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The State of South Carolina

Office of the Attorney General

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June 15, 1989

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

Dear Senator Thomas:

Your letter dated June 1, 1989, to Attorney General Medlock has been referred to me for reply. By that letter, you reference revisions to provisos contained in the 1989-90 appropriations bill concerning "minority/women's highway construction set aside" and state:

> As a follow-up to the opinion you provided me on March 9, 1989, I would like for you to review this new language and issue an opinion regarding its constitutionality. Specifically, I would like to have the following issues addressed:
>
> 1. The U.S. Supreme Court, in the Richmond v. J.A. Croson decision, stated that "... in the extreme case, some form of narrowly tailored racial preference might be necessary to break down patterns of deliberate exclusion...." In the same paragraph, the Court said that a local (or state) government could "take action to end the discriminatory exclusion..." if it "... had evidence before it that nonminority contractors were systematically excluding minority businesses from subcontracting opportunities...." I would like to know if sufficient evidence is contained in Section 64 of the bill to document "deliberate exclusion" or systematic discrimination. Did the General Assembly establish a "compelling state interest" as required by the Supreme Court?

2. Is the language contained in Section 64 "narrowly tailored" to address alleged past discrimination? In particular,

   a) Has constitutional justification been provided regarding the use of goals on projects over $750,000? If so, is this provision narrowly tailored to address an identified degree of past discrimination?

   b) Is the term "ethnic minority" defined anywhere in the State Code of Laws and, if so, is that definition narrowly defined to include contractors and subcontractors who have been discriminated against in the past?

   c) What constitutional justification is there for the extension from five years to nine years of the time a minority or woman contractor may participate in the program? Is this provision narrowly tailored to address an identified degree of past discrimination?

   d) According to the documentation contained in the preamble to Section 64, does the amount to be spent on supportive services (not less than $100,000) have any relationship to an identified degree of past discrimination? Is it narrowly tailored?

   e) Has sufficient documentation of deliberate exclusion or systematic discrimination been established within the construction bonding industry to justify the waiving of bonds for minorities and women and is this provision narrowly tailored to address past discriminations?

   f) The language contained in the bill requires that "the unused portion of a (minority or women's) goal or

set aside must be added to the goal or set aside of the other category." Is this provision narrowly tailored to address an identified degree of past discrimination?

3. The Supreme Court said that the waiver of subcontract goals cannot be based "solely on the availability of MBEs," yet Section 64 limits waiver to situations where an MBE or WBE is not "available to perform a contract." Is this constitutional?

As you acknowledged, this Office has previously opined, at your request, concerning the impact of the ruling by the United States Supreme Court in City of Richmond v. J.A. Croson Co., ___ U.S. ___, ___, 109 S.Ct. 706 712 (1989), decided on January 23, 1989, which "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 enjoined by members of minority groups in our society." S.C. Att'y Gen. Op., Mar. 9, 1989. In that Opinion, this Office essentially advised that the constitutionality of any specific legislation would depend, in light of the holding in Croson, upon a legislative, and ultimately a judicial, determination that the particular legislation was enacted as a remedy for past discrimination. That Opinion concluded that to reach such a determination, a court would require evidence "that nonminority contractors were systematically excluding nonminority businesses from subcontracting opportunities" and "[s]uch 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.'" Id.

You now have posed various questions concerning provisos contained in the 1989-90 appropriations bill, H.R. 3600, 1989 Reg. Sess., 1989 S.C. Acts ___ (Part II, §64), which has been sent to the Governor for his review. Of course, 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).

Although this Office may comment upon potential constitutional problems, the courts of this State have the sole province to declare an act unconstitutional or to make necessary findings of fact prior to finding a legislative act unconstitutional. S.C. Att'y Gen. Op., May 26, 1989. See 7 Am. Jur. 2d Attorney General §11 (discussing the advisory and ministerial, rather than judicial, function of the office of attorney general).

All of your questions, except question #2.b., in your recent letter require a factual and legal, rather than solely a legal, analysis to resolve the constitutionality of the provisos you question. "Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977). Discriminatory intent "need not be proven by direct evidence." Rogers v. Lodge, 458 U.S. 613, 618 (1982). In Washington v. Davis, 426 U.S. 229, 242 (1976), the United States Supreme Court stated: "Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." Evidentiary sources which might be probative of discriminatory intent include

> [t]he impact of the official action - whether it "bears more heavily on one race than another,"... [t]he historical background of the decision... particularly if it reveals a series of official actions taken for invidious purposes... [and] [t]he legislative or administrative history... especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

Arlington Heights, supra at 266-8. Thus, the totality of the relevant facts is essential to such a constitutional analysis. Accord Croson, supra (The United States Supreme Court struck down the City of Richmond's ordinance primarily because of a dearth of evidence to satisfy the applicable strict scrutiny test.). Likely involved in fully resolving your questions as to the constitutionality of the relevant provisos is a great deal of statistical analysis and the use of expert witnesses. See Croson, supra at ___, 109 S.Ct. at 729 ("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."). Your letter simply does

not provide this Office with the totality of the facts necessary to resolve fully the constitutional questions you pose. Moreover, an Opinion from this Office is not the appropriate forum for such resolution.[1] More appropriately, a court would possess the necessary factfinding resources and machinery required adequately to determine the difficult factual questions you present.

A recent decision by the United States Supreme Court clearly illustrates the importance of fact-finding in the context of whether a particular set aside program is in conflict with the Court's guidelines set forth in Croson. In H.K. Porter Co. Inc. v. Metropolitan Dade County, 103 L.Ed. 2d 804 (1989), the Court granted a petition for certiorari, vacated the judgment and remanded for further consideration by the District Court in light of Croson. In short, the Court felt it necessary to send the case back to the trial court because factual determinations were essential to determine whether the set aside program in question violated the Constitution. This case emphasizes the overriding importance of fact-finding in this area. Likewise, factual determinations are critical to determine the validity of South

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[1] We recently noted in Opinion No. 85-132, dated November 15, 1985:

> Because this office does not have the authority of a court or other fact-finding body, we are not able, in a legal opinion to adjudicate or investigate factual questions. Unlike a fact-finding body, such as a legislative committee, an administrative agency or a court, we do not possess the necessary fact-finding authority and resources required to adequately determine the difficult factual questions present here.
>
> A fact-finding body normally possesses the authority to call witnesses, swear them under oath and compel them to testify in a public proceeding. Witnesses are usually subject to cross-examination, to bring out all the relevant facts. A factual record of the proceedings is maintained and numerous documents admitted into evidence.... Of course, none of these important mechanisms for bringing out all the relevant facts is available in a legal opinion of this Office.

Carolina's new set aside program.[2]

As to your question #2.b., I am unaware of any definition of the phrase "ethnic minority" contained within the statutory law of South Carolina. But cf. S.C. Code Ann. §11-35-5010 (1976)(In article 21 of chapter 35 of Title 11, the South Carolina General Assembly provided: "'Minority person' for the purpose of this article, means a United States citizen who is economically and socially disadvantaged.").

In conclusion, the United States Supreme Court set forth certain guidelines which are essential for the provisos that you question to be upheld. See S.C. Att'y Gen. Op., Mar. 9, 1989. Whether or not specific legislation comports with those guidelines requires a complex factual and legal analysis beyond the scope of an Opinion of this Office. Apparently, the phrase "ethnic minority" is not defined in South Carolina statutory law.

I hope the foregoing will be of assistance to you.

Sincerely,

Samuel L. Wilkins

Samuel L. Wilkins
Assistant Attorney General

SLW/fg

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[2] We recognize that the United States Supreme Court recently has held that Michigan's set aside program is unconstitutional in light of Croson's guidelines. In Milliken v. Michigan Road Builders, 57 U.S.L.W. 3583 (1989), the Court recently affirmed the 6th Circuit's ruling (834 F.2d 583) that the Michigan statute requiring state agencies to set aside at least seven (7) per cent of public contract expenditures for minority-owned businesses and five (5) per cent for women-owned businesses is supported only by findings of past societal discrimination, not discimination in awarding of public contracts, and thus violates Equal Protection. Of course, in this instance, the facts had already been fully explored in a judicial forum. Such fact-finding is now necessary with respect to South Carolina's statute.

REVIEWED AND APPROVED BY:

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