SB

415

NFIB National Federation of Independent Business

March 25, 1982

Senator Vic Fischer
Alaska Senate
Pouch V
Juneau, Alaska 99811

RE: CSSB 415 (State Affairs)
Proposed Revision to Section 15

Dear Senator Fischer:

In response to your request of March 23, I have considered several alternatives regarding an appropriate definition of "Alaska bidder" for purposes of the preference provided in the law. The following language is proposed for your review:

*Sec. 15. AS 37.05.230(5) is amended to read:
(5) an "Alaska bidder," for the purpose [OF BID AWARDS UNDER (1)(F)] of this section, is a person who
(A) holds a current Alaska business license; [,]
(B) submits a bid for goods or services under the name as appearing on his current Alaska business license; [,]
(C) has, if an individual, derived at least 50% of his earned income, or, if a corporation or partnership, the officer or partner submitting the bid has derived at least 50% of his earned income from the operation of the business [MAINTAINED A PLACE OF BUSINESS] within the state for a period of six months immediately preceding the date of his bid;
(D) provides sufficient information to clearly establish that for the immediately preceeding six month period, he has been actively engaged, in the state, in the business of providing the goods and/or services for which the bid is being submitted; and
(E) is not delinquent in the payment of state taxes;

In addition to the above language, you could consider adding one additional requirement to a bid submitted by anyone claiming the Alaska bidder preference. That requirement would be for him to state, if for goods, the percentage which will be provided from an inventory maintained by the bidder in the state, and, if for services, the percentage which will be performed in Alaska. The obvious question then is, what good is this information? Possibly, you could add another stipulation to the above statutory language whereby a bidder for goods would be required

Director, Governmental Relations/Alaska
P.O. Box 194, Auke Bay, Alaska 99821 Tel. 907/586-4100

to deliver a certain percentage from an inventory in Alaska or a bidder for services would be required to perform a certain percentage of the services in Alaska. Unfortunately, a requirement of this nature could possibly produce a worse quagmire than anything else because there will be some bids where all of the goods should be drop shipped from the lower states regardless of who the bidder was and others where 100% could be delivered from inventories in Alaska. The same thing would also be true on some of the services contracts.

It appears that if the Legislature wants to maintain the "Alaska bidder" preference, you can only go so far without creating more administrative problems than anything else. If you decide to go with some of the more stringent requirements suggested above, a penalty should be added to the law for a bidder submitting false information when seeking the "Alaska bidder" preference. I would suggest that the individual submitting the false information be barred and any company for which he was a majority stockholder or an officer be barred from being able to apply for "Alaska bidder" preference for a period of 10 years. Ten years may seem a little stiff, however, if the penalty is not sufficiently severe, the bidder may decide it's worth the gamble to falsify an application.

I hope that these suggestions are of some assistance as you consider this very difficult issue. If I can be of assistance in the future, feel free to contact me.

Very truly yours,

Gary L. Jenkins
Director, Governmental Relations
Alaska

OF COUNSEL
M. E. MONAGLE

R. E. ROBERTSON (1886-1961)
F. O. EASTAUGH
J. B. BRADLEY
WILLIAM O. RUDDY
L. B. JACOBSON
JAMES F. CLARK
PAUL M. HOFFMAN
J. P. TANGEN
D. ELIZABETH CUADRA
HAROLD E. SNOW, JR.
PAMELA L. FINLEY
STEVEN W. SILVER

JUNEAU OFFICE
210 FERRY WAY, 2ND FLOOR
POST OFFICE BOX 1211
JUNEAU, ALASKA 99802
PHONE (907) 586-3340
CABLE: ROMEA
TELEX: 090-45-376

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
POST OFFICE BOX 1211
JUNEAU, ALASKA 99802

ROBERT B. BAKER
MICHAEL T. THOMAS
LEROY J. BARKER
L. O. BERRY
C. R. RICH
CARL W. WINNER
SUSAN L. MENDENHALL
JILL A. DRIVER

ANCHORAGE OFFICE
601 WEST FIFTH, SUITE 810
ALASKA MUTUAL BANK BLDG.
POST OFFICE BOX 679
ANCHORAGE, ALASKA 99510
PHONE (907) 277-6693
CABLE: ROMEA
TELEX: 090-26-486

March 19, 1982

The Honorable Vic Fischer
Chairman, Senate State Affairs
Committee
Alaska State Legislature
Pouch V
Juneau, Alaska 99811

Re: Surety Bonding Bills

Dear Senator Fischer:

We understand that your committee will take up SB 45, and a possible committee substitute for SB 414, as well as a new SB 869, next week. Unfortunately, I will have to be out-of-town because of federal court settings, but I wanted to give the Committee some expression with regard to the three bills on behalf of the American Insurance Association.

SB 869 would serve the useful purpose of allowing an applicant for a surety bond to know the reasons for a denial, and presumably work to overcome them, when he or she is not granted a bond. However, candid and full disclosure of all such adverse information could result in embarrassment to the applicant and possible assertions of liability against the company. The problems with regard to the handling of such adverse information have been the subject of lengthy consideration by the industry and by the National Association of Insurance Commissioners. The NAIC has adopted a model privacy act, making clear that adverse underwriting information must be made available, but stipulating how the information is to be kept and the circumstances under which it is divulged, and protecting the persons and companies involved from liability for meeting the requirements of the statute. The American Insurance Association supports the model bill. Obviously, what this comment is leading to, is that the bill before you requires divulgence of adverse information in one very limited line of the insurance business, and does not contain any of the well thought out provisions that have been included in

the model act. We would urge that the Committee consider the model act if it wants to require the kind of disclosure that SB 869 would entail.

An alternative, and much less desirable (because piecemeal) approach, would be to require that the information be retained by the insurer, and to allow the Director of Insurance on investigation to review the information and make such use of it as is appropriate under the circumstances.

Turning to SB 414 as rewritten in the work draft paper, we understand the motivations behind the draft, but we would urge the Committee to be careful that it is obtaining adequate information concerning the cost of such undertaking, and also that the Committee consider the degree to which it wishes a government agency to determine the extent of its involvement in the private market. Speaking to the latter point first, proposed Section 45.71.070(3), makes one of the conditions for issuance of a guarantee of a surety bond, that "the person is not able to obtain the bond on reasonable terms and conditions from a corporate surety ...". What that means in practical effect is that the executive director of the new agency will determine what is reasonable as a price or condition on the issuance of a corporate surety, and will therefore determine the extent to which the agency competes by penetrating the market. This assumes, then, that there is a competitive private market. The alternative would be to make subparagraph (3) read, "the person is not able to obtain the bond from a corporate surety ...". This would make the State the sureter of last resort, but not the sureter of any and all who may be dissatisfied with the private market's rates and can convince a government employee to issue a bond on better terms.

The concern about the cost of the new enterprise is generated in part because the available figures concerning the cost of the SBA program come from the SBA itself. As we are all aware, the SBA budget is under review and the agency has an incentive to make the net cost of their program look small. We are unaware of any statistics which corroborate the agency's assertion that government bids are 10% lower because of the program, and when looking at their cost data, it seems incredible that they have had as many employees over as many years as they report, at no greater cost than they report. One suspects that much of the very substantial indirect cost of the program is not being allocated in this study. Since we do not have independent numbers to challenge the SBA's internal study with, it is perhaps enough to note that one could have had more confidence in the numbers if they had been found in a GAO report.

A further concern with SB 414, as written, is that it will tend not only to cost the State substantially in failed contracts and delays on government construction, but that it will also adversely affect small contractors who have achieved a proven track record and have bonding capacity. Those contractors will not be able to compete effectively with contractors who will qualify for this program, largely for the very reasons which qualify them for bonding: they will be better capitalized, have a proven work force, own their equipment, and generally have, and need to pay for, the things which convince a bonding company that they are not going to fail in a proposed contract. Because the State is responsible for so much of the construction activity in Alaska, depending upon how the program is administered, it could have a very adverse impact on our good contractors. Specifically, we draw the Committee's attention to the fact that proposed Section 45.71.070 promises bid bonds, payment bonds, and performance bonds on contract up to One Million Dollars, but only to contractors whose gross revenue for the most recently completed fiscal year was not in excess of that same figure. It seems likely that, in an effort to allow contractors to gain experience on larger projects, the State will guarantee the performance of contractors who are extended well beyond their capacity.

We also note that the claim processing provisions of proposed AS 45.71 are inappropriate in a surety bond setting.

Turning to SB 45, we acknowledge that any statute which sets a dollar cutoff needs to be reviewed periodically as inflation devalues the dollar. However, in reviewing this statute, the Legislature should require objective evidence that competent contractors are being denied work that they could do because of the bonding requirement, and that the benefits to the State outweigh the adverse consequences. These would include depriving bondable contractors of the work, and increasing the odds that the State will have a major contract held up, and its costs greatly expanded, because of the failure of a subcontractor. It may be that the objective evidence exists, but we are not aware of it. We are in fact aware that small specialty bonding companies have been trying in the last few years to write more and more business in the State.

We would like to commend Mr. Winograd for his thoughtful staff paper. He has identified many of the competing considerations which the Committee must address. We would also like to thank you for the opportunity to comment on these bills. I have sent them for further comment to AIA offices on both coasts, and I will certainly make available further information as it is

received. Unfortunately, that is unlikely to be before the time scheduled for your hearings on the 23rd. If, however, the Committee would be able to use further information that the insurance industry might have available, please contact my office and we will do the best we can to obtain it for you.

Sincerely,

ROBERTSON, MONAGLE, EASTAUGH & BRADLEY

M. T. Thomas

MTT:sd

Alaska State Legislature

Senate Committee on State Affairs

Vic Fischer, Chairman • Pouch V • Juneau, Alaska 99811 • (907) 465-4954

Official Business

MEMORANDUM

DATE: March 25, 1982

TO: All Legislators

FROM: Senator Vic. Fischer

RE: CS for S.B. 415, EXECUTIVE SUMMARY

An Act Relating to Bidders Preferences for Alaska Businesses and Businesses Owned by Minorities and Women and Veterans, and Contracting and Procurement Procedures

The CS for S.B. 415 provides a system to insure that public contracting procedures will favor Alaska bidders. Existing statutes are full of loopholes which result in State subsidization of out-of-state interests. The major features of CS for S.B. 415 are:

1) Closes loopholes which allow State funded contracts to avoid State bidding requirements.
2) The Alaska bidders preference is raised to 10%, from the existing 5%.
3) To qualify for an Alaska bidders preference a business must have 50% of its employees residing in Alaska or employ at least 10 resident employees, and no more than 50% of the contract can be subcontracted to businesses whose primary place of operation is outside of Alaska.
4) If during the prior fiscal year a proportionally smaller dollar amount of contracts are awarded to minority bidders compared to target levels, then businesses owned by economic minorities, including women, Alaska Indians, Eskimos, Aleuts, Blacks and Viet Nam veterans, receive a 10% bidders preference on contracts less than $1,000,000 for the next fiscal year.
5) The Department of Administration is required to prepare an annual report on contracts awarded in accordance with bidders preference lists by all State agencies, municipalities, and other entities for contracts using State monies. The report shall be submitted to the House and Senate State Affairs Committees.

This legislation would provide a means to help accomplish our long-standing goals of redistributing State wealth to Alaskans, strengthening domestic businesses, and increasing economic participation by minority groups. Therefore, I respectfully request your consideration and support.

STATE OF ALASKA
THE LEGISLATURE

LEGISLATIVE AFFAIRS AGENCY

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907 465-3800

M E M O R A N D U M

March 23, 1982

SUBJECT: Public contracts -- CSSB 415
(Work Order No. 12-2755)

TO: Senator Vic Fischer
Chairman, Senate State
Affairs Committee

FROM: Tamara Brandt Cook
Legislative Counsel

Here is the section-by-section analysis you requested of the draft of CSSB 415 (State Affairs).

Sec. 1. The Department of Transportation and Public Facilities is required to award a highway construction contract in accordance with bidding requirements if the contract is $50,000 or more. Existing law requires the department to award a contract in accordance with bid requirements only if it exceeds $100,000. The reference to AS 44.33.300 is deleted, since that section allows a waiver only if the contract is less than $50,000 and by its terms it would not apply to contracts awarded for $50,000 or more.

Sec. 2. The Department of Transportation and Public Facilities is required to award a contract for maintenance of a highway in accordance with bidding requirements if the contract is $25,000 or more. It is discretionary with the department whether to award smaller contracts in accordance with bidding requirements. The department may not award contracts in smaller increments to avoid the bidding requirements. These are new provisions.

Sec. 3. The Department of Transportation and Public Facilities is required to comply with the bidding requirements and preferences of AS 37.05.230(1) in awarding a contract that is subject to bid requirements. Existing law only requires the department to award a contract to the lowest responsible bidder.

Sec. 4. A local government is required to comply with the bidding requirements and preferences of AS 37.05.230(1) in awarding contracts for a local service road or trail that the local government has assumed from the Department of Transportation and Public Facilities if the amount of state money to be used on the project is $50,000 or more. Existing law only requires that contracts be awarded on the basis of the lowest responsible bid.

Sec. 5. A contract for maintenance of local service roads and trails that is for $25,000 or more entered into by the state and a contract for maintenance of local service roads and trails that is for $25,000 or more for which state money is to be used entered into by a local government is required to be awarded in accordance with the bidding requirements and preferences of AS 37.05.230(1).

Sec. 6. The Department of Transportation and Public Facilities is required to award a public works construction contract in accordance with bidding requirements if the contract is $50,000 or more. Existing law requires the department to award a contract in accordance with bid requirements only if it exceeds $100,000. The reference to AS 44.33.300 is deleted, since that section allows a waiver only if the contract is less than $50,000 and by its terms it would not apply to contracts awarded for $50,000 or more.

Sec. 7. The Department of Transportation and Public Facilities is required to award a contract for maintenance of a public works project in accordance with bidding requirements if the contract is $25,000 or more. It is discretionary with the department whether to award smaller contracts in accordance with bidding requirements. The department may not award contracts in smaller increments to avoid the bidding requirements. These are new provisions.

Sec. 8. The Department of Transportation and Public Facilities is required to comply with the bidding requirements and preferences of AS 37.05.230(1) in awarding a contract for a public works project that is subject to bid requirements. Existing law only requires the department to award a contract to the lowest responsible bidder.

Sec. 9. A municipality or regional educational attendance area is required to comply with the bidding requirements and

preferences of AS 37.05.230(1) in awarding a contract for a public works project assumed from the Department of Transportation and Public Facilities if the amount of state money to be used on the project is $50,000 or more.

Sec. 10. Subject to certain bidding preferences added by this bill, a bid shall be awarded by the Department of Administration to an Alaska bidder if his bid is not more than 10 percent higher than the bid of the lowest nonresident and he is on the certified Alaska bidders list. Existing law requires a bid to be awarded to an Alaska bidder if his bid is not more than five percent higher and makes no provision for a bidders list.

Sec. 11. Existing law provides that competitive bids are not required for sales involving fair trade items or when materials for use in laboratory and experimental studies may be purchased otherwise to the best advantage of the state. These two exceptions to the bid requirements have been deleted.

Sec. 12. A contract shall be awarded to a bidder on the certified minority bidders list under certain conditions, including a requirement that during the prior fiscal year a proportionally smaller dollar amount of contracts were awarded to minority bidders compared to the population of minority people in the state, that the bid not be more than 15 percent higher than the lowest bid, that the minority bidder agrees to lower his bid by five percent or match the lowest bid. This preference applies only to contracts of $1,000,000 or less. A contract shall be awarded to a bidder on the certified women bidders list under similar conditions as those applied to the minority bidders preference, except that during the prior fiscal year women bidders must have received less than 10 percent of the value of contracts of $1,000,000 or less awarded for the preference to apply. A contract shall be awarded to a bidder on the certified Viet Nam veterans bidders list under similar conditions as those applied to minority bidders preference, except that during the prior fiscal year Viet Nam veterans must have received less than five percent of the value of contracts of $1,000,000 or less awarded for the preference to apply. If two or more bidders qualify for a minority bidders, women bidders, or Viet Nam veterans bidders preference a contract shall be awarded to the lowest of the bidders. These are new provisions.

Sec. 13. The Department of Administration is required to solicit bids by sending notices to all bidders on the certified Alaska bidders list and the department may limit solicitation of bids. Under existing law the department is required to send notices to known active prospective bidders and the department is not authorized to limit solicitation of bids.

Sec. 14. A contract for $50,000 or more for the operation of a transportation system for students is subject to competitive bid requirements. Under existing law this type of contract is exempt from the bid requirements.

Sec. 15. Besides the requirements of existing law, to qualify as an Alaska bidder a person may not be delinquent in the payment of state taxes and must maintain inventories or facilities in support of business activities in the state.

Sec. 16. The bidding preferences do not apply to contracts that are less than $50,000 of the Department of Transportation and Public Facilities. Under existing law the Alaska bidders preference does not apply to contracts that exceed $5,000.

Sec. 17. A contract for $50,000 or more for products or services of a sheltered workshop operating in the state is subject to competitive bid requirements. Under existing law this type of contract is exempt from the bid requirements.

Sec. 18. The Department of Administration is required to compile and update a certified Alaska bidders list, a certified minority bidders list, a certified women bidders list, and a certified Viet Nam veterans bidders list. To qualify for a certified list, other than the Alaska bidders list, a person must be on the certified Alaska bidders list and have a business with at least 85 percent of its interest beneficially owned or 85 percent of its voting interest owned by the type of person for which the preference is granted. In addition, the daily operations of the business must be controlled by the type of person for which the preference is granted. The bidders preferences do not apply to contracts involving federal money if the application of a bidding preference would violate federal law or program guidelines. These are new provisions.

Sec. 19. Execpt for the bidding preferences of AS 37.05.-230, a contract for which competitive bids are required shall be awarded by the Department of Administration to the lowest responsible bidder. Under existing law there is a preference for Alaska bidders only.

Sec. 20. A prime contractor must name the principal subcontractors he intends to use when submitting a bid. After a bid is awarded the subscontractors may be changed only for cause. "Principal subcontractor" is defined. This is a new provision.

Sec. 21. At least 20 percent of the money under a contract awarded through the competitve bid process shall be paid to subcontractors on the certified minority bidders list, certified women bidders list, or certified Viet Nam veterans bidders list unless no subcontractor on those lists is available. A prime contractor must identify subcontractors on the lists that he intends to use when submitting his bid. These are new provisions.

Sec. 22. If a bid is awarded under the competitive bid requirements, a proposed substitution for a subcontractor named in the bid shall be submitted to the Department of Administration for approval. This is a new provision.

Sec. 23. The Department of Administration is required to prepare a report on contracts awarded in accordance with a bidders preference for minority bidders, women bidders, or Viet Nam veterans bidders by state agencies, the University of Alaska, municipalities, and other entities. The report shall be submitted to the Senate State Affairs Committee and the House State Affairs Committee. This is a new provision.

Sec. 24. If the amount of state money used to finance a contract of the University of Alaska is $50,000 or more the competitive bidding and preference provisions of AS 37.05.-230(1) apply. This is new.

Sec. 25. If the amount of state money used to finance a contract of a non-profit corporation is $50,000 or more, the bidding and preference provisions of AS 37.05.230(1) apply. This is new.

Sec. 26. To qualify for receipt of a grant, a municipality must comply with the bidding and preference provisions of AS 37.05.230(1) in the award of a contract if $50,000 or more of the contract is financed with the grant or other state money. This is a new requirement.

Sec. 27. To qualify for receipt of a grant, a named recipient must comply with the bidding and preference provisions of AS 37.05.230(1) in the award of a contract if $50,000 or more of the contract is financed with the grant or other state money. This is a new requirement.

Sec. 28. In the awarding of a contract to an entity in an unincorporated community the Department of Community and Regional Affairs must determine if there is an incorporated entity that will agree, along with other things required by existing law, to award any contract of $50,000 or more financed by the grant in accordance with the bidding and preference provisions of AS 37.05.230(1).

Sec. 29. Technical amendments are made to the section providing for a waiver of provisions regarding public contracts in an area impacted by an economic disaster so that citations are to sections dealing with contracts of under $50,000.

Sec. 30. The bill is effective July 1, 1982.

TBC:ljb

Alaska State Legislature

Senate Committee on State Affairs

Vic Fischer, Chairman • Pouch V • Juneau, Alaska 99811 • (907) 465-4954

Official Business

3/18/82

REVISED

SENATE STATE AFFAIRS COMMITTEE SCHEDULE

TUESDAY
March 23
1:30 pm

SB 45	Surety bonding exemptions
SB 414	Small Contractor Surety Bonding Corp.
SB 415	Contracting, procurement and competitive bidding
SR 23	[Study of contracting for state services]
SCR 50	[Delivery of state services]
SB 865	Award of state contracts to minority groups
SB 866	[Appropriation for study of state contracting]
~~SB 821~~ SB 867	Incentive to hire older Alaskans
SB 868	Committee on Employment and Productivity
SB 869	Recordkeeping requirements for surety insurers

THURSDAY
March 25
1:30 pm Further consideration of bills listed above

Committee meetings will be conducted in the Senate State Affairs Committee Room, 423 Capitol.

COMPLETE COVERAGES FOR YOUR COMMERCIAL AND PERSONAL NEEDS

Pate Insurance Agency, Inc.

P.O. BOX 257 • HOMER, ALASKA 99603
PHONE (907) 235-8188
TELEX 090-25687

April 23, 1981

The Honorable Senators
Fischer and Stimson
The State Senate
Juneau, Alaska

Re: Senate Bills 414, 415

Dear Senators Fischer and Stimson:

It was with great interest that I read the above captioned bills. Unfortunately, I was out of the state during the teleconference which was recently held to discuss the presentations: however, after reviewing the conference with some of those who were in attendence, there are a couple of points I would like to bring to your attention.

I don't think that anyone invoved in the bonding markets in this state can deny the fact that there is a real problem currently for the contractor attempting to operate in the $0 to $50, 000 range of bidding. In most instances contractors operating on jobs that require bonds in excess of $500,000 already have standard bonding [illegible] secured; however, even in these areas there is sometimes [illegible]ity. The current SBA market is simply not responsive to the needs of our local contractors. Their current restrictions are not realistic. The service which is generally provided is neither prompt nor professional. And, their general approach seems geared to contractors operating in the southern 48 states, but, allows little regard for the seasonal type of contracting that is done in Alaska.

I am extremely hesitant to recommend that the State become involved in any insurance practices. Certainly bonding is an area of insurance that requires a great deal of care and expertise. However, if it were possible for the State to establish a specific fund to secure performance bonds for contractors operating in the $0 to $500,000 range, and then utilize the existing insurance expertise available through local agents licensed to do business in this state, I believe that a realistic program could be developed that would not only solve the needs of our contractors, but also, avoid the State's intrusion on an area traditionally controlled by private enterprise. After all, the SBA is now guaranteeing 80% of most existing bonding. Why can't the State assume this position and guarantee 100% of the bonding?

It would naturally be extremely important that this program be monitored very closely, and that there be definite guidelines that would have to be followed.

I believe that you are in a position to tailor a specific program to meet a very obvious need. After all, it is the small contractors of this state that provide the backbone of our construction industry, and they certainly deserve our consideration. I would appreciate hearing from you further on this matter, and will most anxiously watch both of these bills as they work their way through committees.

Thank you for your time and consideration.

Sincerely,

Mike Pate

J. Michael Pate

JMP/bam

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

REVISED

I. REQUEST
Bill/Resolution No. SB 415
Title An Act Relating to Contracting and Procurement Procedure...
Requested by Fischer & Stimson Date April 28, 1981

II. FISCAL DETAIL
Agency Affected Department of Administration
Program Category Affected General Government
BRU, Program, or Subprogram(s) Affected General Services - Administrative Services
(Note If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		45.6	49.2	53.2	57.5	62.1
200 TRAVEL						
300 CONTRACTUAL		168.0	73.4	79.3	85.7	92.5
400 COMMODITIES		1.5	1.6	1.7	1.9	2.0
500 EQUIPMENT		3.6	3.9	4.2	4.5	4.9
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC						
TOTAL		218.7	128.1	138.4	149.6	161.5

FUNDING (Thousands of Dollars)

GENERAL FUND		218.7	128.1	138.4	149.6	161.5
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		2	2	2	2	2
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The contractu services expenditures include computerization and implementation of the required certified lists. It also includes funds to revise and reprint existing pamphlets and brochures to reflect statuary changes and to conduct advertising to inform minority businesses of the new regulations.

IV. DATE April 23, 1981 PREPARED BY George Floor
AGENCY Department of Administration
PHONE 465-3560

Original Legislative Finance
cc Budget and Management
Prime Sponsor (Full Legislator Name) Fischer

	POSITION TITLE				RANGE/STEP	BARG. UNIT.	LOCATION		APPROV.	DISAPP.
1	Administrative Support Technician II				8B	G	Juneau	GOV.		
2	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP No.	PCN No.	PRIORITY		FORM 12 PAGE/LINE	LEG.		

	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
4	PERSONAL SERVICES: SALARY 1,433/mo.	17,196	
5	BENEFITS .1579	2,715	
6	FICA .0613	1,054	
7	HEALTH INS. 150 x 12	1,800	
8	TOTAL PERSONAL SERVICES 01		22.8
9	TRAVEL 02		
10	CONTRACTUAL 03		3.0
11	COMMODITIES 04		.5
12	EQUIPMENT 05		1.8
13	OTHER		
14	TOTAL COST		28.1

	CODE	FUNDING SOURCE	
15		FED RCPTS 1002	
16		GF MATCH 1003	
17		GEN FUND 1004	
18	902	I-A RCPTS 1007	28.1
19		PGM RCPTS 1037	
20		OTHER	
21	CONTINUATION		
22	ADDITION		

FOR B&A USE ONLY

4A KEY NUMBER _____ COLUMN NO. _____

JUSTIFICATION:

The purchasing section is presently backlogged. There is no flexibility to assume further requirements.

This position will evaluate applications for the two lists, update listing, review requirements for preferences, and maintain minority purchase records. In addition they will provide copies and updates of the certified lists to other groups covered by the legislation. They will also complete the additional standard clerical tasks necessitated by adding new groups on interested parties to the system and involving more complex and time consuming bid awards.

AGENCY _____ PROGRAM _____

BRU _____

COMPONENT _____

13 REQUEST FOR NEW POSITION.

Page _____ of _____

REVISED DATE _____

FY 82

	POSITION TITLE			RANGE/STEP	BARG. UNIT.	LOCATION		APPROV.	DISAP
1	Clerk Typist III			8B	G	Anchorage	GOV.		
	TYPE OF POSITION	STAFF MONTHS	RP No. / PCN No.	PRIORITY		FORM 12 PAGE/LINE			
2	PFT	12					LEG.		

	TYPE OF EXPENDITURE	1	2	AMOUNT 3
	PERSONAL SERVICES:			
4	SALARY	1,433/mo.	17,196	
5	BENEFITS	.1579	2,715	
6	FICA	.0613	1,054	
7	HEALTH INS.	150 x 12	1,800	
8	TOTAL PERSONAL SERVICES	01		22.8
9	TRAVEL	02		
10	CONTRACTUAL	03		4.0
11	COMMODITIES	04		1.0
12	EQUIPMENT	05		1.8
13	OTHER			
14	TOTAL COST			29.6

	CODE	FUNDING SOURCE	
15		FED RCPTS. 0002	
16		GF MATCH. 1002	
17	100	GEN. FUND 1004	29.6
18		I-A RCPTS. 1007	
19		PGM RCPTS 1008	
20		OTHER	
21	CONTINUATION		
22	ADDITION		

FOR B&M USE ONLY

4A KEY NUMBER _____ COLUMN NO. _____

JUSTIFICATION:

The purchasing section is presently backlogged. There is no flexibility to assume further requirements.

This position will evaluate applications for the two lists, update listing, review requirements for preferences, and maintain minority purchase records. In addition they will provide copies and updates of the certified lists to other groups covered by the legislation. They will also complete the additional standard clerical tasks necessitated by adding new groups on interested parties to the system and involving more complex and time consuming bid awards.

AGENCY Administration PROGRAM Centralized Administrative Services

BRU General Services

COMPONENT Purchasing

13 REQUEST FOR NEW POSITION.

Page ____ of ____

REVISED DATE _____

FY 82

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

REVISED

I. REQUEST
Bill/Resolution No. SB 415
Title An Act Relating to Contracting and Procurement Procedure...
Requested by Fischer & Stimson Date April 23, 1981

II. FISCAL DETAIL
Agency Affected All
Program Category Affected All
BRU, Program, or Subprogram(s) Affected All
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
*** Additional Costs of Goods & Services		5,500.0	5,940.0	6,415.2	6,298.4	7,482.7
TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND		5,500.0	5,940.6	6,415.2	6,298.4	7,482.7
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The exact fiscal impact of this bill is difficult to analyze due to lack of sufficient data to evaluate vendor response to changes in purchasing preferences. Some out of state vendors will drop out of bidding thereby reducing competition and providing increased prices. We project increased costs of goods and service to be approximately 10%* for FY 82 and we assume state expenditures will increase 8% a year. We feel both are conservative estimates.

The increased costs which we have identified will have to be absorbed by each individual agency. This fiscal note is not a request for an additional appropriation to the Department of Administration or any other Department but reflects what we estimate the costs that this bill could be to all state agencies. This will be reflected in their reduced purchasing capabilities. Agencies will either find additional funding within their existing budgets or procure less goods and services or in some cases not procure those goods at this time and submit larger budget requests in future years.

IV. DATE April 23, 1981 PREPARED BY George Elgee
AGENCY Department of Administration
PHONE 465-2250

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named) Fischer

33-301 (Rev. 12/80)

*** (The National Association of State Purchasing Officials, who oppose any local preference statutes, estimate that a bidder's preference raises the cost of doing business proportionate with the preference.)

From a purely professional purchasing standpoint vendor preferences are not condusive to good purchasing practice nor in the purchaser's best interest. We are sympathetic to the idea of stimulating various sectors of business, however we do not believe this is the correct vehicle. A vendor preference is a weak and easy approach to the problem which will not solve it. The preference is little more than a token gesture of appeasement to an interest group. Open competition is the backbone of our free market system. To reduce or eliminate it adversely affects everyone.

PURCHASING PREFERENCES

PRO's	CON's
- New jobs are created.	- Arguably unconstitutional as a barrier to interstate commerce.
- Businesses are encouraged to locate within the State.	- In direct conflict with the principles of competition and precludes the purchaser from obtaining the best competitive price.
	- Many bidders who otherwise would be interested are discouraged from competing and potential sources of supply are reduced.
	- Preferred bidders feel more secure and have less incentive to submit their best prices when a free competitive market is absent.
	- Results in higher costs to taxpayers, prices usually are increased by the amount of the preference.

Sec. 44.33.285. Action by governor. The governor may, upon recommendation of the commissioner of commerce and economic development, designate by proclamation an area as an area impacted by an economic disaster. When an area is so designated, assistance grants shall be made by the Department of Commerce and Economic Development as provided in AS 37.11.100 and the governor may recommend in his budget submission that capital projects planned for the area be accelerated and that new projects be funded for the area. The proclamation may provide that waivers of capital projects requirements, as authorized in AS 44.33.300, become effective only to the extent set out in the proclamation. (§ 1 ch 277 SLA 1976)

Sec. 44.33.290. Employment preference. (a) In the performance of contracts awarded by the state in an area impacted by an economic disaster, residents of the area shall be employed where they are available and qualified so that the economic effects of alleviating the disaster will be maximized. If resident labor is not available, the contractor shall inform the Department of Labor of the number of additional workers needed, the positions to be filled, and the efforts made at recruitment in the area. If the Department of Labor is satisfied that a good faith effort has been made by the contractor to hire residents of the area, it may issue a certificate allowing other hire for designated positions. A clause requiring these provisions shall be part of each state contract awarded.

(b) Wages paid for employment under this section shall be in conformance with the minimum rates of pay schedule published by the Department of Labor in accordance with AS 36.05.030. (§ 1 ch 277 SLA 1976)

Sec. 44.33.295. Contractors' preference. If the department determines that there are contractors in an area designated as an area impacted by an economic disaster and who are qualified to perform a contract, preference to the extent feasible shall be given to those contractors under regulations adopted by the department. (§ 1 ch 277 SLA 1976)

Sec. 44.33.300. Waiver of certain provisions. When the governor has by proclamation declared an area impacted by an economic disaster, the following provisions regarding public contracts may be waived to the extent specified in the proclamation:

(1) the requirement of a contractor's bond as prescribed in AS 36.25.010 may be waived if the contract amount does not exceed $100,000;

(2) the public bid requirements as contained in AS 19.10.170, 19.10.190, 19.30.191(b), and AS 35.15.010 — 35.15.030 may be waived if the contract is to be performed by a contractor whose principal office is in the designated area and the contract amount does not exceed $50,000;

(3) the general policy to require all construction to be under bid contract as contained in AS 35.15.010 may be waived if the contract is to be performed by the state, another governmental entity, or a nonprofit entity. (§ 1 ch 277 SLA 1976)

Sec. 44.33.305. Regulations. The department, after consultation with the Department of Labor may adopt regulations to implement AS 44.33.285 — 44.33.310. (§ 1 ch 277 SLA 1976)

Sec. 44.33.310. Definitions. In AS 44.33.285 — 44.33.310,

(1) "base period" means any 10 years after 1950, not necessarily continuous, and if the economic disaster is caused by a fisheries failure the period shall consist of years during which a fishery produced at economically representative levels as determined by the Department of Fish and Game;

(2) "department" means the Department of Commerce and Economic Development;

(3) "economic disaster" means that the annual income to workers in the designated area dropped below the average annual income for the base period for workers in the designated area and the drop in income is of such magnitude that the average family income of all residents of the designated area as determined by the department is below the Federal Social Security Administration Poverty Guideline, adjusted by the department to reflect subsistence economic patterns and appropriate cost-of-living differentials; the availability of alternate employment shall be considered in determining whether an economic disaster has occurred under this paragraph. (§ 1 ch 277 SLA 1976)

Article 8. Residential Care Facility Revolving Loan Fund.

Sec. 44.33.320. Residential care facility revolving loan fund. There is established in the Department of Commerce and Economic Development a residential care facility revolving loan fund to carry out the purposes of AS 44.33.320 — 44.33.380. The fund may be used for no other purpose. (§ 6 ch 153 SLA 1978)

Sec. 44.33.330. Powers and duties of the department in administering the fund. (a) The department may

(1) make loans for the construction, renovation, and equipping of residential care facilities;

(2) promulgate regulations necessary to carry out the provisions of AS 44.33.320 — 44.33.380.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 415
Title An Act relating to contracting and procurement procedures
Requested by _____ Date April 14, 1981

II. FISCAL DETAIL
Agency Affected Department of Community and Regional Affa[illegible]

(Note: If more than one budget component is affected, separate line-item amounts and totaling for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		-0-				
200 TRAVEL		-0-				
300 CONTRACTUAL		-0-				
400 COMMODITIES		-0-				
500 EQUIPMENT		-0-				
600 LAND & STRUCTURES		-0-				
700 GRANTS, CLAIMS, ETC.		-0-				
TOTAL		-0-				

FUNDING (Thousands of Dollars)

GENERAL FUND		-0-				
FEDERAL FUNDS		-0-				
OTHER (Specify Fund Source)		-0-				

POSITIONS

FULL TIME		-0-				
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

No fiscal impact on this agency.

IV. DATE April 14, 1981 PREPARED BY Terry L. Earley
AGENCY Department of Community & Regional Affairs
PHONE 465-4730

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

DOTPF
1976-1978 Prime Contracts

vision	Total $ Awarded	Total $ Awarded to MBE's	M.B.E. % Participation
hways	229,573,793	7,278,265	3.2%
& Design & Construction	69,367,851	2,008,027	2.9%
tion	64,406,589	2,377,990	3.7%
bors & Waterways	10,917,443	4,231,711	38.8%
al	374,265,676	15,895,993	4.2%

M.B.E. participation figure for the 3 main contracting divisions, excluding Harbors & Waterways, is 3.2%.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. SB 415
Title An Act Relating to Contracting and Procurement Procedure...
Requested by Fischer & Stimson Date April 10, 1981

II. FISCAL DETAIL
Agency Affected All
Program Category Affected All
BRU, Program, or Subprogram(s) Affected All
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES		45.6	49.2	53.2	57.5	62.1
200 TRAVEL						
300 CONTRACTUAL		168.0	73.4	79.3	85.7	92.5
400 COMMODITIES		1.5	1.6	1.7	1.9	2.0
500 EQUIPMENT		3.6	3.9	4.2	4.5	4.9
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
* Additional Costs for Goods & Services		5,500,000	5,940,000	6,415,200	6,928,416	7,482,689
TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND		5,500,000	5,940,000	6,415,200	6,928,416	7,482,689
FEDERAL FUNDS*						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		2	2	2	2	2
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The exact fiscal impact of this bill is difficult to analyze due to lack of sufficient data to evaluate vendor response to changes in purchasing preferences. Some out of state vendors will drop out of bidding thereby reducing competition and providing increased prices. We project increased costs of goods and service to be approximately 10%* for FY 82 and we assume state expenditures will increase 8% a year. We feel both are conservative estimates.

The contractual services expenditures include computerization and implementation of the required certified lists. It also includes funds to revise and reprint existing pamphlets and brochures to reflect statuary changes and to conduct advertising to inform minority businesses of the new regulations.

IV. DATE April 20, 1981 PREPARED BY George Elgee
AGENCY Department of Administration
PHONE 465-2250

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)

001 (Rev. 12/80)

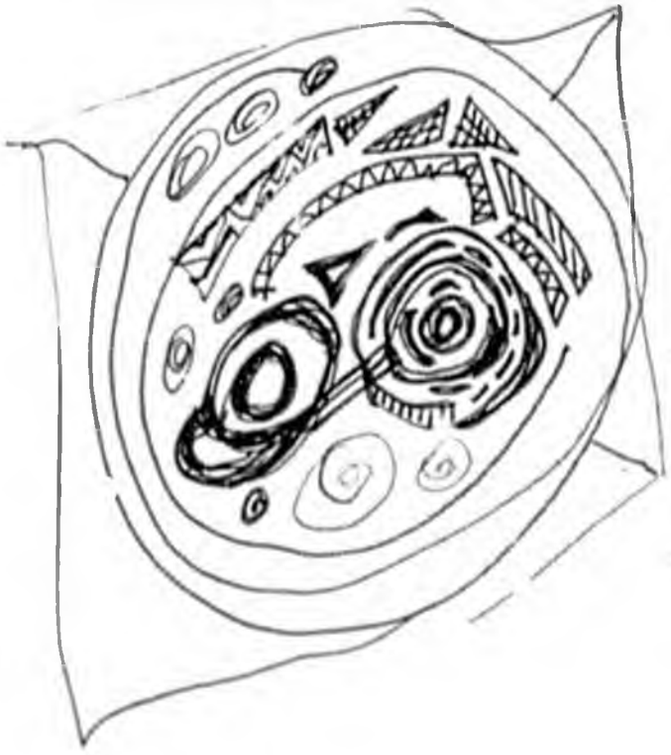
* (The National Association of State Purchasing Officials, who oppose any local preference statutes, estimate that a bidder's preference raises the cost of doing business proportionate with the preference.)

From a purely professional purchasing standpoint vendor preferences are not condusive to good purchasing practice nor in the purchaser's best interest. We are sympathetic to the idea of stimulating various sectors of business, however we do not believe this is the correct vehicle. A vendor preference is a weak and easy approach to the problem which will not solve it. The preference is little more than a token gesture of appeasement to an interest group. Open competition is the backbone of our free market system. To reduce or eliminate it adversely affects everyone.

PURCHASING PREFERENCES

PRO's

- New jobs are created.
- Businesses are encouraged to locate within the State.



CON's

- Arguably unconstitutional as a barrier to interstate commerce.
- In direct conflict with the principles of competition and precludes the purchaser from obtaining the best competitive price.
- Many bidders who otherwise would be interested are discouraged from competing and potential sources of supply are reduced.
- Preffered bidders feel more secure and have less incentive to submit their best prices when a free competitive market is absent.
- Results in higher costs to taxpayers, prices usually are increased by the amount of the preference.

	POSITION TITLE			RANGE/STEP	BARG. UNIT.	LOCATION		APPROV	DISAPP.
1	Clerk Typist III			8B	G	Anchorage	GOV		
2	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP No.	PCN No.	PRIORITY		FORM 12 PAGE/LINE	LEG.		

	TYPE OF EXPENDITURE	1	2	AMOUNT 3
4	PERSONAL SERVICES: SALARY	1,433/mo.	17,196	
5	BENEFITS	.1579	2,715	
6	FICA	.0613	1,054	
7	HEALTH INS.	150 x 12	1,800	
8	TOTAL PERSONAL SERVICES	01		22.8
9	TRAVEL	02		
10	CONTRACTUAL	03		4.0
11	COMMODITIES	04		1.0
12	EQUIPMENT	05		1.8
13	OTHER			
14	TOTAL COST			29.6

	CODE	FUNDING SOURCE	
15		FED RCPTS. 1002	
16		GF MATCH. 1003	
17	100	GEN. FUND 1004	29.6
18		I-A RCPTS. 1007	
19		PGM RCPTS 1009	
20		OTHER	
21	CONTINUATION		
22	ADDITION		

FOR B&M USE ONLY

4A KEY NUMBER _____ COLUMN NO. _____

JUSTIFICATION:

The purchasing section is presently backlogged. There is no flexibility to assume further requirements.

This position will evaluate applications for the two lists, update listing, review requirements for preferences, and maintain minority purchase records. In addition they will provide copies and updates of the certified lists to other groups covered by the legislation. They will also complete the additional standard clerical tasks necessitated by adding new groups on interested parties to the system and involving more complex and time consuming bid awards.

AGENCY Administration PROGRAM Centralized Administrative Services

BRU General Services

COMPONENT Purchasing

13 REQUEST FOR NEW POSITION.

Page ____ of ____

REVISED DATE _____

FY 82

	POSITION TITLE			RANGE/STEP	BARG. UNIT.	LOCATION	GOV.	APPROV.	DISAPP.
1	Administrative Support Technician II			8B	G	Juneau			
	TYPE OF POSITION	STAFF MONTHS	RP No.	PCN No.	PRIORITY	FORM 12 PAGE/LINE			
2	PFT	12					LEG.		

3	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
4	PERSONAL SERVICES: SALARY 1,433/mo.	17,196	
5	BENEFITS .1579	2,715	
6	FICA .0613	1,054	
7	HEALTH INS. 150 x 12	1,800	
8	TOTAL PERSONAL SERVICES 01		22.8
9	TRAVEL 02		
10	CONTRACTUAL 03		3.0
11	COMMODITIES 04		.5
12	EQUIPMENT 05		1.8
13	OTHER		
14	TOTAL COST		28.1

	CODE	FUNDING SOURCE	
15		FI RCPTS. 1002	
16		TCH. 1003	
17		G FUND 1004	
18	902	I-A RCPTS. 1007	28.1
19		PGM RCPTS 1008	
20		OTHER	
21	CONTINUATION		
22	ADDITION		

FOR B&M USE ONLY

4A KEY NUMBER _____ COLUMN NO. _____

JUSTIFICATION:

The purchasing section is presently backlogged. There is no flexibility to assume further requirements.

This position will evaluate applications for the two lists, update listing, review requirements for preferences, and maintain minority purchase records. In addition they will provide copies and updates of the certified lists to other groups covered by the legislation. They will also complete the additional standard clerical tasks necessitated by adding new groups on interested parties to the system and involving more complex and time consuming bid awards.

AGENCY Administration PROGRAM Centralized Administrative Services

BRU General Services

COMPONENT Purchasing

13 REQUEST FOR NEW POSITION.

Page _____ of _____

REVISED DATE _____

FY 82

PLEASE NOTE: THE FOLLOWING PAGES WERE TREATED AS A UNIT IN THE ORIGINAL DOCUMENT

MEMORANDUM State of Alaska

TO: Senator Vic Fischer

DATE: April 20, 1981

FILE NO:

TELEPHONE NO:

FROM: Niel Thomas
Executive Director
Human Rights Commission

SUBJECT: Minority/Female Business Enterprise Legislation
SB415

Here is a package of materials prepared in anticipation of your State Affairs Committee session on April 21. These are the materials we promised you during the committee hearing on April 16 to implement several recommendations we discussed in our testimony.

Preamble and Findings

We suggested that remedial legislation of this type can be insulated from legal challenges based on a reverse discrimination theory by having the legislative body make clear the problem for which it is providing a remedy. One way to do this is with a preamble in the bill in which the legislature makes specific findings. Attachment A is draft language, largely taken from a bill we saw in an earlier legislative session, which you might like to use for ideas. You will have to fill in specific details, and, as will be seen below, include findings with respect to female business enterprises also. If you wish to compare with census data you can refer to the preliminary 1980 data showing that approximately 25% of the Alaska population is now composed of minority people.

The Committee could also consider releasing a report with findings upon which Alaska's courts can review and rely on for legislative intent. I know that certain kinds of reports are used by courts this way in Alaska and certain other kinds of reports are not. You should consult with the legislature's advisors about the form such a report must take in order to be respected by courts as legislative intent.

Attachment B is a copy of the Fullilove decision in which the Supreme Court analyzed similar federal legislation. We have highlighted both the standards which the Supreme Court used in reviewing the legislation and the specific findings which the Congress made. I am calling these to your attention to acquaint your staff with the principles which courts apply in looking at this type of legislation, and to give some further examples of the types of substan-

tive findings which a legislative body can make as a justification for adopting legislation of this type.

One comment in the Fullilove decision noted that the legislation was acceptable because it was limited in scope and duration. You could provide for this by including a sunset provision in the bill. We suggest a sunset review after five years, but not less.

Female Business Enterprises (FBE's)

We suggested, with the apparent concurrence of Senator Stinson, that businesses owned and operated by females should also be included in this bill on the theory that these businesses have experienced many of the types of problem of discrimination which minority business enterprises face. We suggested that to the extent that FBE's are included, however, the goals for them must be set separately from the goals for minority business enterprises. Otherwise, as the federal experience has indicated, there is a substantial risk that goals for a combined FBE/MBE group will be consumed nearly exclusively by the FBE's to the disadvantage of the minority firms. Attachment C is a paste-up of the existing bill with our suggested revisions. As you can see, we have suggested a 10% goal for the FBE's which operates independently of the existing 20% goal for MBE's.

Here is a hypothetical which demonstrates how this system would work. Suppose the low bidder was a white male owned firm which bids a job at $100. The FBE bid is $114 and the MBE $115. If the 10% goal for that fiscal year for FBE's has not been achieved, the FBE gets the job because it falls within the 15% bidders preference and is lower than MBE bid. If the FBE goal has been reached by that time, the MBE would get the job. (The FBE would have had to bid it at $99 to get it if the FBE goal had been met at that time.) In other words, the FBE and MBE's compete with each other until the goal for either has been reached. At that point, each of these groups competes on an equal footing with no bid preference as against other firms.

Definition of MBE's/FBE's

We suggested that the existing definition of MBE's be amended to add to the qualification standard the requirement that the firm be managed by minority people for, in the case of FBE's, by females or

. be on its way toward that objective through an acceptable affirmative action plan. We have suggested language in the paste up draft of Attachment C.

You will notice that we have not tried to go to great length in the legislation to define the details of how this should work, beyond articulating the principle. These details strike us as something which should be left to the Administration to provide for by regulation. We have also inserted the suggestion made by others that the qualification program be administered by the principal department which lets the contracts, the Department of Transportation, instead of Administration.

If you or any of your staff have any questions of us during your session on April 21 we will be available in Anchorage at 276-7474.

ATTACHMENT "A"

SUGGESTED PREAMBULARY LANGUAGE FOR MINORITY
and
FEMALE BID PREFERENCE PROVISIONS OF SB 415.

LEGISLATIVE FINDINGS. Reliable testimony indicates and the legislature finds that

(1) the Alaska minority and female business communities suffer economic distress because they receive a disproportionately low percentage of contracts awarded by the state;

(2) while minorities comprise 25% of Alaska's population according to current 1980 census figures, the most recent data from the Executive Branch indicates that less than _____% of State contract dollars was realized by minority business concerns. Despite the increasing interest among women in owning and operating their own businesses, less than _____% of State contract dollars was realized by female-owned and operated business concerns;

(3) these inequities contribute to the high rate of unemployment in the minority community, and to underemployment among women;

(4) these inequities limit the aspirations of minority and female children to become leaders in business, government, and service to all people;

(5) the disproportinately high unemployment among minority and female workers can be reduced through the awarding of state contracts to minority and female businesses; and

(6) it is in the public interest that the principles relating to the encouragement of minority enterprise embodied in the Public Works Employment Act of 1977, P. L. 95-28, be extended to all procurement by the State in order to place minority and female businesses on a more equitable footing with respect to State contracting opportunities.

ATTACHMENT "B" EXTRA EDITION NO. 4

The United States
LAW WEEK

June 24, 1980 • THE BUREAU OF NATIONAL AFFAIRS, INC., WASHINGTON, D.C. • Volume 48, No. 50

OPINIONS ANNOUNCED JULY 2, 1980

The Supreme Court decided:

LABOR—Occupational Health

Decision by U.S. Court of Appeals for Fifth Circuit that Labor Secretary exceeded his standard-setting authority under Occupational Safety and Health Act by promulgating standard which limited permissible employee exposure to airborne concentrations of benzene to one part per million and which prohibited dermal contact with solutions containing benzene is affirmed (Industrial Union Department, AFL-CIO v. American Petroleum Institute, Nos. 78-911 & 78-1036) page 5022

MEDIA LAW—Fair Trial Free Press

Press and public have right of access under First Amendment to attend criminal trials and may not be excluded from such trials merely upon agreement of trial judge and parties in absence of any findings sufficient to overcome presumption of open trials (Richmond Newspapers, Inc., v. Virginia, No. 79-2431) page 5008

PUBLIC WORKS—Federal Funding

"Minority business enterprise" provision of 1977 Public Works Employment Act, which provides that, absent administrative waiver, at least ten percent of any grant thereunder for local public works projects "shall be expended for minority business enterprises," does not violate equal protection guarantee of Constitution (Fullilove v. Klutznick, No. 78-1007) page 4979

Full Text of Opinions

No. 78-1007

H. Earl Fullilove et al., Petitioners, v. Philip M. Klutznick, Secretary of Commerce of the United States, et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[July 2, 1980]

Syllabus

The "minority business enterprise" (MBE) provision of the Public Works Employment Act of 1977 (1977 Act) requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined as United States citizens "who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Under implementing regulations and guidelines, grantees and their private prime contractors are required, to the extent feasible, in fulfilling the 10% MBE requirement, to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration, or other sources for assisting MBE's in obtaining required working capital, and to give guidance through the intricacies of the bidding process. The administrative program, which recognizes that contracts will be awarded to bona fide MBE's even though they are not the lowest bidders if their bids reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination, provides for handling grantee applications for administrative waiver of the 10% MBE requirement on a case-by-case basis if infeasibility is demonstrated by a showing that, despite affirmative efforts, such level of participation cannot be achieved without departing from the program's objectives. The program also provides an administrative mechanism to ensure that only bona fide MBE's are encompassed by the program, and to prevent unjust participation by minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination.

Petitioners, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in Federal District Court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, *inter alia*, the Equal Protection Clause of the Fourteenth Amendment and the equal protection component of the Due Process Clause of the Fifth Amendment. The District Court upheld the validity of the MBE program, and the Court of Appeals affirmed.

Held: The judgment is affirmed.

568 F. 2d 400, affirmed.

MR. CHIEF JUSTICE BURGER, joined by MR. JUSTICE WHITE and MR. JUSTICE POWELL, concluded that the MBE provision of the 1977 Act, on its face, does not violate the Constitution.

(1) Viewed against the legislative and administrative background of the 1977 Act, the legislative objectives of the MBE provision, and the administrative program thereunder, were to ensure—without mandating the allocation of federal funds according to inflexible percentages solely based on race or ethnicity—that, to the extent federal funds were granted under the 1977 Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities.

(2) In considering the constitutionality of the MBE provision, it first must be determined whether the *objectives* of the legislation are within Congress' power.

(a) The 1977 Act, as primarily an exercise of Congress' spending power under Art. I, § 8, cl. 1, "to provide for the . . . general Welfare," conditions receipt of federal moneys upon the recipient's compliance with federal statutory and administrative directives. Since the reach of the spending power is at least as broad as Congress' regulatory powers, if Congress, pursuant to its regulatory powers, could have achieved the objectives of the MBE program, then it may do so under the spending power.

(b) Insofar as the MBE program pertains to the actions of private prime contractors, including those not responsible for any violation of antidiscrimination laws, Congress could have achieved its objectives under the Commerce Clause. The legislative history shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the prevailing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce.

(c) Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment "to enforce by appropriate legislation" the equal protection guarantee of that Amendment. Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination, and that the prospective elimination of such barriers to minority-firm access to public contracting opportunities was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Cf., *e. g., Katzenbach* v. *Morgan*, 384 U. S. 641; *Oregon* v. *Mitchell*, 400 U. S. 112.

(d) Thus, the objectives of the MBE provision are within the scope of Congress' spending power. Cf. *Lau* v. *Nichols*, 414 U. S. 563.

(3) Congress' use here of racial and ethnic criteria as a condition attached to a federal grant is a valid means to accomplish its constitutional objectives, and the MBE provision on its face does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

(a) In the MBE program's remedial context, there is no requirement that Congress act in a wholly "color-blind" fashion. Cf., *e. g., Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1; *McDaniel* v. *Barresi*, 402 U. S. 39; *North Carolina Board of Education* v. *Swann*, 402 U. S. 43.

(b) The MBE program is not constitutionally defective because it may disappoint the expectations of access to a portion of government contracting opportunities of nonminority firms who may themselves be innocent of any prior discriminatory actions. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 777.

(c) Nor is the MBE program invalid as being underinclusive in that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities, and there has been no showing that Congress inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program.

(d) The contention that the MBE program, on its face, is overinclusive in that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination, is also without merit. The MBE provision, with due account for its administrative program, provides a reasonable assurance that application of racial or ethnic criteria will be narrowly limited to accomplishing Congress' remedial objectives and that misapplications of the program will be promptly and adequately remedied administratively. In particular, the administrative program provides waiver and exemption procedures to identify and eliminate from participation MBE's who are not "bona fide," or who attempt to exploit the remedial aspects of the program by charging an unreasonable price not attributable to the present effects of past discrimination. Moreover, grantees may obtain a waiver if they demonstrate that their best efforts will not achieve or have not achieved the 10% target for minority firm participation within the limitations of the program's remedial objectives. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration and subject to reassessment and re-evaluation by the Congress prior to any extension or re-enactment.

(4) In the continuing effort to achieve the goal of equality of economic opportunity, Congress has latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives, especially in programs where voluntary cooperation is induced by placing conditions on federal expenditures. When a program narrowly tailored by Congress to achieve its objectives comes under judicial review, it should be upheld if the courts are satisfied that the legislative objectives and projected administration of the program give reasonable assurance that the program will function within constitutional limitations.

MR. JUSTICE MARSHALL, joined by MR. JUSTICE BRENNAN and MR. JUSTICE BLACKMUN, concurring in the judgment, concluded that the proper inquiry for determining the constitutionality of racial classifications that provide benefits to minorities for the purpose of remedying the present effects of past racial discrimination is whether the classifications serve important governmental objectives and are substantially related to achievement of those objectives, *University of California Regents* v. *Bakke*, 438 U. S. 265, 359 (opinion of BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., concurring in judgment in part and dissenting in part), and that, judged under this standard, the 10% minority set-aside provision of the 1977 Act is plainly constitutional, the racial classifications being substantially related to the achievement of the important and congressionally articulated goal of remedying the present effects of past racial discrimination.

BURGER, C. J., announced the judgment of the Court and delivered an opinion, in which WHITE and POWELL, JJ., joined. POWELL, J., filed a concurring opinion. MARSHALL, J., filed an opinion concurring in the judgment, in which BRENNAN and BLACKMUN, JJ., joined. STEWART, J., filed a dissenting opinion, in which REHNQUIST, J., joined. STEVENS, J., filed a dissenting opinion.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion in which MR. JUSTICE WHITE and MR. JUSTICE POWELL joined.

We granted certiorari to consider a facial constitutional challenge to a requirement in a congressional spending program that, absent an administrative waiver, 10% of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups. 441 U. S. 960.

I

In May 1977, Congress enacted the Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116, which amended the Local Public Works Capital Development and Investment Act of 1976, Pub. L. 94-369, 90 Stat. 999. The 1977 amendments authorized an additional $4 billion appropriation for

Published each Tuesday except first Tuesday in September and last Tuesday in December by The Bureau of National Affairs, Inc., 1231 Twenty-fifth Street, N.W., Washington, D.C. 20037. Subscription rates (payable in advance) $276.00 first year and $261.00 per year thereafter. Second class postage paid at Washington, D.C. and at additional mailing offices.

federal grants to be made by the Secretary of Commerce, acting through the Economic Development Administration (EDA), to state and local governmental entities for use in local public works projects. Among the changes made was the addition of the provision that has become the focus of this litigation. Section 103(f)(2) of the 1977 Act, referred to as the "minority business enterprise" or "MBE" provision, requires that:[1]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

In late May 1977, the Secretary promulgated regulations governing administration of the grant program which were amended two months later.[2] In August 1977, the EDA issued guidelines supplementing the statute and regulations with respect to minority business participation in local public works grants,[3] and in October 1977, the EDA issued a technical bulletin promulgating detailed instructions and information to assist grantees and their contractors in meeting the 10% MBE requirement.[4]

On November 30, 1977, petitioners filed a complaint in the United States District Court for the Southern District of New York seeking declaratory and injunctive relief to enjoin enforcement of the MBE provision. Named as defendants were the Secretary of Commerce, as the program administrator, and the State and City of New York, as actual and potential project grantees. Petitioners are several associations of construction contractors and subcontractors, and a firm engaged in heating, ventilation and air conditioning work. Their complaint alleged that they had sustained economic injury due to enforcement of the 10% MBE requirement and that the MBE provision on its face violated the Equal Protection Clause of the Fourteenth Amendment, the equal protection component of the Due Process Clause of the Fifth Amendment, and various statutory antidiscrimination provisions.[5]

After a hearing held the day the complaint was filed, the District Court denied a requested temporary restraining order and scheduled the matter for an expedited hearing on the merits. On December 19, 1977, the District Court issued a memorandum opinion upholding the validity of the MBE program and denying the injunctive relief sought. *Fullilove* v. *Kreps*, 443 F. Supp. 253 (SDNY 1977).

The United States Court of Appeals for the Second Circuit affirmed, 584 F. 2d 600 (CA2 1978), holding that "even under the most exacting standard of review the MBE provision passes constitutional muster." *Id.*, at 603. Considered in the context of many years of governmental efforts to remedy past racial and ethnic discrimination, the court found it "difficult to imagine" any purpose for the program other than to remedy such discrimination. *Id.*, at 605. In its view, a number of factors contributed to the legitimacy of the MBE provision, most significant of which was the narrowed focus and limited extent of the statutory and administrative program, in size, impact and duration, *id.*, at 607–608; the court looked also to the holdings of other courts of appeals and district courts that the MBE program was constitutional, *id.*, at 608–609.[6] It expressly rejected petitioners' contention that the 10% MBE requirement violated the equal protection guarantees of the Constitution.[7] 584 F. 2d, at 609.

II

A

The MBE provision was enacted as part of the Public Works Employment Act of 1977, which made various amendments to Title I of the Local Public Works Capital Development and Investment Act of 1976. The 1976 Act was intended as a short-term measure to alleviate the problem of national unemployment and to stimulate the national economy by assisting state and local governments to build needed public facilities.[8] To accomplish these objectives, the Congress authorized the Secretary of Commerce, acting through the Economic Development Administration, to make grants to state and local governments for construction, renovation, repair or other improvement of local public works projects.[9] The 1976 Act placed a number of restrictions on project eligibility designed to assure that federal monies were targeted to accomplish the legislative purposes.[10] It established criteria to determine grant priorities and to apportion federal funds among political jurisdictions.[11] Those criteria directed grant funds toward areas of high unemployment.[12] The statute authorized the appropriation of up to

---

[1] 91 Stat. 116, 42 U. S. C. (1976 ed., Supp. III) § 6705 (f)(2).

[2] 13 CFR Part 317 (1978).

[3] U. S. Department of Commerce, Economic Development Administration, Local Public Works Program, Publication No. [illegible], Standards for Participation in LPW Grants (1977), App. [illegible].

[4] U. S. Department of Commerce, Economic Development Administration, EDA Minority Enterprise (MBE) Technical Bulletin [illegible] Instructions and Information Available to Grantees and Their Contractors in Meeting The 10% MBE Requirement (1977), App. [illegible].

[5] See 42 U. S. C. (1976 ed.) § 2[illegible]; 42 U. S. C. (1976 ed., Supp. III) § [illegible]; 42 U. S. C. § [illegible]; Title VI of the Civil Rights Act of 1964, 78 Stat. 252, 42 U. S. C. § 2000d *et seq.*; Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.*

[6] *Ohio Contractors Association* v. *Economic Development Administration*, 585 F. 2d 213 (CA6 1978); *Constructors Association* v. *Kreps*, 573 F. 2d 811 (CA3 1978); *Rhode Island Chapter, Associated General Contractors* v. *Kreps*, 450 F. Supp. 329 (RI 1978); *Associated General Contractors* v. *Secretary of Commerce*, No. 77-4215 (Kan. Dec. 19, 1977); *Carolinas Branch, Associated General Contractors* v. *Kreps*, 442 F. Supp. 392 (SC 1977); *Ohio Contractors Assn.* v. *Economic Development Administration*, 442 F. Supp. 1013 (SD Ohio 1977); *Montana Contractors' Association* v. *Secretary of Commerce*, 439 F. Supp. 1331 (Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce*, No. 77-4331 (SD Fla. Nov. 3, 1977); but see *Associated General Contractors* v. *Secretary of Commerce*, 441 F. Supp. 955 (CD Cal. 1977), vacated and remanded for consideration of mootness, 439 U. S. 990 (1978), on remand, 459 F. Supp. 766 (CD Cal.), appeal docketed sub nom. *Associated* v. *Associated General Contractors of California*, No. 78-1107.

[7] Both the Court of Appeals and the District Court rejected petitioners' various statutory arguments without extended discussion. 584 F. 2d, at 608, n. 15, 443 F. Supp., at 262.

[8] H. R. Rep. No. 94-1077, p. 2 (1976). The bill discussed in this report was reported by the Conference Committee in reference to the Senate version. S. Conf. Rep. No. 94-630, p. 1 (1976); H. R. Conf. Rep. No. 94-1290, p. 1 (1976).

[9] 90 Stat. 999, 42 U. S. C. § 6702.

[10] 90 Stat. 999, 42 U. S. C. § 6708.

[11] 90 Stat. 1001, 42 U. S. C. § 6707.

[12] 90 Stat. 1001, 42 U. S. C. § 6705 (a).

$2 billion for a period ending in September 1977;[11] this appropriation was soon consumed by grants made under the program.

Early in 1977, Congress began consideration of expanded appropriations and amendments to the grant program. Under administration of the 1976 appropriation, referred to as "Round I" of the local public works program, applicants seeking some $25 billion in grants had competed for the $2 billion in available funds; of nearly 25,000 applications, only some 2,000 were granted.[12] The results provoked widespread concern for the fairness of the allocation process.[13] Because the 1977 Act would authorize the appropriation of an additional $4 billion to fund "Round II" of the grant program,[14] the congressional hearings and debates concerning the amendments focused primarily on the politically sensitive problems of priority and geographic distribution of grants under the supplemental appropriation.[15] The result of this attention was inclusion in the 1977 Act of provisions revising the allocation criteria of the 1976 legislation. Those provisions, however, retained the underlying objective to direct funds into areas of high unemployment.[16] The 1977 Act also added new restrictions on applicants seeking to qualify for federal grants;[17] among these was the MBE provision.

The origin of the provision was an amendment to the House version of the 1977 Act, H. R. 11, offered on the floor of the House on Feb. 23, 1977 by Representative Mitchell of Maryland.[18] As offered, the amendment provided:[19]

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

The sponsor stated that the objective of the amendment was to direct funds into the minority business community, a sector of the economy sorely in need of economic stimulus but which, on the basis of past experience with government procurement programs, could not be expected to benefit significantly from the public works program as then formulated.[20] He cited the marked statistical disparity that in fiscal year 1976 less than 1% of all federal procurement was concluded with minority business enterprises although minorities comprised 15-18% of the population.[21] When the amendment was put forward during debate on H. R. 11,[22] Rep. Mitchell reiterated the need to ensure that minority firms would obtain a fair opportunity to share in the benefits of this government program.[23]

The amendment was put forward not as a new concept, but rather one building upon prior administrative practice. In his introductory remarks, the sponsor rested his proposal squarely on the ongoing program under § 8 (a) of the Small Business Act of 1958, Pub. L. 85-536, § 2 (8), 72 Stat. 389, which, as will become evident, served as a model for the administrative program developed to enforce the MBE provision:[24]

> "The first point in opposition will be that you cannot have a set-aside. Well, Madam Chairman, we have been doing this for the last 10 years in Government. The 8-A set-aside under SBA has been tested in the courts more than 30 times and has been found to be legitimate and bona fide. We are doing it in this bill."

Although the proposed MBE provision on its face appeared mandatory, requiring compliance with the 10% minority participation requirement "[n]otwithstanding any other provision of law," its sponsor gave assurances that existing administrative practice would ensure flexibility in administration if, with respect to a particular project, compliance with the 10% requirement proved infeasible.[25]

Representative Roe of New Jersey then suggested a change of language expressing the twin intentions (1) that the federal administrator would have discretion to waive the 10% requirement where its application was not feasible, and (2) that the grantee would be mandated to achieve at least 10% participation by minority businesses unless infeasibility was demonstrated.[26] He proposed as a substitute for the first sentence of the amendment the language that eventually was enacted:[27]

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 percent of the amount of each grant shall be expended for minority business enterprises."

The sponsor fully accepted the suggested clarification because it retained the directive that the initial burden of compliance would fall on the grantee. That allocation of burden was necessary because, as he put it, "every agency of the Government has tried to figure out a way to avoid doing this very thing. Believe me, these bureaucracies can come up with 10,000 ways to avoid doing it."[28]

Other supporters of the MBE amendment echoed the sponsor's concern that a number of factors, difficult to isolate or

---

[11] [illegible] 42 U. S. C. § 6710. The actual appropriation of the [illegible] was made several weeks [illegible] 90 Stat. 1407.

[12] 123 Cong. Rec. S3115 (Mar. 23, 1977) (remarks of Sen. Randolph).

[13] See, e.g., Hearings on H. R. 11 and related bills before the Subcommittee on Economic Development of the House Committee on Public Works and Transportation, 95th Cong., 1st Sess. (1977); H. R. Rep. No. 95-29 (1977); S. Rep. No. 95-56 (1977).

[14] [illegible] 42 U. S. C. [illegible] § 6710. The actual [illegible] was made by the [illegible] Act, 90 Stat. 1407.

[15] [illegible] 123 Cong. Rec. H1360-H1361 (daily ed. Feb. 23, 1977) (remarks of Rep. Randall); [illegible] Act, 90 Stat. 1407.

[16] [illegible] 42 U. S. C. [illegible] § 6710.

[17] [illegible] 42 U. S. C. [illegible] § 6710.

[18] 123 Cong. Rec. H1359 (Feb. 23, 1977) (remarks of Rep. Mitchell).

[19] *Id.* at H1359.

[20] *Id.* at H1359 (daily ed. Feb. 24, 1977). As ultimately enacted, the first sentence of the amendment was modified to provide:

"Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per centum of the dollar amount of each grant shall be set aside for minority business enterprises and, in addition, at least 10 per centum of the amount of all materials and supplies which will be used in such project are procured from minority business enterprises."

[21] *Id.* at H1358-H1359.

[22] *Id.* at H1357.

[23] *Id.* at H1357-H1359.

[24] *Id.* at H1360 (remarks of Rep. Roe).

[25] *Ibid.*

[26] *Id.* (remarks of Rep. Mitchell).

quantify, seemed to impair access by minority businesses to public contracting opportunities. Representative Conyers of Michigan spoke of the frustration of the existing situation, in which, due to the intricacies of the bidding process and through no fault of their own, minority contractors and businessmen were unable to gain access to government contracting opportunities.

Representative Biaggi of New York then spoke to the need for the amendment to "promote a sense of economic equality in the Nation." He expressed the view that without the amendment, "this legislation may be potentially inequitable to minority businesses and workers" in that it would perpetuate the historic practices that have precluded minority businesses from effective participation in public contracting opportunities. The amendment was accepted by the House.

Two weeks later, the Senate considered S. 427, its package of amendments to the Local Public Works Capital Development and Investment Act of 1976. At that time Senator Brooke of Massachusetts introduced an MBE amendment, worded somewhat differently than the House version, but aimed at achieving the same objectives. His statement in support of the 10% requirement reiterated and summarized the various expressions on the House side that the amendment was necessary to ensure that minority businesses were not deprived of access to the government contracting opportunities generated by the public works program.

The Senate adopted the amendment without debate. The Conference Committee, called to resolve differences between the House and Senate versions of the Public Works Employment Act of 1977, adopted the language approved by the House for the MBE provision. The Conference Reports added only the comment, "This provision shall be dependent on the availability of minority business enterprises located in the project area."

The device of a 10% MBE participation requirement, subject to administrative waiver, was thought to be required to assure minority business participation; otherwise it was thought that repetition of the prior experience could be expected, with participation by minority business accounting for an inordinately small percentage of government contracting. The causes of this disparity were perceived as involving the longstanding existence and maintenance of barriers impairing access by minority enterprises to public contracting opportunities, or sometimes as involving more direct discrimination, but not as relating to lack—as Senator Brooke put it—"of capable and qualified minority enterprises who are ready and willing to work." In the words of its sponsor, the MBE provision was "designed to begin to redress this grievance that has been extant for so long."

B

The legislative objectives of the MBE provision must be considered against the background of ongoing efforts directed toward deliverance of the century-old promise of equality of economic opportunity. The sponsors of the MBE provision in the House and the Senate expressly linked the provision to the existing administrative programs promoting minority opportunity in government procurement, particularly those related to § 8 (a) of the Small Business Act of 1958. Section 8 (a) delegates to the SBA an authority and an obligation "whenever it determines such action is necessary" to enter into contracts with any procurement agency of the Federal Government to furnish required goods or services, and, in turn, to enter into subcontracts with small businesses for the performance of such contracts. This authority lay dormant for a decade. Commencing in 1968, however, the SBA was directed by the President to develop a program pursuant to its § 8 (a) authority to assist small business concerns owned and controlled by "socially or economically disadvantaged" persons to achieve a competitive position in the economy.

At the time the MBE provision was enacted, the regulations governing the § 8 (a) program defined "social or economic disadvantage" as follows:

> "An applicant concern must be owned and controlled by one or more persons who have been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage. Such disadvantage may arise from cultural, social, chronic economic circumstances or background, or other similar cause. Such persons include, but are not limited to, black Americans, American Indians, Spanish-Americans, oriental Americans, Eskimos, and Aleuts . . . ."

The guidelines accompanying these regulations provided that a minority business could not be maintained in the program, even when owned and controlled by members of the identified minority groups, if it appeared that the business had not been deprived of the opportunity to develop and maintain a competitive position in the economy because of social or economic disadvantage.

As the Congress began consideration of the Public Works Employment Act of 1977, the House Committee on Small

---

Id., at H1440 (remarks of Rep. Conyers).

Id., at H1440–H1441 (remarks of Rep. Biaggi).

Id., at H1441.

[illegible] (remarks of Sen. Brooke). The [illegible]

[illegible]

Id., at [illegible]

[illegible] H. R. Conf. Rep. No. [illegible]

[illegible]

123 Cong. Rec. [illegible] (Mar. 10, 1977) (remarks of Sen. Brooke).

Id., at H1[illegible] (remarks of Rep. Mitchell).

Id., at H14[illegible]; *Id.*, at S3910 (Mar. 10, 1977) (remarks of Sen. Brooke).

Exec. Order No. [illegible], 3 CFR [illegible] (1964–1970 Comp.); Exec. Order No. [illegible], 3 CFR [illegible] (1966–1970 Comp.).

13 CFR § 124.8–1 [illegible] (1977).

U. S. Small Business Administration, Office of Business Development, Section 8 (a) Program, Small Business Administration Standard Operating Procedure [illegible] H. R. Rep. No. [illegible] [illegible]

Business issued a lengthy report summarizing its activities, including its evaluation of the ongoing § 8 (a) program.[?] One chapter of the report, entitled "Minority Enterprise and Allied Problems of Small Business," summarized a 1975 committee report of the same title dealing with this subject matter.[?] The original report, prepared by the House Subcommittee on SBA Oversight and Minority Enterprise, observed: [?]

> "The subcommittee is acutely aware that the economic policies of this Nation must function within and be guided by our constitutional system which guarantees 'equal protection of the laws.' *The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.*
>
> "While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only $16.6 billion, or about 0.65 percent was realized by minority business concerns.
>
> "These statistics are not the result of random chance. The presumption must be made that past discriminatory systems have resulted in present economic inequities. In order to right this situation, the Congress has formulated certain remedial programs designed to uplift those socially or economically disadvantaged persons to a level where they may effectively participate in the business mainstream of our economy.*
>
> "*For the purposes of this report the term 'minority' shall include only such minority individuals as are considered to be economically or socially disadvantaged."[?] (Emphasis added.)

The 1975 report gave particular attention to the § 8 (a) program, expressing disappointment with its limited effectiveness.[?] With specific reference to government construction contracting, the report concluded, "there are substantial § 8 (a) opportunities in the area of Federal construction, but . . . the practices of some agencies preclude the realization of that potential."[?] The subcommittee took "full notice . . . as evidence for its consideration" of reports submitted to the Congress by the General Accounting Office and by the U. S. Commission on Civil Rights, which reflected a similar dissatisfaction with the effectiveness of the § 8 (a) program.[?] The Civil Rights Commission report discussed at some length the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state and local levels.[?] Among the major difficulties confronting minority businesses were deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate "track record," lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses.[?]

The subcommittee report also gave consideration to the operations of the Office of Minority Business Enterprise (OMBE), an agency of the Department of Commerce organized pursuant to Executive Orders[?] to formulate and coordinate federal efforts to assist the development of minority businesses. The report concluded that OMBE efforts were "totally inadequate" to achieve its policy of increasing opportunities for subcontracting by minority businesses on public contracts. OMBE efforts were hampered by a "glaring lack of specific objectives which each prime contractor should be required to achieve," by a "lack of enforcement provisions," and by a "lack of any meaningful monitoring system."[?]

Against this backdrop of legislative and administrative programs, it is inconceivable that Members of both Houses were not fully aware of the objectives of the MBE provision and of the reasons prompting its enactment.

C

Although the statutory MBE provision itself outlines only the bare bones of the federal program, it makes a number of critical determinations: the decision to initiate a limited racial and ethnic preference; the specification of a minimum level for minority business participation; the identification of the minority groups that are to be encompassed by the program; and the provision for an administrative waiver where application of the program is not feasible. Congress relied on the administrative agency to flesh out this skeleton, pursuant to delegated rulemaking authority, and to develop an administrative operation consistent with legislative intentions and objectives.

As required by the Public Works Employment Act of 1977, the Secretary of Commerce promulgated regulations to set into motion "Round II" of the federal grant program.[?] The regulations require that construction projects funded under the legislation must be performed under contracts awarded by competitive bidding, unless the federal administrator has made a determination that in the circumstances relating to a particular project some other method is in the public interest. Where competitive bidding is employed, the regulations echo the statute's requirement that contracts are to be awarded on the basis of the "lowest responsive bid submitted by a bidder meeting established criteria of responsibility," and they

---

[?] H. R. Rep. No. 94-1791 (1977).

[?] *Id.*, at 124-149.

[?] H. R. Rep. No. 94-468, pp. 1-2 (1975).

[?] Another chapter of the 1977 Report of the House Committee on Small Business summarized a review of the SBA's Surety Bond Guarantee Program, making specific reference to minority business participation in the construction industry. [illegible]

[?] [illegible] over the years there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system [illegible] [illegible] to perpetuate these past inequities. Minorities, until recently, have not participated [illegible] business system generally [illegible]" H. R. Rep. No. 94-1791, p. 182 (1977), quoting from H. R. Rep. No. 94-468, p. 1? (1975).

[?] H. R. Rep. No. 94-468, pp. 20-21 (1975).

[?] *Id.*, at 29.

[?] *Id.*, at 1?; U. S. General Accounting Office, "Questionable Effectiveness of the 8 (a) Procurement Program" (1975); U. S. Commission on Civil Rights, "Minorities and Women as Government Contractors" (1975).

[?] U. S. Commission on Civil Rights, "Minorities and Women as Government Contractors" 19-28, 86-89 (1975).

[?] *Ibid.*

[?] Exec. Order No. 11458, 3 CFR 779 (1966-1970 Comp.); Exec. Order No. 11625, 3 CFR 616 (1971-1975 Comp.).

[?] H. R. Rep. No. 94-468, p. 32 (1975). For other congressional observations with respect to the effect of past discrimination [illegible] business opportunities for minorities, see, e. g., H. R. Rep. No. [illegible], p. 3 (1972); H. R. Rep. No. 92-1615, p. 8 (1972); S. Rep. No. 92-1?? [illegible], pp. 16-[illegible]; S. Rep. No. 94-?? [illegible], pp. 177, 179-180 (1975); see also, e. g., H. R. Doc. No. 92-169, p. 4 (1971); H. R. Doc. No. 92-194, p. 1 (1972).

[?] [illegible] 13 CFR part 317 (1977).

also restate the MBE requirement."

EDA also has published guidelines devoted entirely to the administration of the MBE provision. The guidelines outline the obligations of the grantee to seek out all available, qualified, bona fide MBE's, to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration or other sources for assisting MBE's in obtaining required working capital and to give guidance through the intricacies of the bidding process."

EDA regulations contemplate that, as anticipated by Congress, most local public works projects will entail the award of a predominant prime contract, with the prime contractor assuming the above grantee obligations for fulfilling the 10% MBE requirement." The EDA guidelines specify that when prime contractors are selected through competitive bidding, bids for the prime contract "shall be considered by the Grantee to be responsive only if at least 10 percent of the contract funds are to be expended for MBE's." The administrative program envisions that competitive incentive will motivate aspirant prime contractors to perform their obligations under the MBE provision so as to qualify as "responsive" bidders. And, since the contract is to be awarded to the lowest responsive bidder, the same incentive is expected to motivate prime contractors to seek out the most competitive of the available, qualified, bona fide minority firms. This too is consistent with the legislative intention."

The EDA guidelines also outline the projected administration of applications for waiver of the 10% MBE requirement, which may be sought by the grantee either before or during the bidding process." The technical bulletin issued by EDA discusses in greater detail the processing of waiver requests, clarifying certain issues left open by the guidelines. It specifies that waivers may be total or partial, depending on the circumstances," and it illustrates the projected operation of the waiver procedure by posing hypothetical questions with projected administrative responses. One such hypothetical is of particular interest, for it indicates the limitations on the scope of the racial or ethnic preference contemplated by the federal program when a grantee or its prime contractor is confronted with an available, qualified, bona fide minority business enterprise who is not the lowest competitive bidder. The hypothetical provides: "

> "*Question:* Should a request for waiver of the 10% requirement based on an unreasonable price asked by an MBE ever be granted?
>
> "*Answer:* It is possible to imagine situations where an MBE might ask a price for its product or services that is unreasonable and where, therefore, a waiver is justified. However, before a waiver request will be honored, the following determinations will be made:
>
> "a) The MBE's quote is unreasonably priced. This determination should be based on the nature of the product or service of the subcontractor, the geographic location of the site and of the subcontractor, prices of similar products or services in the relevant market area, and general business conditions in the market area. Furthermore, a subcontractor's price should not be considered unreasonable if he is merely trying to cover his costs because the price results from disadvantage which affects the MBE's cost of doing business or results from discrimination.
>
> "b) The contractor has contacted other MBE's and has no meaningful choice but to accept an unreasonably high price."

This announced policy makes clear the administrative understanding that a waiver or partial waiver is justified (and will be granted) to avoid subcontracting with a minority business enterprise at an "unreasonable" price, i. e., a price above competitive levels which cannot be attributed to the minority firm's attempt to cover costs inflated by the present effects of disadvantage or discrimination.

This administrative approach is consistent with the legislative intention. It will be recalled that in the report of the House Subcommittee on SBA Oversight and Minority Enterprise the subcommittee took special care to note that when using the term "minority" it intended to include "only such minority individuals as are considered to be economically or socially disadvantaged." The subcommittee also was cognizant of existing administrative regulations designed to ensure that firms maintained on the lists of bona fide minority business enterprises be those whose competitive position is impaired by the effects of disadvantage and discrimination. In its report, the subcommittee expressed its intention that these criteria continue to govern administration of the SBA's § 8 (a) program." The sponsors of the MBE provision, in their reliance on prior administrative practice, intended that the term "minority business enterprise" would be given that same limited application; this even found expression in the legislative debates, where Representative Roe made the point: "

> ". . . when we are talking about companies held by minority groups . . . [c]ertainly people of a variety of backgrounds are included in that. That is not really a measurement. They are talking about people in the minority and deprived."

The EDA technical bulletin provides other elaboration of the MBE provision. It clarifies the definition of "minority group members." It also indicates EDA's intention "to allow credit for utilization of MBE's only for those contracts in which involvement constitutes a basis for strengthening the long-term and continuing participation of the MBE in the construction and related industries." Finally, the bulletin outlines a procedure for the processing of complaints of "unjust participation by an enterprise or individuals in the MBE program," or of improper administration of the MBE requirement."

III

When we are required to pass on the constitutionality

" 91 Stat. 116, 42 U. S. C. (1976 ed. Supp. III) § 6705 (e)(1). 13 CFR § 317.13 (1979).

" Guidelines, n. 2, supra, at 2-7, App. 135a-136a. The relevant portions of the Guidelines are set out in the Appendix to this opinion, ¶ 1.

" *Id.*, at 2, App. 135a; see 123 Cong. Rec. H1637-H1638 (Feb. 24, 1977) (remarks of Rep. Mitchell and Rep. Roe).

" Guidelines, n. 2, supra, at 4, App. 141a.

" See 123 Cong. Rec. H1637-H1638 (Feb. 24, 1977) (remarks of Rep. Mitchell and Rep. Roe).

" Guidelines, n. 2, supra, at 11-12, App. 148a-150a. The relevant portions of these Guidelines are set out in the Appendix to this opinion, ¶ 2.

" Technical Bulletin, n. 4, supra, at 3, App. 154a.

" *Id.*, at 5-10, App. 156a.

" Text accompanying n. 47, supra.

" H. R. Rep. No. 95-468, p. 30 (1977).

" 123 Cong. Rec. H1638 (Feb. 24, 1977) (remarks of Rep. Roe).

" Technical Bulletin, n. 4, supra, at 1, App. 153a-155a. These determinations are set out in the Appendix to this opinion, ¶ 3.

" *Id.*, at 3, App. 153a.

" *Id.*, at 10, App. 158a. The relevant portions of the technical bulletin are set out in the Appendix to this opinion, ¶ 4.

of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." *Blodgett* v. *Holden*, 275 U. S. 142, 148 (1927) (opinion of Holmes, J.). A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment. Art. I, § 8, cl. 1; Amdt. 14, § 5. In *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U. S. 94, 102 (1973), we accorded "great weight to the decisions of Congress" even though the legislation implicated fundamental constitutional rights guaranteed by the First Amendment. The rule is not different when a congressional program raises equal protection concerns. See, *e. g.*, *Cleland* v. *National College of Business*, 435 U. S 213 (1978); *Mathews* v *De Castro*, 429 U. S. 181 (1976).

Here we pass, not on a choice made by a single judge or a school board but on a considered decision of the Congress and the President. However, in no sense does that render it immune from judicial scrutiny and it "is not to say we 'defer' to the judgment of the Congress . . . on a constitutional question," or that we would hesitate to invoke the Constitution should we determine that Congress has overstepped the bounds of its constitutional power. *Columbia Broadcasting*, *supra*, 412 U. S., at 103.

The clear objective of the MBE provision is disclosed by our necessarily extended review of its legislative and administrative background. The program was designed to ensure that, to the extent federal funds were granted under the Public Works Employment Act of 1977, grantees who elect to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority businesses to public contracting opportunities. The MBE program does not mandate the allocation of federal funds according to inflexible percentages solely based on race or ethnicity.

Our analysis proceeds in two steps. At the outset, we must inquire whether the *objectives* of this legislation are within the power of Congress. If so, we must go on to decide whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives and does not violate the equal protection component of the Due Process Clause of the Fifth Amendment.

A

(1)

In enacting the MBE provision it is clear that Congress combined the amalgam of its expressly delegated powers. The Public Works Employment Act of 1977, by its very nature, is primarily an exercise of the Spending Power. U. S. Const., Art. I, § 8, cl. 1. This Court has recognized that the power to "provide for the . . . general Welfare" is an independent grant of legislative authority distinct from other legislative powers. *Buckley* v. *Valeo*, 424 U. S. 1, 90 (1976); *United States* v. *Butler*, 297 U. S. 1, 65-66 (1936). Congress has frequently employed the Spending Power to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives. This Court has repeatedly upheld against constitutional challenge the use of this technique to induce governments and private parties to cooperate voluntarily with federal policy. *E. g.*, *California Bankers Assn.* v. *Shultz*, 416 U. S. 21 (1974); *Lau* v. *Nichols*, 414 U. S. 563 (1974); *Oklahoma* v. *United States Civil Service Comm'n*, 330 U. S. 127 (1947); *Helvering* v. *Davis*, 301 U. S. 619 (1937); *Steward Machine Co.* v. *Davis*, 301 U. S. 548 (1937).

The MBE program is structured within this familiar legislative pattern. The program conditions receipt of public works grants upon agreement by the state or local governmental grantee that at least 10% of the federal funds will be devoted to contracts with minority businesses, to the extent this can be accomplished by overcoming barriers to access and by awarding contracts to bona fide MBE's. It is further conditioned to require that MBE bids on these contracts are competitively priced, or might have been competitively priced but for the present effects of prior discrimination. Admittedly, the problems of administering this program with respect to these conditions may be formidable. Although the primary responsibility for ensuring minority participation falls upon the grantee, when the procurement practices of the grantee involve the award of a prime contract to a general or prime contractor, the obligations to assure minority participation devolve upon the private contracting party; this is a contractual condition of eligibility for award of the prime contract.

Here we need not explore the outermost limitations on the objectives attainable through such an application of the Spending Power. The reach of the Spending Power, within its sphere, is at least as broad as the regulatory powers of Congress. If, pursuant to its regulatory powers, Congress could have achieved the objectives of the MBE program, then it may do so under the Spending Power. And we have no difficulty perceiving a basis for accomplishing the objectives of the MBE program through the Commerce Power insofar as the program objectives pertain to the action of private contracting parties, and through the power to enforce the equal protection guarantees of the Fourteenth Amendment insofar as the program objectives pertain to the action of state and local grantees.

(2)

We turn first to the Commerce Power. U. S. Const., Art. I, § 8, cl. 3. Had Congress chosen to do so, it could have drawn on the Commerce Clause to regulate the practices of prime contractors on federally funded public works projects. *Katzenbach* v. *McClung*, 379 U. S. 294 (1964); *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241 (1964). The legislative history of the MBE provision shows that there was a rational basis for Congress to conclude that the subcontracting practices of prime contractors could perpetuate the continuing impaired access by minority businesses to public contracting opportunities, and that this inequity has an effect on interstate commerce. Thus Congress could take necessary and proper action to remedy the situation. *Ibid.*

It is not necessary that these prime contractors be shown responsible for any violation of anti-discrimination laws. Our cases dealing with application of Title VII of the Civil Rights Act of 1964, 78 Stat. 253 as amended, express no doubt of the congressional authority to prohibit practices challenged as perpetuating the effects of [past unlawful] discrimination occurring prior to the effective date of the Act." *Franks* v. *Bowman Transportation Co.*, 424 U. S. 747, 761 (1976); see *California Brewers Assn.* v. *Bryant*, — U. S. —, No. 78-1348 Feb. 20 1980); *International Brotherhood of Teamsters*

v. *United States*, 431 U. S. 324 (1977); *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975); *Griggs* v. *Duke Power Co.*, 401 U. S. 424 (1971). Insofar as the MBE program pertains to the actions of private prime contractors, the Congress could have achieved its objectives under the Commerce Clause. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(3)

In certain contexts, there are limitations on the reach of the Commerce Power to regulate the actions of state and local governments. *National League of Cities* v. *Usery*, 426 U. S. 833 (1976). To avoid such complications, we look to § 5 of the Fourteenth Amendment for the power to regulate the procurement practices of state and local grantees of federal funds. *Fitzpatrick* v. *Bitzer*, 427 U. S. 445 (1976). A review of our cases persuades us that the objectives of the MBE program are within the power of Congress under § 5 "to enforce by appropriate legislation" the equal protection guarantees of the Fourteenth Amendment.

In *Katzenbach* v. *Morgan*, 384 U. S. 641 (1966), we equated the scope of this authority with the broad powers expressed in the Necessary and Proper Clause, U. S. Const., Art. I, § 8, cl. 18. "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." 384 U. S., at 651. In *Katzenbach*, the Court upheld § 4 (e) of the Voting Rights Act of 1965, 79 Stat. 439, which prohibited application of state English-language literacy requirements to otherwise qualified voters who had completed the sixth grade in an accredited American school in which a language other than English was the predominant medium of instruction. To uphold this exercise of congressional authority, the Court found no prerequisite that application of a literacy requirement violate the Equal Protection Clause. 384 U. S., at 648–649. It was enough that the Court could perceive a basis upon which Congress could reasonably predicate a judgment that application of literacy qualifications within the compass of § 4 (e) would discriminate in terms of access to the ballot and consequently in terms of access to the provision or administration of governmental programs. *Id.*, at 652–653.

Four years later, in *Oregon* v. *Mitchell*, 400 U. S. 112 (1970), we upheld § 201 of the Voting Rights Act Amendments of 1970, 84 Stat. 315, which imposed a five-year nationwide prohibition on the use of various voter-qualification tests and devices in federal, state and local elections. The Court was unanimous, albeit in separate opinions, in concluding that Congress was within its authority to prohibit the use of such voter qualifications; Congress could reasonably determine that its legislation was an appropriate method of attacking the perpetuation of prior purposeful discrimination, even though the use of these tests or devices might have discriminatory effects only. *See City of Rome* v. *United States*, — U. S. —, No. 78-1840, slip op., at 18–19 (Apr. 22, 1980). Our cases reviewing the parallel power of Congress to enforce the provisions of the Fifteenth Amendment, U. S. Const., Amdt. 15, § 2, confirm that congressional authority extends beyond the prohibition of purposeful discrimination to encompass state action that has discriminatory impact perpetuating the effects of past discrimination. *South Carolina* v. *Katzenbach*, 383 U. S. 301 (1966); *cf. City of Rome*, *supra*.

With respect to the MBE provision, Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination. Congress, of course, may legislate without compiling the kind of "record" appropriate with respect to judicial or administrative proceedings. Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct. Although much of this history related to the experience of minority businesses in the area of federal procurement, there was direct evidence before the Congress that this pattern of disadvantage and discrimination existed with respect to state and local construction contracting as well. In relation to the MBE provision, Congress acted within its competence to determine that the problem was national in scope.

Although the Act recites no preambulary "findings" on the subject, we are satisfied that Congress had abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination. Accordingly, Congress reasonably determined that the prospective elimination of these barriers to minority firm access to public contracting opportunities generated by the 1977 Act was appropriate to ensure that those businesses were not denied equal opportunity to participate in federal grants to state and local governments, which is one aspect of the equal protection of the laws. Insofar as the MBE program pertains to the actions of state and local grantees, Congress could have achieved its objectives by use of its power under § 5 of the Fourteenth Amendment. We conclude that in this respect the objectives of the MBE provision are within the scope of the Spending Power.

(4)

There are revelant similarities between the MBE program and the federal spending program reviewed in *Lau* v. *Nichols*, 414 U. S. 563 (1974). In *Lau*, a language barrier "effectively foreclosed" non-English-speaking Chinese pupils from access to the educational opportunities offered by the San Francisco public school system. *Id.*, at 564–566. It had not been shown that this had resulted from any discrimination, purposeful or otherwise, or from other unlawful acts. Nevertheless, we upheld the constitutionality of a federal regulation applicable to public school systems receiving federal funds that prohibited the utilization of "criteria or methods of administration *which have the effect* . . . of defeating or substantially impairing accomplishment of the objectives of the [educational] program as respect individuals of a particular race, color, or national origin." *Id.*, at 566 (emphasis added). Moreover, we upheld application to the San Francisco school system, as a recipient of federal funds, of a requirement that "[w]here inability to speak and understand the English language excludes national origin-minority group children from effective participation in the educational program offered by a school district, the district must take affirmative steps to rectify the language deficiency in order to open its instructional program to these students." *Ibid.*

It is true that the MBE program differs from the program approved in *Lau* in that the MBE program directly employs racial and ethnic criteria as a means to accomplish congressional objectives; however, these objectives are essentially the same as those approved in *Lau*. Our holding in *Lau* is

instructive on the exercise of congressional authority by way of the MBE provision. The MBE program, like the federal regulations reviewed in *Lau*, primarily regulates state action in the use of federal funds voluntarily sought and accepted by the grantees subject to statutory and administrative conditions. The MBE participation requirement is directed at the utilization of criteria, methods or practices thought by Congress to have the effect of defeating, or substantially impairing, access by the minority business community to public funds made available by congressional appropriations.

B

We now turn to the question whether, as a *means* to accomplish these plainly constitutional objectives, Congress may use racial and ethnic criteria, in this limited way, as a condition attached to a federal grant. We are mindful that "[i]n no matter should we pay more deference to the opinion of Congress than in its choice of instrumentalities to perform a function that is within its power," *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U. S. 582, 603 (1949) (opinion of Jackson, J.). However, Congress may employ racial or ethnic classifications in exercising its Spending or other legislative Powers only if those classifications do not violate the equal protection component of the Due Process Clause of the Fifth Amendment. We recognize the need for careful judicial evaluation to assure that any congressional program that employs racial or ethnic criteria to accomplish the objective of remedying the present effects of past discrimination is narrowly tailored to the achievement of that goal.

Again, we stress the limited scope of our inquiry. Here we are not dealing with a remedial decree of a court but with the legislative authority of Congress. Furthermore, petitioners have challenged the constitutionality of the MBE provision on its face; they have not sought damages or other specific relief for injury allegedly flowing from specific applications of the program; nor have they attempted to show that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party to this case.[1] In these circumstances, given a reasonable construction and in light of its projected administration, if we find the MBE program on its face to be free of constitutional defects, it must be upheld as within congressional power. *Parker v. Levy*, 417 U. S. 733, 760 (1974); *Fortson v. Secretary of State of Georgia*, 379 U. S. 433, 438–439 (1965); *Aptheker v. Secretary of State*, 378 U. S. 500, 515 (1964); see *United States v. Raines*, 362 U. S. 17, 20–24 (1960).

Our review of the regulations and guidelines governing administration of the MBE provision reveals that Congress enacted the program as a strictly remedial measure; moreover, it is a remedy that functions prospectively, in the manner of an injunctive decree. Pursuant to the administrative program, grantees and their prime contractors are required to seek out all available, qualified, bona fide MBE's; they are required to provide technical assistance as needed, to lower or waive bonding requirements where feasible, to solicit the aid of the Office of Minority Business Enterprise, the Small Business Administration or other sources for assisting MBE's to obtain required working capital, and to give guidance through the intricacies of the bidding process. *Supra*, at 17. The program assumes that grantees who undertake these efforts in good faith will obtain at least 10% participation by minority business enterprises. It is recognized that, to achieve this target, contracts will be awarded to available, qualified, bona fide MBE's even though they are not the lowest competitive bidders, so long as their higher bids, when challenged, are found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantage and discrimination. *Supra*, at 18–19. There is available to the grantee a provision authorized by Congress for administrative waiver on a case-by-case basis should there be a demonstration that, despite affirmative efforts, this level of participation cannot be achieved without departing from the objectives of the program. *Supra*, at 17–18. There is also an administrative mechanism, including a complaint procedure, to ensure that only bona fide MBE's are encompassed by the remedial program, and to prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of prior discrimination. *Supra*, at 19–20.

(1)

As a threshold matter, we reject the contention that in the remedial context the Congress must act in a wholly "color-blind" fashion. In *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U. S. 1, 18–21 1971), we rejected this argument in considering a court-formulated school desegration remedy on the basis that examination of the racial composition of student bodies was an unavoidable starting point and that racially based attendance assignments were permissible so long as no absolute racial balance of each school was required. In *McDaniel v. Barresi*, 402 U. S. 39, 41 (1971), citing *Swann*, we observed that "[i]n this remedial process, steps will almost invariably require that students be assigned 'differently because of their race.' . . . Any other approach would freeze the status quo that is the very target of all desegregation processes." (Citations omitted.) And in *North Carolina Board of Education v. Swann*, 402 U. S. 43 (1971), we invalidated a state law that absolutely forbade assignment of any student on account of race because it foreclosed implementation of desegregation plans that were designed to remedy constitutional violations. We held that "[j]ust as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." 402 U. S., at 46.

In these school desegregation cases we dealt with the authority of a federal court to formulate a remedy for unconstitutional racial discrimination. However, the authority of a court to incorporate racial criteria into a remedial decree also extends to statutory violations. Where federal anti-discrimination laws have been violated, an equitable remedy may in the appropriate case include a racial or ethnic factor. *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976); see *International Brotherhood of Teamsters v. United States*, 431 U. S. 324 (1977); *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975). In another setting, we have held that a state may employ racial criteria that are reasonably necessary to assure compliance with federal voting rights legislation, even though the state action does not entail the remedy of a constitutional violation. *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U. S. 144, 167–165 (1977)

[1] In their complaint, in order to establish standing to challenge the validity of the program, petitioners alleged as "[e]xamples" of instances where use of these racial criteria would have been required a public works contract but for enforcement of the MBE provision. Petitioners requested only declaratory and injunctive relief against continued enforcement of the MBE provision; they did not seek any remedy for these specific instances of asserted unlawful discrimination. App. 10a-11a, 17a-18a.

opinion of WHITE, J. joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); *id.*, at 180–187 (BURGER, C. J., dissenting on other grounds).

"When we have discussed the remedial powers of a federal court, we have been alert to the limitation that "[t]he power of the federal courts to restructure the operation of local and state governmental entities is not plenary. . . . [A] federal court is required to tailor the scope of the remedy to fit the nature and extent of the . . . violation." *Dayton Board of Education* v. *Brinkman*, 433 U. S. 406, 419–420 (1977) (quoting *Milliken* v. *Bradley*, 418 U. S. 717, 738 (1974), and *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U. S., at 16).

Here we deal, as we noted earlier, not with the limited remedial powers of a federal court, for example, but with the broad remedial powers of Congress. It is fundamental that in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees. Congress not only may induce voluntary action to assure compliance with existing federal statutory or constitutional antidiscrimination provisions, but also, where Congress has authority to declare certain conduct unlawful, it may, as here, authorize and induce state action to avoid such conduct. *Supra*, at 22–28.

(2)

A more specific challenge to the MBE program is the charge that it impermissibly deprives nonminority businesses of access to at least some portion of the government contracting opportunities generated by the Act. It must be conceded that by its objective of remedying the historical impairment of access, the MBE provision can have the effect of awarding some contracts to MBE's which otherwise might be awarded to other businesses, who may themselves be innocent of any prior discriminatory actions. Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-firm access to public contracting opportunities may have been an incidental consequence of "business-as-usual" by public contracting agencies and among prime contractors.

It is not a constitutional defect in this program that it may disappoint the expectations of nonminority firms. When effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such "a sharing of the burden" by innocent parties is not impermissible. *Franks*, *supra*, at 777; see *Albemarle Paper Co.*, *supra*; *United Jewish Organizations*, *supra*. The actual "burden" shouldered by nonminority firms is relatively light in this connection when we consider the scope of this public works program as compared with overall construction contracting opportunities.[*] Moreover, although we may assume that the complaining parties are innocent of any discriminatory conduct, it was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities.

[*] The Court of Appeals relied upon Department of Commerce statistics to show that the $4.3 billion in federal grants contracted upon annually with the MBE provision amounted to about 1.5% of the total of nearly $300 billion spent on construction in the United States during 1977. Thus the 10% minimum minority business participation mandated by the program would account for only 0.15% of the annual expenditure for construction work in the United States. *Fullilove* v. *Klutznick*, 448 F. Supp. 258, 267 (SD NY 1978).

(3)

Another challenge to the validity of the MBE program is the assertion that it is underinclusive—that it limits its benefit to specified minority groups rather than extending its remedial objectives to all businesses whose access to government contracting is impaired by the effects of disadvantage or discrimination. Such an extention would, of course, be appropriate for Congress to provide; it is not a function for the courts.

Even in this context, the well-established concept that a legislature may take one step at a time to remedy only part of a broader problem is not without relevance. See *Dandridge* v. *Williams*, 397 U. S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U. S. 483 (1955). We are not reviewing a federal program that seeks to confer a preferred status upon a nondisadvantaged minority or to give special assistance to only one of several groups established to be similarly disadvantaged minorities. Even in such a setting, the Congress is not without a certain authority. See, *e. g.*, *Personnel Administrator of Massachusetts* v. *Feeney*, 442 U. S. 256 (1979); *Califano* v. *Webster*, 430 U. S. 313 (1977); *Morton* v. *Mancari*, 417 U. S. 535 (1974).

The Congress has not sought to give select minority groups a preferred standing in the construction industry, but has embarked on a remedial program to place them on a more equitable footing with respect to public contracting opportunities. There has been no showing in this case that Congress has inadvertently effected an invidious discrimination by excluding from coverage an identifiable minority group that has been the victim of a degree of disadvantage and discrimination equal to or greater than that suffered by the groups encompassed by the MBE program. It is not inconceivable that on very special facts a case might be made to challenge the congressional decision to limit MBE eligibility to the particular minority groups identified in the Act. See *Vance* v. *Bradley*, 440 U. S. 93, 109–112 (1979); *Oregon* v. *Mitchell*, 400 U. S. 112, 240 (1970) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.). But on this record we find no basis to hold that Congress is without authority to undertake the kind of limited remedial effort represented by the MBE program. Congress, not the courts, has the heavy burden of dealing with a host of intractable economic and social problems.

(4)

It is also contended that the MBE program is overinclusive—that it bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination. It is conceivable that a particular application of the program may have this effect; however, the peculiarities of specific applications are not before us in this case. We are not presented here with a challenge involving a specific award of a construction contract or the denial of a waiver request; such questions of specific application must await future cases.

This does not mean that the claim of overinclusiveness is entitled to no consideration in the present case. The history of governmental tolerance of practices using racial or ethnic criteria for the purpose or with the effect of imposing an invidious discrimination must alert us to the deleterious effects of even benign racial or ethnic classifications when they stray from narrow remedial justifications. Even in the context of a facial challenge such as is presented in this case, the MBE provision cannot pass muster unless, with due account for its administrative program, it provides a reasonable assurance that application of racial or ethnic criteria will be

limited to accomplishing the remedial objectives of Congress and that misapplications of the program will be promptly and adequately remedied administratively.

It is significant that the administrative scheme provides for waiver and exemption. Two fundamental congressional assumptions underlie the MBE program: (1) that the present effects of past discrimination have impaired the competitive position of businesses owned and controlled by members of minority groups; and (2) that affirmative efforts to eliminate barriers to minority-firm access, and to evaluate bids with adjustment for the present effects of past discrimination, would assure that at least 10% of the federal funds granted under the Public Works Employment Act of 1977 would be accounted for by contracts with available, qualified, bona fide minority business enterprises. Each of these assumptions may be rebutted in the administrative process.

The administrative program contains measures to effectuate the congressional objective of assuring legitimate participation by disadvantaged MBE's. Administrative definition has tightened some less definite aspects of the statutory identification of the minority groups encompassed by the program.[73] There is administrative scrutiny to identify and eliminate from participation in the program MBE's who are not "bona fide" within the regulations and guidelines; for example, spurious minority-front entities can be exposed. A significant aspect of this surveillance is the complaint procedure available for reporting "unjust participation by an enterprise or individuals in the MBE program." *Supra*, at 20. And even as to specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, *i. e.*, a price not attributable to the present effects of past discrimination. *Supra*, at 17-19. We must assume that Congress intended close scrutiny of false claims and prompt action on them.

Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participation within the limitations of the program's remedial objectives. In these circumstances a waiver or partial waiver is available once compliance has been demonstrated. A waiver may be sought and granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

Nor is the program defective because a waiver may be sought only by the grantee and not by prime contractors who may experience difficulty in fulfilling contract obligations to assure minority participation. It may be administratively cumbersome, but the wisdom of concentrating responsibility at the grantee level is not for us to evaluate; the purpose is to allow the Economic Development Administration to maintain close supervision of the operation of the MBE provision. The administrative complaint mechanism allows for grievances of prime contractors who assert that a grantee has failed to seek a waiver in an appropriate case. Finally, we note that where private parties, as opposed to governmental entities, transgress the limitations inherent in the MBE program, the possibility of constitutional violation is more removed. See *United Steelworkers of America* v. *Weber*, 443 U. S. 193, 200 (1979).

That the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process gives reasonable assurance that application of the MBE program will be limited to accomplishing the remedial objectives contemplated by Congress and that misapplications of the racial and ethnic criteria can be remedied. In dealing with this facial challenge to the statute, doubts must be resolved in support of the congressional judgment that this limited program is a necessary step to effectuate the constitutional mandate for equality of economic opportunity. The MBE provision may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment.[74] Miscarriages of administration could have only a transitory economic impact on businesses not encompassed by the program, and would not be irremediable.

IV

Congress, after due consideration, perceived a pressing need to move forward with new approaches in the continuing effort to achieve the goal of equality of economic opportunity. In this effort, Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the program may press the outer limits of congressional authority affords no basis for striking it down.

Petitioners have mounted a facial challenge to a program developed by the politically responsive branches of Government. For its part, the Congress must proceed only with programs narrowly tailored to achieve its objectives, subject to continuing evaluation and reassessment; administration of the programs must be vigilant and flexible; and, when such a program comes under judicial review, courts must be satisfied that the legislative objectives and projected administration give reasonable assurance that the program will function within constitutional limitations. But as Justice Jackson admonished in a different context in 1941:[75]

> "The Supreme Court can maintain itself and succeed in its tasks only if the counsels of self-restraint urged most earnestly by members of the Court itself are humbly and faithfully heeded. After the forces of conservatism and liberalism, of radicalism and reaction, of emotion and of self-interest are all caught up in the legislative process

[73] The MBE provision, 42 U. S. C. § 6705(f)(2) (1976 ed., Supp. II), classifies as a minority business enterprise any "business at least 50 per centum of which is owned by minority group members or, in the case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." The administrative definitions are set out in the Appendix to this opinion [illegible]. These categories also are classified as minorities in the regulations implementing the nondiscrimination requirements of the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U. S. C. § 803, see 42 Fed. Reg. 4285, 4286 (1977), on which Congress relied as precedent for the MBE provision. See 123 Cong. Rec. 5098 (1977) (remarks of Sen. Brooke). The House Subcommittee on SBA Oversight and Minority Enterprise, whose activities played a significant part in the legislative history of the MBE provision, also recognized that these categories were included within the Federal Government's definition of "minority business enterprise." H. R. Rep. No. 94-468, pp. 1-2 (1975). The specific inclusion of these groups in the MBE provision demonstrates that Congress concluded they were victims of discrimination. Petitioners did not press any challenge to Congress' classification categories in the Court of Appeals; there is no reason for this Court to pass upon the issue at this time.

[74] Cf. GAO Report to the Congress, Minority Firms on Local Public Works Projects—Mixed Results, CED-79-9 (Jan. 16, 1979); U. S. Dept. of Commerce, Economic Development Administration, Local Public Works Program, Interim Report on 10 Percent Minority Business Enterprise Requirement (Sept. 1978).

[75] R. H. Jackson, The Struggle for Judicial Supremacy 321 (1941).

and averaged and come to rest in some compromise measure such as the Missouri Compromise, the N. R. A., the A. A. A., a minimum-wage law, or some other legislative policy, a decision striking it down closes an area of compromise in which conflicts have actually, if only temporarily, been composed. Each such decision takes away from our democratic federalism another of its defenses against domestic disorder and violence. The vice of judicial supremacy, as exerted for ninety years in the field of policy, has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts."

Justice Jackson reiterated these thoughts shortly before his death in what was to be the last of his Godkin Lectures:[76]

> "I have said that in these matters the Court must respect the limitations on its own powers because judicial usurpation is to me no more justifiable and no more promising of permanent good to the country than any other kind. So I presuppose a Court that will not depart from the judicial process, will not go beyond resolving cases and controversies brought to it in conventional form, and will not consciously encroach upon the functions of its coordinate branches."

In a different context to be sure, that is, in discussing the latitude which should be allowed to states in trying to meet social and economic problems, Mr. Justice Brandeis had this to say:

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation." *New State Ice Co. v. Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting).

Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees. This case is one which requires, and which has received, that kind of examination. This opinion does not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as *University of California Regents v. Bakke*, 438 U. S. 265 (1978). However, our analysis demonstrates that the MBE provision would survive judicial review under either "test" articulated in the several *Bakke* opinions. The MBE provision of the Public Works Employment Act of 1977 does not violate the Constitution."

Affirmed.

APPENDIX

§ 1. The EDA guidelines, at 2-7, provide in relevant part:

> "The primary obligation for carrying out the 10% MBE participation requirement rests with EDA Grantees. . . . The Grantee and those of its contractors which will make subcontracts or purchase substantial supplies from other firms (hereinafter referred to as 'prime contractors') must seek out all available *bona fide* MBE's and make every effort to use as many of them as possible on the project.
>
> "An MBE is *bona fide* if the minority group ownership interests are real and continuing and not created solely to meet 10% MBE requirements. For example, the minority group owners or stockholders should possess control over management, interest in capital and interest in earnings commensurate with the percentage of ownership on which the claim of minority ownership status is based. . . .
>
> "An MBE is available if the project is located in the market area of the MBE and the MBE can perform project services or supply project materials at the time they are needed. The relevant market area depends on the kind of services or supplies which are needed. . . . EDA will require that Grantees and prime contractors engage MBE's from as wide a market area as is economically feasible.
>
> "An MBE is qualified if it can perform the services or supply the materials that are needed. Grantees and prime contractors will be expected to use MBE's with less experience than available nonminority enterprises and should expect to provide technical assistance to MBE's as needed. Inability to obtain bonding will ordinarily not disqualify an MBE. Grantees and prime contractors are expected to help MBE's obtain bonding, to include MBE's in any overall bond or to waive bonding where feasible. The Small Business Administration (SBA) is prepared to provide a 90% guarantee for the bond of any MBE participating in an LPW [local public works] project. Lack of working capital will not ordinarily disqualify an MBE. SBA is prepared to provide working capital assistance to any MBE participating in an LPW project. Grantees and prime contractors are expected to assist MBE's in obtaining working capital through SBA or otherwise.
>
> ". . . [E]very Grantee should make sure that it knows the names, addresses and qualifications of all relevant MBE's which would include the project location in their market areas. . . . Grantees should also hold prebid conferences to which they invite interested contractors and representatives of . . . MBE support organizations.
>
> "Arrangements have been made through the Office of Minority Business Enterprise . . . to provide assistance to Grantees and prime contractors in fulfilling the 10% MBE requirement. . . .
>
> "Grantees and prime contractors should also be aware of other support which is available from the Small Business Administration. . . .
>
> ". . . [T]he Grantee must monitor the performance of its prime contractors to make sure that their commitments to expend funds for MBE's are being fulfilled. . . . Grantees should administer every project tightly. . . ."

§ 2. The EDA guidelines, at 13-15, provide in relevant part:

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

---

[76] R. H. Jackson, The Supreme Court in the American System of Government 61-62 (1955).

[illegible] Although the complaint alleged that the MBE program violated several federal statutes, the only statutory argument urged upon us is that the MBE provision is inconsistent with Title VI of the Civil Rights Act of 1964. We perceive no inconsistency between the requirements of Title VI and those of the MBE provision. To the extent any statutory inconsistencies might be asserted, the MBE provision—the later, more specific enactment—must be deemed to control. See, e.g., *Morton v. Mancari*, 417 U. S. 535, 550-551 (1974); *Preiser v. Rodriguez*, 411 U. S. 475, 489-490 (1973); *Bulova Watch Co. v. United States*, 365 U. S. 753, 758 (1961); *United States v. Borden Co.*, 308 U. S. [illegible] (1939).

waiver request would ordinarily be made after the initial bidding or negotiation procedures proved unsuccessful. . . .

"[A] Grantee situated in an area where the minority population is very small may apply for a waiver before requesting bids on its project or projects. . . ."

¶ 3. The EDA technical bulletin, at 1, provides the following definitions:

"a) Negro—An individual of the black race of African origin.

"b) Spanish-speaking—An individual of a Spanish-speaking culture and origin or parentage.

"c) Oriental—An individual of a culture, origin or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of islands adjacent thereto, and out to the Pacific including but not limited to Indonesia, Indochina, Malaysia, Hawaii and the Philippines.

"d) Indian—An individual having origins in any of the original people of North America and who is recognized as an Indian by either a tribe, tribal organization or a suitable authority in the community. (A suitable authority in the community may be: educational institutions, religious organizations, or state agencies.)

"e) Eskimo—An individual having origins in any of the original peoples of Alaska.

"f) Aleut—An individual having origins in any of the original peoples of the Aleutian Islands."

¶ 4. The EDA technical bulletin, at 19, provides in relevant part:

"Any person or organization with information indicating unjust participation by an enterprise or individuals in the MBE program or who believes that the MBE participation requirement is being improperly applied should contact the appropriate EDA grantee and provide a detailed statement of the basis for the complaint.

"Upon receipt of a complaint, the grantee should attempt to resolve the issues in dispute. In the event the grantee requires assistance in reaching a determination, the grantee should contact the Civil Rights Specialist in the appropriate Regional Office.

"If the complainant believes that the grantee has not satisfactorily resolved the issues raised in his complaint, he may personally contact the EDA Regional Office."

MR. JUSTICE POWELL, concurring.

Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my own views. Accordingly, I join that opinion and write separately to apply the analysis set forth by my opinion in *University of California Regents* v. *Bakke*, 438 U. S. 265 (1978) (hereinafter *Bakke*).

The question in this case is whether Congress may enact the requirement in § 103 (f)(2) of the Public Works Employment Act of 1977 (PWEA), that 10% of federal grants for local public work projects funded by the Act be set aside for minority business enterprises. Section 103 (f)(2) employs a racial classification that is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest. *Bakke*, at 299, 305; see *In re Griffiths*, 413 U. S. 717, 721–722 (1973); *Loving* v. *Virginia*, 388 U. S. 1, 11 (1967); *McLaughlin* v. *Florida*, 379 U. S. 184, 196 (1964). For the reasons stated in my *Bakke* opinion, I consider adherence to this standard as important and consistent with precedent.

The Equal Protection Clause, and the equal protection component of the Due Process Clause of the Fifth Amendment, demand that any governmental distinction among groups must be justifiable. Different standards of review applied to different sorts of classifications simply illustrate the principle that some classifications are less likely to be legitimate than others. Racial classifications must be assessed under the most stringent level of review because immutable characteristics, which bear no relation to individual merit or need, are irrelevant to almost every governmental decision. See, *e. g.*, *Anderson* v. *Martin*, 375 U. S. 399, 402–404 (1964). In this case, however, I believe that § 103 (f)(2) is justified as a remedy that serves the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress.[1]

I

Racial preference never can constitute a compelling state interest. "'Distinctions between citizens solely because of their ancestry' [are] 'odious to a free people whose institutions are founded upon the doctrine of equality.'" *Loving* v. *Virginia*, 388 U. S., at 11, quoting *Hirabayashi* v. *United States*, 320 U. S. 81, 100 (1943). Thus, if the set-aside merely expresses a congressional desire to prefer one racial or ethnic group over another, § 103 (f)(2) violates the equal protection component in the Due Process Clause of the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U. S. 497, 499 (1954).

The Government does have a legitimate interest in ameliorating the disabling effects of identified discrimination. *Bakke*, 438 U. S., at 307; see, *e. g.*, *Keyes* v. *School District No. 1*, 413 U. S. 189, 236 (1973) (POWELL, J., concurring in part and dissenting in part); *McDaniel* v. *Barresi*, 402 U. S. 39, 41 (1971); *Board of Education* v. *Swann*, 402 U. S. 43, 45–46 (1971); *Green* v. *County School Board*, 391 U. S. 430, 437–438 (1968). The existence of illegal discrimination justifies the imposition of a remedy that will "make persons whole for injuries suffered on account of unlawful . . . discrimination." *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 418 (1975). A critical inquiry, therefore, is whether § 103 (f)(2) was enacted as a means of redressing such discrimination. But this Court has never approved race-conscious remedies absent judicial, administrative, or legislative findings of constitutional or statutory violations. *Bakke*, 438 U. S., at 307; see, *e. g.*, *Teamsters* v. *United States*, 431 U. S. 324, 367–376 (1977); *United Jewish Organizations* v. *Carey*, 430 U. S. 144, 155–159 (1977) (opinion of WHITE, J.); *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308–315 (1966).

Because the distinction between permissible remedial action and impermissible racial preference rests on the existence of a constitutional or statutory violation, the legitimate interest in creating a race-conscious remedy is not compelling unless an appropriate governmental authority has found that such a violation has occurred. In other words, two requirements must be met. First, the governmental body that attempts to impose a race-conscious remedy must have the authority to

---

[1] [illegible] Cf. *Lee* v. *Washington*, 390 U. S. 333, 334 (1968) (Black, Harlan, and Stewart, JJ., concurring).

PLEASE NOTE: THE PRECEDING PAGES WERE TREATED AS A UNIT IN THE ORIGINAL DOCUMENT.

ATTACHMENT "C"

Introduced: 4/10/81
Referred: State Affairs, Transportation and Finance

IN THE SENATE

BY FISCHER AND STIMSON

SENATE BILL NO. 415

IN THE LEGISLATURE OF THE STATE OF ALASKA

TWELFTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act relating to contracting and procurement procedures, and competitive bidding under the Fiscal Procedures Act."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 19.10.190 is amended to read:

Sec. 19.10.190. ADVERTISEMENT, BIDS, CONTRACTS, AND INFORMAL BIDS. (a) When [EXCEPT AS PROVIDED IN AS 44.33.300, WHEN] the estimated cost of any construction is $50,000 or more [EXCEEDS $100,000], the department shall, except as provided in AS 19.10.170(a), proceed to advertise, request bids, and award the contract in the manner provided in AS 19.10.200 and 19.10.210. Whenever any proposed construction contract is for a sum less than $50,000 [$100,000], it shall be discretionary with the department whether the contract shall be advertised and awarded in accordance with AS 19.10.200 and 19.10.210. In all events the department shall request informal bids from as many contractors as can be requested conveniently.

* Sec. 2. AS 19.10.190 is amended by adding new subsections to read:

(b) Except as provided in AS 44.33.300, when the estimated cost of any maintenance is $25,000 or more, the department shall proceed to advertise, request bids, and award the contract in the manner provided in AS 19.10.200 and 19.10.210. When any proposed maintenance contract is for a sum less than $25,000, it shall be discretionary with the department whether the contract shall be advertised and awarded in accordance with AS 19.10.200 and 19.10.210. In all events the depart-

ment shall request informal bids from as many contractors as can be requested conveniently.

(c) The department may not award construction contracts in increments of less than $50,000 or maintenance contracts in increments of less than $25,000 to the same contractor for the same project so as to circumvent the bid procedure required in (a) and (b) of this section.

* Sec. 3. AS 19.10.210 is amended to read:

Sec. 19.10.210. AWARD OF CONTRACTS [TO LOWEST RESPONSIBLE BIDDER]. The department shall award the contract in accordance with AS 37.05.230(1) [TO THE LOWEST RESPONSIBLE BIDDER], or it may reject all bids. If no satisfactory bid is received, the department may readvertise the project. All awards shall be made in compliance with applicable federal law and [THE] regulations [PROMULGATED THEREUNDER], with AS 19.05 - AS 19.25, and with AS 37.05 [.] and the [RULES AND] regulations [WHICH ARE] adopted under it [PROMULGATED THEREUNDER], where not in conflict with AS 19.05 - AS 19.25.

* Sec. 4. AS 19.30.191(b) is amended to read:

(b) Contracts entered into by a local government that has assumed local road powers for the construction of each project shall be awarded only on the basis of the lowest responsible bid submitted by a bidder meeting established criteria of responsibility, except that if the amount of state money to be used on the project is $50,000 or more the contract shall be awarded in accordance with AS 37.05.230(1).

* Sec. 5. AS 19.30.211(a) is amended to read:

(a) The department shall maintain, or cause to be maintained, any project constructed by the department under the provisions of AS 19.30.111 - 19.30.241, except that upon mutual agreement of the commissioner and the local government the responsibility for maintenance may be transferred to the local government if it is authorized to assume road

maintenance powers. If a maintenance contract entered into by the state is for $25,000 or more or if the amount of state money to be used in a maintenance contract awarded by a local government is for $25,000 or more, the contract shall be awarded in accordance with AS 37.05.230(1).

* Sec. 6. AS 35.15.030 is amended to read:

Sec. 35.15.030. ADVERTISEMENT, BIDS, CONTRACTS, AND INFORMAL BIDS. (a) When the estimated cost of any construction under this chapter is $50,000 or more [EXCEEDS $100,000], the department shall, except as provided in AS 35.15.010 [AND IN AS 44.33.300], proceed to advertise, request bids, and award the contract in the manner provided in AS 35.15.040 and 35.15.050. When any proposed construction contract is for a sum less than $50,000 [$100,000], it is discretionary with the department whether the contract is advertised and awarded in accordance with AS 35.15.040 and 35.15.050. In all events the department shall request informal bids from as many contractors as can be requested conveniently. A complete record shall be kept by the commissioner or his designee of all transactions entered into under this section including names of employees involved in the transactions.

* Sec. 7. AS 35.15.030 is amended by adding new subsections to read:

(b) When the estimated cost of any maintenance under this chapter is $25,000 or more, the department shall, except as provided in AS 44.33.300, proceed to advertise, request bids, and award the contract in the manner provided in AS 35.15.040 and 35.15.050. When any proposed construction contract is for a sum less than $25,000, it is discretionary with the department whether the contract is advertised and awarded in accordance with AS 35.15.040 and 35.15.050. In all events the department shall request informal bids from as many contractors as can be requested conveniently. A complete record shall be kept by the commissioner or his designee of all transactions entered into under

this section including names of employees involved in the transactions.

(c) The department may not award construction contracts in increments of less than $50,000 or maintenance contracts in increments of less than $25,000 to the same contractor for the same project so as to circumvent the bid procedure required in (a) and (b) of this section.

* Sec. 8. AS 35.15.050 is amended to read:

Sec. 35.15.050. AWARD OF CONTRACTS. The department shall award the contract in accordance with AS 37.05.230(1) [TO THE LOWEST RESPONSIBLE BIDDER], or it may reject all bids. If no satisfactory bid is received, the department may readvertise the project. The department shall make the award in compliance with applicable federal law and [THE] regulations [PROMULGATED UNDER IT], with this title, and in compliance with AS 37.05 [,] and the [RULES AND] regulations adopted [PROMULGATED] under it, where they are not in conflict with this title and federal law.

* Sec. 9. AS 35.15.080 is amended by adding a new subsection to read:

(g) A contract entered into by a municipality or regional educational attendance area for the construction of a public works project under this section shall be awarded in accordance with AS 37.05.230(1) if the amount of state money to be used to finance the contract is $50,000 or more.

* Sec. 10. AS 37.05.230(1) is repealed and reenacted to read:

(1) a contract for construction and repairs, or a purchase of and contract for supplies, materials, equipment, and contractual services must be based on competitive bids; an award shall be made to the lowest responsible bidder after advertising for bids, except that

(A) a bid shall be awarded to a bidder on the certified minority bidders list if

(i) he submits a bid for goods or services under

the name appearing on his current Alaska business license;

(ii) the value of contracts awarded during the fiscal year to bidders on the certified minority bidders list is less than 20 percent of the total value of contracts to be awarded during the fiscal year;

(iii) the bid is not more than 15 percent higher than the bid of the lowest bidder; and

~~(iv) the bidder agrees to lower his bid by five percent;~~

(iv) the bidder agrees to either lower his bid by five percent or match the lowest bid, whichever action results in a higher bid;

new section

(B) a bid shall be awarded to a bidder on the certified female bidders list if

(i) she submits a bid for goods or services under the name appearing on her current Alaska business license;

(ii) the value of contracts awarded during the fiscal year to bidders on the certified female bidders list is less than 10 percent of the total value of contracts to be awarded during the fiscal year;

(iii) the bid is not more than 15 percent higher than the bid of the lowest bidder; and

(iv) the bidder agrees to either lower her bid by five percent or match the lowest bid, whichever action results in a higher bid;

New Section → (C) if a certified minority bidder and a certified female bidder qualify under (1)(A) and 1(B) of this section, respectively, for the same bid, the bid shall be awarded to the lowest of the two bidders;

(D) subject to (1)(A) through (1)(C) of this section,

~~(B) subject to (i)(A) of this section,~~ a bid shall be awarded to an Alaska bidder if he is on the certified Alaska bidders list and his bid is not more than 10 percent higher than the bid of the lowest nonresident bidder; and

(E) ~~(C)~~ competitive bids are not required

(i) for contractual services when no known competition exists;

(ii) when rates are fixed by law or ordinance;

(iii) for items traded in on like items; or

(iv) for professional services;

* Sec. 11. AS 37.05.230(2) is amended to read:

(2) if the amount of the contractual services, purchase, or sale is estimated to exceed $2,500 sealed bids shall be solicited, when practicable, by publication in a newspaper calculated to reach prospective bidders and by posting notices in public places within the area where the work is to be performed or material furnished and in addition the department may also designate a trade journal for publication; the department shall also solicit bids by sending notices by mail to all [ACTIVE PROSPECTIVE] bidders <u>on the certified Alaska bidders list.</u> [KNOWN TO IT AND] all bids shall be sealed when received, and

shall be opened in public at the hour stated in the notice; the department may limit solicitation of bids or negotiate directly if it finds that it is in the best interest of the state;

* Sec. 12. AS 37.05.230(4) is amended to read:

(4) unless a contract is $50,000 or more, the provisions of this section relative to competitive bids do not apply to contracts for the operation of transportation systems for students to and from the schools within the state, as are authorized under AS 14.09.010; and these contracts may be awarded by bid or negotiation and, at the discretion of the Board of Education, may be awarded for periods of three years or less;

* Sec. 13. AS 37.05.230(5) is amended to read:

(5) an "Alaska bidder," for the purpose [OF BID AWARDS UNDER (1)(B)] of this section, is a person who

(A) holds a current Alaska business license; [,]

(B) submits a bid for goods or services under the name as appearing on his current Alaska business license; [,]

(C) has maintained a place of business within the state for a period of six months immediately preceding the date of his bid;

(D) is not delinquent in the payment of state taxes; and

(E) maintains inventories or facilities in support of business activities in the state; [.]

* Sec. 14. AS 37.05.230(7) is amended to read: through (1)(D)

(7) the provisions of (1)(A) [AND (1)(B)] of this section [RELATIVE TO AN "ALASKA BIDDER"] do not apply to contracts estimated to be less than $50,000 [EXCEED $5,000,] of [EITHER] the Department of Transportation and Public Facilities, which are authorized under AS 35.-

15 [,] or [THE DEPARTMENT OF HIGHWAYS, WHICH ARE AUTHORIZED] under AS 19.10[.]

* Sec. 15. AS 37.05.230(8) is amended to read:

(8) the provisions of this section relative to competitive bids do not apply to the purchase of products or services manufactured or provided by a sheltered workshop, unless the contract is for $50,000 or more.

* Sec. 16. AS 37.05.230 is amended by adding new paragraphs to read:

(9) the Department of Administration shall compile and update annually a certified Alaska bidders list containing the names of persons who meet the requirements of (5)(A), (C), (D), and (E) of this section;

[(10) the Department of Administration shall compile and update annually a certified minority bidders list containing the names of persons who are on the certified Alaska bidders list, and have a business whose majority interest is beneficially owned by members of minority groups or have a business whose majority voting interest is owned by members of minority groups; for the purpose of this paragraph minority group members are citizens of the United States who are Negroes, Hispanics, Orientals, American Indians, Eskimos, or Aleuts;

Substitute language for (10)

(10) the Department of Transportation and Public Facilities shall compile and update annually a certified minority bidders list containing the names of persons who are on the certified Alaska bidders list, have a business whose majority interest is beneficially owned by members of minority groups or have a business whose majority voting interest is owned by members of minority groups, and have a business whose [redacted] management and daily business operations are controlled by one or more minority persons. For the purpose of this paragraph, minority group members are citizens of the United States who are Black, Hispanic, Asian or Pacific Islander, American Indian, Eskimo, or Aleut.

New Section FOR FEMALE BUSINESSES

(11) The Department of Transportation and Public Facilities shall compile and update annually a certified female bidders list containing the names of persons who are on the certified Alaska bidders list, have a business whose majority interest is beneficially owned by women or have a business whose majority voting interest is owned by women, and have a business whose management and daily business operations are controlled by one or more women.

NEW SECTION

(12) The Department of Transportation and Public Facilities shall provide by regulation the standards by which it will make determinations that minority and female - owned business entitled to the benefits of this bill qualify as businesses whose management and daily business operations are controlled by one or more minority persons.

(13) ~~(12)~~ the provisions of (1) A) ~~and (1)(B)~~ through (1)(D) of this section do not apply to purchases and contracts involving federal money received by the state if the application of a bidding preference would violate federal law or program guidelines.

* Sec. 17. AS 37.05.240 is amended to read:

Sec. 37.05.240. BID REQUIREMENTS; AWARD OF CONTRACTS AND PURCHASES. (a) Except as provided in AS 37.05.230, a [A] contract or purchase made by or under the supervision of the department for which competitive bids are required shall be awarded to the lowest responsible

bidder, taking into consideration conformity with the specifications, terms of delivery, and other conditions imposed in the call for bids. Bids may be rejected, and a bid shall be rejected if it contains a material alteration or erasure which is not initialed by the signer of the bid. The department may reject the bid of a bidder who is in arrears on taxes due the state or who failed to perform on a previous contract with the state. Where competitive bids are required and where all bids are rejected, new bids shall be called for as in the first instance. Before the awarding of a contract for a building or the making of repairs upon a building, the department shall see that the bids conform with plans and specifications approved by the Department of Transportation and Public Facilities. All bids with the names of the bidders and the amounts of the bids, together with all documents pertaining to the award of a contract, shall be made a part of a file or record and retained by the department for three years, unless reproduced by microfilming and these files or records are open to public inspection at all reasonable times. An aggrieved bidder may within five days after an award of contract appeal to the department for hearing, with notice to interested parties, for redetermination and final award in accordance with law.

(b) When submitting a bid under this chapter, a prime contractor shall name the principal subcontractors he intends to use. After a bid is awarded, a prime contractor may change principal subcontractors only for cause. For purposes of this section "principal subcontractor" means a subcontractor who, in the performance of a contract awarded to the prime contractor, supplies materials and services with a value equal to or greater than 10 percent of the total value of the contract.

~~(c) If more than 10 percent of the money from a contract awarded under this chapter is to be paid to~~

~~subcontractors on the certified minority bidders list, unless no sub-contractors on the minority bidders list are available to perform the work. When submitting a bid, a prime contractor shall name the sub-contractors he intends to use who are on the minority bidders list together with the total amount of money he intends to pay to subcon-tractors on the minority bidders list. If no subcontractors on the minority bidders list are available, the prime contractor shall so state in writing when submitting a bid.~~

substitute language for (c)

(c) At least 20 percent of the money from a contract awarded under this chapter which is paid to subcontractors shall be paid to subcontractors on the certified minority bidders list, unless no subcontractors on the minority bidders list are available to perform the work. At least 10 percent of the money from a contract awarded under this chapter which is paid to subcontractors shall be paid to subcontractors on the certified female bidders list, unless no subcontractors on the female bidders list are available to perform the work. When submitting a bid, a prime contractor shall name the sub-contractors he intends to use who are on the minority and female bidders lists together with the total amount of money he intends to pay to subcontractors on the minority and female bidders lists. If no subcontractors on the minority and/or female bidders lists are available, the prime contractor shall so state in writing when submitting a bid.

(d) If a bid is awarded under this chapter, a proposed substitution for a subcontractor named in the bid under (b) or (c) of this section shall be submitted to the department for approval together with reasons for the proposed substitution.

* Sec. 18. AS 37.05.305 is amended by adding a new subsection to read:

(b) If the amount of state money to be used to finance a contract awarded by the University of Alaska is $50,000 or more, the contract shall be awarded in accordance with AS 37.05.230(1).

* Sec. 19. AS 37.05 is amended by adding a new section to read:

Sec. 37.05.306. APPLICABILITY TO NONPROFIT CORPORATIONS. If the amount of state money to be used to finance a contract awarded by a nonprofit corporation is $50,000 or more, the contract shall be awarded in accordance with AS 37.05.230(1).

* Sec. 20. AS 37.05.315(a) is amended to read:

(a) When an appropriation is made as a grant to a municipality, the Department of Administration shall promptly notify the municipality of the availability of the grant. When the Department of Administration receives an agreement executed by the municipality which provides that the municipality (1) will spend the grant for the purposes specified in the appropriation; (2) will allow, on request, an audit by the state of the uses made of the grant; [AND] (3) assures that, to the extent

consistent with the purpose of the appropriation, the facilities and services provided with the grant will be available for the use of the general public, and (4) will comply with AS 37.05.230(1) in the award of a contract if $50,000 or more of the contract is financed with the grant or other state money, the Department of Administration shall pay the grant directly to the municipality. The agreement executed by a municipality under this section shall be on a form furnished by the Department of Administration.

* Sec. 21. AS 37.05.315(d) is amended to read:

(d) When an appropriation is made to a department as a grant for a named recipient which is not a municipality, the department to which the appropriation is made shall promptly notify the named recipient of the availability of the grant and request the named recipient to submit a proposal to provide the goods or services, or both, for which the appropriation is made. At the same time, the department shall issue a request for proposals from other qualified persons to provide the same goods or services, or both, in the same area. The department shall contract with the named recipient unless the Office of the Governor, with due regard for any local expertise or experience among those making proposals, determines that an award of the contract to a different party would better serve the public interest. If the contract is awarded to another party than that named by the legislature, the basis of that action shall be stated in writing at the time the grant is issued. The purchase of the goods or services, or both, shall be in accordance with AS 37.05.230(1)(C) and, if the purchase is for a sum of $50,000 or more, shall be in accordance with AS 37.05.230(1)(A) and (1)(B).

* Sec. 22. AS 37.05.315(f)(2) is amended to read:

(2) The Department of Community and Regional Affairs shall

determine whether there is a qualified incorporated entity in the community area which will agree to receive the grant and administer it, subject to terms generally applicable to private grantees, and if the grant is to be used to finance a contract of $50,000 or more, subject to AS 37.05.230(1). If there is more than one such entity, the Department of Community and Regional Affairs shall select the most qualified and the grant shall be awarded to that incorporated entity for the purposes of the appropriation; however, the Department of Community and Regional Affairs shall give preference to a nonprofit corporation organized by a community for receipt of the grant.

* Sec. 23. AS 37.05.320 is amended by adding a new paragraph to read:

(5) "department" means the Department of Administration.

* Sec. 24. AS 44.33.300(2) is amended to read:

(2) the public bid requirements [AS] contained in AS 19.10.-170, 19.10.190(b) [19.10.190], AS 19.30.191(b), AS 35.15.010 - 35.15.-020, and 35.15.030(b) [AS 35.15.010 - 35.15.030] may be waived if the contract is to be performed by a contractor whose principal office is in the designated area and the contract amount is less than [DOES NOT EXCEED] $50,000;

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CS for SB 415
Title An Act Relating to Contracting and Procurement Procedure...
Requested by Fischer and Stinson Date 3/24/82

II. FISCAL DETAIL
Agency Affected Department of Administration
Program Category Affected General Government
BRU, Program, Or Subprogram(s) Affected General Services
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES		49.2	53.2	57.5	62.1	67.1
200 TRAVEL						
300 CONTRACTUAL		336.0	146.8	158.6	171.4	185.0
400 COMMODITIES		1.6	1.7	1.9	2.0	2.1
500 EQUIPMENT		10.0	0	0	0	0
600 LAND & STRUCTURES						
700 GRANTS,CLAIMS,ETC.						
TOTAL		396.8	201.7	218.0	235.5	254.2

FUNDING (Thousands of Dollars)

GENERAL FUND		396.8	201.7	218.0	235.5	254.2
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME		4	4	4	4	4
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

The contractual services expenditures include computerization and implementation of the required certified lists and preparation of request reports. It also includes funds to revise and reprint existing pamphlets and brochures to reflect statuary changes and to conduct advertising to inform minority businesses of the new regulations.

This fiscal note differs from the one supplied for SB865 in that this bill has larger preferences and greater computer complexities and reporting requirements.

IV. DATE _____ PREPARED BY George Sipos
AGENCY Department of Administration
Original: Legislative Finance PHONE 465-2250
cc: Budget and Management
Prime Sponsor (first Legislator Named)
JJ-001 (Rev. 12/81)

GE/bab
GSS2A/01

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST
Bill/Resolution No. CS for SB 415
Title An Act Relating to Contracting and P
Requested by Fischer and Stimson Date 4/25/82

II. FISCAL DETAIL
Agency Affected All
Program Category Affected All
BRU, Program, Or Subprogram(s) Affected All
(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 82	FY 83	FY 84	FY 85	FY 86	FY 87
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
** Additional Costs & Goods		6,000.0	6,480.0	6,998.4	7,558.3	8,162.9
TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND		6,000.0	6,480.0	6,998.4	7,558.3	8,162.9
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

The exact fiscal impact of this bill is difficult to analyze due to lack of sufficient data to evaluate vendor response to changes in purchasing preferences. Some out of state vendors will drop out of bidding thereby reducing competition and providing increased prices. We project increased costs of goods and service to the approximately 10% for FY 83 and we assume state expenditures will increase 8% a year. We feel both are conservative estimates.

The increased costs which we have identified will have to be absorbed by each individual agency. This fiscal note is not a request for an additional appropriation to the Department of Administration or any other Department, but reflects what we estimate the costs that this bill could be to all state agencies. This will be reflected in their reduced purchasing capabilities. Agencies will either find additional funding within their existing budgets or procure less goods and services or in some cases not procure those goods at this time and submit larger budget requests in future years.

IV. DATE _____ PREPARED BY George E'ore
AGENCY Department of Administration
PHONE 465-2240

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named)
33-001 (Rev. 12/81)

GE/bab
G552A/82

FISCAL NOTE ANALYSIS OF SB 415

As stated, in the narrative of our fiscal note, on SB 415, the fiscal impact of this bill is difficult to analyze.

We have suggested that the cost of goods and services might increase by as much as 10% or $6,000,000 in FY 83 (10% of $60.0 million = $6.0 million).

This is based on a couple of assumptions, first the National Association of State Purchasing Officials has indicated that preferences raise costs proportionate with the preference. This is difficult to substantiate based upon this assumption alone, there is currently a 5% preference at this time and increasing the preference to 10% is only a 5% increase, (i.e. 5% of $6.0 million = $3.0 million).

However, the second assumption is based upon the theory that out-of-state and in some cases in-state business may be reluctant to go through the bidding process if they are competing against a preference from 10 to 15 percent.

It is difficult to prove that people have stopped submitting bids for this reason, but some vendors have expressed this as a reason.

Possibly the best way to depict how these particular preferences might effect competition and prices is with some hypothetical examples.

EXAMPLE #1

	Bid Price	
Out-of-State Bidder	$10,000.00	
Certified Alaska Bidder	$11,000.00	
Certified Alaska Minority Bidder	$11,500.00	*Winner: If bidder is willing to drop price by 5% or to $11,000.00.

*This represents a 10% increase.

EXAMPLE #2

	Bid Price	
Out-of-State Bidder	No Bid	
Certified Alaska Bidder	$11,000.00	
Certified Alaska Minority Bidder	$12,650.00	*Winner: If bidder is willing to drop price by 5% or to $12,100.00.

*This represents a 10% increase over the low bidder, but, a 21% increase over the original out-of-state bidder.

GE/bab
GSS2A/E1

EXAMPLE #3

	Bid Price
Out-of-State Bidder	No Bid
Certified Alaska Bidder	No Bid
Certified Minority Bidder	$12,650.00 or higher *

*This represents a 26.5% increase over the original out-of-state bid. At this point the bidder will realize that there is no competition. The bidder may play it safe and only bid 15% higher than the suspected competition, but again the bidder may just as likely increase the price still further.

These examples indicate that a 10% increase may be conservative. It is not the Alaska or minority preferences which seem to be the cause for the dramatic increase but the lack of competition caused by the preference. The preferred bidders feel more secure and have less incentive to submit their best price when a free competitive market is absent.

I hope this explains in some detail how we arrived at the present figures for the fiscal note on SB 415. The figures could be higher or lower depending on which set of assumptions people choose to use. However, I till believe our fiscal note may be conservative, in that it only includes goods and services procured by the State and does not take in account the fiscal impact that this bill may present to construction contracts or municipal grants.

The increased costs which we have identified will have to be absorbed by each individual agency. The fiscal note is not a request for an additional appropriation to the Department of Administration or any other department, but reflects what we estimate the costs that this bill could be to all State agencies. This will be reflected in their reduced purchasing capabilities. Agencies will either find additional funding within their existing budgets or procure less goods and service or in some case not procure those services at this time and submit larger budget requests in future years.

As a further clarification of our fiscal estimate of this bill we will submit two fiscal notes. The first will indicate the potential fiscal impact this bill will have on the Division of General Services and Supply. The other fiscal note will be our estimate of the fiscal impact to all State agencies, as reflected in their reduced purchasing capabilities.

GE/bab
GSS2A/E2

*** (The National Association of State Purchasing Officials, who oppose any local preference statutes, estimate that a bidder's preference raises the cost of doing business proportionate with the preference.)

From a purely professional purchasing standpoint vendor preferences are not conducive to good purchasing practice nor in the purchaser's best interest. We are sympathetic to the idea of stimulating various sectors of business, however we do not believe this is the correct vehicle. A vendor preference is a weak and easy approach to the problem which will not solve it. The preference is little more than a token gesture of appeasement to an interest group. Open competition is the backbone of our free market system. To reduce or eliminate it adversely affects everyone.

PURCHASING PREFERENCES

PRO's

- New jobs are created.
- Businesses are encouraged to locate within the State.

CON's

- Arguably unconstitutional as a barrier to interstate commerce.
- In direct conflict with the principles of competition and precludes the purchaser from obtaining the best competitive price.
- Many bidders who otherwise would be interested are discouraged from competing and potential sources of supply are reduced.
- Preferred bidders feel more secure and have less incentive to submit their best prices when a free competitive market is absent.
- Results in higher costs to taxpayers, prices usually are increased by the amount of the preference.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

REVISED

I. REQUEST
Bill/Resolution No. SB 415
Title An Act Relating to Contracting and Procurement Procedure...
Requested by Fischer & Stimson Date April 23, 1981

II. FISCAL DETAIL
Agency Affected All
Program Category Affected All
BRU, Program, or Subprogram(s) Affected All
(Note: If more than one budget component is affected, separate line item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
*** Additional Costs of Goods & Services		5,500.0	5,940.0	6,415.2	6,298.4	7,482.7
TOTAL						

FUNDING (Thousands of Dollars)

GENERAL FUND		5,500.0	5,940.6	6,415.2	6,298.4	7,482.7
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The exact fiscal impact of this bill is difficult to analyze due to lack of sufficient data to evaluate vendor response to changes in purchasing preferences. Some out of state vendors will drop out of bidding thereby reducing competition and providing increased prices. We project increased costs of goods and service to be approximately 10%* for FY 82 and we assume state expenditures will increase 8% a year. We feel both are conservative estimates.

The increased costs which we have identified will have to be absorbed by each individual agency. This fiscal note is not a request for an additional appropriation to the Department of Administration or any other Department but reflects what we estimate the costs that this bill could be to all state agencies. This will be reflected in their reduced purchasing capabilities. Agencies will either find additional funding within their existing budgets or procure less goods and services or in some cases not procure those goods at this time and submit larger budget requests in future years.

IV. DATE April 23, 1981 PREPARED BY George Elgee
AGENCY Department of Administration
PHONE 465-2250

Original: Legislative Finance
cc: Budget and Management
Prime Sponsor (First Legislator Named) Fischer

33-001 (Rev. 12/80)

*** (The National Association of State Purchasing Officials, who oppose any local preference statutes, estimate that a bidder's preference raises the cost of doing business proportionate with the preference.)

From a purely professional purchasing standpoint vendor preferences are not condusive to good purchasing practice nor in the purchaser's best interest. We are sympathetic to the idea of stimulating various sectors of business, however we do not believe this is the correct vehicle. A vendor preference is a weak and easy approach to the problem which will not solve it. The preference is little more than a token gesture of appeasement to an interest group. Open competition is the backbone of our free market system. To reduce or eliminate it adversely affects everyone.

PURCHASING PREFERENCES

PRO's

- New jobs are created.
- Businesses are encouraged to locate within the State.

CON's

- Arguably unconstitutional as a barrier to interstate commerce.
- In direct conflict with the principles of competition and precludes the purchaser from obtaining the best competitive price.
- Many bidders who otherwise would be interested are discouraged from competing and potential sources of supply are reduced.
- Preferred bidders feel more secure and have less incentive to submit their best prices when a free competitive market is absent.
- Results in higher costs to taxpayers, prices usually are increased by the amount of the preference.

THE LEGISLATURE OF THE STATE OF ALASKA
TWELFTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. SB 415

Title An Act Relating to Contracting and Procurement Procedure...

Requested by Fischer & Stimson Date April 10, 1981

II. FISCAL DETAIL

Agency Affected Department of Administration

Program Category Affected General Government

BRU, Program, or Subprogram(s) Affected General Services - Administrative Services

(Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

		FY 81	FY 82	FY 83	FY 84	FY 85	FY 86
100	PERSONAL SERVICES		45.6	49.2	53.2	57.5	62.1
200	TRAVEL						
300	CONTRACTUAL		168.0	73.4	79.3	85.7	92.5
400	COMMODITIES		1.5	1.6	1.7	1.9	2.0
500	EQUIPMENT		3.6	3.9	4.2	4.5	4.9
600	LAND & STRUCTURES						
700	GRANTS, CLAIMS, ETC.						
	TOTAL		218.7	128.1	138.4	149.6	161.5

FUNDING (Thousands of Dollars)

GENERAL FUND		218.7	128.1	138.4	149.6	161.5
FEDERAL FUNDS						
OTHER (Specify Fund Source)						

POSITIONS

FULL TIME		2	2	2	2	2
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instructions, Section III)

The contractual services expenditures include computerization and implementation of the required certified lists. It also includes funds to revise and reprint existing pamphlets and brochures to reflect statuary changes and to conduct advertising to inform minority businesses of the new regulations.

IV. DATE April 23, 1981 PREPARED BY George Elgee

AGENCY Department of Administration

PHONE 465-2250

Original: Legislative Finance

cc: Budget and Management

Prime Sponsor (First Legislator Named) Fischer

33-001 (Rev. 12/80)

	POSITION TITLE			RANGE/STEP	BARG. UNIT.	LOCATION		APPROV.	DISAPP.
1	Administrative Support Technician II			8B	G	Juneau	GOV.		
2	TYPE OF POSITION: PFT	STAFF MONTHS: 12	RP No.	PCN No.	PRIORITY		FORM 12 PAGE/LINE	LEG.		

	TYPE OF EXPENDITURE		AMOUNT
	1	2	3
4	PERSONAL SERVICES: SALARY 1,433/mo.	17,196	
5	BENEFITS .1579	2,715	
6	FICA .0613	1,054	
7	HEALTH INS. 150 x 12	1,800	
8	TOTAL PERSONAL SERVICES 01		22.8
9	TRAVEL 02		
10	CONTRACTUAL 03		3.3
11	COMMODITIES 04		.5
12	EQUIPMENT 05		1.8
13	OTHER		
14	TOTAL COST		28.1

	CODE	FUNDING SOURCE	
15		FED RCPTS 1002	
16		GF MATCH 1003	
17		GEN FUND 1004	
18	902	I-A RCPTS 1007	28.1
19		PGM RCPTS 1108	
20		OTHER	
21	CONTINUATION		
22	ADDITION		

FOR B&M USE ONLY

48 KEY NUMBER _____ COLUMN NO. _____

JUSTIFICATION:

The purchasing section is presently backlogged. There is no flexibility to assume further requirements.

This position will evaluate applications for the two lists, update listing, review requirements for preferences, and maintain minority purchase records. In addition they will provide copies and updates of the certified lists to other groups covered by the legislation. They will also complete the additional standard clerical tasks necessitated by adding new groups on interested parties to the system and involving more complex and time consuming bid awards.

AGENCY _____ PROGRAM _____

BRU _____

COMPONENT _____

13 REQUEST FOR NEW POSITION.

Page _____ of _____

REVISED DATE _____

FY 82

	POSITION TITLE			RANGE/STEP	BARG. UNIT.	LOCATION		APPROV.	DISAPP
1	Clerk Typist III			8B	G	Anchorage	GOV		
	TYPE OF POSITION	STAFF MONTHS	RP No. / PCN No.	PRIORITY		FORM 12 PAGE/LINE			
2	PFT	12					LEG.		

	TYPE OF EXPENDITURE	1	2	AMOUNT 3
4	PERSONAL SERVICES: SALARY	1,433/mo.	17,196	
5	BENEFITS	.1579	2,715	
6	FICA	.0613	1,054	
7	HEALTH INS.	150 x 12	1,800	
8	TOTAL PERSONAL SERVICES	01		22.8
9	TRAVEL	02		
10	CONTRACTUAL	03		4.0
11	COMMODITIES	04		1.0
12	EQUIPMENT	05		1.8
13	OTHER			
14	TOTAL COST			29.6

	CODE	FUNDING SOURCE	
15		FED RCPTS. 1002	
16		GF MATCH. 1003	
17	100	GEN. FUND 1004	29.6
18		I-A RCPTS. 1007	
19		PGM RCPTS 1108	
20		OTHER	
21	CONTINUATION		
22	ADDITION		

FOR B&M USE ONLY

4A KEY NUMBER _____ COLUMN NO. _____

JUSTIFICATION:

The purchasing section is presently backlogged. There is no flexibility to assume further requirements.

This position will evaluate applications for the two lists, update listing, review requirements for preferences, and maintain minority purchase records. In addition they will provide copies and updates of the certified lists to other groups covered by the legislation. They will also complete the additional standard clerical tasks necessitated by adding new groups on interested parties to the system and involving more complex and time consuming bid awards.

AGENCY Administration

PROGRAM Centralized Administrative Services

BRU General Services

COMPONENT Purchasing

13 REQUEST FOR NEW POSITION.

Page _____ of _____

REVISED DATE _____

FY 82