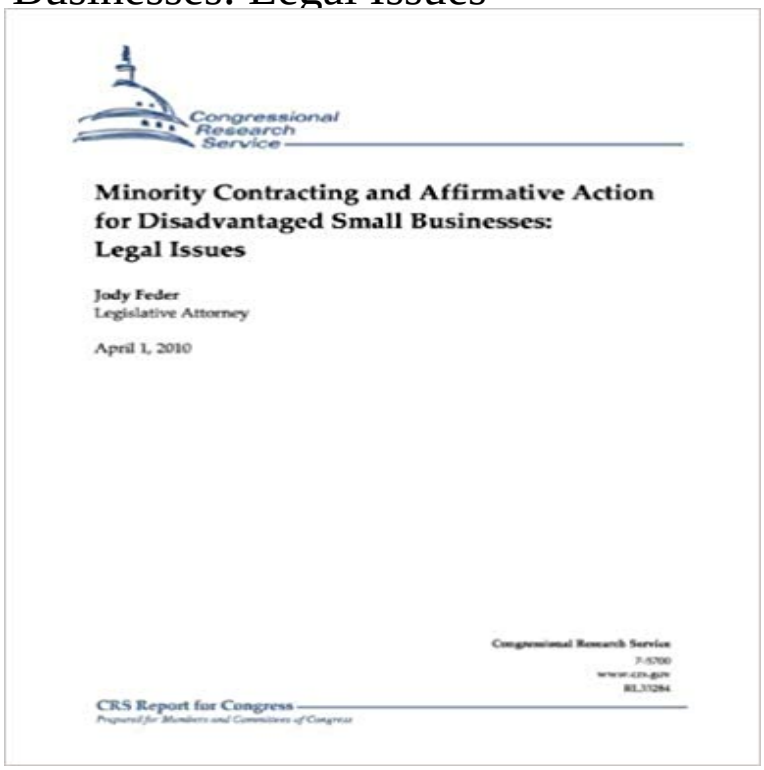
Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues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Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues

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Since the early 1960s, minority participation goals have been an integral part of federal policies to promote racial and gender equality in contracting on federally financed construction projects and in connection with other large federal contracts. Federal contract set-asides and minority subcontracting goals evolved from Small Business Administration (SBA) programs to foster participation in the federal procurement process by small disadvantaged businesses (SDBs), or small businesses owned and controlled by socially and economically disadvantaged individuals. Minority group members and women are presumed to be socially and economically disadvantaged under the Small Business Act, while non-minority contractors must present evidence to prove their eligibility. Goals or set-asides for minority groups, women, and other disadvantaged individuals have also been routinely included in federal funding measures for education, defense, transportation, and other activities over much of the last two decades.The U.S. Supreme Court has narrowly approved of congressionally mandated racial preferences to allocate the benefits of contracts on federally sponsored public works projects, while generally condemning similar actions taken by state and local entities to promote public contracting opportunities for minority entrepreneurs. Disputes prior to City of Richmond v. J.A. Croson generated divergent views as to whether state affirmative action measures for the benefit of racial minorities were subject to the same strict scrutiny as applied to invidious racial discrimination under the Equal Protection Clause, an intermediate standard resembling the test for gender-based classifications, or simple rationality. In Croson, a 5 to 4 majority resolved that while race-conscious remedies could be legislated in response to proven past

discrimination by the affected governmental entities, racial balancing untailored to specific and identified evidence of minority exclusion was impermissible.Until Adarand Constructors, Inc. v. Pena, however, a different, more lenient standard was thought to apply to use of racial preferences in federally conducted activities. The majority there applied strict scrutiny to a federal transportation program of financial incentives for prime contractors who subcontracted to firms owned by socially and economically disadvantaged group members. Although the Court refrained from deciding the constitutional merits of the particular program before it, and remanded for further proceedings below, it determined that all racial classifications by government at any level must be justified by a compelling governmental interest and narrowly tailored to that end. But the majority opinion, by Justice OConnor, sought to dispel the notion that strict scrutiny is strict in theory, but fatal in fact, by acknowledging a role for Congress as architect of remedies for discrimination nationwide. Bottom line, Adarand and its progeny suggest that racial preferences in federal law or policy are a remedy of last resort, which must be adequately justified and narrowly drawn to pass constitutional muster. In the post-Adarand era, lower federal courts have at times upheld and at other times struck down federal programs that contain minority contracting preferences. For example, in Rothe Development Corporation v. Department of Defense, the Federal Circuit recently held that the Department of Defenses Small Disadvantaged Business program was unconstitutional.

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April 1, 2010. **Minority Contracting and Affirmative Action for Disadvantaged Small** Minority Contracting and Affirmative Action for Disadvantaged Small Businesses: Legal Issues Page: 15 of 28. This report is part of the **Minority contracting and affirmative action for disadvantaged small**

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