IN THE UNITED STATES COURT OF FEDERAL CLAIMS

KEVCON, INC.,	)	
Plaintiff,	)	
v.	)	No. 09-625C
	)	(Judge Williams)
UNITED STATES,	)	
Defendant.	)	

DEFENDANT'S MOTION TO DISMISS IN PART PLAINTIFF'S SECOND AMENDED COMPLAINT, OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD, AND CROSS-MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD

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Pursuant to Rules 12(b)(1) and 12(b)(6) of the Rules of the United States Court of Federal Claims ("RCFC"), defendant, the United States, respectfully requests that the Court dismiss Counts II and IV of the second amended complaint filed by plaintiff, Kevcon, Inc. ("Kevcon"). We further respectfully request that the Court dismiss the portion of Count III seeking compensation for alleged "out-of-pocket, bid preparation, and proposal costs." See Second Am. Compl. 9 ¶ 56.[1] Finally, with respect to the entire complaint, we request that the Court deny Kevcon's motion for judgment upon the administrative record and grant our cross-motion for judgment upon the administrative record. We rely upon Kevcon's second amended complaint,

[1] "Second Am. Compl. __" refers to Kevcon's Second Amended Complaint for Declaratory Judgment and Injunctive Relief, filed January 12, 2010. References are to page and paragraph numbers. "Count __" refers to a claim for relief in plaintiff's second amended complaint. "Pl. First Supp. Br. __" refers to page numbers in Kevcon's October 22, 2009 Supplemental Brief in Support of Jurisdiction. Although Kevcon filed its first supplemental brief in support of its motion for judgment upon the administrative record regarding the original solicitation it challenged, we assume that Kevcon relies upon the same theory in challenging the second solicitation. "Pl. Cancellation Br. __" refers to page numbers in Kevcon's February 12, 2010 Supplemental Brief Regarding Cancellation of Solicitation I.

this brief, the administrative record, the supplemental materials that we have filed, and the prior filings and proceedings in this action.[2]

STATEMENT OF THE ISSUES

1. **Cancellation of Original Solicitation.** Kevcon originally challenged Navy Solicitation No. 62473-09-R-1009 ("Solicitation I" or "first solicitation") upon equal protection grounds. When it first commenced this action, Kevcon claimed that it was unconstitutionally precluded from bidding upon Solicitation I and requested that the Court cancel it. The Navy subsequently cancelled that solicitation, thereby giving Kevcon the very relief it was requesting. Should the Court dismiss Kevcon's claim upon the grounds that Kevcon is not aggrieved by the cancellation and lacks standing to challenge it?

2. **Facial Equal Protection Challenge.** This Court possesses jurisdiction to adjudicate bid protests arising from specific procurements. This Court does not possess general federal question jurisdiction. Therefore, this Court cannot entertain facial equal protection challenges to a statute. In Count II of its second amended complaint, Kevcon asks this Court to

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[2] "AR__" refers to page numbers in the public administrative record and administrative record supplements filed in this action, and "Conf. AR__" refers to page numbers in the confidential administrative record and administrative record supplements. Page numbers in the Administrative Record Respecting Cancellation are designated by "C__." Page numbers in the Administrative Record Respecting the New Solicitation are designated by "N __." "Tab" refers to a tab in one of these administrative records. Thus, for example, page one of the Administrative Record Respecting the New Solicitation would be cited as "AR N1, Tab 1."

"SM __, Tab __" refers to page and tab numbers in the supplemental materials and additional supplemental materials that we have filed, which include materials such as disparity studies that are not technically part of the administrative record because they were not before the contracting officer. We have included these materials because Kevcon's constitutional claims cannot be adjudicated without considering materials from outside the administrative record. "PIA __, Tab __" refers to page and tab numbers in the appendix we filed with our preliminary injunction response.

grant declaratory and injunctive relief precluding the Department of Defense from using the racial classifications of section 8(a) of the Small Business Act in unidentified, hypothetical procurements.

a. Should the Court dismiss Kevcon's facial constitutional challenge for lack of jurisdiction, where the subject of that challenge is not a specific, existing solicitation, but rather hypothetical solicitations that Kevcon has not identified and that may not currently exist?

b. Alternatively, should the Court deny Kevcon's motion for judgment upon the administrative record, and grant our cross-motion, because Kevcon has failed to establish that it is an interested party to the unidentified, hypothetical solicitations that it seeks to enjoin pursuant to its facial constitutional challenge?

3. **Equal Protection Challenge to the Navy's New Solicitation.** Kevcon claims that there is no evidence demonstrating that the section 8(a) program serves a compelling interest and is narrowly tailored. In support of this cross-motion, however, we have provided voluminous materials that establish such a compelling interest and show that the program is narrowly tailored. Should the Court grant judgment in favor of the Government upon the administrative record because the section 8(a) program is constitutional?

4. **Bid Preparation and Proposal Costs.** Kevcon alleges that it was unconstitutionally precluded from bidding upon the new Navy solicitation that it has identified. It nonetheless seeks bid preparation and proposal costs. Should the Court dismiss Kevcon's claim for such costs because its position is illogical, has no factual predicate, and lacks any legal basis?

5. **Attorney Fees and Costs.** To obtain attorney fees and costs under the Equal Access to Justice Act ("EAJA"), a plaintiff must be a prevailing party in the litigation, among other requirements. Further, parties are precluded by statute and case law from filing an EAJA application until after the Court issues a final, non-appealable judgment in their favor. Should the Court dismiss Kevcon's EAJA claim where Kevcon has not obtained a favorable judgment or any other relief, and therefore is precluded by statute and case law from filing an EAJA application?

STATEMENT OF THE CASE

The Small Business Administration ("SBA") administers a business development program pursuant to section 8(a) of the Small Business Act, 15 U.S.C. § 637(a). The SBA 8(a) program is a business development program designed to provide small disadvantaged business owners an opportunity to gain a foothold in Federal contracting by limiting a small number of contracting opportunities with Federal agencies for 8(a) firms, as well as providing management and technical assistance.

On July 1, 2009, the Navy issued the first solicitation that Kevcon challenged in this case. On January 4, 2010, the Navy cancelled that solicitation. Accordingly, on January 7, 2010, the Government moved to dismiss Kevcon's protest because, among other things, it was moot. Kevcon subsequently withdrew its constitutional challenge to the first solicitation, and is apparently not pursuing its claims for bid preparation and proposal costs, or EAJA fees, regarding that solicitation. To the extent that any of those claims are still pending, this Court should grant our motion to dismiss.

The same day that the Navy cancelled the first solicitation, it published a notice that it intended to issue a new 8(a) solicitation ("Solicitation II" or "second solicitation") for different Navy requirements. On January 12, 2010, Kevcon filed a second amended complaint, challenging the second solicitation and – despite the obvious mootness of the original protest – continuing to ask that the Court set aside the first solicitation, and award Kevcon bid preparation and proposal costs. Second Am. Compl. 8 ¶¶ 43-47 (Count I). Contradicting that request, Kevcon also challenged the Navy's cancellation of the first solicitation. Id. at 10 ¶ 65 (Count IV). Though Kevcon subsequently withdrew its constitutional challenge to the first solicitation, it continues to challenge the cancellation of Solicitation I. See A1-5,[3] Jan. 29, 2010 Tr. 33:14-37:15.

Kevcon also asserts a facial equal protection challenge to the 8(a) program, Second Am. Compl. 9 ¶¶ 48-51 (Count II), and a constitutional challenge to the second solicitation, in which it seeks declaratory relief, injunctive relief, alleged out-of-pocket expenses, and alleged bid preparation and proposal costs. See Second Am. Compl. 9 ¶¶ 52-57 (Count III). Contradicting its claim for bid preparation and proposal costs, however, Kevcon acknowledges that it was not permitted to submit a proposal for a second solicitation because it is not a section 8(a) firm. See id. at 6 ¶¶ 26-27. Finally, Kevcon prematurely seeks EAJA fees pursuant to 28 U.S.C. § 2412. Id. at 10 ¶¶ 58-64, 66.

In sum, although Kevcon no longer challenges Solicitation I, it now asserts: (1) a challenge to the Navy's cancellation of Solicitation I, which is completely inconsistent with the original basis of Kevcon's protest; (2) a facial constitutional challenge alleging that the section

[3] "A__" refers to page numbers in the addendum attached to this brief.

8(a) program is unconstitutional – a claim over which this Court lacks jurisdiction; (3) an as-applied equal protection challenge to Solicitation II; (4) an unfounded claim for bid preparation and proposal costs related to Solicitation II; and (5) a premature EAJA claim. Kevcon's cancellation claim, facial constitutional challenge, bid preparation and proposal costs claim, and EAJA claim must be dismissed. This leaves Kevcon's as-applied challenge to Solicitation II, a claim for which the Government is entitled to judgment upon the administrative record.

STATEMENT OF THE FACTS

I. The Section 8(a) Program

A. Standards For Firms

The SBA's 8(a) program is a business development program for small businesses that are at least 51 percent unconditionally owned and controlled by individuals who are both socially and economically disadvantaged. 15 U.S.C. § 637(a); see also 13 C.F.R. § 124.1. These small businesses may apply to the SBA and, once admitted into the program, are eligible to receive technological, financial, and practical assistance, along with the opportunity to bid on Government contracts reserved for 8(a) firms, for up to nine years.

A business qualifies as "small" if it meets the standards set forth in 13 C.F.R. Part 121. 13 C.F.R. § 124.102; see 15 U.S.C. § 632(a)(1)-(3). A business is "disadvantaged" if at least 51 percent of the firm is unconditionally owned and controlled by one or more individuals who are both socially and economically disadvantaged. See 15 U.S.C. § 637(a)(4)(A)-(B); 13 C.F.R. § 124.105. "Socially disadvantaged" individuals are those who have been "subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups without regard to their individual qualities." 13 C.F.R. § 124.103(a); see 15 U.S.C.

§ 637(a)(5). "Economically disadvantaged" individuals are those socially disadvantaged individuals "whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged." 13 C.F.R. § 124.104(a); see 15 U.S.C. § 637(a)(6)(A).[4]

In 1978, Congress enacted a rebuttable presumption that individuals of specific racial or ethnic groups (e.g., blacks and Hispanics) are socially disadvantaged. 13 C.F.R. § 124.103(b); see 15 U.S.C. §§ 631(f)(1), 637(d)(3)(C). As this presumption is rebuttable for any minority individual, it may be overcome by evidence demonstrating that the individual owner seeking 8(a) certification has not been personally subjected to discrimination. 13 C.F.R. § 124.103(b)(3). The application of the presumption may be challenged in specific cases. See 13 C.F.R. §§ 124.103(b)(3), 124.112(c), 124.517(e); see also 13 C.F.R. § 121.1001(a)(2). In addition, a non-minority individual (i.e., any individual who is not a member of one of these specified groups), may be admitted to the 8(a) program by establishing that he or she has suffered similar social disadvantage under the criteria set forth in 13 C.F.R. § 124.103(c)(1). As of 2008, 2.3 percent of certified 8(a) business owners were white.[5]

An individual or firm can participate in the 8(a) program only once, 13 C.F.R. § 124.108(b); see 15 U.S.C. § 636(j)(11)(B), (C), and may remain in the 8(a) program for only

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[4] To qualify as economically disadvantaged, an individual entering the program must have a net worth below $250,000, not counting the individual's equity in the firm and primary personal residence. 13 C.F.R. § 124.104(c)(2).

[5] See U.S. Small Business Administration, Fiscal Year 2008: Report to the U.S. Congress on Minority Small Business and Capital Ownership Development ("2008 SBA Report"), PIA 2021, Tab O.

nine years, and then only if the firm or individual continues to meet all of the eligibility requirements. 13 C.F.R. § 124.2; see 15 U.S.C. §§ 636(j)(10)(E), 636(j)(10)(H), 636(j)(15). A firm must leave the 8(a) program before the end of nine years if it has attained its business objectives as set forth in its business plan on file with the SBA and has demonstrated the ability to compete in the marketplace without further assistance or if it has outgrown the definition of a "small business." See 13 C.F.R. § 124.302(a)(1)-(2).

B. Placement Of Contracts Into The 8(a) Program

A Federal agency may ask the SBA to place a procurement contract into the 8(a) program. 15 U.S.C. § 637(a)(1)(A); see also Totolo/King v. United States, 87 Fed. Cl. 680, 695 (2009). Once the SBA places a contract into the 8(a) program, bidding is limited to 8(a) firms. The SBA is barred from awarding an 8(a) contract, however, "if the award of the contract would result in a cost to the awarding agency which exceeds a fair market price." 15 U.S.C. § 637(a)(1)(A); see also 48 C.F.R. § 19.806(b).

The SBA also takes steps to minimize the impact of the 8(a) program on non-8(a) firms. For example, the SBA will not accept a procurement for the 8(a) program where doing so would have a negative effect on an individual, small business, a group of small businesses in a specific geographic location, or other small business program. 13 C.F.R. § 124.504. In reality, agency use of the 8(a) program reserves an exceedingly small portion of Federal contract dollars for 8(a) firms. For example, in fiscal year ("FY") 2007, only 2.67 percent of the $460 billion Federal

contracting budget was designated for 8(a) firms.[6] The Small Business Act requires SBA to submit to Congress an annual assessment of the 8(a) program. 15 U.S.C. § 636(j)(16)(B).

II. The Navy's Cancellation Of The First Solicitation

The plaintiff in this case, Kevcon, alleges that it is a service-disabled, veteran-owned, small business located in California. Second Am. Compl. 2 ¶ 4. Kevcon's president, Kevin Kutina, asserts that Kevcon performs minor construction, addition, renovation, alteration, and repair work, and has performed such work under contracts with Government entities. Second Am. Compl., Exh. E, Kutina Affidavit at 2-3.

The Navy issued the first 8(a) solicitation that Kevcon challenged on July 1, 2009. See AR 62, Tab 6. The solicitation was for minor construction, addition, renovation, alteration, and repair of various types of non-residential buildings at the Marine Corps Base, Camp Pendleton, California, and the Naval Weapons Station, Fallbrook Annex, California. Second Am. Compl. 3 ¶ 11. Kevcon did not submit a proposal in response to this solicitation. See id., Exh. E, at 3. Kevcon filed its protest of the first solicitation with this Court on September 24, 2009.

The Navy cancelled the first solicitation on January 4, 2010. AR C5-6. The Navy indicated that it would no longer use the 8(a) program to obtain the services that it originally had sought to acquire through that solicitation. AR C6. On January 15, 2010, the Navy issued a Service Disabled Veteran Owned Small Business solicitation (the "replacement solicitation") for work that would have been provided by Solicitation I had that solicitation not been cancelled. AR C13-14, Tab 5. Although the Navy's decision to cancel the first solicitation disposed of the

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[6] Federal Procurement Data System – Next Generation, Federal Procurement Report, FY 2007, Section III: Agency Views, SM 41324-25, Tab 65.

basis for Kevcon's objection to that solicitation, and although Kevcon was eligible to bid on the replacement solicitation, Kevcon has inexplicably failed to withdraw its claim challenging the cancellation of the first solicitation.

III. The Second Solicitation

On January 4, 2010, the Navy issued the second solicitation for a multiple award construction contract for new construction, design services, renovation, revitalization, alteration, and repair of various facilities in Southern California, Arizona, and New Mexico, among other locations. AR N1, Tab 1. The second solicitation is unrelated to the first solicitation.

The second solicitation is limited to qualified firms in the 8(a) program. Id. In its second amended complaint dated January 12, 2010, Kevcon asserted several new claims premised upon a challenge to the second solicitation. Kevcon's main claims now are a facial equal protection challenge to the 8(a) program – with respect to which this Court lacks jurisdiction – and an equal protection challenge to the second solicitation. In addition to the administrative record, we have filed voluminous supplemental materials, including an expert report, that demonstrate that there is a strong basis in the evidence supporting the constitutionality of the 8(a) program and, accordingly, of the second solicitation.

The Navy has agreed not to award a contract pursuant to the second solicitation earlier than October 30, 2010.

SUMMARY OF THE ARGUMENT

1. Kevcon lacks standing to challenge the cancellation of the first solicitation because it had requested cancellation of the first solicitation, and has now received the relief it requested.

2. Kevcon's challenges, and efforts to enjoin all solicitations and contracts that contain racial classifications under the Department of Defense ("DOD") portion of SBA's 8(a) program, must be dismissed because the Court lacks jurisdiction to entertain such claims. This Court's bid protest jurisdiction is defined by 28 U.S.C. § 1491(b). That section confines this Court's jurisdiction to actions brought "by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

Kevcon's facial challenge pertains to a multitude of unspecified solicitations and contracts, including hypothetical solicitations and contracts that have not yet been issued or awarded. This Court's jurisdiction, however, is limited to "objections to a solicitation," that is, a specific solicitation, not unspecified or hypothetical solicitations. Further, Kevcon's challenge is so broad that it covers solicitations for goods and services that Kevcon has not alleged it can provide and presumably does not provide and which, in the aggregate, would exceed the capacity of a small business like Kevcon. Kevcon accordingly cannot demonstrate that it is an "interested party" regarding the solicitations and contracts that it seeks to enjoin.

3. The Government is entitled to judgment upon the administrative record regarding Kevcon's constitutional challenge to the second solicitation. Kevcon relies upon an over-reading

of Rothe Dev. Corp. v. Dep't of Defense, 545 F.3d 1023 (Fed. Cir. 2008) ("Rothe VII"), which addressed a facial constitutional challenge to a different procurement statute. The evidence considered by the Rothe VII court in support of a compelling interest consisted primarily of six studies that were before Congress prior to 2006 in support of 10 U.S.C. § 2323. However, both before and after Rothe VII was issued, Congress examined voluminous additional documentation supporting the necessity for the 8(a) program, including materials before Congress that were not before the Federal Circuit in Rothe. A similarly lengthy public record created by Congress, demonstrating the existence and effects of discrimination in public contracting, has been considered by courts in multiple cases in the past decade. As discussed below, in every case other than Rothe VII, the courts have upheld the constitutionality of Federal contracting programs with race-conscious provisions.[7] Moreover, other evidence not before Congress also supports the continued need for the 8(a) program.

4. Kevcon's "claim" for alleged out-of-pocket, bid preparation, and proposal costs in connection with the second solicitation must be dismissed because Kevcon is precluded from bidding upon that solicitation and, as a result, its claim for such costs is illogical and has no factual predicate or legal basis.

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[7] See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 492 (1980); Western States Paving Co. Inc. v. Washington Dep't of Transp., 407 F.3d 983, 1003 (9th Cir. 2005) (considering several decades of Congressional evidence in finding constitutional the Transportation Equity Act For The 21st Century ("TEA-21"), Pub. L. No. 105-178, 112 Stat. 107 (1998)); Sherbrooke Turf, Inc. v. Minn. Dep't of Transp., 345 F.3d 964, 970 (8th Cir. 2003) (also upholding TEA-21); Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1176 (10th Cir. 2000) ("Adarand VII"); Northern Contracting, Inc. v. Illinois, No. 00 C 4515, 2004 WL 422704 (N.D. Ill. Mar. 3, 2004) (not reported).

5. Kevcon's EAJA claim is premature and should be dismissed because Kevcon is not a prevailing party and the Court has not issued a final, non-appealable judgment.

ARGUMENT

I. Legal Standards

A. Subject Matter Jurisdiction

"'Jurisdiction is a threshold issue and a court must satisfy itself that it has jurisdiction to hear and decide a case before proceeding to the merits.'" Ultra-Precision Mfg. Ltd. v. Ford Motor Co., 338 F.3d 1353, 1356 (Fed. Cir. 2003) (quoting PIN/NIP, Inc. v. Platte Chem. Co., 304 F.3d 1235, 1241 (Fed. Cir. 2002)). When a Federal court reviews the jurisdictional sufficiency of a complaint, "its task is necessarily a limited one." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). "'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 74 U.S. 506, 514 (1868)).

Where a court's subject matter jurisdiction is placed in issue, the plaintiff bears the burden of establishing jurisdiction. McNutt v. Gen. Motors Acceptance Corp. of Ind., 298 U.S. 178, 189 (1936); Myers Investigative & Sec. Servs., Inc. v. United States, 275 F.3d 1366, 1369 (Fed. Cir. 2002) (burden on plaintiff to establish standing, a jurisdictional issue). In deciding a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), the Court may consider evidentiary matters outside the pleadings. Indium Corp. of Am. v. Semi-Alloys, Inc., 781 F.2d 879, 884 (Fed. Cir. 1985); see also Cedars-Sinai Med. Ctr. v. Watkins, 11 F.3d 1573,

1584 (Fed. Cir. 1993). Whether this Court possesses subject matter jurisdiction is a legal issue. See Ramcor Servs. Group, Inc. v. United States, 185 F.3d 1286, 1288 (Fed. Cir. 1999).

B. Failure To State A Claim Upon Which Relief May Be Granted

"A motion to dismiss . . . for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the plaintiff do not entitle him to a legal remedy." Boyle v. United States, 200 F.3d 1369, 1372 (Fed. Cir. 2000) (citation omitted). "In ruling on a RCFC 12(b)(6) motion to dismiss, the court must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to plaintiff. . . . Nevertheless, 'conclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.'" Figueroa v. United States, 57 Fed. Cl. 488, 497 (2003), aff'd, 466 F.3d 1023 (Fed. Cir. 2006) (internal citations omitted) (quoting Briscoe v. Lattue, 663 F.2d 713, 123 (7th Cir. 1981), aff'd, 460 U.S. 325 (1983)). Thus, although a complaint "'does not need detailed factual allegations,'" it must provide the grounds upon which plaintiff claims it is entitled to relief, which "'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" Totes-Isotoner Corp. v. United States, 594 F.3d 1346, 1354 (Fed. Cir. 2009), petition for cert. filed, (U.S. May 6, 2010) (No. 09-1360) (quoting Bell Alt. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

II. Kevcon Lacks Standing To Challenge The Cancellation Of Solicitation I (Count IV)

Kevcon lacks standing to challenge the cancellation of the first solicitation for three reasons. First, in its initial complaint and two amended complaints, Kevcon requested that the solicitation be cancelled; Kevcon accordingly cannot now complain that the Navy voluntarily gave it the very relief it requested. Second, Kevcon cannot demonstrate harm from the

cancellation. Indeed, the cancellation resulted in the issuance of a solicitation limited to service disabled veteran small businesses, for which Kevcon was eligible to bid. Third, Kevcon cannot argue that the alleged harm it identifies – the issuance of 8(a) solicitations – is capable of repetition but evades review, because that argument would preserve its challenge to the original solicitation, not the cancellation. Furthermore, Kevcon's current challenge to the second solicitation demonstrates that the issue of the constitutionality of the 8(a) program has not evaded review.

A. The Navy Voluntarily Provided Kevcon The Relief It Sought

Kevcon lacks standing to challenge the receipt of the very relief it sought in this protest. Kevcon's complaint states, "the Court is requested to set [Solicitation I] aside as unlawful and . . . permanently enjoin all procurement proceedings involving it[,]" including the award of a contract. Second Am. Compl. 8 ¶ 45, see also 11 (prayer for relief) ¶ 2.[8] Yet the same complaint requests that the Court "[d]eclare the NAVY's decision to cancel [Solicitation] I arbitrary, capricious, an abuse of discretion and not otherwise in accordance with Federal procurement law and enjoin the cancellation decision." Id. at 11 (prayer for relief) ¶ 6. Taken together, the contradictory relief Kevcon requested would be impossible to grant. The Court cannot both cancel the solicitation and enjoin its cancellation.[9]

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[8] See also Second Am. Compl. 5-6 ¶ 25 ("Unsupported uses of racial classifications, which include all uses of section 8(a), by DOD, must be enjoined immediately."); 7 ¶ 32 ("[T]his Complaint is also a challenge to the Navy's decision to competition restrict [Solicitations] I & II to afford preferential treatment based upon racial classifications as contemplated by the 8(a) set-aside program."); 8 ¶ 41 ("KEVCON requests that the [solicitations] be declared unlawful and set aside, enjoining and future award . . . .").

[9] Kevcon's earlier complaints also requested that the first solicitation be cancelled. Although Kevcon has withdrawn its substantive challenges to Solicitation I, it did so only after

A party that files a protest against a solicitation and requests that the Court set it aside cannot thereafter challenge the Government's unilateral decision to cancel the solicitation. Permitting such a challenge could lead theoretically to an endless circle of challenges. For example, if the Government were to reverse the cancellation and reissue the original section 8(a) solicitation, Kevcon could then dismiss its challenge to the cancellation and file a new claim challenging the solicitation upon constitutional grounds. And if the Government should again cancel the solicitation, Kevcon could then reverse its position.[10] This Court should reject this absurd possibility.

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they became moot due to the cancellation.

[10] This case presents a situation similar, but not identical, to cases involving issues of judicial estoppel. Cf., Marshall v. Dep't of Health and Human Serv., 587 F.3d 1310, 1315 (Fed. Cir. 2009) ("Judicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (citing New Hampshire v. Maine, 532 U.S. 742, 749 (2001)) (additional citation omitted); Trustees in Bankruptcy of North American Rubber Thread Co., Inc. v. United States, 593 F.3d 1346, 1354 (Fed. Cir. 2010) ("Judicial estoppel applies just as much when one of the tribunals is an administrative agency as it does when both tribunals are courts.") (citing Lampi Corp. v. Am. Power Prod., Inc., 228 F.3d 1365, 1377 (Fed. Cir. 2000)); First Annapolis Bancorp, Inc. v. United States, 89 Fed. Cl. 765, 803 (2009) (trial court has discretion to invoke judicial estoppel to preclude argument; although there is no precise formula for invoking judicial estoppel, certain factors inform trial court's decision: positions clearly inconsistent; party succeeded in persuading trial court of earlier position; unfairness to opposing party). Although this is not a case in which a plaintiff has prevailed before a court or administrative tribunal, the harm that judicial estoppel seeks to prevent – taking inconsistent positions by a party who received what it sought in earlier proceedings – exists here. Further, Kevcon's challenge to the cancellation is not simply contrary to a "position" it took earlier; it is directly contrary to the very essence of its constitutional challenge.

B. Kevcon Was Not Harmed By The Cancellation Of Solicitation I

Kevcon is not harmed by the cancellation of the solicitation, and accordingly lacks standing to challenge it. Indeed, Kevcon's request that the Court reverse the cancellation would deprive Kevcon of the potential contracting opportunity that substituted for the cancelled solicitation – a position entirely inconsistent with its protest. Thus, far from harming Kevcon, the cancellation benefitted the firm by providing it with an additional business opportunity.

Certainly, Kevcon cannot claim that it lost any contracting opportunity when the solicitation for which it was ineligible to compete was cancelled. In addition, Kevcon's challenge to the cancellation of Solicitation I is entirely inconsistent with its constitutional challenge to Solicitation II. Kevcon is accordingly precluded from maintaining its challenge to the cancellation. The essence of Kevcon's claim is that Solicitation II is unconstitutional because it was issued pursuant to the section 8(a) program, allegedly in violation of Kevcon's equal protection rights. Kevcon's request that the cancellation of Solicitation I be enjoined (Second Am. Compl. 11 (prayer for relief) ¶ 6), cannot stand at the same time as its constitutional challenge, because Kevcon essentially asks the Court, in the same case, to enjoin Solicitation II as unconstitutional, while at the same time order that the Government proceed with the allegedly unconstitutional Solicitation I. It is unreasonable for Kevcon to expect the Court to issue such inconsistent relief, especially since Kevcon would undoubtedly challenge Solicitation I as unconstitutional when reinstated. Thus, Kevcon must choose which relief it wants in this case; it cannot have it both ways.[11]

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[11] See Pantry, Inc. v. Stop-N-Go Foods, Inc., 777 F. Supp. 713, 718 (S.D. Ind. 1991) ("When a matter is in the pleading stage, a plaintiff may plead alternative legal and equitable theories of relief because it is unclear which remedy will be supported by the evidence. A party

C. The Capable-Of-Repetition-Yet-Evading-Review Exception Is Inapplicable

Kevcon cannot challenge the cancellation upon the basis that the issuance of future 8(a) solicitations would be capable of evading review. First, the effect of the doctrine that preserves standing because the harm complained of is "capable of repetition yet evading review" is to preserve the initial, underlying claim, not to permit the plaintiff to challenge the action that mooted that claim. See, e.g., Davis v. Fed. Election Comm'n, 128 S. Ct. 2759, 2769 (2008) (permitting continuation of a Free Speech challenge to an election law after the election had occurred). Second, Kevcon's amendment of its complaint to assert a claim against the second 8(a) solicitation illustrates that the alleged harm – issuance of an 8(a) solicitation – while capable of repetition, has not evaded review.

Accordingly, Kevcon's statements asserting or implying that subsequent 8(a) solicitation issuances are capable of evading review are belied by Kevcon's own behavior in this case. See Second Am. Compl. 5 ¶ 21; Pl. Cancellation Br. 5-6 (quoting Northeastern Florida Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville, Florida, 508 U.S. 656, 661-62

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must elect between inconsistent forms of relief when both forms of relief become ripe to choose between them.").

(1993)).[12] Moreover, had Kevcon not amended its complaint, it could have protested the new 8(a) solicitation in an independent protest action. See Second Am. Compl. 8 ¶ 40.

D. Kevcon's Remaining Arguments Are Immaterial

Kevcon raises a series of arguments concerning the cancellation of Solicitation I, but because Kevcon clearly lacks standing to challenge the cancellation, requiring dismissal as a matter of law, these arguments simply are red herrings. Accordingly, we discuss Kevcon's accusations only briefly below.

First, Kevcon claims that the Navy cancelled Solicitation I because it allegedly knew it could not prevail in this action, so the reasons given for the cancellation were "pretext." Second Am. Compl. 10 ¶ 65; Pl. Cancellation Br. 3.

Kevcon's claim of pretext is unfounded. SBA forthrightly stated that the reason it withdrew Solicitation I from the 8(a) program was to "enable the Department of the Navy to receive necessary maintenance services in a more efficient manner[,]" AR C000001, Tab 1, recognizing that this Court's October 2, 2009 order "stated that the Navy would not proceed to award a contract until the case is resolved." AR C00004, Tab 2. The Navy cancelled Solicitation I because the SBA had withdrawn it from the 8(a) program. There is, accordingly,

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[12] Kevcon also raises, in defense of its challenge to the cancellation, the notion that its challenge to the 8(a) program as a whole is not moot, quoting at length the District of Columbia Circuit's opinion in Dynalantic Corp. v. Dep't of Defense, 115 F.3d 1012, 1015 (D.C. Cir. 1997). See Pl. Cancellation Br. 6-7; see also Second Am. Compl. 8 ¶ 40. Kevcon's argument is unpersuasive. First, as we demonstrate later in this motion, this Court lacks subject matter jurisdiction to entertain Kevcon's challenge to the entire 8(a) program, in contrast to the district court in Dynalantic, which possessed general federal question jurisdiction. Second, even if this Court possessed jurisdiction over Kevcon's challenge to the entire 8(a) program, that would not confer upon Kevcon standing to challenge the cancellation of the original solicitation, because the cancellation is the very relief Kevcon requested, and because the cancellation did not harm it.

no basis for Kevcon's allegation that "[i]nexplicably the Navy does not give a single reason much less a rational reason for the cancellation of [Solicitation] I." Second Am. Compl. 10 ¶ 65; see also Pl. Cancellation Br. 3. Nor is there any basis for the claim that the Navy used a "pretext" in justifying the cancellation. See Pl. Cancellation Br. 3-5.[13]

Kevcon's other assertion respecting the cancellation, that the new 8(a) solicitation was intended as a substitute for the cancelled solicitation, Second Am. Compl. 3 ¶ 14, is equally irrelevant. Kevcon has been able to challenge the new 8(a) solicitation in this case, so it has no cause to complain about any alleged substitution.

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[13] This Court has stated that cancelling a protested solicitation, "far from indicating 'bad faith,' as plaintiff alleges, represents a commendable and salutary government willingness to accommodate the concerns of plaintiff (and perhaps other potential bidders)." CW Gov't Travel, Inc. v. United States, 46 Fed. Cl. 554, 559 (2000); see also Dismas Charities, Inc. v. United States, 61 Fed. Cl. 191, 202 (2004) (agency "recognized a problem . . . and rectified it prior to award – an action that should be commended, not discouraged"); Brickwood Contrs., Inc. v. United States, 49 Fed. Cl. 738, 749 (2001), rev'd on other grounds, 288 F.3d 1371 (Fed. Cir. 2002) (Court of Federal Claims has a policy against "discourag[ing] . . . self-corrective action . . . .").

This Court has indicated that contracting officers have broad discretion to take corrective action to ensure fair competition in light of litigation risk, given issues raised by a protester. See Seaborn Health Care, Inc. v. United States, 55 Fed. Cl. 520, 527 (2003) (citing Omega World Travel, Inc. v. United States, 54 Fed. Cl. 570, 574 (2002)); DGS Contract Serv., Inc. v. United States, 43 Fed. Cl. 227, 238 (1999). When "attorneys and procurement officials. . . t[ake] a hard look at the alleged defects in the solicitation process and decide[] to take corrective action[,] . . . they act[] responsibly and ethically." Griffy's Landscape Maint. LLC v. United States, 51 Fed. Cl. 667, 675 (2001). Moreover, taking corrective action in light of perceived litigation risk is not an indication that the agency believes its position on the merits is flawed, because taking corrective action is not an admission of error. See ManTech Tels. and Inf. Sys. Corp. v. United States, 49 Fed. Cl. 57, 72 & n.24 (2001), aff'd, 30 Fed. Appx. 995 (2002) (citing CCL Serv. Corp. v. United States, 43 Fed. Cl. 680, 692 (1999)). In any event, given that Kevcon was not even a bidder on the cancelled solicitation and has no standing to challenge the cancellation, the reason for the cancellation is not properly before the Court.

Further, although not relevant, the record demonstrates that the cancelled 8(a) solicitation and the new 8(a) solicitation are unrelated and that the new solicitation was not a substitute for the cancelled solicitation. First, the Navy will meet the requirements of the cancelled 8(a) solicitation with a combination of a HUBZone and a service disabled veteran owned small business ("SDVOSB") set-aside, both of which were in the process of being developed at the time that the 8(a) solicitation was cancelled. See AR C000009 (describing the market research for HUBZone and SDVOSB set-asides for small construction projects at the Marine Corps Base, Camp Pendleton, and the Naval Weapons Station, Fallbrook Annex); C000013-18 (competitive HUBZone and SDVOSB procurements for small construction work at those sites).[14] Indeed, the new 8(a) solicitation was planned long before Kevcon brought its protest against the cancelled solicitation, demonstrating that it was not intended as a substitute for the cancelled solicitation, but rather, as a separate concurrent solicitation. See Conf. AR N650, Tab 5 (Plan of Action and Milestones shows work on new 8(a) solicitation beginning on August 19, 2009).

Moreover, the new 8(a) solicitation differs from the cancelled solicitation both in scope and in the contracting mechanism it uses. Kevcon itself admits that the new 8(a) solicitation is "broader in location" than the cancelled solicitation. Second Am. Compl. 3 ¶ 14. Indeed, Kevcon describes the cancelled solicitation as being "for minor construction, addition,

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[14] Kevcon attempts to create confusion by suggesting that, because the Navy's Determination and Findings ("D&F") respecting cancellation contain electronic signatures from September and November 2009, the D&F does not serve to justify the January 4, 2010 cancellation. See Pl. Cancellation Br. 2-3. Yet Kevcon explains this alleged discrepancy itself: "[T]he D&F must have been initially drafted on September 17, 2009 and modified after receipt of the SBA's December 17, 2009 letter." Id. at 3. Indeed, the D&F still appears under the heading "Agency Protest," referencing the decision in Kevcon's agency protest from which it was modified. C000002. There is nothing nefarious about using an old document as a template for a new document – which is exactly what happened here.

renovation, alteration and/or repair of various types of non-residential buildings with the Marine Corps Base, Camp Pendleton and the Naval Ordnance Center at Fallbrook, [California] . . . restricted to eligible 8(a) firms with a bona fide office within the jurisdiction of the [SBA] of California." Second Am. Compl. 3 ¶ 11. By contrast, Kevcon describes the new 8(a) solicitation as being "for new construction, renovation, revitalization, alteration [and] repair at various locations restricted to eligible 8(a) firms with a bona fide office within the jurisdiction of the [SBA] Los Angeles, San Francisco, Santa Ana, Phoenix and Albuquerque District Offices." Id. at 3 ¶ 13. Solicitation II is also greater in dollar amount – $100 million – rather than $50 million for Solicitation I.[15] See 000062; N000013. Plainly, the new 8(a) solicitation covers far more territory and concerns far more money than the cancelled solicitation did.

In addition, the cancelled solicitation was a job order contract for one awardee, while the new solicitation is a multiple award contract for three or more awardees. See AR 000062; N000013. In this respect as well, the new solicitation does not substitute for the cancelled solicitation.

Finally, because Kevcon cannot demonstrate that the new solicitation substitutes for the cancelled solicitation, its allegations of bad faith stemming from the alleged substitution, see Second Am. Compl. 10 ¶ 65, are unsupportable.

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[15] Solicitation II originally had a dollar value of $500 million. On February 1, 2010, the amount was modified to $100 million. First Supplemental AR N651, Tab 6.

III. This Court Lacks Jurisdiction To Entertain Kevcon's Facial Challenge To Solicitation II (Count II)

This Court's procurement protest jurisdiction is defined by 28 U.S.C. § 1491(b). That section confines this Court's jurisdiction to actions "by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement." 28 U.S.C. § 1491(b)(1).

This Court lacks jurisdiction to entertain Kevcon's sweeping claim against SBA's entire 8(a) program as it relates to DOD contracts. Kevcon requests that the Court "permanently enjoin all use of 8(a)'s racial classifications by DOD." Second Am. Compl. 9 ¶ 51; see also id. at 11 (prayer for relief) ¶ 4 (seeking a declaration that "the use of section 8(a)'s racial classifications by DOD in any procurement is agency action 'not in accordance with law' and 'contrary to constitutional right, power, privilege, or immunity.[']"). Thus, Kevcon asserts a facial equal protection challenge that seeks to enjoin the Defense Department from using the 8(a) program in connection with hypothetical and unidentified solicitations. If Kevcon's motion is granted, the scope of the injunctive relief that Kevcon seeks, at a minimum, could result in an injunction against all existing 8(a) solicitations, as well as any future DOD 8(a) contracts and solicitations.

A. The Statute Granting This Court Jurisdiction To Entertain Bid Protests, 28 U.S.C. § 1491(b), Does Not Provide Jurisdiction Over Kevcon's Facial Constitutional Challenge

Kevcon cannot demonstrate that section 28 U.S.C. § 1491(b)'s grant of jurisdiction to "render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract" (emphasis added) – that is, an objection to a

specific, existing solicitation for a specific proposed contract – provides jurisdiction to consider challenges to unidentified, hypothetical, and even nonexistent solicitations.

The plain language of section 1491(b) provides for no such sweeping jurisdiction. The language, "a solicitation . . . for a proposed contract," can only refer to an existing, identified solicitation. See Fire-Trol Holdings, LLC v. United States, 62 Fed. Cl. 440, 444-45 (2004) ("There must be '*outstanding* a specific viable solicitation' before Fire-Trol can establish that it is a bidder or offeror. . . . Though Fire-Trol has expressed its intention to bid in response to solicitations to be issued during the [agency's] 2005 procurement for wildland fire retardant, it concedes that no such solicitation has been issued. . . . Therefore, Fire-Trol is not now an 'interested party' within the meaning of 28 U.S.C. § 1491(b)(1).") (quoting Omega World Travel, Inc. v. United States, 9 Cl. Ct. 623, 628 (1986)). Congress simply did not provide this Court with jurisdiction to render advisory opinions upon solicitations that have not been issued or identified.

The requirement that any objection be raised by an "interested party" reinforces this interpretation. 28 U.S.C. § 1491(b); see American Fed. of Gov't Employees, AFL-CIO v. United States, 258 F.3d 1294, 1301, 1302 (Fed. Cir. 2001) ("[W]aivers of sovereign immunity, such as that set forth in § 1491(b)(1), are to be construed narrowly." . . . Appellants lacked standing because they were not "actual or prospective bidders or offerors") (citation omitted). The interested party requirement is rendered meaningless if a specifically identified, existing solicitation is not required because, if a solicitation does not exist, a plaintiff cannot be an

interested party, and if a solicitation is not identified, the Court has no way of determining whether a plaintiff is an interested party.[16]

Similarly, the jurisdictional statute provides that, "[t]o afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief . . . ." 28 U.S.C. § 1491(b)(2) (emphasis added). By "such an action," the provision refers to an action challenging a specific solicitation. Accordingly, section 1491(b)(2)'s grant of authority to award injunctive relief is limited to cases where there is an existing bid protest over which the Court possesses jurisdiction. See Rex Servs. Corp. v. United States, 448 F.3d 1305, 1307-08 (Fed. Cir. 2006) (plaintiff lacked standing where it failed to submit a bid and did not file a timely protest, therefore protest properly dismissed for lack of jurisdiction). Thus, Kevcon's assertion that "[t]here is no limit on the scope of the injunctive relief that may be granted," Pl. First Supp. Br. 5, is contradicted by the plain language of the statute.

B. Kevcon Is Not An Interested Party Regarding Its Challenge To Unidentified Solicitations

Apart from the Court's lack of jurisdiction to entertain a broad challenge to unspecified solicitations, and regardless of whether Kevcon is an interested party in its challenge to Solicitation II, Kevcon has failed to demonstrate that it is an interested party to the multitude of unidentified solicitations and contracts it seeks to enjoin under its facial challenge to the 8(a) program, including hypothetical solicitations and contracts that have not yet been issued.

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[16] As the Federal Circuit has recognized, for this Court to possess jurisdiction in a bid protest where the protestor is not challenging an actual procurement, at a minimum, the protester must be challenging a discreet and specific pre-procurement decision. See Distributed Solutions, Inc. v. United States, 539 F.3d 1340, 1346 (Fed. Cir. 2008). Here, Kevcon's broad 8(a) challenge is a facial attack upon a statute without reference to any agency acquisition.

In the pre-award context, to qualify as an "interested party," Kevcon must demonstrate "a non-trivial competitive injury which can be addressed by judicial relief." Weeks Marine Inc. v. United States, 575 F.3d 1352, 1362 (Fed. Cir. 2009).

Kevcon has not demonstrated that it is an interested party for the unidentified, hypothetical 8(a) contracts that it seeks to enjoin. Aside from Solicitation II, Kevcon has identified no existing solicitations for the types of services that it provides, let alone solicitations that it would be able to perform. Absent this information, Kevcon has not demonstrated that it is an interested party in its challenge to any existing 8(a) solicitation, save the one before this Court.

Additionally, Kevcon's insistence upon challenging a broad class of unidentified, hypothetical solicitations makes it impossible for the Court to determine whether Kevcon is an interested party to any of those alleged solicitations, assuming that they even exist. For this reason as well, Kevcon has not met its burden to establish interested party status.

Finally, to the extent that Kevcon seeks to prevent the Defense Department from issuing any new 8(a) solicitations or contracts in the future, Kevcon can only speculate that it would be able to provide the services required under such future procurements. Kevcon's claim is rendered even more speculative by the fact that agencies have discretion to place their procurements into the 8(a) program, because Kevcon cannot predict whether agencies will place future procurements that it can perform into the program or not. See 15 U.S.C. § 637(a)(1)(A). This speculation is yet another reason that Kevcon has failed to demonstrate that it is an "interested party."

Kevcon's citations to Rothe Development Corp. v. Dep't of Defense, 413 F.3d 1327 (Fed. Cir. 2005), and Dynalantic Corp., 115 F.3d at 1018, Pl. First Supp. Br. 5, in support of standing,

are unavailing. Both of those cases dealt with different standing requirements applicable in Federal district courts, not the requirement that a protester be an interested party under 28 U.S.C. § 1491(b), applicable in this Court.

Because Kevcon cannot demonstrate that it is an "interested party" for any of the unidentified solicitations it hopes to enjoin, this Court lacks jurisdiction to entertain its request for an injunction barring further action upon those solicitations.

IV. Because The 8(a) Program Is Narrowly Tailored To Serve A Compelling Interest, Kevcon's Equal Protection Challenge To Solicitation II Must Be Rejected

Kevcon has challenged both the 8(a) program as a whole and as applied to Solicitation II. As we have demonstrated, its challenge to the 8(a) program as a whole is beyond this Court's jurisdiction. We now demonstrate that Kevcon's challenge to Solicitation II fails on the merits.

A. The Legal Standard

In reviewing the constitutionality of race-conscious contracting programs, the Supreme Court has stated that Congress "is not disqualified from acting in response" to "both the practice and the lingering effects of racial discrimination against minority groups in this country . . . ." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995). Such programs are constitutional where Congress has a "strong basis in evidence" to justify its use of race-conscious means. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 500 (1989). Courts must subject any Government program employing racial classifications to careful review to guard against impermissible uses of race, see Croson, 488 U.S. at 493, and the evidence must demonstrate that there is a "compelling need for the program and [that] the program is . . . narrowly tailored." Rothe Dev. Corp. v. Dep't of Defense, 262 F.3d 1306, 1328 (Fed. Cir. 2001) ("Rothe III").

Even where the Federal Government has not itself engaged in discriminatory conduct, the Court has held that Congress may take steps to ensure that its own actions do not perpetuate the discriminatory conduct of others. See Croson, 488 U.S. at 492 ("It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.") (citing Norwood v. Harrison, 413 U.S. 455, 465 (1973)); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such [private] prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."). Consequently, Congress has authority under the Constitution to take race into account when necessary to fulfill its duty to avoid entangling the Federal Government in private bias:

> [T]he Fourteenth Amendment permits race-conscious programs that seek both to eradicate discrimination by the governmental entity itself and to prevent the public entity from acting as a 'passive participant' in a system of racial exclusion practiced by elements of the [private sector] by allowing tax dollars to finance the evil of private prejudice.

Adarand VII, 228 F.3d at 1164 (citation omitted).

The questions now before this Court are whether that standard was met when the 8(a) program was enacted in 1978 and whether it continues to be met today. The 8(a) program easily meets these standards. Nothing in the Federal Circuit's decision in Rothe VII, which forms the entire basis of Kevcon's argument, in any way undermines the constitutional legitimacy of the 8(a) program or alters the proper analysis of Congress's use of race in an effort to remedy discrimination.

B. Congress Was Justified In Establishing The 8(a) Program

Against the backdrop of abundant evidence of economic discrimination against racial and ethnic minorities, Congress first enacted the race-conscious portions of the 8(a) program in 1978. See Pub. L. No. 95-507, 92 Stat. 1757 (1978). Shortly thereafter, the constitutionality of a program similar to the 8(a) program was tested in the Supreme Court through a challenge to the Public Works Employment Act ("PWEA") of 1977. The PWEA authorized Federal grants to states and localities for public works projects. See Pub L. No. 95-28, 91 Stat. 116 (1977). Like section 8(a), the PWEA used race-conscious criteria in providing that any funded project should make efforts to award a small portion of the Federal funds to minority-owned businesses. Id. Several associations of non-minority construction contractors and subcontractors challenged the constitutionality of the PWEA on equal protection grounds in Fullilove v. Klutznick, 448 U.S. 448 (1980).

The Supreme Court in Fullilove closely examined the legislative record to determine whether Congress's use of the race-conscious measures in the PWEA was justified. After reviewing the legislative record Congress had developed in the years prior to the PWEA's enactment, id. at 456-67, the Court found that there was "abundant evidence from which [Congress] could conclude" that the low rate of participation by minority businesses in public contracting opportunities, as compared to that of non-minority businesses, was in significant measure the product of Federal procurement practices that perpetuated the effects of prior private discrimination against minorities. Id. at 477-78. The Court ruled that the evidence before Congress demonstrated that the disparity was caused in part by "the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and

which continue today," id. at 478, and upheld Congress's use of race-conscious measures in the PWEA.

Specifically, the Court found that the evidence before Congress established, among other things, the discriminatory denial of working capital to minority businesses; the barriers imposed upon minorities by high bonding requirements that deprived minority-owned firms of access to necessary funding; the disabilities caused by the inadequate "track record" of minority businesses that, as a result of discrimination, had not had an opportunity to enter the contracting market; and minority businesses' lack of awareness of bidding opportunities often due to their existing contacts' failure to disclose such opportunities to minority entrepreneurs. The Court held that, based upon the evidence, Congress could fairly "conclude that minority businesses have been denied effective participation in public contracting opportunities," and that "traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination." Id. at 477, 478.

All of the evidence that justified the PWEA in 1977, and was cited in Fullilove, was necessarily known to Congress when it added the race-conscious provisions to section 8(a) just one year later. See Pub. L. No. 95-507, 92 Stat. 1757 (1978). The legislative history of section 8(a) makes clear that Congress's purpose was to address just this history of discrimination. For example, the Senate report accompanying the 8(a) legislation recognized a "pattern of social and economic discrimination that continues to deprive racial and ethnic minorities, and others, of the opportunity to participate fully in the free enterprise system." See S. Rep. No. 1070, 95 Cong., 2d Sess., at 14-15 (1978). The final version of the law found that many "persons are socially disadvantaged because of their identification as members of certain groups that have suffered the

effects of discriminatory practices or similar invidious circumstances over which they have no control[.]" Pub. L. No. 95-507, § 201(e)(1)(b), 92 Stat. 1757, 1760 (1978). The Conference Report explained that these findings:

> basically establish the premise that many individuals are socially and economically disadvantaged as a result of being identified as members of certain groups . . . . In other words, in many, but not all, cases status as a minority can be directly and unequivocally correlated with social disadvantagement and this condition exists regardless of the individual, personal qualities of that minority person.

H.R. Rep. No. 1714, 95th Cong., 2d Sess., at 20-21 (1978).[17] Congress unquestionably was advancing a compelling interest through its enactment of section 8(a), and Kevcon's argument to the contrary is meritless.

C. Congress Has A Compelling Interest To Continue The 8(a) Program Today

Kevcon's complaint challenges the constitutionality of the section 8(a) program both at the time it was enacted, and as a basis for the current race-conscious criteria in the recent 8(a) solicitation Kevcon challenges. As the Federal Circuit explained in Rothe III, in order to justify the Government's ongoing use of race-conscious measures, the evidence must demonstrate that there is a current "compelling need for the program and [that] the program is still narrowly

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[17] Both House and Senate managers of the bill made statements to similar effect. 124 Cong. Rec. 34097 (October 6, 1978) (statement of Rep. Addabbo) ("[o]ur findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantage of persons identified by society as members of those groups"); id. at 35408 (October 10, 1978) (statement of Sen. Nunn) ("Because of present and past discrimination many minorities have suffered social disadvantagement."). The Supreme Court often accords the views of a bill's floor managers particular weight in determining legislative intent. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 686-87 (1978); United States v. Emmons, 410 U.S. 396, 405 n.14 (1973).

tailored." 262 F.3d at 1328.[18] To make this showing, Congress must have a basis in current evidence to justify its ongoing use of race-conscious measures. Id.[19]

The extensive evidence before Congress more than meets this standard. In just the last four years, for example, Congress has convened over thirty hearings and received more than fifty disparity studies that demonstrate that the effects of racial and ethnic discrimination continue to

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[18] Over the last thirty years, Congress has regularly revisited the question of whether race-conscious measures are necessary in Government contracting. As part of this examination, Congress, among other things, has made revisions to section 8 of the Small Business Act. It has added groups to the list of those presumed to be socially disadvantaged, see, e.g., Pub. L. No. 96-302, 94 Stat. 833 (1980) (adding Asian Pacific Americans as a socially disadvantaged group); Pub. L. No. 99-272, § 18015, 100 Stat. 370 (1986) (adding Native Americans); Pub. L. No. 100-656, § 207, 102 Stat. 3861, as amended by Pub. L. No. 101-37, § 6, 103 Stat. 72 (1988) (adding Native Hawaiians), and made other amendments to the program, including: substantially revising the participation terms for section 8(a) program participants and incorporating competitive procurement procedures in the program, see Pub. L. No. 100-656, 102 Stat. 3853 (1988); changing the revenue-based eligibility requirements for program participants, see Pub. L. No. 101-574, 104 Stat. 2814 (1990); adding a provision to include qualified HUBZone Small Business Concerns ("SBCs") in the subcontracting assistance program, see Pub. L. No. 105-135, §§ 601-607, 11 Stat. 2592, 2627-36 (1997); and amending the qualifications of HUBZone SBCs. See Pub. L. No. 108-447, 118 Stat. 3441 (2005). Since 1978, however, the evidence received by Congress, which has consistently demonstrated the persistence of economic discrimination against racial and ethnic minorities, has convinced Congress that, as a general matter, the race-conscious provisions of section 8(a) remain necessary. When Congress leaves a portion of a statute intact, as it has done repeatedly with section 8(a), while altering other provisions, courts infer that Congress made a considered decision that the unaltered language remains necessary and is designed to work in concert with the rest of the statute as revised. See Lovshin v. Dep't of Navy, 767 F.2d 826, 842 (Fed Cir. 1985).

[19] Although courts look primarily to evidence before Congress in making this determination, courts may also consider other relevant and timely information demonstrating that there is a strong basis in evidence for Congress to believe that race-conscious measures are necessary to address the past and present effects of racial and ethnic economic discrimination. See Adarand VII, 228 F.3d at 1166. As demonstrated below, the Government relies primarily on current evidence that has been presented to Congress to justify the ongoing need for the section 8(a) program. But other evidence, produced up to the time of this filing, similarly demonstrates the compelling need for the program.

hinder minority-owned firms' ability to compete for public contracts.[20] Through these hearings and studies, Congress has developed an extensive record of evidence regarding not only persistent disparities in both business formation and success between minority-owned and non-minority owned businesses, but also the specific barriers that minority-owned businesses continue to face.

1. Scores Of Quantitative And Qualitative Studies Have Concluded That Economic Discrimination Against Racial And Ethnic Minorities Continues To Exist Throughout The Country

The more than fifty disparity studies that Congress has received, totaling over 13,000 pages, have been submitted to this Court.[21] These disparity studies examine both the number of businesses that are formed by racial and ethnic minorities and the success of those businesses relative to businesses owned by non-minorities.

To provide a reasonable mechanism for this Court to assess the strength of those studies and the significance of the data they report, the United States has hired Dr. Jon Wainwright, a nationally renowned and recognized economic expert in the preparation and use of disparity studies, to review and summarize the findings in the studies submitted to Congress. Dr. Wainwright's report ("Wainwright Report") was filed with the Court on April 19, 2010. In brief,

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[20] See PIA 1-6, Tab A; see also The Minority Business Development Agency: Enhancing the Prospects for Success, 111th Cong. (Oct. 15, 2009) (testimony of David Hinson, National Director of Minority Business Development Agency), SM 20515-24, Tab 23c.

[21] A disparity study is a statistical analysis performed to determine whether discrimination based upon a suspect classification is affecting the level of awards of public contracting opportunities. See Report of Defendant's Expert, Dr. Jon Wainwright, at 1, 4-9; see also Rothe VII, 545 F.3d at 1037 (explaining significance of disparity studies). Unless otherwise indicated, all of the studies cited below, and in Dr. Wainwright's report, have been presented to Congress.

Dr. Wainwright unequivocally finds that the disparity studies, which analyze state and municipal data from every region of the country, provide significant support for Congress's conclusion that the ongoing effects of both past and present racial and ethnic discrimination are being felt across the nation.

First, Dr. Wainwright states that the studies, many of which addressed public contracting by states and localities, establish that "the disparities between minorities and non-minorities are more pronounced in business enterprise than in any other aspect of American economic life." Wainwright Report at 2. Although minority groups constitute approximately 32 percent of the population, they own just 11.6 percent of all businesses with employees in the United States and earn only about 5 percent of the nation's business revenue.[22] Id. at 32. Blacks are 13.5 percent of the general population but own only 5 percent of the nation's businesses and earn less than 0.5 percent of business sales and receipts. Id. at 2. Hispanics are 15.5 percent of the population but own only 6.6 percent of the nation's businesses and earn less than 1 percent of business sales and receipts. Id. Asian and Pacific Islanders are 5.5 percent of the population, and although they own 4.7 percent of the nation's businesses, those businesses earn less than 1.5 percent of business sales and receipts. Id. As experts, including Dr. Wainwright, have explained to Congress, these disparities are "large, adverse, and statistically significant." Id. at 30.[23]

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[22] See also Ying Lowrey, Small Business Administration, Minorities in Business: A Demographic Review of Minority Business Ownership ("Minorities in Business"), 298 U.S. Small Business Administration (2007) (reporting similar findings), SM 37496, 37498, Tab 39p.

[23] How Information Policy Affects the Competitive Viability of Small and Disadvantaged Business in Federal Contracting: Hearing Before the H. Subcomm. on Information Policy, Census, and National Archives of the H. Comm. on Oversight and Government Reform, 110th Cong. (2008) ("Information Policy"), SM 18654, Tab 19; see also Minority Entrepreneurship: Assessing the Effectiveness of SBA's Programs for the Minority Business Community: Hearing

While comparisons between the percentage of businesses that are minority-owned and the percentage of minorities in the general population may not always capture perfectly the effects of discrimination in business, the Supreme Court has recognized that "gross statistical disparities" between the racial composition of a work force and the general population suggest the existence of discrimination. See, e.g., Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977); see also Concrete Works of Colorado, Inc. v. City and County of Denver, 321 F.3d 950, 960-69 (10th Cir. 2003). As explained in Dr. Wainwright's report, numerous disparity studies find dramatically different rates of business formation and success between minority- and non-minority-owned businesses. For example, minority-owned businesses generally are far smaller than white-owned businesses and the four-year survival rate of minority-owned businesses is lower than that for white-owned businesses. Wainwright Report at 3.[24] Even for the firms that survive, minority-owned firms earn just about half, or, for black-owned businesses less than half, of what white-owned firms of similar size earn over the same period of time. Dr. Wainwright quotes from a study finding that "for every dollar that a White-owned firm made, Pacific

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Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. (2007) ("Minority Entrepreneurship"), PIA 45-53, Tab D; Minorities in Business (2007), SM 37496, 37498, Tab 39p.

[24] The Small Business Administration reported four-year survival rates for black-owned and Hispanic-owned businesses of 61 and 68.6 percent, respectively, compared to a business survival rate of 73 percent for non-minority owned businesses. Ying Lowrey, Dynamics of Minority-Owned Business Establishments, 1997-2001, 251 U.S. Small Business Administration (2005), SM 37466, Tab 39o. Although SBA made this report available to the public on its website at the time of publication, to date, it has not yet been formally submitted to Congress.

Islander-owned firms made about 59 cents, Hispanic-, Native American- and Asian-owned firms made 56 cents and Black-owned businesses made 43 cents." Id.[25]

The disparity studies cover dozens of states and localities around the country, and address construction-related activity and other types of state and local economic activity beyond the construction industry. See also id. at 16-17. Even though the studies used different methodologies, were undertaken at different points in time (although all were relatively recent), and covered a wide variety of Government agencies, the findings of these studies are quite consistent. Id. at 28. The core of these studies assesses the extent to which the utilization of minority-owned firms mirrors their availability in the relevant market; as shown in Table 5 of Dr. Wainwright's report, the studies find disparities in nearly all industrial activities in the country. Id. at 31 (Table 5). Moreover, those disparities are substantial; Dr. Wainwright explains that, of 106 disparity indices reported in studies before Congress, 89 percent report a lack of parity (i.e., utilization rates below 100 percent), between utilization of minority-owned and non-minority-owned firms, and 81 percent report that utilization of minority-owned firms fell below 80 percent of the use of non-minority-owned firms.[26] Dr. Wainwright finds that "[i]n the vast majority of

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[25] The Small Business Administration reported similar findings in its 2007 report, Minorities in Business. Specifically, in 2002, more than half of black-owned businesses had less than $10,000 in business receipts, compared with only one-third of white-owned firms, and, on average, a non-minority-owned employer firm (i.e., a firm with employees) had more than $1.6 million in annual sales, while a black-owned employer firm had just over $695,000. Id., SM 37502-03, Tab 39p. Although the SBA made this report available to the public on its website at the time of publication, to date, it has not yet been formally submitted to Congress.

[26] As discussed in Dr. Wainwright's report, Federal regulations provide that a disparity ratio less than or equal to 80 (on a scale of zero to 100, with zero being perfect disparity and 100 being perfect parity) indicates the presence of discrimination ("the four-fifths rule"). Wainwright Report at 19, n.27; see also 29 C.F.R. § 1607.4(d).

studies . . . , these statistical findings are supported by additional statistical evidence of disparities in subcontracting activity and by anecdotal evidence of discrimination against MBEs [minority-owned business enterprises] consistent with the statistical findings." Id. at 28.

Importantly, Dr. Wainwright quotes former Secretary of Labor and economist Ray Marshall, who also prepares disparity studies, as stating that disparities remained consistent even when the studies controlled for many factors such as "detailed balance sheet and credit worthiness measures[,]" "educational achievement, labor market experience, . . . locational mobility, . . . interest and dividend income, . . . local labor market variables[,]" and others. Id. at 35. Secretary Marshall concluded that "analyses of available data for business owners that enable personal characteristics and other factors to be controlled for [generate results that are] compatible with racial exclusion." Id. at 36. Dr. Wainwright similarly concludes that "even in cases where qualification-type factors have been controlled for in statistical analyses, results consistent with business discrimination are still typically observed[,]" id. at 35, and that the different approaches do not result in different conclusions.

Thus, studies that look only at the number of currently available minority-owned firms, or at minority-owned firms with the current capacity to perform a contract, reveal significant disparities in utilization between minority-owned and non-minority-owned firms. But as Dr. Wainwright emphasizes, data like "[f]irm revenues, employment size, or other metrics, can be influenced by the presence of discrimination in the relevant markets, and cause availability or disparity statistics to [mask] the continuing effects of discrimination." Id. at 7. For example, Dr. Wainwright states that the disparity studies, and his own research that has been submitted to Congress, suggest that, while a factor such as "experience" may be relevant to results, experience

can be achieved fairly readily, especially with subcontracts. Likewise, the capacity and qualifications of firms, particularly in the construction and related fields, are "highly elastic," meaning that firms can expand readily to meet new capacity. Id. at 34. As the disparity studies show, firms that compete for many types of contracts often expand once a contract is secured. As a result, studies that control for purported "capacity" likely understate the extent to which minority-owned firms have been subjected to discrimination. By contrast, disparity studies that account for the ways in which discrimination has impeded the ability of minority firms to gain experience or expand their capacity more accurately capture the extent to which minority firms are underutilized relative to their non-minority competitors.

2. Evidence Before Congress Identifies Specific Discriminatory Barriers Facing Minority-Owned Businesses

a. Discrimination In Lending And Bonding Impedes Minority Business Formation And Growth

As Dr. Wainwright discusses in his report and as is consistently disclosed in testimony at Congressional hearings, minority business owners across the country most frequently cite discrimination in access to capital as the greatest barrier to starting and growing their businesses.[27] Id. at 34, 45; see also id. at 32-33 (describing Congressional testimony of Dr. Thomas Boston regarding denial of equal access to credit). Dr. Wainwright concludes that data from the National Survey of Small Business Finances, a report issued by the Federal Reserve Board and SBA and submitted to Congress, is "consistent with the presence of discrimination

[27] Information Policy, 110th Cong. (2008) (statement of Jon Wainwright) SM 18565, Tab 19; see also Robert W. Fairlie, Minority Entrepreneurship, The Small Business Economy, produced under contract with the SBA, Office of Advocacy (2005), SM 37319, Tab 39j.

against MBEs in the credit market for small businesses." Id. at 46.[28]

The most current data available, from 2003, demonstrate that historical discrimination against minority-owned firms in access to credit has not abated in recent years. Id. at 47-48 & Table 10 (data showing that minority-owned businesses have higher rates of loan denial and incur higher cost of credit). After controlling for assets, liabilities, and other measures of creditworthiness like bankruptcies, judgments and delinquencies, black-owned firms are still 29 percent more likely, and Hispanic-owned firms 18-24 percent more likely, to be denied a loan; than a similarly situated non-minority-owned firm. Id. at 47. Dr. Wainwright states that his own disparity studies, which were submitted to Congress at Congressional hearings, found similar results across the country. Id. at 48.[29]

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[28] See also Robert Fairlie, Disparities in Capital Access between Minority and Non-Minority-Owned Businesses: The Troubling Reality of Capital Limitations Faced by MBEs, produced under contract with the U.S. Department of Commerce, Minority Business Development Agency (2010) (concluding that "[a] factor posing a barrier to obtaining financial capital for minority-owned businesses is racial discrimination in lending practices."), SM 37259, Tab 39i.

[29] See also Business Start-Up Hurdles in Underserved Communities: Access to Venture Capital and Entrepreneurship Training: Hearing Before the H. Subcomm. on Economic Development, Public Buildings, and Emergency Management Staff of the H. Comm. on Transp. and Infrastructure, 110th Cong. (2008) ("Business Start-Up Hurdles") (testimony of Jon Wainwright), SM 3733, Tab 3.

In addition to the voluminous academic research on this subject received by Congress,[30] Congressional testimony from minority business owners regarding their experiences with credit discrimination demonstrates the extent to which the discriminatory denial of access to capital prevents minority-owned businesses from forming, developing, and succeeding in today's markets. For example, Congress heard testimony about one minority contractor with solid financial data who was denied a loan only to have one of his white employees take the same financial data to the same loan officer, receive a loan, and be told that he was "the kind of businessman [the bank was] looking for."[31]

Even when minority-owned businesses successfully apply for bank loans, the credit is often significantly more expensive than the credit extended to non-minority-owned businesses. As Dr. Wainwright notes in his report, black business owners pay between 1.5 percent and 1.7

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[30] See, e.g., David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, Discrimination in the Small-Business Credit Market, 85(4) Review of Economics and Statistics 930 (2003) (finding that "loan denial rates are significantly higher for Black-owned firms that for white-owned firms even after taking into account differences in an extensive array of measures of creditworthiness and other characteristics"), SM 37232, Tab 39h; Lloyd Blanchard, Bo Zhao, and John Yinger, Do Credit Market Barriers Exist for Minority and Women Entrepreneurs? 14, Center for Policy Research, Maxwell School, Syracuse University, Working Paper No. 74 (2005) (finding same), SM 36954, Tab 39c; Ken Cavalluzzo & John Wolken, Small Business Loan Turndowns, Personal Wealth, and Discrimination, 78(6) Journal of Business 2153 (2005), SM 37076, Tab 39d; Susan Coleman, Access to Debt Capital for Women and Minority Owned Small Firms: Does Educational Attainment Have an Impact, 9(2) Journal of Developmental Entrepreneurship 127 (2004) (finding same), SM 37156-57, Tab 39e; Jonathan Taylor, Income and Wealth Transfer Effects of Discrimination in Small Business Lending, 32(3/4) Review of Black Political Economy 87 (2005) (finding same), SM 37824-26, Tab 39u.

[31] The Department of Transportation's Disadvantaged Business Enterprise Program: Hearing Before the H. Comm. on Transp. and Infrastructure, 111th Cong. (2009) ("DOT DBE Program") (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT), PIA 1914, Tab N.

percent higher rates of interest on their credit than non-minority businesses. Id. at 47.[32] Hispanics, Asian and Pacific Islanders, and Native Americans likewise pay more for their credit. Id. at 48 (Table 11) (noting disparities of 82-90 basis points, 79-122 basis points, and 101-124 basis points for each group, respectively). Evidence before Congress also indicates that discriminatory lack of access to traditional sources of credit has forced minority-owned firms starting or acquiring a business to rely on credit cards that charge, on average, higher rates of interest compared to other sources of capital, thereby increasing minority businesses' operating costs relative to those of non-minority businesses.[33] Finally, reports submitted at congressional hearings indicate that, due to the frequency of their personal experiences, or those of their

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[32] Numerous other studies before Congress confirm that minorities-owned businesses pay rates of interest that are roughly 100 basis points (1 percent) higher than the rates charged non-minority businesses. Lloyd Blanchard, Bo Zhao, and John Yinger, Do Credit Market Barriers Exist for Minority and Women Entrepreneurs? 14, Center for Policy Research, Maxwell School, Syracuse University, Working Paper No. 74 (2005) (finding that black-owned businesses pay, on average, 1.12 percent interest rate premium for loans other than credit line loans, and that business owners of other races with low non-housing wealth may face discrimination by paying 1.45 percent more in interest), SM36954, Tab 39c; David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, Discrimination in the Small-Business Credit Market, 85(4) Review of Economics and Statistics 930 (2003) (finding that, in 1993, black-owned firms paid 98 basis points more and Hispanic-owned firms paid about 50 basis points more than equally qualified white owned firms, and in 1998 finding a difference of 122 basis points between black-owned and white-owned firms, and a difference of 85 basis points between Asian-owned and white-owned firms), SM 37231, Tab 39h; id. ("Even among a sample of firms with no past credit problems, Black-owned firms pay significantly higher interest rates."), SM 37231, Tab 39h.

[33] U.S. Department of Commerce, Minority Business Development Agency, Characteristics of Minority Businesses and Entrepreneurs, An Analysis of the 2002 Survey of Business Owners (2008), SM 20636-37, Tab 24.

colleagues, in being denied credit, some minority business owners simply expect to be turned down and therefore do not apply for financing in the first place.[34]

Evidence before Congress further establishes that discrimination also prevents minority businesses from meeting bonding requirements.[35] Surety companies often require businesses to demonstrate a proven "track record," and yet historical discrimination has prevented many minority businesses from obtaining precisely the kind of experience that they need in order to secure bonding. This produces a "Catch-22" situation for minority businesses: without bonding, they cannot gain experience, and yet without experience, they cannot secure bonding.[36]

Moreover, discrimination in access to credit affects not only minority business formation but also the ability of minority-owned businesses to grow their capacity and increase their market

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[34] See, e.g., David G. Blanchflower, Phillip B. Levine, and David J. Zimmerman, Discrimination in the Small-Business Credit Market, 85(4) Review of Economics and Statistics 930 (2003), SM 37232, Tab 39h.

[35] Minority Entrepreneurship, 110th Cong. (2007) (statement of Jon Wainwright) (minority-owned businesses continue to "encounter discrimination in obtaining loans and surety bonds"), PIA 52-53, Tab D.

[36] Access to Federal Contracts: How to Level the Playing Field: Hearing Before the S. Comm. on Small Business and Entrepreneurship, 110th Cong. (2007) ("Access to Federal Contracts") (statement of Randy McRae) ("[B]onding has been a cruel Catch-22 for [DBEs]. These struggling firms either can't afford a bond or can't persuade bonding companies to guarantee their performance. But without a bond, they can't bid on many jobs in the public or private sector, limiting their growth."), PIA 1438, Tab L; id. (statement of Wayne Frazier, Sr., President, Maryland-Washington Minority Contractors Association) ("Small businesses dealing with the Federal Government cannot get surety bonding. Again, no financing, no bonding, no contract, no award, no way to compete."), PIA 1354, Tab L; DOT DBE Hearing (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT) (relating comment from a contractor in California that "minorities . . . have a much harder time getting capital, getting bonding, getting insurance"), PIA 1914, Tab N; see also Washington Suburban Sanitary Commission by BBC Research & Consulting, WSSC 2005 Disparity Study – Summary and Recommendations, § 4 (2005) (minority business owner reported that MBE firms get charged a higher rate for the same bonding as compared to white competitors), at SM 36738-39, Tab 39af.

share. Evidence before Congress demonstrates that, without access to traditional sources of financing, minority-owned businesses are often forced to forego opportunities that would allow them to expand their businesses.[37]

b. Minority Businesses Continue To Experience Discriminatory Exclusion From And Treatment By Existing Business Networks, Suppliers, And Contractors

Recent evidence before Congress also shows that minority business owners continue to experience discriminatory exclusion from business networks, as well as discrimination by suppliers and prime contractors.[38] The evidence demonstrates that minority business owners encounter such discrimination when "obtaining public and private sector prime contracts and subcontracts, and being paid promptly."[39] In testimony to Congress, a Department of Transportation ("DOT") official recently stated that DOT considers lack of access to business networks and to the information those networks provide to be "[o]ne of the most important

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[37] See Business Start-Up Hurdles, 110th Cong. (2008) (statement of Dr. Thomas Boston), SM 3725, Tab 3; Minority Entrepreneurship, 110th Cong. (2007) (statement of Jon Wainwright), PIA 51, Tab D.

[38] DOT DBE Program, 111th Cong. (2009) (statement of Julie Cunningham, President and Chief Executive Officer, Conference of Minority Transportation Officials) (testifying that "discrimination is still a serious problem" and citing "use of antiquated 'old boy networks,' exclusion of DBEs from business opportunities, discrimination in credit lending, bonding and insurance, attempts to induce DBEs to act fraudulently as 'fronts' and discriminatory application of procurement and contracting rules"), PIA 1826, Tab N; see also Minority Entrepreneurship, 110th Cong. (2007) (statement of Jon Wainwright) (discussing findings from thousands of surveys and interviews which show that, throughout the country, and within both the public and private sector marketplaces, minorities report similar instances of stereotypical attitudes about their qualifications, double standards about their performance, and discrimination by bonding companies and suppliers), PIA 46, Tab D.

[39] Minority Entrepreneurship, 110th Cong. (2007) (statement of Jon Wainwright), PIA 53, Tab D.

barriers to participation [in contracting]" that minorities face.[40] As many state and local studies confirm,[41] "old-boys networks" remain prevalent, meaning that minority business owners continue to face difficulty when attempting to break into these industries.[42]

Congress also has heard substantial evidence that minorities continue to be subjected to stereotypes about their suspected lack of competence and are held to higher performance standards by clients than similar white men.[43] Evidence before Congress also reveals that minorities regularly receive higher price quotes from suppliers.[44] This phenomenon is often

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[40] DOT DBE Program, 111th Cong. (2009) (statement of Joel Szabat, Acting Assistant Secretary, Transportation Policy, DOT), PIA 1914, Tab N.

[41] A disparity study for New Jersey, for example, found that both "new and established minority and women business owners report difficulties breaking into the contracting network." Mason Tillman Assocs., State of New Jersey Construction Services Disparity Study, 2000-2002, Vol. 1 (2005), SM13545, Tab 14s. That study also found that some minority-owned businesses that "have been in operation for more than 20 years . . . are still excluded from job opportunities because they are not included in the social and business networks with those in positions of power in their respective fields." Id. Another study reported that minority business owners interviewed "were especially vocal about the 'good ole boy' system." CRA International for the San Mateo County Transit District and the Peninsula Corridor Joint Powers Board, Measuring Minority- and Woman-Owned Construction and Professional Service Firm Availability and Utilization (2008), SM 25588, Tab 38f.

[42] Minority Entrepreneurship, 110th Cong. (2007), PIA 62, Tab D; DOT DBE Program, 111th Cong. (2009) PIA 1811, Tab N.

[43] Minority Entrepreneurship, 110th Cong. (2007) (statement of Jon Wainwright); PIA 52, Tab D.

[44] For example, just last year, Congress heard testimony about an African-American employee of a minority-owned business in Michigan, who obtained a quote of $613 per tire for 16 new tires. The minority business owner discovered that a white business associate had paid only $400 per tire. He then called the supplier and "put on a white voice" and was quoted $400. DOT DBE Program, 111th Cong. (2009) (statement of Chuck Covington, CEO, People's Transit), PIA 1820, Tab N; see also Minority Entrepreneurship, 110th Cong. (2007) (statement of Jon Wainwright), PIA 46, Tab D.

related to the fact that minorities lack long-standing business relationships with suppliers and, in part due to the effects of discrimination, have been excluded from the business networks where such relationships are formed.[45]

Hearings before Congress also show that, in the absence of legally-imposed goals for the use of minority businesses, many prime contractors simply will not do business with minority firms at all.[46] Congress has heard testimony that various states that have scaled back or discontinued race-conscious state contracting programs have seen a significant drop in DBE participation – or, as was the case in Michigan, a drop to zero percent utilization of DBEs – in state contracting.[47] One witness testified that many prime contractors maintain a "mentality of exclusion," and explained that contractors exhibiting this mentality believe that "minority[-owned] . . . businesses don't belong at the table."[48]

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[45] In 2007, Congress heard testimony about an African-American mechanical contractor who solicited a quote for equipment from his majority-owned supplier, which he then included in his bid. He then received a fax from the supplier that was intended for his majority-owned competitor, quoting the competitor a lower quote. When the minority business owner requested the lower price quote provided to his competitor, the supplier responded that it reserved the right to provide better pricing to its better customers. Minority Entrepreneurship, 110th Cong. (2007) (statement of Anthony W. Robinson, President, Minority Business Enterprise Legal Defense and Educational Fund), PIA 58, Tab D.

[46] Minority Entrepreneurship, 110th Cong. (2007) (letter from Rita Baslock, President Max Electric, Inc.) (reporting a general "unwillingness to use minorities . . . on jobs where there is no [minority-owned business contracting] goal" even though "[t]here are a significant number of minority . . . small business contractors who have the capability and proven experience to perform"), PIA 62, Tab D.

[47] DOT DBE Program, 111th Cong. (2009) (statement of Joann Payne, President, Women First National Legislative Committee), PIA 1904, Tab N.

[48] Information Policy, 110th Cong. (2008) (statement of Anthony Brown, Chair, Government Affairs Committee of the AMAC, Senior Associate Partner, MGT of America), SM 18630, Tab 19.

c. Past And Present Racial And Ethnic Discrimination Hinders New Business Formation And Success In Numerous Other Ways

The current evidence before Congress also reveals other insidious effects of discrimination that prevent minorities from forming and growing successful businesses, thereby perpetuating the effects of discrimination into the future. For example, employment discrimination not only impedes the ability of minorities to develop the business and leadership skills necessary to develop a successful business model,[49] but also prevents minorities from being able to teach these skills to their children.[50] Studies indicate that the lower prevalence of business ownership in minority communities results in a general lack of familiarity about running a business, which in turn discourages minorities from forming businesses.[51]

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[49] Although overt discrimination remains a significant issue, discrimination can take a more subtle, yet no less damaging, form. See, e.g., CRA International for the San Mateo County Transit District and the Peninsula Corridor Joint Powers Board, Measuring Minority- and Women-Owned Construction and Professional Service Firm Availability and Utilization 95 (2008) (discussing study in which researchers sent fictitious resumes that included randomly assigned "white- and black-sounding" names to help-wanted ads in Boston and Chicago, and finding that resumes with "white-sounding" names received 50 percent more callbacks for interviews than did the resumes with "black-sounding" names), SM 25434, Tab 38f.

[50] See, e.g., Robert W. Fairlie and Alicia M. Robb, Why are Black-Owned Businesses Less Successful Than White-Owned Businesses? The Role of Families, Inheritances, and Business Human Capital (2003) ("Role of Families") ("the lack of work experience in family businesses among future black business owners, perhaps by restricting their acquisition of general and specific business human capital, limits the successfulness of their businesses relative to whites"), SM 37351, Tab 39k.

[51] Access to Federal Contracts, 110th Cong. (2007) (testimony of Wayne R. Frazier, Sr., President, Maryland-Washington Minority Contractors Association) ("[I]f you took a survey in this room of minority business owners, I would venture to say that 95 percent or more are first-time business owners, first-time entrepreneurs. And if you dug even deeper, you would find that no one in their family had ever owned a business before. So when you talk about the initial barriers, it is, one, comprehension, understanding."), PIA 1377, Tab L.

Research further suggests that the historical dearth of minority businesses places minorities at a further disadvantage due to the demonstrated correlation between having a parent who owned a business and the likelihood of engaging in entrepreneurial activity.[52] Researchers have found that African-American and Latino men in particular are at a disadvantage in terms of self-employment because they are less likely to have a father who was self-employed, and because African-American and Latino men whose fathers were not self-employed are significantly less likely to become self-employed compared to other men without self-employed fathers.[53] Discriminatory employment practices also impede the ability of minorities to obtain senior management positions, which then limits their opportunity to build the human capital necessary for future entrepreneurial success.

D. Courts Have Found That Evidentiary Records Like The Record Currently Before Congress Establish A Compelling Governmental Interest

Under well-established case law, the evidence summarized above easily demonstrates that the record currently before Congress establishes a compelling interest for the section 8(a) program's limited use of race in contracting. In Adarand, 515 U.S. at 235, the Supreme Court made clear that Federal racial classifications are subject to the same strict scrutiny analysis that

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[52] Michael Hout and Harvey Rosen, Self-Employment, Family Background, and Race, National Bureau of Economic Research Working Paper 7344 (2000), SM 37376, Tab 39l; see also Robert W. Fairlie, Minority Entrepreneurship 86, The Small Business Economy, produced under contract with the SBA, Office of Advocacy (2005), SM 37314, Tab 39j; Business Start-Up Hurdles, 110th Cong. (2008), SM 3733-34, Tab 3.

[53] Role of Families, SM 37335, Tab 39k. The study also cites research finding that African-American and Latino men whose fathers were self employed are significantly less likely to follow their fathers into self-employment when compared to other sons of self-employed men. Id.; see also Minority Entrepreneurship, SM37314, Tab 39j. But this finding is consistent with research about the other ways in which discrimination discourages minorities from pursuing self-employment at rates comparable to non-minorities.

applies to the actions of state and local governments. Based upon Adarand, non-minority contractors brought numerous lawsuits alleging that race-conscious Government contracting programs, particularly the DOT's DBE program, failed to satisfy strict scrutiny. In each of these challenges, the Government established that the DOT DBE program fully met compelling interest standards based on then-current evidence virtually identical to the evidence before Congress now. Adarand VII, 228 F.3d at 1176; Northern Contracting, Inc. v. Illinois, 473 F.3d 715, 720-21 (7th Cir. 2007); Sherbrooke, 345 F.3d at 969-70; see also Western States, 407 F.3d at 993.

The evidence upon which the courts relied in these post-Adarand challenges came largely from a 1996 report prepared by the Government to comprehensively examine the evidentiary record in support of its race-conscious contracting programs. The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,0442-1, 26,050 (May 23, 1996) ("Compelling Interest Report"). Compiling evidence closely along the lines of the evidence the Supreme Court cited in Fullilove as the proper foundation for Congress's use of race-conscious measures in contracting (and which is currently before Congress as well), the 1996 Compelling Interest Report documented the extensive evidence before Congress, including dozens of hearings, numerous reports and other documents that demonstrated that racial discrimination in many economic areas was hampering the development of businesses owned by socially and economically disadvantaged individuals.[54] It was on this

[54] Specifically, the Compelling Interest Report described the barriers preventing minority businesses from developing technical expertise, including discrimination by employers. 61 Fed. Reg. 26,050, SM 41308, Tab 64. It catalogued "discrimination by private sector customers, prime contractors, business networks, suppliers, and bonding companies," which had the effect of "restrict[ing] the competitiveness of minority firms, thereby impeding their ability to gain

evidence that these courts held that Congress had a compelling interest for a program very similar in operation to the 8(a) program. In fact, prior to 2008, every court to consider the question had held that Congress had ample predicate for enactment of its race-conscious contracting programs. See Adarand VII, 228 F.3d at 1176; Northern Contracting, 473 F.3d at 720-21; Sherbrooke, 345 F.3d at 969-70; Western States, 407 F.3d at 993.

Rothe VII is not to the contrary. Contrary to Kevcon's allegations, Rothe VII and the subsequent injunction enjoining DOD from implementing 10 U.S.C. § 2323, do not invalidate the section 8(a) program. 545 F.3d at 1050. Rothe VII concerned the constitutionality of section 2323 – which was a DOD-specific small and disadvantaged business contracting program – and not section 8(a), which is a Government-wide business development program.

In fact, the district court, on several occasions, explicitly disavowed any connection between the Rothe litigation and the 8(a) program. The district court stated "specifically this court does not entertain in this case any challenge to section 8(a) of the SBA, 15 U.S.C. §§ 637, et seq." See Rothe Dev. Corp. v. Dep't of Defense, No. 98-CA-1011, 2006 WL 2052944, at *1 (W.D. Tex. Jul. 24, 2006) (citing other docket numbers 195, 199, and 218 in Rothe district court litigation). Similarly, in a November 10, 2005 order, the court noted that it would consider Rothe's challenge to all preferences contained in section 2323, but not any challenge to section

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access to public contracting markets." Id. at 26,058, SM 41316, Tab 64. The Compelling Interest Report cited discriminatory exclusion from business networks, which limited minority-businesses' access to information, their chances of obtaining competitive pricing from suppliers, and their ability to develop a "track record" with clients and lenders. Id. at 26,052, SM 41310, Tab 64. The Compelling Interest Report also explained the numerous ways in which minority-owned businesses were denied or given discriminatory access to credit, whether through direct lending practices or by operation of bonding requirements. Id. at 26,050-58, SM 41308-16, Tab 64.

8(a) program. See District Court Docket No. 218 at 2, A7. This conclusion was reasserted in the district court's August 10, 2007 final order adjudicating cross motions for summary judgment, in which the court stated that it "would not consider any challenge to the Small Business Act's Section 8(a)[.]" Rothe Development Corp. v. Dep't of Defense., 499 F. Supp. 2d 775, 814 (W.D. Tex., 2007), rev'd on other grounds, Rothe VII, 545 F.3d 1023 (Fed. Cir. 2008) (also citing Docket No. 218).

Furthermore, in Rothe VII, the Federal Circuit specifically stated that the question of whether there was sufficient evidence to support other Government-wide minority business development programs was distinct from the particular question before it: whether the evidence demonstrated a compelling interest for 10 U.S.C. § 2323 when it was reauthorized in 2006. 545 F.3d at 1046. With respect to the validity of section 2323, the district court had heard only evidence that was directly tied to Congress's reauthorization of the program in 2006: disparity studies from six counties and municipalities, a Civil Rights Commission study, a few letters from business owners, a few statements made during congressional hearings in 2001 and 2004, and three SBA reports, one from 2000 and two from 2004. Id. at 1036-37. The Federal Circuit deemed this evidence insufficient, in part because it believed that the evidence was too sparse and in part because of concerns regarding the methodologies used in the disparity studies. Id. at 1040-49. The Federal Circuit emphasized, however, that its "holding [was] grounded in the particular items of evidence offered by DOD and relied on by the district court in this case," and made clear that, with a more developed record of current evidence, it would be possible for Congress to make the evidentiary showing necessary to satisfy the compelling interest inquiry

under strict scrutiny. Id. at 1049. As the Court specifically held, "[d]ifferent studies, in the context of different legislative history, may support different conclusions." Id. at 1046.

The Rothe VII court cited with approval one study's use of regression analysis to demonstrate racial disparities in contracting. See id. at 1044-45. Here, Dr. Wainwright has presented such regression analyses and confirmed that racial disparities remain between minority and non-minority firms even after accounting for facially non-discriminatory variables. See Report at 36-45; see also Rothe VII, 545 F.3d at 1045 ("[W]e recognize that a minority-owned firm's capacity and qualifications may themselves be affected by discrimination."). Finally, the Rothe VII Court recognized that, even in studies that do not hold facially non-discriminatory variables constant, resultant disparity ratios that are significantly low may give rise to inferences of discrimination. See 545 F.3d at 1045. Dr. Wainwright has identified numerous jurisdictions in which disparity studies reveal disparity ratios far lower than the 80 percent threshold for inferring discrimination. See Report at 18-29.

The evidentiary deficit that the Rothe VII Court found existed in terms of the section 2323 program in 2006 simply does not exist in this case with respect to section 8(a) now. As summarized above, in recent years, Congress has received abundant evidence that discriminatory practices and barriers to equal opportunity persist today. In contrast to the limited studies the Rothe VII Court considered, the record in this case includes over fifty methodologically sound disparity studies submitted to Congress that are expansive in terms of economic and geographic scope.[55] The evidence upon which Congress has relied is precisely the kind of evidence that,

[55] As discussed above, the studies uniformly demonstrate statistically significant disparities across the country in the utilization of minority businesses as compared to non-minority businesses. Furthermore, the disparity studies that fail to take into account the ways in

since Adarand, has been sufficient to demonstrate a compelling interest for other race-conscious contracting programs.[56]

Accordingly, section 8(a) furthers a compelling Government interest.

E. The 8(a) Program Was, And Remains, A Narrowly Tailored Means Of Furthering Congress's Compelling Interest

Courts look at a variety of factors to determine whether the Government's use of race-conscious provisions is narrowly tailored: whether there is evidence that the Government considered and reasonably rejected race-neutral means before using race-conscious ones; whether the program is flexible in application; whether the use of race is too extensive; whether race-conscious provisions produce an undue burden on third parties; and whether the program is reviewed periodically to determine its ongoing necessity. See, e.g., Grutter v. Bollinger, 539 U.S. 306, 333-43 (2003); Adarand, 515 U.S. at 237-39; Paradise v. United States, 480 U.S. 149, 171 (1987). The 8(a) program satisfies these factors. The section 8(a) program's limited use of race easily satisfies narrow tailoring.

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which past discrimination has negatively affected the ability of minority businesses to develop experience and build capacity, while still reporting statistically significant disparities, actually underreport the gap between minority and non-minority businesses for the reasons explained by Dr. Wainwright.

[56] Courts have also rejected Kevcon's argument that Congress was required to conduct independent fact-finding about every group listed in 15 U.S.C. § 637(d)(3)(C) as presumptively socially disadvantaged to justify their inclusion in the 8(a) program. See Adarand VII, 228 F.3d at 1176 n.18 ("We likewise reject Adarand's contention that Congress must make specific findings regarding discrimination against every single sub-category of individuals within the broad racial and ethnic categories designated by statute and addressed by the relevant legislative findings."). Congress also need not find that discrimination exists in each of the fifty states to determine that the ongoing problem of racial and ethnic discrimination warrants a national response. Oregon v. Mitchell, 400 U.S. 112, 133-34 (1970); see also Fullilove, 448 U.S. at 506 (Powell, J., concurring).

1. Congress Considered Race-Neutral Means And Concluded That They Are Insufficient To Achieve The Goals Advanced By The 8(a) Program

As the Court stated in Fullilove, at the time Congress enacted section 8(a), it was acutely aware of the ways in which previous attempts to increase participation by minority contractors using nondiscrimination laws and other race-neutral means had failed. 448 U.S. at 465-67; see also id. at 511-13 (Powell, J., concurring). Therefore, Fullilove essentially resolved in favor of Congress the question of whether section 8(a) satisfied this aspect of the narrow tailoring analysis at the time of its enactment. Id. at 490-91. See also Adarand VII, 228 F.3d at 1178 ("Congress considered the futility of race-neutral measures prior to incorporating aspirational goals into the [Small Business Act.]").

The inability of race-neutral programs to correct today for the effects of discrimination comes starkly into focus in jurisdictions that recently have discontinued race-conscious programs. As noted briefly above, Congress received testimony that less than a year after Michigan discontinued its racial contracting goals, the percentage of state-funded highway construction projects performed by DBEs fell to zero, even though DBE participation in the Federal program, which continued to use goals, was 13 percent.[57] Other states also saw dramatic drops in participation of minority-owned businesses when race-conscious remedies were abandoned.[58] Indeed, Congress is well aware of research that shows that the disparity in

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[57] DOT DBE Program, 111th Cong. (2009) (statement of Joann Payne, President, Women First National Legislative Committee), PIA 1904, Tab N.

[58] In Idaho, for example, the rate of minority- and women-owned business participation remained steady at just above 6 percent from 2004 through 2006 under a program that included goals for participation by minority businesses. When Idaho switched to a program without goals in 2007, DBE participation rate dropped to below 4 percent. DOT DBE Program, 111th Cong.

contracting between minority- and non-minority-owned businesses is "markedly greater in jurisdictions where there [is] no goals program in place."[59]

Academic studies have also found that the presence of race-conscious programs significantly helps remedy minority-owned businesses' inability to develop and participate in Government contracting. For example, one study found that the gap between white and minority self-employment rates narrowed during the 1980s "when affirmative action programs were implemented by many public sector jurisdictions."[60] The same study found that the gap began to widen again when the use of race-conscious contracting programs decreased after the Supreme Court's decision in Croson, and again narrowed after 2000, once courts began to uphold race-conscious contracting programs.[61] Another study similarly reported that when race-conscious "programs are removed or replaced with race-neutral programs the utilization of minorities . . . in public construction declines rapidly."[62]

(2009), PIA 1904, Tab N. The same thing happened in California: DBE participation in federally funded contracts was 9 percent between 2002 and April 2006, but dropped to less than 5 percent in May 2006 after the state discontinued setting DBE goals. Id. The participation rate for women-owned businesses was just 0.1 percent. Id. A two-year suspension of the DBE program in Minnesota resulted in a drop in participation of DBEs from 11 percent to 2 percent. Id.

[59] Minority Entrepreneurship, 110th Cong. (2007) (statement of Anthony Robinson, President, Minority Business Legal Defense and Education Fund), PIA 57, Tab D.

[60] David. G. Blanchflower, Minority Self-Employment in the United States and the Impact of Affirmative Action Programs 17, National Bureau of Economic Research, Working Paper 13972 (2008), SM 37554, Tab 39q. To date, this study has not been presented to Congress.

[61] Id., SM 37554, Tab 39q.

[62] David. G. Blanchflower and Jon Wainwright, An Analysis of the Impact of Affirmative Action Programs on Self-Employment in the Construction Industry 24 (National Bureau of

Evidence before Congress has also given it strong reason to believe that race-conscious means remain necessary in its contracting programs to avoid the Federal Government's becoming a passive participant in private sector discrimination.[63] A recent study that included surveys and interviews of hundreds of DBEs found general agreement among them "that without the use of affirmative remedies such as the USDOT DBE Program, minorities . . . would receive few, if any, opportunities [– either as prime contractors or as subcontractors –] on Government contracts."[64] In recent testimony before Congress, Dr. Wainwright reported his findings that contractors who use minority-owned businesses on projects with goals "rarely use [those businesses] — or even solicit them — in the absence of such goals."[65] The evidence before Congress demonstrates that, notwithstanding its enactment of numerous race-neutral provisions aimed at stemming discrimination in areas like credit, 15 U.S.C. § 1691, et seq., and employment, 42 U.S.C. § 2000e, et seq., race-conscious measures remain necessary to ensure

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Economic Research, Working Paper 11793 (2008) (" Construction Industry Analysis") ("The evidence we have available to us suggests that very rapidly after the race and gender conscious programs were removed the utilization of firms owned by women and minorities collapsed."), SM 36851, Tab 39b; see also Insight Center for Community Economic Development, The Impact of State Affirmative Procurement Policies on Minority- and Women- Owned Businesses in Five States, Best Practices, Imperfections, and Challenges in State Inclusive Business Programs, iv (2007) (concluding that "when affirmative procurement policies end or are interrupted, MBEs and WBEs do not grow as fast as similar businesses in other states" and that these "slower business growth rates are not usually made up later, indicating the importance of the consistent presence of affirmative procurement programs"), SM 37415, Tab 39m. These studies have not yet been presented to Congress.

[63] See, e.g., Information Policy, 110th Cong. (2008), SM 18630-31, Tab 19.

[64] DOT DBE Program, 111th Cong. (2009), PIA 1934, Tab N; see also Minority Entrepreneurship, 110th Cong. (2007), PIA 46, Tab D.

[65] DOT DBE Program, 111th Cong. (2009), PIA 1934, Tab N.

that the procurement practices of the Federal Government do not perpetuate and exacerbate the harms caused by racial and ethnic economic discrimination by non-Federal actors.

In Grutter, the Supreme Court made clear that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative." 539 U.S. at 339. Rather, "serious, good faith consideration of workable race-neutral alternatives that will achieve [the Government's objectives]" is all that is required. Id. Congress has undertaken a thorough examination of the problem of racial and ethnic discrimination in public contracting, and its fact-finding is "generally entitled to a presumption of regularity and deferential review by the judiciary." Croson, 488 U.S. at 500. Indeed, Kevcon has offered no evidence from which Congress could reasonably conclude that the race-conscious provisions of section 8(a) are no longer necessary to ensure equal opportunity for racial and ethnic minorities in contracting.

2. Section 8(a) Is A Flexible Program With An Appropriate Scope

Section 8(a) not only uses race in a limited manner, but also is a carefully structured, and thus narrowly tailored, program. First, the use of 8(a) firms is limited by the fact that the Government may not employ the 8(a) program unless the goods or services can be procured at fair market value. 15 U.S.C. § 637(a)(1)(A); 48 C.F.R. § 19.806(b).[66]

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[66] There are aspirational Government-wide and agency-specific goals for the percentage of Federal procurement dollars to be awarded to small disadvantaged businesses ("SDBs"), which include 8(a) firms. 15 U.S.C. § 644(g)(1)-(2). In addition to socially and economically disadvantaged businesses, the Small Business Act creates goals for small businesses owned and controlled by service disabled veterans, women, and small businesses within designated historically underutilized business districts ("HUBZones"). Id. The current nationwide SDB goal of 5 percent as well as the goals set by the various Federal agencies are hortatory, and no agency has been or can be penalized simply for failing to achieve this aspirational goal.

The 8(a) program is also limited in scope to the extent that an individual socially and economically disadvantaged business is permitted to participate only once, only for a limited period of time, and never for longer than nine years. 13 C.F.R. § 124.2; see 15 U.S.C. §§ 636(j)(10)(E), 636(j)(10)(H), 636(j)(15). This limitation is consistent with the business-development objectives of section 8(a). 13 C.F.R. § 124.108(b); see 15 U.S.C. § 636(j)(11)(B), (C). Moreover, a business loses its 8(a) eligibility as soon as it attains its business objectives as set forth in its business plan on file with the SBA, grows beyond "small business" status, or otherwise demonstrates the ability to compete in the marketplace without further assistance from the program. See 13 C.F.R. § 124.302(a).

These conditions on participation in the 8(a) program ensure that the benefits of this race-conscious Government contracting program flow only to new and developing businesses, rather than to those business that no longer need a competitive advantage to gain experience, increase business networks, or otherwise overcome their historical disadvantages. For these reasons, in post-Adarand litigation, courts have cited section 8(a) as an example of a narrowly tailored program. See, e.g., Adarand VII, 228 F.3d at 1179-81.

3. Section 8(a) Makes Limited Use Of Race In Determining Disadvantage

In addition to the program's flexibility and limited scope, section 8(a) ensures that race or ethnicity, and the past and present effects of discrimination against racial and ethnic minorities, are considered but are not dispositive to a business owner's section 8(a) application. The qualifying criteria ensure that the focus rests upon the disadvantaged status, not merely the racial status, of program participants. First, the presumption of social disadvantage is itself a rebuttable

presumption that may be overcome by "credible evidence to the contrary." 13 C.F.R. § 124.103 (b)(3); see Adarand, 515 U.S. at 208; Adarand VII, 228 F.3d at 1191. For example, "[b]eing born in a country does not, by itself, suffice to make the birth country an individual's country of origin for purposes of being included within a designated group." 13 C.F.R. § 124.103(b)(1) The SBA, in appropriate cases, will require individuals to demonstrate that they have held themselves out as, or have been identified by others to be, members of a designated minority group. 13 C.F.R. § 124.103(b)(2). The application of the presumption may be challenged in specific cases. See 13 C.F.R. §§ 124.103(b)(3), 124.112(c), 124.517(e); see also 13 C.F.R. § 121.1001(a)(2).

Second, firms owned by non-minorities who can establish that they are socially and economically disadvantaged may also participate in the program. 13 C.F.R. § 124.103(c). Any business owner is eligible for the program if he or she can: (1) identify any "objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, physical handicap, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;" (2) describe his or her own "[p]ersonal experiences of substantial and chronic social disadvantage in American society[;]" and (3) demonstrate the "[n]egative impact on entry into or advancement in the business world because of the disadvantage." Id. In 2008, in fact, 2.3 percent of 8(a) business owners were white. See 2008 SBA Report at 16, PIA 2021, Tab O.

Third, section 8(a) separates the presumption of social disadvantage from the showing of economic disadvantage. Thus, a minority business owner who is entitled to a presumption of social disadvantage, but whose assets exceed the ceiling to be considered economically

disadvantaged, may not participate in the program. 15 U.S.C. § 637(a)(6)(A) & (E); 13 C.F.R. § 124.104; see Adarand VII, 228 F.3d at 1183-84. Moreover, to maintain their eligibility, section 8(a) participants must submit annual reports affirming that they continue to be denied access to capital and credit. 13 C.F.R. § 124.112. Finally, if an 8(a) firm grows to exceed small business standards at any point during the nine-year period of eligibility, its eligibility ends immediately. See 13 C.F.R. § 124.302(a). Accordingly, section 8(a) makes its program eligibility determinations based on individualized assessments, with race being only one of many factors taken into consideration. See, e.g., Grutter, 539 U.S. at 340-41.

4. The Government's Very Modest Use Of Section 8(a) Establishes That Any Negative Effect On Third Parties Satisfies Constitutional Standards

The fact that Kevcon, a white-owned firm, may be disqualified from bidding upon one or more contracts does not establish that the 8(a) program places a constitutionally unacceptable burden upon third parties. In Fullilove, the Supreme Court grappled specifically with the concern that third parties who had not actively engaged in discrimination would be harmed by the race-conscious provisions of the PWEA. 448 U.S. at 484. The Court found that any burden imposed on non-minorities was not onerous, as fully 90 percent of the $4.2 billion of the PWEA was available to non-minority contractors, and that the 10 percent set-aside for minority businesses in the PWEA amounted to only 0.25 percent of all construction activity in the United States in one year. Id. at 484 & n.72.

Section 8(a)'s burden upon third parties is similar to, and perhaps even less, than the program upheld in Fullilove. First of all, the 8(a) program reserves a very small portion of Federal contract dollars for 8(a) firms. For example, in FY 2007, the total amount of Federal

procurement dollars going to small businesses was over $83.3 billion.[67] The total going to 8(a) firms was $12.3 billion,[68] representing only 2.67 percent of Federal procurement expenditures, which in FY 2007 was approximately $460 billion.[69] In other words, fully 97 percent of all Federal procurement dollars in FY 2007 were unaffected by the 8(a) program and open to bidding by any qualified firm, regardless of race. Even with respect to the small percentage of contracts limited to bidding by 8(a) firms, non-minority businesses can qualify for participation in the 8(a) program based on individualized evidence of social disadvantage. 13 C.F.R. § 124.103(c).

Other aspects of the 8(a) program are designed to minimize the burden on non-8(a) firms. See Adarand VII, 228 F.3d at 1183. SBA regulations prescribe circumstances under which the SBA will not accept a procurement for award as an 8(a) contract. One such circumstance arises where the SBA determines that acceptance of the procurement would have an adverse impact upon an individual small business, a group of small businesses located in a specific geographic location, or other small business programs. This regulation is designed to protect small business concerns that are not in the 8(a) program. 13 C.F.R. § 124.504.

In this case, where the goal is remedying past discrimination and where the effects upon third parties are minimal, the case law leaves no doubt that section 8(a) is narrowly tailored for

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[67] Federal Procurement Data System – Next Generation, Federal Procurement Report, FY 2007, Section I: Total Federal Views, SM 41650, Tab 67.

[68] Federal Procurement Data System – Next Generation, Federal Procurement Report, FY 2007, Section III: Agency Views, SM 41325, Tab 65 (sum of "8(a) Sole Source," "8(a) Competed," and "8(a) with HUBZone Preference" procurement dollars).

[69] Id., SM 41324, Tab 65.

constitutional purposes. As the Supreme Court stated in Fullilove, and numerous times since then, some "sharing of the burden" of remedying the effects of discrimination is constitutionally permissible. 484 U.S. at 484; see also Grutter, 539 U.S. at 341; Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 281 (1986); Paradise, 480 U.S. at 182; Local 28 of Sheet Metal Workers' Ass'n v. EEOC, 478 U.S. 421, 479 (1986).

5. Congress Has Regularly Considered Contemporary Evidence To Ensure That Limited Use Of Race-Conscious Provisions In Section 8(a) Is Constitutionally Justified

Kevcon's argument that Congress has failed to undertake sufficient fact-finding to support the ongoing use of the 8(a) race-conscious business development provisions is meritless. As the record above demonstrates, Congress has clearly undertaken the kind of careful and regular review of evidence supporting the use of race in the section 8(a) program called for by the Supreme Court.

The Fullilove decision lays out the extensive Congressional fact-finding that provided the necessary evidentiary support for section 8(a) at the time of its enactment. 448 U.S. at 478. Fullilove also makes clear that Congress has flexibility in terms of how it develops its evidentiary record to justify the use of race-conscious criteria. Id. As noted previously, the fact that Congress has left section 8(a) intact in the years that followed does not, as a constitutional matter, mean that Congress has failed to fulfill its obligation to undertake a periodic review of the necessity and efficacy of these provisions. Rather, Congress's decision to leave the race-conscious provisions of section 8(a) intact while modifying other provisions of the Small

Business Act[70] reflects Congress' judgment that these provisions remain necessary. See Lovshin, 767 F.2d at 842 ("[t]he normal assumption, where Congress amends one part of a law leaving another part unchanged, is that 'the two were designed to function as parts of an integrated whole,' and each should be given 'as full a play as possible'") (citation omitted); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353, 381-82 (1982) ("the fact that a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions under which the federal courts had implied a cause of action is itself evidence that Congress affirmatively intended to preserve that remedy.").

Since at least the Supreme Court's decisions in Fullilove, Croson, and Adarand, Congress has been well aware of its responsibility to ensure that programs like section 8(a) have not outlived their necessity, and has continuously considered evidence on this point. Congress's ongoing fact-gathering efforts regarding the continued need for this program, placed alongside its amendments of other portions of section 8 of the Small Business Act, further support a judicial conclusion that the 8(a) program has been adequately reviewed and is well supported.

Certainly with respect to the question before this Court – whether or not the use of section 8(a) is permissible today – the record clearly demonstrates that, repeatedly and particularly in recent years, Congress has held numerous hearings and has received annual agency reports and other documents that easily demonstrate that the effects of private discrimination still hinder the

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[70] See, e.g., Pub. L. No. 96-302, 94 Stat. 833 (1980); Pub. L. No. 99-272, § 18015, 100 Stat. 370 (1986); Pub. L. No. 100-656, § 207, 102 Stat. 3861, as amended by Pub. L. No. 101-37, § 6, 103 Stat. 72 (1988); Pub. L. No. 100-656, 102 Stat. 3853 (1988); Pub. L. No. 101-574, 104 Stat. 2814 (1990); Pub. L. No. 105-135, §§ 601-607, 11 Stat. 2592, 2627-36 (1997); Pub. L. No. 108-447, 118 Stat. 3441. See also footnote 18, above.

ability of minority-owned firms to compete equally and fairly for Federal contracts, and that the race-conscious provisions of section 8(a) remain necessary to address this problem.

V. Kevcon Cannot Recover Alleged Out-Of-Pocket, Bid Preparation, Or Proposal Costs, Because Kevcon Did Not Submit A Proposal For Solicitation II (Count III)

Kevcon asserts that it is entitled to "all out-of-pocket, bid preparation, and proposal costs incurred up to the time of judgment, in an amount not exceeding $10,000" with respect Solicitation II. Second Am. Compl. 9 ¶ 56. Kevcon's reference to out-of-pocket costs is to bid preparation and proposal costs. Second Am. Compl. 6 ¶ 27 (Kevcon has incurred "out-of-pocket expenses not exceeding $10,000 in bid preparation and proposal costs"). Kevcon's claim should be dismissed for failure to state a claim upon which relief may be granted. RCFC 12(b)(6).

Bid preparation and proposal costs are the only form of monetary relief that this Court may award in a bid protest. 28 U.S.C. § 1491(b)(1) (2) (granting this Court jurisdiction over bid protests and permitting "any relief that the [C]ourt considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs").

The entire theory of Kevcon's case, however, is that it has been unconstitutionally denied an opportunity to bid for section 8(a) contracts. See Second Am. Compl. 5 ¶¶ 23-24, 6 ¶ 26. Kevcon claims that, were Solicitation II not an 8(a) set-aside, it "could and would" submit a proposal. See id. at 6, ¶ 26. Thus, it is undisputed that Kevcon did not and could not submit a bid or proposal for Solicitation II.

Kevcon accordingly cannot recover alleged bid preparation and proposal costs because Kevcon had no basis to incur any expenses to prepare a proposal for a solicitation upon which it

knew it could not bid and that it seeks to set aside. See Second Am. Compl. 9 ¶ 56. Certainly, Congress did not provide this Court authority to award bid preparation and proposal costs to non-bidders. See 28 U.S.C. § 1491. Accordingly, Kevcon's claim for bid preparation and proposal costs does not state a claim upon which relief may be granted, and should be dismissed.

VI. Kevcon's Claim For EAJA Fees And Costs Is Premature

EAJA provides that a party seeking an award of fees and other expenses shall, "within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award . . . ." 28 U.S.C. § 2412(d)(1)(B). Section 2412(d)(2)(G) defines "final judgment" as "a judgment that is final and not appealable, and includes an order of settlement[.]" In Melkonyan v. Sullivan, the Supreme Court held that "[t]he 30-day EAJA clock begins to run after the time to appeal that 'final judgment' has expired." 501 U.S. 89, 96 (1991) (emphasis added). Consequently, to obtain EAJA fees, Kevcon must first obtain a final, non-appealable judgment, and then submit to the Court an application showing that it was a prevailing party eligible to receive an award. Since Kevcon has neither obtained a final judgment in its favor nor submitted an EAJA application, it cannot obtain EAJA fees. Thus, its request for such fees is premature.[71]

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[71] In M.A. DeAtley Const., Inc. v. United States, 71 Fed. Cl. 370, 377-78 (2006), this Court dismissed an EAJA claim, without prejudice, where it was filed prematurely. See also Boers v. United States, 44 Fed. Cl. 725, 733-34 (1999) (dismissing premature EAJA application without prejudice), aff'd, 243 F.3d 561 (Fed. Cir. 2000) (table). But see Valcon II, Inc. v. United States, 26 Cl. Ct. 393, 394, 398 (1992) (although EAJA request was premature, it did not constitute a "claim" to be dismissed, and dismissing request would not promote judicial economy because plaintiff would be able to apply for EAJA fees after judgment entered).

CONCLUSION

For the foregoing reasons, we respectfully request that the Court grant our motion to dismiss in part, deny Kevcon's motion for a judgment upon the agency record, grant our cross-motion, and enter judgment in favor of the United States.

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CERTIFICATE OF FILING

I hereby certify that on this 14th day of May 2010, a copy of the foregoing **"DEFENDANT'S MOTION TO DISMISS IN PART PLAINTIFF'S SECOND AMENDED COMPLAINT, OPPOSITION TO PLAINTIFF'S MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD, AND CROSS-MOTION FOR JUDGMENT UPON THE ADMINISTRATIVE RECORD"** was filed electronically. I understand that notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Richard P. Schroeder