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Federal Contract Compliance: Use of Special Contract Provisions to Encourage Minority Employment

INTRODUCTION

One of the federal government's most effective weapons in its commitment to end job discrimination has been the use of anti-discrimination conditions in federally-assisted construction contracts.¹ First used in 1965 under authority of Executive Order 11,246² these provisions began with simple nondiscrimination language, blossomed in later years to include strong affirmative action requirements, and have in recent times grown to include special provisions mandating the use of minority business enterprises.

Special provisions require prime contractors to allocate portions of the contracts awarded to minority contractors and subcontractors.³ Unlike hometown plans and plans imposed by the Office of Federal Contract Compliance, both of which are directed at the employment of individuals,⁴ the special provision programs are designed to build an economic base in the minority community. Though both employment and special provision programs proceed from common bases, the special provision programs are intended "to obtain social and economic justice" for minority persons "and [to] improve the functioning of our national economy."⁵ Special provision programs appear to be working, but they will probably be challenged on constitutional grounds due to recent decisions holding

1. See, e.g., Note, *Executive Order 11,246: Anti-Discrimination Obligations in Government Contracts*, 44 N.Y.U.L. REV. 590 (1969); Note, *The Philadelphia Plan*, 45 NOTRE DAME LAW. 678 (1970); Note, *The Affirmative Action Requirements of Executive Order 11,246 and Its Effect on Government Contractors, Unions and Minority Workers*, 32 MONT. L. REV. 249 (1971); Comment, *Race Quotas*, 8 HARV. C.R.-C.L. L. REV. 128 (1973); Comment, *California's Approach to Racial Discrimination in Employment: The Complaint Process vs. Voluntary Affirmative Action*, 5 U. SAN. FRAN. L. REV. 404 (1971). See generally Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109 (1971).

2. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), as amended, Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967). See also 41 C.F.R. § 60-1 et seq. (1976).

3. See text accompanying notes 79-85 *infra*.

4. 41 C.F.R. §§ 60-6 to 60-11 (1976); Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), as amended, Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

5. Exec. Order No. 11,625, 36 Fed. Reg. 19,967 (1971). The Office of Minority Enterprise was established in 1969 by Executive Order 11,478. See 34 Fed. Reg. 12,985 (1969). A clarifying order, Executive Order 11,625 was issued in 1971 and said in part:

The opportunity for full participation in our free enterprise system by socially and economically disadvantaged persons is essential if we are to obtain social and economic justice for such persons and improve the functioning of our national economy.

36 Fed. Reg. 19,967 (1971).

reverse discrimination impermissible.⁶ This article will discuss the growth of anti-discrimination programs in the construction industry as implemented through federal contract compliance, and will examine special provision programs, their use, and the obstacles they face.

THE FOUNDATION OF CONTRACTUALLY IMPOSED AFFIRMATIVE ACTION
—EXECUTIVE ORDER 11,246

The nominal ancestor of the special provision programs is Executive Order 11,246, issued in 1965 by President Johnson.⁷ Superseding two previous executive orders which contained similar provisions prohibiting employment discrimination, but which provided for administration by the President's Committee on Equal Employment Opportunities, Executive Order 11,246 dissolved that committee and placed the program under the direction of the Secretary of Labor.⁸ To carry out the terms of the order, the Secretary established the Office of Federal Contract Compliance (OFCC).⁹ The OFCC abolished the previous system of voluntary programs and replaced it with a program which required affirmative action as

6. See *McDonald v. Santa Fe Trail Transp. Co.* 427 U.S. 273 (1976); *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 97 S. Ct. 1098 (1977).

7. Executive Order 11,246 was signed September 24, 1965, and became effective October 24, 1965. See 30 Fed. Reg. 12,319 (1965). It states in relevant part:

[A]ll government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

During the performance of this contract, the contractor agrees as follows:

¶ (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. . . .

¶ (2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

¶ (3) The contractor will send to each labor union . . . with which he has a collective bargaining agreement . . . a notice . . . of the contractor's commitments [under the Order]

¶ (7) The contractor will include the[se] provisions . . . in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor . . . The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance

Id. at § 202.

8. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *superseding* Exec. Order No. 10,925, 26 Fed. Reg. 1977 (1961) and Exec. Order No. 11,114, 28 Fed. Reg. 6,485 (1963).

9. Exec. Order No. 11,246, at § 201, 30 Fed. Reg. 12,319 (1965).

a precondition to both bidding for and receiving federal government contracts.¹⁰

Premised on the acknowledged right of the federal government to effectuate national policy through federal contract provisions,¹¹ Executive Order 11,246 serves as the basis for both the present contract compliance programs and the implementing regulations promulgated by the OFCC.¹² It extends to businesses providing goods, services, and supplies to the Government¹³ as well as to construction contractors.¹⁴

Under the terms of Executive Order 11,246, each contracting or administering agency has primary responsibility for insuring compliance and affirmative action. The Secretary of Labor is authorized to set up "compliance agencies" responsible for determining whether the prime contractor or subcontractor is maintaining non-discriminatory hiring and employment practices and taking affirmative action.¹⁵ In 1969 OFCC established a system which assigned compliance agencies to service and to supply contractors according to the Standard Industrial Classification codes of the employers.¹⁶ The type of business the contractor is engaged in determines which government agency is responsible for reviewing compliance. The Defense Department monitors makers of textiles, apparel, leather products, fabricated metals, machinery and a variety of other products used by the Department. The General Services Administration

10. [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 1308.

11. The Supreme Court has held that the Government has substantial latitude in determining contract provisions:

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone.

Perkins v. Lukens Steel Co., 310 U.S. 113, 127 (1940).

12. See Note, *The Affirmative Action Requirement of Executive Order 11,246 and Its Effect on Government Contractors, Unions and Minority Workers*, 32 MONT. L. REV. 249 (1971).

13. Exec. Order No. 11,246, Part II, 30 Fed. Reg. 12,319 (1965).

14. *Id.* at Part III.

15. *Id.* at Part II. Section 203(a) states:

Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

16. [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ ¶ 2064, 4380.

monitors contractors in the communication, transportation, securities, and wholesaling fields. The Department of Health, Education and Welfare monitors both producers of educational services and institutions of higher learning. Each compliance agency reports to the OFCC, which determines if further action is necessary.¹⁷

Construction contracts are dealt with under part III of the order.¹⁸ Part III covers all executive departments and agencies which administer programs involving federal financial assistance for construction contracts:

Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, [that each applicant] undertake and agree (1) to assist and cooperate actively . . . in obtaining the compliance of contractors and subcontractors . . . (2) to obtain and to furnish . . . such information [as is required] for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations . . . and (4) to refrain from entering into a contract . . . with a contractor debarred from Government contracts. . . .¹⁹

Part III covers virtually all construction contracts.²⁰ Contractors can also fall within the scope of the order by supervising on-site construction functions.²¹

Compliance under construction contracts is monitored by the OFCC and not the compliance agency.²² Firms having construction contracts or subcontracts exceeding \$10,000 during any twelve month period must include in each such contract a clause in which the contractor agrees not to discriminate against any applicants or employees because of race, color, religion, sex, or national origin.²³ The contractor must take affirmative action to insure compliance. Additionally, he is required to include the anti-discrimination clause in appropriate contracts and subcontracts.²⁴ Construction contractors must agree to an industry-wide rather than individual affirmative action plan. A significant part of the developmental

17. *Id.* at ¶ 2060.

18. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965).

19. *Id.* at § 301.

20. *Id.* Section 302(a) states: "'Construction contract' as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property."

21. 41 C.F.R. § 60-1.5 (1976).

22. 42 Fed. Reg. 3,457 (1977), amending 41 C.F.R. § 60-1.3 (1976).

23. *Id.* § 60-1.4(a).

24. 41 C.F.R. § 60-1.1 *et seq.* (1976).

effort of such plans is performed by the Department of Labor and the OFCC. These efforts are directed at bringing representatives of labor, management, and the minority community together under a voluntary hometown plan, or, if agreement cannot be reached, under an imposed plan.²⁵

HOMETOWN PLANS—THE VOLUNTARY SOLUTION

The OFCC encourages the development of hometown plans on the theory that problems of each community can best be solved at the local level.²⁶ When successfully negotiated, these agreements, which establish goals for employment in the construction industry, are signed by labor unions, contractors, and representatives of the minority community. Usually, these agreements apply beyond federally-assisted projects to include contracts in the local community.²⁷ The hometown plan concept was originally targeted for nineteen major industrial areas, but since then hometown plans have expanded rapidly.²⁸

In 1970, the Department of Labor released a model hometown plan to assist communities in working out area-wide agreements.²⁹ The plan consists of fourteen elements. It includes a statement of purpose which basically identifies the necessary parties to the agreement and calls for increased minority utilization. It provides for the establishment of percentage goals for new minority employment. These goals are based on the labor force turnover rate, planned and existing apprenticeship programs, industry needs, and any other relevant factors. Training programs designed to upgrade the minority labor force are to be established. Federal funds may be used to set up such training programs, but other costs are to be shared by the parties. The agreement lasts for a minimum of one year. An automatic renewal clause is recommended. The signatories to a hometown plan are not required to comply with the otherwise applicable federal bid conditions as set out by the Secretary of Labor.³⁰

Hometown plans have been successfully defended against chal-

25. Dep't of Labor News Release, No. 11,207 (Feb. 9, 1970); See 41 C.F.R. § 60-1.9 (1976).

26. [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 1380.

27. 41 C.F.R. §§ 60-5 to 60-11 (1976).

28. The cities originally named were Atlanta, Boston, Buffalo, Cincinnati, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Milwaukee, Newark, New Orleans, New York, Pittsburgh, San Francisco, Seattle, and St. Louis. See Clark, *The Creation of the Newark Plan*, 23 CATH. U.L. REV. 443, 466 n.81 (1974).

29. Dep't of Labor News Release, No. 11,207 (Feb. 9, 1970).

30. 41 C.F.R. § 60-1 *et seq.* (1976); see also [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 1380; Clark, *The Creation of the Newark Plan*, 23 CATH. U.L. REV. 443, 466-67 (1974).

lenges in the courts. In *Associated General Contractors of Massachusetts v. Altshuler*³¹ the Boston Plan was upheld. Under the Boston Plan, an integral part of all bid documents is a detailed specification known as section 1B.³² The provisions of section 1B require a bidder commitment to an employment program in which not less than twenty percent of all employee man hours in each job category are to be performed by minority workers.³³ Additionally, section 1B requires bidders to engage in job referral programs and to work with a liaison committee regarding all matters relating to minority recruitment, referral, employment, and training.³⁴ Periodic reports must be made to both the liaison committee and the Massachusetts Commission Against Discrimination (MCAD).³⁵ Sanctions include, but are not limited to, a penalty assessment of one-tenth of one percent of the awarded contract price for each week of non-compliance.³⁶

The First Circuit in approving the plan drew a parallel between their ruling and rulings under the Civil Rights Act of 1964.³⁷ In civil rights cases, courts had upheld remedial legislation largely on policy grounds. The First Circuit reasoned that since affirmative action programs are designed to remedy the present effects of past discrimination to strike them down because they discriminate against the majority would nullify the stated purpose of all civil rights legislation.³⁸

The Newark Plan was approved in *Joyce v. McCrane*.³⁹ In *Joyce*

31. 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974).

32. Appendix to Brief for Appellant at 280, *Assoc. Gen. Contractors of Mass. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973) [hereinafter cited as section 1B].

33. Section 1B-.03.1 states:

As part of his obligations of remedial action under the foregoing section, the contractor shall maintain on this project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty percent ratio of minority employee man hours to total employee man hours in each job category

34. The liaison committee comprises representatives from the Bureau of Transportation, the Massachusetts Commission Against Discrimination, Boston State College, the Boston State Coalition, the Black Student Association of Boston State College, and the Contractors' Association of Boston, Inc. See section 1B-.04.1.

35. Section 1B-.04.5. Contractors are also required to give MCAD access to their books, records, and accounts under section 1B-.11.1.

36. Section 1B-.11.2(a).

37. *Assoc. Gen. Contractors of Mass. v. Altshuler*, 490 F.2d 9, 21 (1st Cir. 1973), *citing* *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971); *United States v. IBEW Local 38*, 428 F.2d 144 (6th Cir. 1970); *Local 53, Int'l Ass'n of Heat & Frost Insulators & Asbestos Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States v. Central Motor Lines, Inc.*, 325 F. Supp. 478 (W.D.N.C. 1970); *Joyce v. McCrane*, 320 F. Supp. 1284 (D.N.J. 1970).

38. 490 F.2d at 21. *But see* text accompanying notes 113-21 *infra*.

39. 320 F. Supp. 1284 (D.N.J. 1970).

the issue was whether the program violated the unions' right under federal labor laws to select their members. The district court held that a union's right to choose its members was not violated by requiring a nonsignatory union to admit minority persons into membership if such union referred workers to contractors subject to the plan.⁴⁰ The rationale for the court's ruling was that due to the temporary nature of employment in the construction industry and the impact of the hiring hall arrangement, the unions' control over the available supply of workers could be regulated.

The unions' unique position as the main source of construction labor has made them proper parties in enforcement actions.⁴¹ In *United States v. IBEW Local 212*,⁴² a union which had refused to become a signatory to a hometown plan and which had continued to practice discrimination in referrals and membership was required by the district court overseeing the program to become a participant. Similarly, in *United States v. Carpenters Local 169*,⁴³ unions which had not signed a hometown plan were forced to issue work permits to persons trained under the program as relief for interfering with the plan's implementation.

IMPOSED PLANS—WHEN EFFORTS FAIL

Currently, only six urban areas are functioning under imposed plans: Washington, St. Louis, Atlanta, Camden, N.J., San Francisco, and Chicago.⁴⁴ Generally, imposed plans state bid requirements, contractor obligations, good faith requirements, timetables, goals, methods of enforcement and the geographic area covered. Imposed plans do not become final until all of the interested parties have been given an opportunity to be heard.⁴⁵ The first and prototypical plan was that imposed in Philadelphia.⁴⁶

The Philadelphia Plan went into effect on September 29, 1969.⁴⁷ It related to a five-county area and covered six construction trades. The plan required any federally-assisted contract to contain specified language identical to that set out in Executive Order 11,246,

40. The court dismissed the union's arguments concerning security clauses and usurpation of the union's powers. *Joyce v. McCrane*, 320 F. Supp. 1284, 1291-92 (D.N.J. 1970).

41. *Id.* at 1291. See also *Borden Co. v. Freeman*, 256 F. Supp. 592 (D.N.J. 1966), *aff'd*, 369 F.2d 404 (3d Cir. 1966).

42. 472 F.2d 634 (6th Cir. 1973).

43. 457 F.2d 210 (7th Cir. 1972), *cert. denied*, 409 U.S. 851 (1972).

44. 41 C.F.R. §§ 60-5 to 60-11 (1976).

45. *Id.* § 60-1.26 (1976).

46. *Id.* § 60-12 (1975). The Philadelphia Plan expired in 1975.

47. See Clark, *supra* note 28, at 453-54. See also [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶ 1373.

obligating both the contractor and his subcontractors to refrain from discriminating on the basis of race, color, religion, sex, or national origin.⁴⁸ It further required contractors and subcontractors, in order to be considered responsive bidders, to submit an affirmative action plan. Bidders on contracts exceeding \$500,000 were required to "set specific goals of minority manpower utilization" to meet "definite standard[s]" established after public hearings were held.⁴⁹ Attacked in the courts, the Philadelphia Plan was upheld in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*.⁵⁰ The contractors had claimed that the quota provisions in the plan denied them equal protection under the fifth amendment. The Third Circuit, rejecting the argument in summary fashion, held "the Philadelphia Plan a valid Executive action designed to remedy the perceived evil that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest."⁵¹

Imposed plans currently in effect contain similar provisions. Apprenticeship programs are expanded, minorities are hired on a one-to-one basis with non-minorities, the plans last for four years, and a voluntary committee consisting of labor, management, and minorities is established to advise on the continued operation of the plan.⁵² The main difference between an imposed plan and a hometown plan, aside from the fact that the latter is involuntary, is that imposed plans require responsive bidders to include affirmative action commitments in their specific contract bids, whereas hometown plans require a general commitment to the entire program. Also, the method of enforcement is different. The federal government has generally sought injunctive relief for violations of hometown plans, but has sought punitive damages in contract actions for violations of imposed plans.

BEYOND THE CARROT AND THE STICK: MINORITY BUSINESS ENTERPRISE AND SPECIAL CONTRACT PROVISIONS

Administration of hometown and imposed affirmative action programs has been confused and uneven. Section 209(a) of Executive

48. [1976] 1 EMPL. PRAC. GUIDE (CCH) ¶¶ 1371, 1373.

49. See Clark, *supra* note 28, at 453 n.36.

50. 442 F.2d 159 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

51. *Id.* at 177. But see text accompanying notes 113-24 *infra*.

52. See, e.g., 41 C.F.R. §§ 60-5 to 60-11 (1976).

53. Interview with Douglas Hunt, Office of Federal Contract Compliance, in Chicago, Illinois (Feb. 14, 1977) [hereinafter cited as Hunt Interview].

Order 11,246 gives the OFCC and contracting agencies the power to impose sanctions for non-compliance.⁵⁴ The most serious sanctions are cancellation, termination, or suspension of the contract as well as debarment from future bidding.⁵⁵ That these remedies have rarely been used⁵⁶ is testimony to the demoralization and lack of commitment within the OFCC itself.⁵⁷

Recently, the OFCC has come under bitter attack, with charges leveled that neither the OFCC nor its compliance agencies could identify the contractors for which each was responsible. The system as it now stands has been labeled a "befuddling mass"⁵⁸ and a

54. Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), *as amended*, Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967).

55. *Id.* Specifically, the order states:

[T]he Secretary or the appropriate contracting agency may:

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have complied or have failed to comply with the provisions of this order

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in section 202 of this Order, appropriate proceedings be brought

(4) Recommend to the Department of Justice that criminal proceedings be brought

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended any contract, or any portion or portions thereof

(6) Provide that any contracting agency shall refrain from entering into further contracts . . . until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this order.

Id. § 209(a).

56. UNITED STATES COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 68-69 (1971). *See also* Hadnott v. Laird, 463 F.2d 304, 309 n.13 (D.C. Cir. 1972); *id.* at 313 (Johnson, J., dissenting).

57. A reported survey of the OFCC regional offices revealed that the staff people were demoralized by the overall lack of commitment by senior labor department officials. N.Y. Times, Dec. 19, 1972, at 1, col. 7.

In 1972, Herbert Hill, Labor Director of the NAACP, claimed that "the Nixon administration had abandoned the Philadelphia Plan and other compliance measures in the construction industry" N.Y. Times, Sept. 26, 1972, at 26, col. 4.

58. Statement by Sally March, Representative of Women Employed, 41 C.F.R. §§ 60-1 to 60-60 (1976), *presented at* OFCCP Hearings in Chicago, at 2 (Dec. 13, 1976), *citing* GENERAL ACCOUNTING OFFICE, THE EQUAL EMPLOYMENT OPPORTUNITY PROGRAM FOR FEDERAL NONCONSTRUCTION CONTRACTORS CAN BE IMPROVED (1975). It was charged that the OFCC

did not yet have a fully operational system for measuring the progress contractors have (or have not) made in improving employment for minorities and women. A majority of the compliance agencies reviewed less than 1/5 of the contractor facilities for which they were responsible. When the GAO conducted reviews, it found a large percentage of approved affirmative action plans which failed to meet Department standards, indicating a lax pre-award clearance policy. [The OFCC] has made the standards meet the affirmative action plans and not vice versa.

“palliative which protects discriminatory practices.”⁵⁹ Because of these difficulties with enforcement, it may be hoped that contract compliance plans will alleviate discrimination without the drawbacks of conventional affirmative action programs. The inclusion of federal contract provisions aimed at building an economic base in the minority community through encouraging the use of minority business firms is one economically feasible alternative to affirmative action programs.

The Office of Minority Business Enterprise (OMBE) was created in 1969 by Executive Order 11,478.⁶⁰ A concerted effort to increase participation of minority businesses in federal and federally-assisted construction contracts did not begin, however, until Executive Order 11,625 was issued in 1971.⁶¹ As a result of that order, which required the Secretary of Commerce to take affirmative action to stimulate minority business enterprise in federally-funded contracts, the federal procurement regulations have been amended to provide for the inclusion of a clause in all Government contracts. This clause requires contractors to, “establish and conduct a program which will enable minority business enterprises . . . to be considered fairly as subcontractors and suppliers.”⁶² A parallel regulation requires subcontractors who receive contracts which offer substantial minority business enterprise subcontracting opportunities to maintain a similar program.⁶³ However, regulations in this area have generally been fragmentary and interstitial.

The OMBE is responsible for implementing Executive Order 11,625.⁶⁴ Originally, the OMBE permitted the OFCC to supervise minority hiring and contracting agreements on a contract-by-contract basis.⁶⁵ Recently, the OMBE has entered into a series of

59. Interview with Joseph Evans, Assistant Commissioner of the Chicago Department of Urban Renewal, in Chicago, Illinois (Feb. 22, 1977) [hereinafter cited as Evans Interview].

60. 34 Fed. Reg. 12,985 (1969).

61. 36 Fed. Reg. 19,967 (1971). The preamble to Executive Order 11,625 states:

The Office of Minority Business Enterprise, established in 1969, greatly facilitated the strengthening and expansion of our minority enterprise program. In order to take full advantage of resources and opportunities in the minority enterprise field, we now must build on this foundation. One important way of improving our efforts is by clarifying the authority of the Secretary of Commerce (a) to implement Federal policy in support of the minority business enterprise program; (b) provide additional technical and management assistance to disadvantaged businesses; (c) to assist in demonstration projects; and (d) to coordinate the participation of all Federal departments and agencies in an increased minority enterprise effort.

62. 41 C.F.R. § 1-1.1310-2(b)(a)(1976).

63. 41 C.F.R. § 1-1.1310-2(b)(b)(1976). See also Memorandum of Understanding Between Federal Highway Administration and Office of Minority Business Enterprise 1 (July 22, 1975).

64. 36 Fed. Reg. 19,967 (1971). See also 23 C.F.R. § 230.201 (1976).

65. Hunt Interview, *supra* note 53.

understandings and agreements with various federal agencies, delegating responsibility to the agencies best equipped to administer the programs.⁶⁶ All but one of these programs require contractors to use their best efforts to employ minority contractors and subcontractors. The agreements have generally been successful⁶⁷ despite poor drafting and lax enforcement.⁶⁸

An agreement was reached with the Federal Aviation Administration in 1972 to encourage the use of minority contractors in the construction and maintenance of airports.⁶⁹ Under the terms of the agreement, the FAA is required to place stringent requirements on the recipients of Airport Development Assistance Program grants, by providing a contractual provision in the grants that contractors use their best efforts to employ minority contractors and subcontractors.⁷⁰ Although the FAA is given primary responsibility for enforcement, the OMBE oversees the program and provides contractors with assistance in preparing bid packages which are responsive to the agreement.⁷¹ The problem with this program is that airport repair and construction is big business with bonding requirements too high for most minority contractors to meet. Also, it is merely a best efforts program, meaning that a non-minority contractor can demonstrate compliance with the grant provisions simply by demonstrating an attempt to utilize minority contractors.⁷² Nevertheless, the program has met with some success.⁷³

The OMBE also entered into an agreement with the Department of Defense. As a result, the Department now requires prime contrac-

66. Interview with Barry A. Becker, Finance and Business Department Specialist, Office of Minority Business Enterprise, San Francisco Office, in Chicago, Illinois (Feb. 28, 1977).

67. OFFICE OF MINORITY BUSINESS ENTERPRISE, 1975 MINORITY ENTERPRISE PROGRESS REPORT (1976) [hereinafter cited as 1975 PROGRESS REPORT].

68. Evans Interview, *supra* note 59.

69. Agreement Between the Office of Minority Business Enterprise and the Federal Aviation Administration, October 31, 1972, cited in OFFICE OF MINORITY BUSINESS ENTERPRISE, REGION IV AIRPORT POLICY AND PROCEDURE 1 (1976) (internal memorandum).

70. See generally OFFICE OF MINORITY BUSINESS ENTERPRISE, REGION IV AIRPORT POLICY AND PROCEDURE (1976) (internal memorandum).

71. *Id.* at 3. Specifically, it is:

the responsibility of the OMBE designee to disseminate the airport data to other pertinent OMBE funded organizations in the area served by the airport. Each OMBE funded organization will be instrumental in disseminating data to their respective clients. The OMBE designee will see that prospective bidders are provided assistance in preparing bid packages that are responsive to the airport requirements. It will also be the OMBE designee [sic] responsibility to see that any potential bidder is a responsible bidder by reviewing his method of operation, management ability and technical know-how.

Id. at 2-3.

72. Becker Interview, note 65 *supra*.

73. 1975 PROGRESS REPORT, *supra* note 67, at 25.

tors in defense contracts to employ minority contractors and subcontractors.⁷⁴ For construction contracts, the Department of Defense has established a data system to provide assistance to non-minority defense contractors in locating and contracting with minority construction firms. The Defense Department has the primary enforcement responsibility. The OMBE provides "encouragement and assistance."⁷⁵ Biannual review of prime contractors is conducted by the Defense Contractor Administrative Services.⁷⁶ While Department of Defense minority hiring programs have been moderately successful,⁷⁷ sanctions have never been applied. In California, for example, of 375 prime contractors engaged in contracting work for the Department of Defense, not one has been rated unsatisfactory.⁷⁸

Similar agreements involving best efforts have been entered into with the Department of Housing and Urban Development, the Small Business Administration, and the National Aeronautics and Space Administration.⁷⁹ One agreement which does not simply re-

74. Agreement Between The Office of Minority Enterprise and The Department of Defense To Jointly Develop a Program to Enhance Minority Subcontracting with Department of Defense Prime Contractors, February 4, 1976. The agreement states in relevant part:

to enable minority business concerns to be considered fairly as subcontractors performing work or rendering services under Government contracts . . . Defense prime contractors performing on contracts exceeding \$500,000 which contain substantial subcontracting possibilities must establish an MBE subcontracting program. These contractual clauses [encouraging the use of minority subcontractors, should] obligate each prime contractor to assume affirmative responsibilities with respect to the minority business program, which would include a designated liaison officer and a periodic reporting requirement.

Id. at 1.

75. The Defense Department

1. [W]ill encourage prime contractors to establish yearly MBE subcontract award goals and to give appropriate consideration to minority subcontractors during the pre-award phase of the contracting cycle in order to assure that minority firms will have an equal opportunity to bid on all appropriate subcontracting opportunities.

2. Appropriate DoD contract administration offices will inform prime contractors of OMBE's resources for locating minority subcontractors and encourage them to utilize such resources. The extent to which a prime is using these OMBE-identified sources will be noted in DoD surveillance reviews.

Id. at 3.

76. Becker Interview, *supra* note 65.

77. OMBE figures indicate that minority subcontracting of Department of Defense contracts increased from \$17 million in 1974 to \$69 million in 1975. Minority business firms won a total of 391 contracts on a competitive basis worth \$26 million in 1975. 1975 PROGRESS REPORT, *supra* note 67, at 25.

78. Becker Interview, *supra* note 65.

79. The agreement between the SBA and HUD calls for the encouragement of minority enterprise in the construction, maintenance, and disposition of federal housing constructed under HUD's Property Disposition Program. The SBA gives financial and surety bond assis-

quire best efforts by non-minority prime contractors is the agreement between the OMBE and the Federal Highway Administration (FHWA). In a memorandum of understanding entered into on July 22, 1975, the OMBE delegated to the FHWA the responsibility for initiating "innovative techniques to increase opportunities for minority contractors" and to oversee a program of affirmative action through the use of federal contract provisions in highway construction contracts.⁸⁰ The FHWA was put in charge of administering the program "[i]n coordination with OMBE regional offices. . . and other OMBE funded organizations."⁸¹ The OMBE agreed to "[e]ncourage effective working relationships with contractors and subcontractors" and to "[s]timulate and publicize" the most successful innovations.⁸²

The FHWA, noting it was "obvious" that minority contractors and subcontractors were in need of assistance, had called for an all-out effort between federal and state agencies to encourage minority

tance, the OMBE gives technical and managerial assistance, and HUD serves as the lead agency. Currently, the program covers 13 cities: Chicago, Cleveland, Columbia, S.C., Hempstead/New York, Houston, Indianapolis, Jackson, Miss., Kansas City, Los Angeles, Philadelphia, San Antonio, San Francisco, and Santa Ana, Calif. Agreement between the Department of Housing and Urban Development and the Small Business Administration and the Office of Minority Business Enterprise, June 11, 1974.

The agreement with NASA requires its major contractors to assume affirmative obligations with respect to contracting with minority business enterprise. In 1975, NASA prime contractors contracted for \$30.8 million in minority service, supply, and construction work. This was up from \$19.7 million in the previous year. 1975 PROGRESS REPORT, *supra* note 67, at 25.

80. Memorandum of Understanding Between Federal Highway Administration and Office of Minority Business Enterprise at 2 (July 22, 1975).

81. *Id.* at 3. The agreement states in relevant part:

In order to support a program of Minority Business Enterprise, the Federal Highway Administration will:

1. Review the feasibility of setting reasonable and appropriate goals for Federal-aid MBE contracts and subcontracts and to establish such goals as are warranted.
2. Ensure by appropriate reviews and monitoring that State highway agencies, other recipients of FHWA federal funded [sic] programs, and contractors establish and maintain procedures which will serve to accomplish the objectives of this memorandum. Such procedures should include, but are not limited to:
 - a. Compiling lists of minority business firms who have the capacity or potential for providing the services entailed, and providing lists for prime contractors.
 - b. Fostering innovative techniques to increase opportunities for minority contractors. Insofar as permitted by FHWA regulations and State laws, these can be exemplified by joint ventures and waiver of prequalifications under specific conditions.

3. Share data and experiences with OMBE at national and regional headquarters levels.

Id. at 2-3.

82. *Id.* at 3.

participation.⁸³ One response to this new policy directive has been some states' use of special contract provisions. These provisions require contractors to set aside certain percentages of the contract to be performed by minority contractors and subcontractors.⁸⁴ Unlike the general nondiscrimination clauses used under the federal procurement regulations,⁸⁵ special provision clauses force the contractor to use minority businesses or face sanctions.

ILLINOIS' SPECIAL PROVISION PROGRAM

Only Illinois and Massachusetts are presently using special provision programs to establish percentages of minority contractor and subcontractor participation in construction projects. Since the Illinois program was the first in this area, and since the Massachusetts plan is identical to the one used in Illinois,⁸⁶ the Illinois plan will be discussed.

The Illinois special provision program was designed for use on selected projects in several target areas within the state. The percentage required to be contracted or subcontracted to minority construction firms ranges from two to five percent for most contracts.⁸⁷ The contractor's failure to have the required percentage of the contract performed by minorities may result in a reduction of contract payments by the percent of noncompliance.⁸⁸

In implementing this program, the Illinois Department of Transportation relied on information gathered by the Illinois House of Representatives Contracts Compliance Committee.⁸⁹ The commit-

83. Federal Highway Administration, *Minority Contract Awards During 1973 and 1974 in Region V*, at 2 (March 26, 1975) (internal memorandum).

84. Interview with Roland Eckert, Assistant Chief Counsel, Illinois Department of Transportation, in Chicago, Illinois (Jan. 31, 1977).

85. See text accompanying note 62 *supra*.

86. Interview with Clark Leesman, Illinois Department of Transportation, in Springfield, Illinois (Feb. 16, 1977) [hereinafter cited as Leesman Interview].

87. Letter from H. R. Hanley, Director of Highways, Illinois Department of Transportation, to Jay W. Miller, Division Engineer, Federal Highway Administration (March 24, 1975).

88. Special Provision—Required Participation by Minority Contractors, Illinois Department of Transportation (1976). The provision states in relevant part:

Not less than _____ percent of the awarded contract value of this contract shall be performed by minority prime contractors and/or minority subcontractors. For the purposes of this Special Provision, minorities are defined as Negroes, Orientals, Spanish Surnamed Americans, and American Indians. . . . Compliance with this Provision may be fulfilled by [contractors, subcontractors, owner-operators, renters of equipment, and by assignment of the contract.] . . . Failure of the contractor to have at least _____ percent of this contract performed by minority contractors will result in the reduction in contract payments by the amount determined multiplying the awarded contract value by this percent, and subtracting the dollar value of the work actually performed by minority contractors

89. Leesman Interview, *supra* note 86.

tee interviewed 101 witnesses, considered forty-five written statements, and met with officials from fifteen state and federal agencies. It concluded that minority contractors were simply not getting their share of the dollars spent on public contracts.⁹⁰

Although the impact of the Illinois program cannot be fully assessed at this time, it appears to be working. In 1968 there were no minority contracting firms operating as prime contractors and there were only six active minority subcontractors. Minority subcontractors accounted for \$38,145 of the total dollars spent on public construction contracts in that year, or .02% of the total dollar outlay. By 1976 there were six minority prime contractors accounting for \$374,467 of work, and 113 minority subcontractors accounting for an additional \$5,501,051 for a total of \$5,880,518 paid to minority firms, or 2.6% of all money spent on public construction contracts.⁹¹ Although it is questionable whether Illinois will prequalify twenty-five minority prime contractors by 1978—the target set in the FHWA memorandum⁹²—Illinois has made substantial progress in the last few years.

SPECIAL PROVISION PROGRAMS AND REVERSE DISCRIMINATION

In light of recent decisions upholding reverse discrimination actions,⁹³ the special provision concept faces some rather substantial legal obstacles. Although the programs are designed to effect the laudible purpose of encouraging minority contractors and subcontractors to participate in federal highway programs, they do so by classifications based on race. Courts have long held that race classifications are suspect,⁹⁴ and have recently extended this principle to

90. ILLINOIS HOUSE CONTRACTS COMPLIANCE COMMITTEE, REPORT TO THE ILLINOIS HOUSE OF REPRESENTATIVES, 77th Gen. Assem. 1-10 (June 1972).

91. Defendant Exhibit 18, *Assoc. Gen. Contractors of Ill. v. Bond*, Civil No. 76-0120 (S.D.Ill., Filed Oct. 13, 1976).

92. FHWA MINORITY CONTRACT AWARDS DURING 1973 AND 1974 IN REGION V (March 26, 1975) (internal memorandum). The goals set for registering and prequalifying minority contractors ranged from four in Massachusetts by 1978, to 70 in California for the same year. *Id.*

93. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (reversing lower court dismissal of case brought by discharged white railroad workers on the basis that 42 U.S.C. § 1981 (1970) applies only to blacks); *Bakke v. Regents of the Univ. of Cal.*, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 97 S. Ct. 1098 (1977) (reverse discrimination is unconstitutional where no pattern of racial discrimination shown); *See Note, The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance*, 8 *Loy. Chi. L.J.* 369 (1977).

94. *Loving v. Va.*, 388 U.S. 1 (1967); *McLaughlin v. Fla.*, 379 U.S. 184 (1964); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968); *Anderson v. San Francisco Unified School Dist.*, 357 F. Supp. 248 (N.D. Cal. 1972); *cf. Weber v. Kaiser Aluminum & Chem. Corp.*, 415 F. Supp. 761 (E.D. La. 1976)

classifications based on race which benefit either the majority or the minority.⁹⁵

The concept of applying strict scrutiny to classifications based on suspect classes and suspect categories found its genesis in the *Carolene Products* footnote. In *Carolene Products*, the Court suggested that "prejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry."⁹⁶ A suspect class was recently defined as a class of people "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."⁹⁷ When statutes make classifications based upon race, the Court applies strict scrutiny and generally strikes the law down.⁹⁸ In the development of this judicial philosophy, however, the Supreme Court has emphasized the judicial and political impotence of discrete and insular minorities.⁹⁹ Furthermore, the courts have long held that classifications based upon race are not per se unconstitutional.¹⁰⁰ Only invidious and arbitrary distinctions have been stricken.¹⁰¹ Consequently, special provision programs should not be invalidated under an equal

(overturning seniority program favoring minorities under quota system). *But see* *Bakke v. Regents of Univ. of Cal.*, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 97 S. Ct. 1098 (1977).

95. *McDonald v. Santa Fe Trial Transp. Co.*, 427 U.S. 273 (1976).

96. *United States v. Carolene Prod.Co.*, 304 U.S. 144, 152-53 n.4 (1938). *See also* *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Kahn v. Shevin*, 416 U.S. 351 (1974); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Reed v. Reed*, 404 U.S. 71 (1971).

97. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

98. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Loving v. Virginia*, 388 U.S. 1 (1967).

99. *See, e.g.,* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine in a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

100. Where consideration of race is to the benefit of minorities, it is not per se violative of the fourteenth amendment: *Swann v. Bd. of Educ.*, 402 U.S. 1 (1971); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Intentional recognition of race has been approved, however, in some cases: *Brooks v. Beto*, 366 F.2d 1 (5th Cir. 1966) (selection of grand juries); *Otero v. N.Y.C. Housing Auth.*, 484 F.2d 1122 (2d Cir. 1973) (tenants for public housing).

101. *Hunter v. Erickson*, 393 U.S. 385 (1969); *Loving v. Va.*, 388 U.S. 1 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). For a discussion of this area as it relates to reverse discrimination, *see* Redish, *Preferential Law Admissions*, 22 UCLA L. REV. 343 (1974); *DeFunis Symposium*, 75 COLUM. L. REV. 483 (1975); Sandalow, *Racial Preferences: The Judicial Role*, 42 U. CHI. L. REV. 723 (1974); O'Neil, *Preferential Admissions*, 80 YALE L.J. 699 (1971); Note, *Title VII and the Quota System—A New Approach to a Belabored Problem*, 4 RUT.-CAM. L. REV. 113 (1972); Comment, *Constitutionality of the "Benign" Quota*, 40 TENN. L. REV. 55 (1972). *See also* Note, *The Employer's Dilemma: Quotas, Reverse Discrimination, and Voluntary Compliance*, 8 LOY. CHI. L.J. 369 (1977).

protection analysis for two reasons: (1) *non-minority* contractors clearly are not a discrete and insular minority in need of judicial protections, and (2) the suspect classifications serve not an invidious or arbitrary purpose, but rather encourage minority business enterprise.

Consistent with this view, many courts have upheld, and in some cases ordered, affirmative action programs giving preferential treatment to minorities on the basis of race. In *Norwalk Core v. Norwalk Redevelopment Agency*,¹⁰² the Second Circuit stated:

What we have said may require classification by race. That is something which the Constitution usually forbids, not because it is inevitably an impermissible classification, but because it is one which usually, to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed, and to the extent it is necessary to avoid unequal treatment by race, it will be required.¹⁰³

In *Porcelli v. Titus*,¹⁰⁴ the Third Circuit upheld an affirmative action program despite the claim by a group of white teachers that they had been denied regular promotions because of priorities given to minorities. The court of appeals held that the priority program based upon racial and minority classifications did not per se violate the fourteenth amendment.¹⁰⁵ In *United States v. Lathers*,¹⁰⁶ the Second Circuit ordered the issuance of 100 work permits to minority applicants following an action brought under the Civil Rights Act of 1964 to enjoin discriminatory work referrals by a labor union. Similarly, in *Carter v. Gallagher*,¹⁰⁷ the Eighth Circuit ordered the Minnesota Fire Department to employ a formula that might bypass qualified whites.

The only leading case favoring the opposite view is *Mapp v. Board of Education*.¹⁰⁸ In *Mapp*, the Court of Appeals for the Sixth Circuit reversed a desegregation plan which provided a "racial ratio of not less than 30% nor more than 70% of any race in each elementary school within the system."¹⁰⁹ The defendants argued that under the Supreme Court's decision in *Swann v. Board of Education*,¹¹⁰ "the

102. 395 F.2d 920 (2d Cir. 1968).

103. *Id.* at 931-32.

104. 431 F.2d 1254 (3d Cir. 1970), *cert. denied*, 402 U.S. 944 (1971).

105. *Id.* at 1257.

106. 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973).

107. 452 F.2d 315 (8th Cir. 1971), *cert. denied*, 406 U.S. 950 (1972).

108. 477 F.2d 851 (6th Cir. 1973), *aff'ing*, 329 F. Supp. 1374 (E.D. Tenn. 1971).

109. 477 F.2d at 854, *quoting* 329 F. Supp. at 1382.

110. 402 U.S. 1 (1971).

very limited use made of mathematical ratios was within the equitable remedial discretion of the District Court."¹¹¹ Although it acknowledged that fixed racial quotas were permissible in some cases, the court was not bound by *Swann* and overturned the program.¹¹²

Essentially, the issue is whether the courts in ruling on special provision programs should apply strict scrutiny to non-discrete and non-insular majority contractors discriminated against by special provision classifications based on race. Based on the cases discussed above, the courts should not uphold fourteenth amendment challenges to special provision programs. It is, however, necessary to consider the Supreme Court's decision in *McDonald v. Santa Fe Trail Transportation Co.*¹¹³ In *McDonald* the Court reversed a decision of the Fifth Circuit which held white employees could not bring suit under section 1981.¹¹⁴ The district court asserted that discrimination under 1981 could be brought only by blacks. The Supreme Court reversed and remanded, holding that section 1981 prohibits discrimination against whites as well as blacks.¹¹⁵

With respect to affirmative action, the precedential value of *Santa Fe* is questionable. The majority opinion, written by Justice Marshall, did not state that reverse discrimination quotas are unconstitutional. The Court merely said that, on the basis of legislative history, the case could not be dismissed on standing grounds.¹¹⁶ Additionally, the Court did not address any of the controversial issues surrounding the use of reverse quota systems. It simply held that the legislative history of section 1981 indicated that whites were to be accorded standing.¹¹⁷ While *Santa Fe* casts some doubt on the constitutionality of reverse quota schemes, it hardly stands for the proposition that affirmative action is per se unconstitutional.

The difficulty in interpreting *Santa Fe* stems from the Court's reluctance to grant certiorari to cases in which reverse quota programs have been unsuccessfully challenged on equal protection

111. *Id.* at 25. The Court's caveat in *Swann* must, however, be kept in mind: It would not serve the important objective of *Brown [v. Board of Education]* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination.

Id. at 22-23.

112. 477 F.2d 851, 852 (6th Cir. 1973).

113. 427 U.S. 273 (1976).

114. 513 F.2d 90 (5th Cir. 1975).

115. 427 U.S. at 278-85.

116. *Id.*

117. *Id.* for a discussion of this area, see Shoenberger, *A Prolegomena to Reviving the Civil Rights Act of 1866: White Standing Under Section 1981—A Federal Common Law Right to Contract*, 8 *Loy. Chi. L.J.* 81 (1976).

grounds.¹¹⁸ Recently, however, the California Supreme Court sustained such an attack in *Bakke v. Regents of the University of California*.¹¹⁹ Perhaps with the intention of clarifying *Santa Fe*, certiorari has been granted.¹²⁰ In *Bakke*, the California Supreme Court held that the University of California's medical school admissions program which gave preference to minority students on the basis of race was unconstitutional under the fourteenth amendment. In reaching this result, the court analyzed extensively all of the major federal cases which had adjudicated reverse discrimination programs. It concluded that the prior decisions did not hold that a less demanding standard of review was to be applied in cases where the race discriminated against was the majority rather than the minority:

We cannot agree with the proposition that deprivation based upon race is subject to a less demanding standard of review under the Fourteenth Amendment if the race discriminated against is the majority rather than a minority. We have found no case so holding, and we do not hesitate to reject the notion that racial discrimination may be more easily justified against one race than another, nor can we permit the validity of such discrimination to be determined by a mere census count of the races.¹²¹

The university argued that the program was necessary to integrate the medical school and the profession, that minority doctors would serve as a model for youngsters in the minority community, and that minority doctors would be more willing to serve in minority areas which are desperately short of physicians. The California Supreme Court held that the university's justifications for the admissions program did not justify discrimination against the majority and was not a compelling state interest.¹²²

If upheld, *Bakke* is likely to cause upheaval in the area of affirmative action, but it would not lead to a blanket prohibition of such programs. The admissions program involved set aside sixteen out of

118. See, e.g., *Associated Gen. Contractors of Mass. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); *United States v. Lathers*, 471 F.2d 408 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir.), cert. denied, 404 U.S. 984 (1971); *Weiner v. Cuyahoga Community College Dist.*, 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969), cert. denied, 396 U.S. 1004 (1970). But see *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), cert. granted, 97 S. Ct. 1098 (1977).

119. 18 Cal. 3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976).

120. 97 S. Ct. 1098 (1977).

121. 18 Cal. 3d at 50, 132 Cal. Rptr. at 691, 553 P.2d at 1163.

122. *Id.* at 52, 132 Cal. Rptr. at 692, 553 P.2d at 1164.

100 positions for minority students in a new medical school which did not have a pattern of past discrimination.¹²³ The court did not overrule the use of affirmative action programs where a pattern of past discrimination is shown, where assistance or special consideration is given to minorities, or where flexible and dynamic goals are utilized. Since special provision programs set flexible percentage ranges, not strict numerical goals, and a pattern of discrimination in the construction industry has been frequently demonstrated,¹²⁴ the area is not likely to be ruptured by an adverse decision in *Bakke*.

ALTERNATIVES TO THE SPECIAL PROVISION PROGRAMS

Alternatives to the use of special contract provisions are limited by practical and constitutional considerations. Point systems, a method by which contractors are assigned points or credits depending on the number of minorities the bidder pledges to employ, are generally invalid where the state has a purchasing statute requiring government agencies to accept the lowest bid.¹²⁵ Under a point system, the bidder submitting the lowest bid, when coupled with his commitment to minority hiring, is awarded the contract.

Such a plan has been implemented in Chicago.¹²⁶ The maximum that can be deducted in the Chicago Point System Plan on a \$1 million dollar bid, for example, is \$40,000 if the bidder pledges to use fifty percent minorities in all trades. The base bid would be \$1 million, but \$40,000 would be deducted due to the pledge of fifty percent minority utilization, yielding a bid for purposes of awarding the contract of \$960,000. Thus a contractor who bids \$1 million with fifty percent minority utilization (constructively bidding \$960,000 under the point system) would prevail over someone who bid \$970,000 without the minority employment pledge. As a result the city would award the contract to the \$1 million bidder over the \$970,000 bidder, based on the point system formula.¹²⁷ The difficulty with this system is that it discriminates against the unsuccessful competitors whose actual bids may be substantially lower than the successful bidder. The Chicago Point System is currently being challenged in the state court on statutory grounds.¹²⁸

123. *Id.* at 38, 132 Cal. Rptr. at 683, 553 P.2d at 1155.

124. *See, e.g.*, 41 C.F.R. §§ 60-5 to 60-11 (1976)

125. *See* ILL. REV. STAT. ch. 127, § 132.2 (1977).

126. Evans Interview, *supra* note 59.

127. *Id.*

128. The Chicago Point System Plan was suspended after the municipal court ruled it illegal under the Illinois Purchasing Act, ILL. REV. STAT. ch. 127, § 132.2 (1977). The lower court ruling is currently under consideration before the Illinois Supreme Court. Underground

Plans which designate specific contracts to be carried out only by minorities present another alternative to special provision programs.¹²⁹ Pursuant to these plans, the contracting government agency identifies contracts open to bidding by minority contractors only. These programs suffer administrative problems, as well as legal ones, in that they identify contracts as "minority" contracts in advance. If difficulties are encountered in obtaining minority contractors or subcontractors to do the work, construction is delayed. As a rule special provision programs provide more flexibility by allowing the contractor to fill his quotas within certain percentages. The Department sets the percentages of minority utilization, but permits the contractor flexibility as to which jobs are to be performed by minorities. If a contractor is unable to fill his quota by using minority subcontractors of one type, he can fill the quota by utilizing minorities of another or a variety of types.¹³⁰

CONCLUSION

The use of special contract provisions to encourage the use of minority contractors and subcontractors represents an interesting and useful experiment in affirmative action. The primary obstacle is that such provisions discriminate against non-minority contractors. Earlier courts upheld similar programs when they related solely to the hiring of minority personnel, but even then, the quotas established were occasionally overruled.¹³¹ Special provision programs, because those programs not only set goals for affirmative action but also discriminate against identifiable non-minorities, may be more difficult to justify.¹³² However, because the classes adversely affected by affirmative action are non-discrete and non-insular, the special contract provisions should survive the searching judicial review which accompanies constitutional challenge. Such a result seems preferable. It would allow the federal government to pursue its remedial efforts by increasing flexibility in an area in which the Government possesses the power to "obtain social and economic justice" for minority businesses and individuals to enable them to participate fully in a free market system.

L. STEVEN PLATT

Contractors Assoc. v. City of Chicago, Civil No. 75-48109 (Nov. 13, 1975). See also Tometz v. Bd. of Educ., Waukegan Dist. 61, 39 Ill. 2d 593, 237 N.E.2d 498 (1968).

129. See generally, ILLINOIS HOUSE CONTRACTS COMPLIANCE COMMITTEE, REPORT TO THE ILLINOIS HOUSE OF REPRESENTATIVES, 77th Gen. Assem. (June 1972).

130. *Id.*

131. See text accompanying notes 25-30 *supra*.

132. See, e.g., Kirkland v. N.Y. State Dept. of Correctional Serv., 520 F.2d 420, 428 (2d Cir. 1975).