesses).

[39] Eligibility for the mentor-protégé program is generally limited to 8(a) firms that are in the developmental stage of the 8(a) Program; have never received an 8(a) contract; or have a size that is less than half the size standard corresponding to its primary NAICS code. 13 C.F.R. §124.520(c)(1)(i)-(iii). For more on the 8(a) mentor-protégé program, see CRS Report R41722, *Small Business Mentor-Protégé Programs*, by Robert Jay Dilger.

subcontracts; and assistance in performing prime contracts through joint venture arrangements.[40] In particular, mentors and protégés may form joint ventures that could qualify as "small" for purposes of government procurements, including sole-source awards under Section 8(a).[41]

Small Disadvantaged Businesses

"Small disadvantaged businesses" (SDBs) include 8(a) participants and other small businesses that are at least 51% unconditionally owned and controlled by socially or economically disadvantaged individuals or groups.[42] SDBs that are not 8(a) firms need not demonstrate potential for success,[43] and individuals owning and controlling non-8(a) SDBs may have net worth of up to $750,000 (excluding ownership interests in the SDB firm and equity in their primary personal residence).[44] Otherwise, however, SDBs must generally satisfy the same eligibility requirements as 8(a) firms, although they do not apply to the SBA to be designated SDBs in the same way that 8(a) firms do.

Certification of SDBs

At one time, SDBs had to be certified by the SBA, or a private certifying entity acting in compliance with SBA regulations, to qualify for certain federal programs as prime contractors.[45] However, most federal programs for SDB prime contractors have been discontinued, with only the government-wide and agency-specific goals for the percentage of federal contract dollars awarded to SDB contractors and, in some cases, subcontractors each year remaining.[46] Because of the discontinuance of these programs, the SBA ceased certifying SDBs in October 2008,[47] and no longer issues regulations for private certifiers.[48] In the few cases where SDB certification is currently required, 8(a) participants are deemed to be certified,[49] and other firms may be certified by the agency conducting the procurement, private certifying entities, or state and local governments.[50] Firms not relying on their 8(a) status that have submitted applications for SDB certification to a procuring agency are treated as if they are certified so long as the agency has not rejected their application.[51] Certification generally lasts for three years,[52] and the same firm could

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[40] 13 C.F.R. §124.520(a).

[41] 13 C.F.R. §124.520(d)(1). For the joint venture to qualify as "small," the 8(a) firm must qualify as "small" under the size standards for the procurement, and, in the case of sole-source contracts awarded under the authority of Section 8(a), must not have received a combined total of competitive and sole-source awards in excess of $100 million or other applicable threshold. *See generally* 13 C.F.R. §124.519.

[42] 13 C.F.R. §124.1002.

[43] 13 C.F.R. §124.1002(e).

[44] 13 C.F.R. §124.1002(c).

[45] *See, e.g.*, 13 C.F.R. §124.1004 and §124.1008 (2007).

[46] *See infra* notes 57-63 and accompanying text.

[47] *See* Small Business Administration, Small Disadvantaged Business Program, 73 *Federal Register* 57490 (October 3, 2008 (announcing that SBA would no longer certify SDBs).

[48] *Id*.

[49] 13 C.F.R. §124.1003(a).

[50] 13 C.F.R. §124.1003(b)-(c). It is the procuring agency's decision whether to accept certifications from private certifying entities or state or local governments.

[51] 13 C.F.R. §124.1001(b)(4).

[52] 13 C.F.R. §124.1005(a). SBA may, however, extend the certification beyond three years in certain circumstances. 13 (continued...)

apparently be certified as an SDB repeatedly, so long as it meets the requirements for certification.

Firms do not need to be certified SDBs to qualify for federal programs for subcontractors. Rather,

> [a] firm may represent that it qualifies as an SDB for any Federal subcontracting program if it believes in good faith that it is owned and controlled by one or more socially and economically disadvantaged individuals.[53]

Prime contractors "acting in good faith" may rely on subcontractors' written representation of their status as an SDB.[54] However, the SBA retains the authority to review the status of uncertified firms that represent themselves as SDBs for purposes of federal subcontracts when it receives "credible information" that they are not disadvantaged.[55] The SBA, agency contracting officers, and other "interested parties" (such as business competitors) may also protest firms' SDB status.[56]

Contracting Programs for SDBs

The government promotes contracting and subcontracting with SDBs by setting government-wide and agency-specific goals for the percentage of federal contract and subcontract dollars awarded to SDBs each fiscal year. The government-wide goal is that "not less than 5 percent of the total value of all prime contract and subcontract awards" be made to SDBs,[57] a goal that was met in FY2013, when $30.6 billion was awarded to SDBs.[58] Agency specific goals are generally also set at 5% of the total value of prime contracts and subcontracts awarded each fiscal year, although agency achievements range from 2.6% (Department of Energy) to 47.3% (SBA).[59] In the past, agencies also had authority to "us[e] less than full and open competitive procedures and partial set-asides," including a 10% price evaluation adjustment,[60] when evaluating bids or offers involving SDB contractors or subcontractors.[61] However, such authorities have either expired[62] or been subject to statutory conditions or judicial decisions precluding their use.[63]

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C.F.R. §124.1005(b).

[53] 13 C.F.R. §124.1001(c).

[54] 48 C.F.R. §19.703(b).

[55] 13 C.F.R. §124.1006.

[56] 13 C.F.R. §124.1007.

[57] 15 U.S.C. §644(g)(1)(A)(iv).

[58] *See* Small Business Goaling Report, *supra* note 5. This $30.6 billion represented 8.6% of eligible federal procurement spending in FY2013.

[59] *Id*.

[60] A price evaluation adjustment can work as follows: when comparing a bid or offer from an SDB with one submitted by another business, the agency can subtract up to 10% of the price from the bid or offer submitted by the SDB in determining which bid or offer has the lowest price or represents the best value. For example, if a business that is not an SDB bids $100,000 and an SDB bids $110,000, the SDB would win because it is the lower bidder after its price is reduced by 10% ($110,000-$11,000=$99,000).

[61] *See, e.g.*, Department of Defense Authorization Act for FY1987, P.L. 99-661, §1207, 100 Stat. 3973-75 (November 14, 1986) (codified at 10 U.S.C. §2323) (procurements of defense agencies); Federal Acquisition Streamlining Act, P.L. 103-355, §7102, 108 Stat. 3368-69 (October 13, 1994) (procurements of civilian agencies).

[62] *See* P.L. 103-355, §7102 (authority expiring at the end of FY2000). This authority was later extended through the (continued...)

Other federal programs focus specifically on promoting SDBs as subcontractors on federal prime contracts. Agencies must negotiate "subcontracting plans" with the apparently successful bidder or offeror on eligible prime contracts prior to awarding the contract.[64] Subcontracting plans set goals for the percentage of subcontract dollars to be awarded to SDBs, among others, and describe efforts that will be made to ensure that SDBs "have an equitable opportunity to compete for subcontracts."[65] Failure to make a good faith effort to comply with the subcontracting plan constitutes a material breach of the contract, potentially allowing the agency to terminate the contract for default[66] and subjecting the contractor to liquidated damages.[67] Federal agencies may also consider the extent of subcontracting with SDBs in determining to whom to award a contract,[68] or give contractors "monetary incentives" to subcontract with SDBs.[69] Such incentives reward prime contractors by paying them up to 10% of the amount by which their actual performance in subcontracting with SDBs exceeds their proposed performance.[70]

(...continued)

end of FY2003, but not renewed thereafter. *See* P.L. 106-554, §503(d), 114 Stat. 2763A-695 (December 21, 2000).

[63] *See* Strom Thurmond National Defense Authorization Act for FY1999, P.L. 105-261, §801, 112 Stat. 2080-81 (October 17, 1998) (barring 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 SDBs); Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008) (finding 10 U.S.C. §2323 unconstitutional on its face); archived CRS Report R40440, *Rothe Development Corporation v. Department of Defense: The Constitutionality of Federal Contracting Programs for Minority-Owned and Other Small Businesses*, by Jody Feder and Kate M. Manuel.

[64] 15 U.S.C. §637(d)(4)(A) (contracts awarded via sealed bidding) & (5)(A) (contracts awarded by negotiated procurement). Eligible contracts are those (1) exceeding $650,000 ($1.5 million, in the case of construction contracts) and (2) offering subcontracting possibilities. 48 C.F.R. §19.701(a)(1). Agencies may not find a contractor affirmatively "responsible" for purposes of the award of a federal contract unless it agrees to any required subcontracting plan. For more on responsibility determinations, see CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

[65] 15 U.S.C. §637(d)(6).

[66] 15 U.S.C. §637(d)(9).

[67] 48 C.F.R. §19.705-7. "Liquidated damages" are damages whose amount was agreed upon, as compensation for specific breaches, by the parties during the contract's formation.

[68] Prior to October 2014, a specific provision of the FAR (FAR 19.1202) discussed the use of SDB status as an evaluation factor in source selection determinations. This provision was deleted in its entirety in October 2014 on the grounds that it was promulgated "solely" under the authority of the provisions of 10 U.S.C. §2323 that were found to be unconstitutional in *Rothe*. However, in deleting this provision, the Federal Acquisition Regulatory Council (FAR Council) expressly noted that "nothing ... precludes an agency from using evaluation factors and subfactors for subcontracting." Dep't of Defense, Gen. Servs. Admin., & Nat'l Aeronautics & Space Admin., Federal Acquisition Regulation; Federal Contracting Programs for Minority-Owned and Other Small Businesses: Final Rule, 79 Fed. Reg. 61746, 61746 (Oct. 14, 2014). The FAR Council further noted that SBA regulations (i.e., 13 C.F.R. §125.3(g)) "allow the use of small business as an evaluation factor or subfactor for an offeror's proposed approach to subcontracting with any small businesses," including SDBs. *Id*.

[69] 48 C.F.R. §19.705-4(c). Similar provisions had previously been codified in FAR 19.1203, but were moved to FAR 19.705-4 in October 2014. *See* Federal Contracting Programs for Minority-Owned and Other Small Businesses, 79 Fed. Reg. at 61746,

[70] 48 C.F.R. §52.219-10(b) ("If the Contractor exceeds its subcontracting goals for small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns in performing this contract, it will receive _ [Contracting Officer to insert the appropriate number between 0 and 10] percent of the dollars in excess of each goal in the plan ....").

Disadvantaged Business Enterprises

Like 8(a) participants and SDBs, "disadvantaged business enterprises" (DBEs) are small businesses at least 51% unconditionally owned and controlled by socially and economically disadvantaged individuals.[71] However, DBEs differ from 8(a) participants and SDBs in that members of the following groups—which include women—are presumed to be both socially *and* economically disadvantaged:

> (i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;
>
> (ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;
>
> (iii) "Native Americans," which includes persons who are enrolled members of a federally or State recognized Indian tribe, Alaska Natives, or Native Hawaiians;
>
> (iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), Republic of the Northern Marianas Islands, Samoa, Macao, Fiji, Tonga, Kirbati, Tuvalu, Nauru, Federated States of Micronesia, or Hong Kong;
>
> (v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;
>
> (vi) [w]omen;
>
> (vii) [a]ny additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.[72]

Members of these groups must nonetheless submit a signed, notarized statement regarding their group membership,[73] as well as certain information concerning their economic condition.[74] Additionally, their net worth cannot exceed $1.32 million, excluding their ownership interest in the DBE firm and equity in their primary residence.[75] Individuals who are not members of

[71] 49 C.F.R. §26.5 (defining "disadvantaged business enterprise"). SBA size standards are generally used in determining whether DBE firms are "small." 49 C.F.R. §26.65(a). However, as required by statute, firms whose average gross receipts over the past three years exceed $23.98 million are excluded from the DBE program, even if they meet the size standards established by SBA. *See* 49 U.S.C. §47113(a)(1)(B); 49 C.F.R. §26.65(b).

[72] 49 U.S.C. §26.5. Members of these groups may be required to present evidence of their membership in the group, including showing that they held themselves out as a member of the group over a "long period of time prior to application for certification" and are regarded as a member of the group by the relevant community. 49 C.F.R. §26.63(a)(1) & (b).

[73] 49 C.F.R. §26.63(a)(1).

[74] 49 C.F.R. §26.61(c); 49 C.F.R. §26.67(a)(2)(ii) (notarized statement of personal net worth, with "appropriate supporting documentation").

[75] 49 C.F.R. §26.67(a)(2)(i) & (iii)(A)-(B).

designated groups must demonstrate by a preponderance of the evidence that they are socially and economically disadvantaged.[76]

Certification of DBEs

DBEs are certified by Department of Transportation (DOT) funding recipients, who must determine DBEs' eligibility based upon (1) an on-site visit with the firm, including interviews with its principal officers; (2) an on-site visit to any job sites operated by the firm; (3) an analysis of the legal structure, ownership, and control of the firm, as well as its bonding and financial capacity; (4) the firm's work history, including the contracts it has received and the work it has completed; (5) a statement from the firm indicating its preferred type(s) of work and work locations; (6) a list of equipment and licenses owned by or available to the firm, as well as its key personnel to perform the work it seeks to do as part of the DBE program; (7) federal income tax returns for the past three years; and (8) a completed application form.[77] All certifications must be final before the due date for bids or offers for any contract on which a firm seeks to participate as a DBE.[78] Once certified, DBEs must provide written notices of any changes in circumstances affecting their eligibility as these changes occur.[79] They must also produce a sworn affidavit affirming that there have been no changes in circumstances affecting the firm's eligibility each year on the anniversary of their date of certification.[80]

Firms that have been certified as DBEs generally remain certified "until and unless" the funding recipient removes their certification, in whole or in part, using procedures spelled out in federal regulation.[81] Assuming firms must be recertified, there is no apparent limit on the number of times they may be recertified. Certifications are state-specific,[82] although states may recognize one another's certifications.[83]

Contracting Programs for DBEs

DBEs are eligible for various contracting programs, most of which are operated by state governments and other entities that receive certain federal highway or transit funds, or airport

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[76] 49 C.F.R. §26.61(d).

[77] 49 C.F.R. §26.83(c)(1)(i)-(vii). A copy of this application form can be found in Appendix F to Part 26 of Title 49 of the *Code of Federal Regulations*.

[78] 49 C.F.R. §26.83(a) ("You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.").

[79] 49 C.F.R §26.83(*i*).

[80] 49 C.F.R. §26.83(j).

[81] 49 C.F.R. §26.83(h) ("Once you have certified a DBE, it shall remain certified until and unless you have removed its certification, in whole or in part, through the procedures of §26.87 of this part, except as provided in §26.67(b)(1) of this part.... You may not require DBEs to reapply for certification or undergo a recertification process. However, you may conduct a certification review of a certified DBE firm, including a new on-site review, if appropriate in light of changed circumstances ..., a complaint, or other information concerning the firm's eligibility. If information comes to your attention that leads you to question the firm's eligibility, you may conduct an on-site review on an unannounced basis, at the firm's offices and job sites.").

[82] *See* 49 C.F.R. §26.81(a) & (b)(1) (requiring all recipients of federal funding within a state to participate in a Unified Certification Program (UCP), whose DBE certifications are binding on recipients in that state).

[83] 49 C.F.R. §26.81(e)-(f).

funds.[84] The federal government has as a goal that 10% of such funds be awarded to DBEs.[85] However, this is "an aspirational goal at the national level" and "does not authorize or require [funding] recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent."[86]

Funding recipients also generally set goals for DBE participation overall and on individual contracts that have the possibility of subcontracting.[87] However, they are barred from using "quotas," or requiring that certain percentages of their contract dollars go to DBEs, and they can "set aside" contracts for DBEs only "in limited and extreme circumstances … when no other method could be reasonably expected to redress egregious instances of discrimination."[88] Instead, they must use race-neutral means to meet "the maximum feasible portion" of these goals.[89] Such means include

- arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules so as to facilitate DBE participation;
- providing assistance in overcoming limitations that DBEs may encounter in obtaining bonding or financing;
- providing technical assistance and other services;
- publicizing contract opportunities and providing information about contracting procedures;
- assisting DBEs in developing and improving their business management, record keeping, and financial and accounting capabilities;
- providing services to help DBEs develop, participate in various kinds of work, and achieve self-sufficiency;
- assisting new start-up firms, particularly in fields where DBE participation has historically been low;
- distributing DBE directories to potential prime contractors; and
- assisting DBEs to develop their capability to utilize emerging technology and conduct business through electronic media.[90]

[84] 49 C.F.R. §26.3(a). These generally include recipients of (1) federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Titles I, III, and V of the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), and Divisions A and B of the Moving Ahead for Progress in the 21st Century Act (MAP-21); (2) federal transit funds authorized by Titles I, III, V and VI of ISTEA, federal transit laws in Title 49 of the *United States Code*, Titles I, III, and V of the TEA-21, Titles I, III, and V of SAFETEA-LU, and Divisions A and B of MAP-21; and (3) airport funds authorized by 49 U.S.C. 47101, *et seq*.

[85] *See, e.g.*, 49 C.F.R. §26.41(a).

[86] 49 C.F.R. §26.41(b)-(c).

[87] 49 C.F.R. §26.45(a)(1). These goals are to be based on demonstrable evidence of the availability of "ready, willing and able" DBEs relative to the availability of other firms ready, willing and able to participate on the contract. 49 C.F.R. §26.45(b). *See also* 49 C.F.R. §26.51(e)(1) (goals only on contracts with subcontracting possibility).

[88] 49 C.F.R. §26.43(a)-(b).

[89] 49 C.F.R. §26.51(a).

[90] 49 C.F.R. §26.51(b)(1)-(9).

Funding recipients cannot be penalized for failure to meet their goals unless they did not administer their DBE program in good faith.[91]

Recipients may also establish development and mentor-protégé programs for DBEs,[92] although participants in any mentor-protégé programs do not enjoy the same exemption from the SBA size standards when they form joint ventures as 8(a) firms participating in the SBA mentor-protégé program do.[93]

Tabular Comparison of the Various Types of Disadvantaged Small Businesses

Table 2 provides a comparison of the various types of disadvantaged small businesses for purposes of federal and federally funded contracting programs.

Table 2. Comparison of the Various Types of Disadvantaged Small Businesses

	8(a) Participant	SDB	DBE
Social disadvantage	Presumed for designated racial and ethnic groups Not presumed for women	Presumed for designated racial and ethnic groups Not presumed for women	Presumed for designated racial and ethnic groups Presumed for women
Economic disadvantage	Not presumed[a] Personal net worth of less than $250,000 at time of application ($750,000 thereafter)	Not presumed[a] Personal net worth of less than $750,000	Presumed for designated racial and ethnic groups and women Personal net worth of less than $1.32 million
Application or certification process	Firms apply to the SBA Firms must be approved before participating Initial application form with supporting materials Mandatory disclosure of changes in circumstances Annual renewal form with supporting materials; may need audited financial statements	8(a) participants deemed to be SDBs; other firms certified by procuring agencies, private certifying entities, or state or local governments Firms can participate as prime contractors while certification is pending and as subcontractors with good faith belief in their eligibility	Firms must be certified by the Unified Certification Program for the state of the funding recipient Firms must be certified before participating in programs On-site reviews conducted Mandatory disclosure of changes in circumstances Sworn affidavit annually on anniversary of certification
Length of designation	One time eligibility for firms and disadvantaged individuals; no more than nine years in the 8(a) Program	Certification lasts three years; firms may seek and be certified multiple times	Certification lasts until and unless revoked
Contracting and related programs	Set-asides and sole-source contracts Direct and guaranteed loans	5% government-wide goal for contracting and subcontracting Agency-specific goals for	10% national goal for contracting and subcontracting Recipient-set goals, including on

[91] 49 C.F.R. §26.47(a).

[92] *See generally* 49 C.F.R. Part 26, Appendix D.

[93] *See* Small Business Administration, Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations, 74 *Federal Register* 55694, 55694 (October 28, 2009).

8(a) Participant	SDB	DBE
from the SBA Transfer of federal technology and surplus property Management and technical assistance Mentor-protégé program	contracting and subcontracting Subcontracting plans Subcontracting an evaluation factor Monetary incentives for subcontracting	individual contracts Race-neutral means to meet goals, if possible Development programs Mentor-protégé program

Source: Congressional Research Service, based on 13 C.F.R. §§124.1-12.1016 and 49 C.F.R. §§26.1-26.109.

a. Individually owned firms only. Group-owned firms are treated somewhat differently.

Constitutionality of Federal Programs for Disadvantaged Small Businesses

All federal programs for disadvantaged small businesses currently define "disadvantage," in part, based on the presumption that racial and ethnic minorities, or women, are disadvantaged.[94] Presumptions based on race have been found to constitute "explicit racial classifications,"[95] subjecting programs that incorporate them to "strict scrutiny" if they are challenged on the grounds that they violate the constitutional guarantee of equal protection.[96] For a challenged program to survive strict scrutiny, the government must show that the program is necessary to meet a compelling government interest.[97] Presumptions based on gender are similarly subject to heightened scrutiny,[98] with the Supreme Court in *United States v. Virginia* having required the State of Virginia to provide an "exceedingly persuasive justification" for its policy of maintaining an all-male military academy.[99] In contrast, classifications that are not based on race, gender, or another suspect classification, and that do not involve the exercise of a fundamental right, will generally be upheld so long as they are rationally related to a legitimate government interest.[100]

The ability of programs to withstand strict or other heightened scrutiny may depend, in part, upon how the program is structured. In a recent decision, the U.S. District Court for the District of

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[94] *See* 13 C.F.R. §124.103(b)(1) (8(a) participants); 13 C.F.R. §124.1001(a) (SDBs); 49 C.F.R. §26.5 (DBEs).

[95] Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023, 1035 (Fed. Cir. 2008).

[96] 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. *See* Bolling v. Sharpe, 347 U.S. 497 (1954).

[97] 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 Jody Feder.

[98] *See* Craig v. Boren, 429 U.S. 190, 197 (1976).

[99] 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.

[100] *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).

Columbia found that the 8(a) Program is not unconstitutional on its face, although it is unconstitutional as-applied in the military simulation and training industry.[101] Particularly in its rejection of the facial challenge to the 8(a) Program, the court emphasized certain aspects of the program's history and requirements when finding that "breaking down barriers to minority business development created by discrimination" constituted a compelling government interest, and the government had a strong basis in evidence for concluding that race-based action was necessary to further this interest.[102] For example, the court rejected the plaintiff's assertion that the 8(a) Program was "not truly remedial," but rather favored "virtually all minority groups … over the larger pool of citizens," because non-minority individuals may qualify for the program, and all 8(a) applicants must demonstrate economic disadvantage.[103] Similarly, in finding that the program was narrowly tailored to meet the government's interests, the court noted (1) that goals for contracting with small disadvantaged businesses are purely aspirational, and there are no penalties for failing to meet them;[104] (2) the nine-year limits on program participation for individual owners and firms;[105] and (3) that SBA may not accept a requirement for the 8(a) Program if it determines that doing so will have an adverse effect on another small business or group of small businesses.[106] The court emphasized that the last two factors, in particular, helped ensure that race-conscious remedies do not "last longer than the discriminatory effects [they are] designed to eliminate,"[107] and "work the least harm possible to other innocent persons competing for the benefit."[108]

On the other hand, in 2008, the U.S. Court of Appeals for the Federal Circuit focused less on the details of the program than on the evidence of discrimination before Congress when Congress reauthorized the program when striking down a Department of Defense (DOD) program for SDBs. Specifically, the Federal Circuit found that the DOD program—which allowed DOD to take 10% off the price of bids or offers submitted by SDBs when determining which bid or offer had the lowest price or represented the best value for the government—was unconstitutional on its face because Congress lacked a strong basis in evidence for concluding that race-conscious contracting was necessary to remedy discrimination in the defense industry when it reauthorized the program in 2006.[109] The district court, which had upheld the constitutionality of the challenged SDB program, 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.[110]

[101] DynaLantic Corp. v. U.S. Dep't of Defense, 885 F. Supp. 2d 237 (D.D.C 2012).

[102] *Id*., at 251, 271-272.

[103] *Id*. at 252. The court also noted that the history of the 8(a) program prior to 1978 (when Congress expressly authorized set-asides for disadvantaged small businesses) had evidenced that race-neutral methods were insufficient to promote contracting with minority-owned small businesses. *Id.* at 255. The court further noted that the 8(a) Program was intended to be a business development program, not a means to "channel contracts" to minority firms; that Section 8(a) of the Small Business Act expressly provides that awards may be made through the 8(a) Program only when SBA determines that "such action is necessary and appropriate"; and that the act requires the President and SBA to report annually to Congress on the program, thereby ensuring that Congress has evidence as to whether there is a "continuing compelling need for the program." *Id*. at 252-254.

[104] *Id*. at 285-286.

[105] *Id*. at 287-288.

[106] *Id*. at 289-291.

[107] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 238 (1995).

[108] Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

[109] *Rothe Dev. Corp.*, 545 F.3d at 1023.

[110] *See* Rothe Dev. Corp. v. Dep't of Defense, 499 F. Supp. 2d 775 (W.D. Tex. 2007). A disparity study is a "study attempting to measure the difference—or disparity—between the number of contracts or contract dollars actually (continued...)

However, the Federal Circuit disagreed.[111] 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"[112]—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."[113] A similar lack of evidence of discrimination also played a part in the U.S. District Court for the District of Columbia finding that the 8(a) Program is unconstitutional as applied in the military training and simulation industry. However, in this case, DOD conceded that it had "no evidence of discrimination, either in the public or private sector, in the simulation and training industry."[114]

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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). *Rothe Dev. Corp.*, 545 F.3d at 1036-37.

[111] *Rothe Dev. Corp.*, 545 F.3d at 1046.

[112] *Id*. at 1037.

[113] *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).

[114] *DynaLantic*, 885 F. Supp. 2d at 265. It may also be worth noting that the *DynaLantic* court relied on the precedent of *United States v. Salerno* in requiring that a plaintiff in a facial challenge must establish "that no set of circumstances exists under which [Section 8(a)] would be valid." *Id*. at 249 (quoting *Salerno*, 481 U.S. 739, 745 (1987)). The *Rothe* court, in contrast, declined to apply this requirement of *Salerno* to the facial challenge to the program it struck down. *See Rothe*, 545 F.3d at 1032.