The State of South Carolina

Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3680

March 9, 1989

The Honorable David L. Thomas
Senator, District No. 8
602 Gressette Building
Columbia, South Carolina 29202

Dear Senator Thomas:

As you are aware, your letter dated January 24, 1989, to Attorney General Medlock has been referred to me for response. By that letter, you have inquired: "In light of the United States Supreme Court ruling in the Richmond, Virginia, case relative to affirmative action, I would like to question the constitutionality of South Carolina's 10% highway set-aside money."

In City of Richmond v. J.A. Croson Co., ___U.S.___, 109 S.Ct. 706 (1989), decided on January 23, 1989, the United States Supreme Court "confront[ed] once again the tension between the Fourteenth Amendment's guarantee of equal treatment to all citizens, and the use of race-based measures to ameliorate the effects of past discrimination on the opportunities enjoyed by members of minority groups in our society." Id. at ___, 109 S.Ct. at 712. In J.A. Croson Co., the Court struck down an ordinance requiring city construction contractors to set aside thirty (30%) percent of the subcontracts for minority business enterprises because insufficient evidence was offered in support of past racial discrimination in the city's construction industry to justify the ordinance as a race-based remedy. Id. Relying

upon Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986),[1] the Chief Justice and Justices O'Connor, White, Kennedy, and Scalia agreed that a strict scrutiny test under the equal protection clause of the fourteenth amendment must be applied to governmental programs that impose racial classifications for remedial purposes. J.A. Croson Co., supra at ___, 109 S.Ct. at 721 & 735-9 (majority opinion written by Justice O'Connor and concurring opinion of Justice Scalia). The majority held, in J.A. Croson Co., that Richmond failed to establish evidence of past discrimination in the local construction industry sufficient to meet this strict scrutiny test. Id. at ___, 109 S.Ct. at 723-4. Analyzing a recitation that the ordinance had a remedial purpose, the majority determined that such a recitation is entitled to little or no weight and stated: "Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice." Id. at ___, 109 S.Ct. at 724. The majority in J.A. Croson Co., supra at ___, 109 S.Ct. at 724-7, also concluded that neither a generalized, conclusional assertion that there was racial discrimination in the construction industry in the area, the state, and the nation, nor a finding by Congress in connection with the set-aside approved in Fullilove v. Klutznick, 448 U.S. 448 (1980), that there had been nationwide discrimination in the construction industry was deemed sufficient to establish a need for imposing a race-based remedy in Richmond, Virginia. The majority determined that Richmond's reliance on the fact that only 0.67 percent of city contracts were awarded to minorities in a city with a fifty (50%) percent minority population was misplaced. "Without any information on minority participation in subcontracting, it is quite simply impossible to evaluate overall minority representation in the city's construction expenditures." J.A. Croson Co., supra at ___, 109 S.Ct. at 725. In addition, the majority found that the Richmond Plan was not narrowly tailored to withstand strict scrutiny, at least in part because Richmond apparently did not consider the use of race-neutral means to increase minority business participation in city

---

[1] The United States Supreme Court had earlier granted J.A. Croson Co.'s petition for writ of certiorari, vacated the opinion of the Court of Appeals found at J.A. Croson v. Richmond, 779 F.2d 181 (4th Cir. 1985)("Croson I"), and remanded the case for further consideration in light of Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986). J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986)(memorandum decision). On remand, the Court of Appeals struck down the Richmond ordinance as violating the equal protection clause of the fourteenth amendment. J.A. Croson Co. v. Richmond, 822 F.2d 1355 (4th Cir. 1987)("Croson II").

contracting. Id. at ___, 109 S.Ct. at 728-9. In summary, the majority stated:

> Nothing we say today precludes a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction. If the city of Richmond had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities it could take action to end the discriminatory exclusion. Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise. [Citations omitted.] Under such circumstances, the city could act to dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria. [Citation omitted.] In the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion.
>
> Nor is local government powerless to deal with individual instances of racially motivated refusals to employ minority contractors. Where such discrimination occurs, a city would be justified in penalizing the discriminator and providing appropriate relief to the victim of such discrimination. [Citation omitted.] Moreover, evidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified. [Citation omitted.]
>
> . . . .
>
> . . . .

> Proper findings in this regard are necessary to define both the scope of the injury and the extent of the remedy necessary to cure its effects. Such findings also serve to assure all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself. Absent such findings, there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics. . . .

Id. at ___, 109 S.Ct. at 729-30.

Although your letter does not specify the legislation you question, apparently your inquiry involves certain provisions of the 1988-89 appropriations act.

> 126.24. Notwithstanding any other provisions of law, not less than ten percent of the total State Highway funds contracted for construction purposes during any fiscal year must be expended with small business concerns owned and controlled by economically and socially disadvantaged individuals as defined in Section 11-35-5010 of the 1976 Code or owned and controlled by women, as certified by the Department of Highways and Public Transportation. The Department of Highways must give at least thirty days' notice to these small business concerns on their list of contracts to be let. When such small business concerns are not available to perform the work required by the provisions of this section, the Department must verify and record this fact which verification must be preserved in the records of the Department. No contractor may be excluded from consideration for an award of a construction contract under this proviso if the prime contractor files with the department an affidavit with sufficient proof that there is no small business concern located in South Carolina that can satisfactorily perform any of the construction work required under the contract.

126.25. (A) Of total state source highway funds expended in fiscal year on construction contracts, the Department of Highways and Public Transportation shall, through the use of goals or set-asides, provided that goals be used only on projects exceeding $500,000, insure not less than:

(1) five percent are expended with small business concerns owned and controlled by socially and economically disadvantaged individuals (DBE'S) as defined in Public Law 95-507; and

(2) five percent are expended with firms owned and controlled by disadvantaged females (WBE'S)

The department shall certify eligible firms under this paragraph and shall give at least thirty days' notice to certified firms of contracts to be let. No firm may be certified if it has previously been certified as a DBE or WBE for purposes of federal or state source highway construction contracts set-asides for more than five years, nor shall a firm, corporation, or partnership be certified where more than twenty-five percent interest is earned by a member or a spouse of a member, stockholder, or partner that has earned any interest in a firm, corporation, or partnership that has been certified for more than three years.

(B) If no DBE or WBE firms certified pursuant to this paragraph are available to perform a contract, the department shall verify and record this fact and the verification must be preserved in department records. To the extent a goal or set-aside for a particular category cannot be met, the unused portion of a goal or set-aside must be added to the goal or set-aside of the other category if the appropriate category firm is available.

(C) To facilitate implementation of this section, the department may waive or

guarantee bonding requirements for contracts let pursuant to this paragraph with estimated construction costs not exceeding two hundred fifty thousand dollars a contract, and that any such contract set aside and awarded to a DBE or WBE contractor without bonding shall expressly provide that termination of the contract for default of the contractor renders the contractor ineligible for any further department nonbonded set-aside contracts for a minimum period of two years from the date of the notice.

(D) In awarding any contract pursuant to this paragraph, preference must be given to an otherwise eligible South Carolina contractor submitting a responsible bid not exceeding an otherwise eligible out-of-state contractor's low bid by two and one-half percent.

(E) A DBE or WBE acting as a prime contractor shall, in letting subcontracts, comply with the applicable provisions of this section.

(F) The Department shall make available technical and support services for DBE's and WBE's the same percentages of state source highway construction funds as is provided for the same purpose in federal highway construction funds, not to exceed $100,000.

(G) Procurements and contracts made pursuant to Section 106(c) of the Federal Surface Transportation Assistance Act of 1987 (STAA-1987) are subject to the provisions of Sections 11-35-1210(2), 11-35-1220, and 11-35-1230.

126.26. Notwithstanding the time limitation set forth in Section 4 of Act 197 of 1987 the one-forth of one cent authorized under Section 4 of Act 197 of 1987 must be allocated not later than June 30, 1989.

1988 S.C. Acts 658, §§126.24 & 126.25.

When the validity of a legislative act is questioned, the court will presume the legislative act to be constitutionally valid, and every intendment will be indulged in favor of the act's validity by the court. Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988). "While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." S.C. Att'y Gen. Op. #87-62 (Jun. 15, 1987).

Despite this presumption in favor of the constitutionality of legislation, Richland County v. Campbell, supra, whether or not 1988 S.C. Acts 658, §§126.24 & 126.25 would survive an equal protection challenge based on the analysis in J.A. Croson Co., supra, is not entirely free from doubt. Nevertheless, several distinctions could exist which would militate in favor of the constitutionality of those provisos. First, the Court in J.A. Croson Co. struck down Richmond's ordinance primarily because of a dearth of evidence to satisfy the (newly) applicable strict scrutiny test. Your letter does not indicate whether or not facts exist to prove, for example, that nonminority contractors in South Carolina were systematically excluding minority businesses from subcontracting opportunities.[2] See J.A. Croson Co., supra at ___, 109 S.Ct. at 729. Presumably presentation of such evidence, if it exists, would enable the South Carolina provisos in question to survive such a constitutional attack. See, id. In addition, 1988 S.C. Acts 658, §§126.124 & 126.25 address economically and socially disadvantaged individuals,[3] unlike the ordinance in J.A. Croson Co., supra, which addressed solely a racial classification. Perhaps this apparent use of a race-neutral means to increase minority business participation pursuant to those provisos would constitute, as required by J.A. Croson Co., supra, a narrowly tailored remedy to the effects of prior discrimination.

In conclusion, the impact of the United States Supreme Court's decision in J.A. Croson Co., supra, upon 1988 S.C. Acts 658, §§126.24 & 126.25 is not entirely clear. Assuming that evidence exists to establish an inference of discriminatory exclusion in South Carolina, those South Carolina provisos may survive an equal protection challenge based upon the analysis in J.A. Croson Co., supra.

---

[2] Of course, this Office can not engage in fact finding in the context of issuing advice. S.C. Att'y Gen. Op., Nov. 18, 1986.

[3] The phrase "economically and socially disadvantaged individuals" in 1988 S.C. Acts 658, §126.24 is, according to that proviso, as defined in S.C. Code Ann. §11-35-5010 (1976).

CONCLUSION

In conclusion, the United States Supreme Court has suggested the following guidelines for the provisions in question to be upheld:

1. The legislation in question must have been enacted "to rectify the effects of identified discrimination within. . . [the] jurisdiction."

2. Such requires evidence "that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities."

3. Such evidence should most probably show "a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors." This raises "an inference of discriminatory exclusion."

4. If such evidence is produced, the locality [city, State, etc.] is authorized to "dismantle the closed business system by taking appropriate measures against those who discriminate on the basis of race or other illegitimate criteria."

5. Any racial preference must be "narrowly tailored" to "break down patterns of deliberate exclusion."[4]

I hope the foregoing will be of assistance to you. If I can answer any further questions, please advise me.

Sincerely,

Samuel L. Wilkins

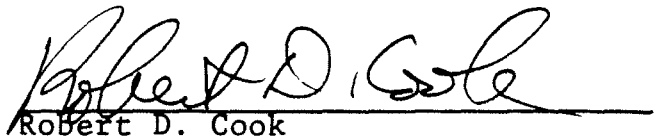
Samuel L. Wilkins
Assistant Attorney General

---

[4] It is our understanding that a number of states are now in the process of enacting legislation pursuant to these guidelines. You may wish to contact these states for information should you intend to pursue legislation in this area.

SLW/fg

REVIEWED AND APPROVED BY:



Robert D. Cook
Executive Assistant for Opinions