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STATE of SOUTH CAROLINA

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Columbia 29211

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The Honorable Michael L. Fair
Senator, District No. 6
P. O. Box 14632
Greenville, South Carolina 29610

Dear Senator Fair:

You correctly state in a letter to me that there are presently a number of state and federal laws requiring the use of quotas or "set-asides" with respect to highway and bridge construction as well as state procurement. Your inquiry is whether these programs are constitutional.

In a single word, the answer is no. These quotas treat individuals unequally, based upon the color of their skin and their gender, and thus violate the United States Constitution.

By way of background, federal and state statutes have imposed an intricate quota system as part of the State's highway and bridge construction program. Pursuant to state law, SCDOT is required to set aside at least 10% [5% + 5%] of all its state source highway funds expended in a fiscal year to firms which are minority owned, as defined. To meet these quota requirements, SCDOT must advertise a number of highway construction projects to be bid "exclusively" by minority firms. Others may not bid on the set-aside projects. See S.C. Code Ann. § 12-27-1320. Moreover, federal law requires SCDOT, as a condition of acceptance of federal funds under the Surface Transportation Act, to insure compliance with the federal set-aside requirements (10%) and to establish dollar goals for minority participation. Section 105(f) of the Surface Transportation Act of 1982.

REQUEST LETTER

Likewise, the State Procurement Code sets aside certain contracts for minority bid. State law requires that selected contracts may be negotiated with "certified, South Carolina-based minority firms." See, § 11-35-5010 et seq.; § 11-35-5230. The State also gives an income tax credit to firms with state contracts that subcontract with minority firms. Id.

The bill footed by taxpayers and the State for these quotas is enormously high. To illustrate, a 1995 Study indicates that the total dollars awarded to subcontractor minority firms (black, Hispanic, Asian, Native-American, and white women) for SCDOT work between 1980 and 1993 (during much of this time some sort of minority goals and/or set-aside program was in effect) was almost 137 million dollars. See, "A Study of Minority and Women-Owned Business Participation In The South Carolina Department of Transportation's Construction Contracts," (July 1995), p.ix. The Legislative Audit Council reported in 1991 that 91 million dollars were committed to these minority firm subcontractors during a four year period as a result of the SCDOT program. See, "A Limited-Scope Review of The South Carolina Department of Highways and Public Transportation Minority Goals Program," (May, 1991), p.5. Between fiscal years 1986-87 and 89-90, almost 12 million dollars in set-aside contracts were actually awarded. Id., p.34. For one fiscal year, I am informed that the set-aside target at DOT is around 25 million dollars. In short, the set-aside program is big business in South Carolina.

Condemnation and criticism of the set-aside program is rampant and frustration with it abounds. In 1993 alone, thirty affirmative action programs were voluntarily suspended, ninety were being reevaluated, and fifty-five were challenged nationwide. Very few state and local programs were able to survive constitutional scrutiny. Newman, "Affirmative Action and The Construction Industry," 25 Pub. Cont. L.J. 433, 440 (Winter, 1996). Closer to home, the Audit Council's verdict was that "[e]vidence indicates that only a few [minority] ... companies will benefit from the set-aside program." Non-minority firms feel they are held to different standards compared, to minority firms. However, the 1995 Study, referenced above, found that minority entrepreneurs believe only a few "favored" minority firms ever get contracts. Id. at xiv. Any number of "dodges" are allegedly used to achieve compliance with the quotas, including accounts of the use of organizational "fronts" to create the ruse that the firm is minority in composition.

The 1995 Study - which cost the State 350,000 dollars and was aimed at legally justifying the program - recognized that even with the quota, minority firms continue to face "significant constraints and barriers in performing contracts for the SCDOT ... ." Id. at xiii. These barriers result from race- and gender-neutral factors such as bonding requirements, inadequate capital and the ineffectiveness of the set-aside program itself. Indeed, this Study concluded that "[t]he state set-aside program ... has [actually] limited

the dollar participation of [minority firms] in state contracting." Id. Such a quota system is demeaning to minorities who often receive the task of hauling and guardrail work. Worse, it sends a signal that without these quotas, minorities could not make it on their own. Clearly, building the State's roads and providing the State's services, when saddled by such a system, is a price far too high for the taxpayers, the State and, particularly, for minorities to pay.

These quotas stand the goal of "equal justice under law" on its head and mock the principle of a "color blind" Constitution. In the name of a remedy for past racial and gender discrimination, these laws sanction one bidding process for white men and yet another for minorities. With set-asides, we are sliding back into a segregated legal system, the likes of which mandated "Jim Crow" and separate water fountains, restrooms and buses at its worst. This form of unequal treatment is morally and legally reprehensible. The supreme irony is that in our rush to atone for previous wrongs, blacks and women continue to be stifled. Rather than a slice of the economic pie, minorities receive only crumbs; instead of their realizing the "American dream", the State is experiencing a nightmare.

The Constitution does not sanction this 1990s version of separate and unequal any more than it did in the 1950s and 60s. South Carolina is not required to remedy past discrimination with present inequality. No doctrine of constitutional law mandates a state to discriminate today to atone for the wrongs of yesterday.

Indeed, when a State does try to rectify past discrimination through discrimination in the other direction, it places itself in imminent constitutional peril. The courts subject this form of invidious reverse discrimination to the strictest scrutiny and the closest review. Such reverse discrimination is upheld only with the most thorough documentation and the most narrowly drawn program. See, e.g. City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995); Podberesky v. Kirwan, 38 F.3d 147 (4th Cir. 1994); Assoc. Genl. Contractors of America v. Columbus, 936 F.Supp. 1363 (S.D. Ohio, 1996); La. Assoc. Genl. Contractors Inc. v. La., 669 So.2d 1185 (La. 1996). Our statutes miserably fail this test. In the words of the courts, quotas are a "presumptively illegal practice." Engineering Contractors Assn. of South Florida v. Metro. Dade Co., 943 F.Supp. 1546, 1556 (S.D. Fla. 1996). In my opinion, such quotas are paternalistic, patently offensive and plainly unlawful.

I do not, however, suggest, nor have the courts held, that the state may not assist small businesses to grow, develop and thrive on a race-and gender-neutral basis, free from the shackles of quotas. The Court, in the City of Columbus case, was quick to point out the obvious distinction between set-asides and race-and gender-neutral assistance to small businesses. There the Court stated:

> [t]he race- and gender-neutral programs recommended by the city's consultants addressed the major barriers that small and newly formed construction firms would encounter in performing work on city projects as prime and subcontractors. Most of them were adopted in one form or another ... but not as race- and gender-neutral measures; instead, their benefits are limited to firms owned by blacks and women. How and why significant race-and gender-neutral programs become race and gender specific is one of the more troubling questions left unanswered by the city's evidence.

936 F.Supp at 1463 (emphasis added). Race and gender-neutral measures which provide economic aid to small businesses generally are constitutional and make good economic sense. These include elimination or relaxation of pre-qualification requirements and other red tape, bond guaranty programs, capital enhancement tools, breaking down projects to facilitate smaller business participation, prompt payment measures, and small business resource centers and contractor mentoring programs. See, Concrete Workers v. City and County of Denver, 823 F.Supp. 821, 841 (D. Colo. 1993), revd. on other grounds, 36 F.3d 1513 (10th Cir. 1994).

However, the South Carolina set-asides are far from being race- and gender-neutral. Rather, these set-asides unabashedly discriminate on the basis of race and gender with the same force of law behind them as served as the foundation for segregation years ago. The constitutional mandate of "equal protection of the laws" forbids racial and gender preference and requires that such unequal treatment be eliminated "root and branch." Green v. School Bd. of New Kent Co., 391 U.S. 430, 437-38 (1968). This is so regardless of whether the discrimination is against black or white, female or male or is labelled segregation or dubbed affirmative action. Racial and gender discrimination, whether in the traditional form or in reverse, is illegal. No matter how you cut it, what you call it or why you do it, discrimination is discrimination.

These set-aside programs do great injustice to the towering ideal of the Declaration of Independence. In no dictionary that I know of does the word "equality" mean separate treatment, preferential treatment or treatment which gives one race or sex the advantage over the other. Ability, ingenuity and opportunity made this nation great, but racial disparity can and will tear it apart. South Carolina should not be doing what is politically correct, but what is legally and morally right; not what makes us feel good, but what is good for all the people.

Accordingly, it is my opinion that the South Carolina set-aside programs are unlawful quotas and cannot stand. The courts would strike these laws which create a segregated system for building the State's roads and procuring its services as violative of

the Equal Protection Clause. Thus, these unconstitutional racial and gender quotas must be eliminated forthwith.

Sincerely,

Charles Molony Condon
Attorney General

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