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The Honorable John J. La Falce Chairman, Committee on Small Business House of Representatives

Dear Mr. Chairman:

This responds to your letter dated August 7, 1987, requesting our comments on H.R. 2972, the proposed Minority Small Business Development Act of 1987. The primary purpose of the bill is to provide for a 10-year fixed term participation period for socially and economically disadvantaged small business concerns under the Small Business Act.

In informal discussions with your stats, we were advised that you are primarily interested in our views regarding the constitutionality of section 13 of H.R. 2972. Section 13 provides that if the Department of Defense (DOD) "fails to meet the five percent goal established in section 1207(a) of Public Law 99-661 by the end of fiscal year 1989, the five percent goal shall become a mandatory five percent requirement

Section 1207 of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3816, 3973, November 14, 1986, provides that it shall be DOD's objective to achieve the following goal -- of the total amount obligated in four program areas during the 1987, 1988 and 1989 fiscal years DOD should obligate 5 percent of that amount in contracts and subcontracts with (1) small business concerns owned and controlled by socially and economically disadvantaged individuals, as defined by 15 U.S.C. Sec. 637(d), (2) historically Black colleges and universities, or (3) minority institutions, as defined by the Secretary of Education. The four program areas are (1) procurement, (2) research, development, test and evaluation, (3) military construction, and (4) operations and maintenance.

Our Office does not ordinarily express any opinion with respect to questions of constitutional interpretation. Particularly where the issue involves the constitutionality of duly enacted legislation we recognize that only the courts, and ultimately the Supreme Court, have the authority to determine whether a statute passes constitutional muster. Accordingly, we must emphasize that regardless of our opinion in this matter, the courts could rule otherwise should section 13 of this bill be enacted in its present form and later become the subject of a constitutional challenge. Nevertheless, it is our view that section 13 which would make the 5 per cent "minority." contracting goal set forth in section 1207 of Pub. L. No. 99-661 a mandatory requirement if DOD does not meet that goal by the end of fiscal year 1989, does not violate the Constitution,

specifically the Due Process Clause of the Fifth Amendment.

Our opinion in this respect is based on our analysis of relevant judicial decisions. In J.H. Rutter Rex Manufacturing Co., Inc. v. United States, 706 F.2d 702 ((5th Cir. 1983), cert. denied, 464 U.S. 1008 (1983), the court considered the constitutionality of a DOD program under which DOD would set aside certain military procurement contracts for exclusive participation by small business concerns as authorized by 10 U.S.C. Sec. 2301. In upholding the constitutionality of DOD's set-aside program, the court specifically rejected the plaintiff's claim that it had "a Fifth Amendment property entitlement to participate in the awarding of government contracts." The court went on to state:

"Since no fundamental rights are implicated, we need only determine whether the contested socioeconomic legislation rationally relates to a legitimate governmental purpose. . . . the procurement statutes and regulations promulgated thereunder are rationally related to the sound legislative purpose of promoting small businesses in order to contribute to the security and economic health of this Nation." Rutter Rex Mfg. Co., Inc. at 713.

One of the cases the court relied on in Rutter Rex Mfg. Co., Inc., was Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F. 2d 696 (5th Cir. 1973). In that case the court considered whether a federal procurement program under which government contracts are awarded to small business concerns owned by "socially or economically disadvantaged persons" violated the due process clause. The court upheld regulations adopted by the Small Business Administration (SBA) under section 8(a) of the Small Business Act, 15 U.S.C. Sec. 637(a), which limited eligibility for participation in the program to small businesses owned by socially or economically disadvantaged persons. The court refused to accept the plaintiff's argument that the program violated constitutional due process because the plaintiffs might be disadvantaged competitively.

The court said the following in this respect:

"There is no constitutional duty to offer government procurement contracts for competitive bidding. . . . The [8a] program may produce some inequalities among small business concerns as a class. But in the area of socioeconomic legislation, the government's action must be upheld if it is rationally related to a proper government purpose.. Ray Baillie Trash Hauling, Inc., at 709.

We recognize that whenever any statutory preference is based on racial or ethnic criteria, the statute involved will receive careful judicial scrutiny. In Fullilove v. Klutznick, 448 U.S. 448 (1980), the Supreme Court considered whether the minority business enterprise (MBE) provision of the Public Works Employment Act of 1977 violated the equal protection component of the Due Process Clause of the Fifth Amendment. The MBE provision required that, absent an administrative waiver by the Secretary of Commerce, at least 10 percent of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members, defined in the statute as United States citizens who are 'Negroes, Spanish-speaking, Oriental, Indians, Eskimos, and Aleuts." 42 U.S. 6705(f)(2). In upholding the constitutionality of the MBE provision, the Supreme Court said that "Congress had abundant evidence from which it could conclude that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects

of prior discrimination.. Fullilove, at 477, 478. Accordingly, the Court determined that Congress had the "necessary latitude to try new techniques such as the limited use of racial and ethnic-criteria to accomplish remedial objectives . . . ." Fullilove at 490.

Based on these judicial precedents, it is our opinion that if H.R. 2972 is enacted, the provision in section 13 that would make the 5 percent goal set forth in Pub. L. No. 99661 mandatory if DOD did not meet the goal by the end of fiscal year 1989, would not be found to violate the constitution. However, we recognize that the ruling of a court on this question could depend on a variety of factors we were unable to consider, including the specific facts and circumstances under which the litigation arose and, as is discussed in Fullilove, whether the legislative history of the provision contains the necessary congressional findings that support the need for the legislation.

Sincerely yours,

Harry R. Van Cleve Comptroller General of the United States