1981 S.C. Op. Atty. Gen. 15 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-9, 1981 WL 96536

Office of the Attorney General

State of South Carolina
Opinion No. 81-9
February 4, 1981

***1 SUBJECT: Constitutionality of Chapter 11 of Proposed Title 62, The South Carolina Consolidated Procurement Code.**

Chapter 11 of the Proposed South Carolina Consolidated Procurement Code entitled, 'Assistance to Minority Business', provides for an income tax credit of 4%: (1) To Minority-Owned Business Enterprises (M.B.E.'s) on payments they receive from the State on State Generated contracts; and (2) To Non-Minority businesses which subcontract State work to Minority-Owned Business Enterprises (M.B.E.'s) to the extent of the dollar value paid to the Minority-Owned Business Enterprise. Chapter 11 is not violative of either the Federal or the State Constitution, providing certain findings are made by the General Assembly.

TO: The State Reorganization Commission

QUESTION:

Is Chapter 11, entitled 'Assistance to Minority Business', in violation of any constitutional provisions?

STATUTES:

Amendment 14 of the United States Constitution; Article I, Section 3, of the South Carolina Constitution

DISCUSSION:

This question will be discussed in four parts. First, a short background of Chapter 11 of Proposed Title 62. Second, whether or not this tax advantage is permissible under the Federal Constitution. Third, whether or not the tax advantage is permissible under the State Constitution. And, finally, whether or not Chapter 11 of proposed Title 62 (hereinafter 'the Act') is constitutional as it is currently written.

A. Background.

Proposed Title 62 (Consolidated Procurement Code) to the Code of Laws of South Carolina, 1976, has been filed in the General Assembly as Senate Bill 95 and House Bill 2230. Chapter 11 of the Act requires that a tax credit of 4% be given Minority-Owned Business Enterprises (M.B.E.'s) on payments they receive from the State on State contracts. This credit also applies to non-minority businesses which sub-contract State work to M.B.E.'s, to the extent of the dollar value paid to M.B.E.'s.

Accordingly, the State Reorganization Commission has requested advice on the constitutionality of this racially based tax credit.

B. United States Constitution.

The United States Supreme Court has, in the past, upheld actions taken to relieve the effects of prior racial discriminations (See eg. Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); Swann v. Charlotte Board of Education, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971)). The Court has also upheld legislative acts which award economic

advantages to women, where the purpose of the gender-based act was to redress past disparate treatment of women by society, Califano v. Goldfarb, 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 n.8 (1977), or current economic disadvantages, Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (1974). More recently, in the case of Fullilove v. Klutznicl 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (hereinafter Fullilove), the Court held that Congress has wide latitude to redress racial discrimination by granting economic advantage to M.B.E.'s and that such advantages are not violative of Equal Protection. The opinions of both the Chief Justice and Justice Powell in Fullilove, recognized that the setting aside of governmental contracts for M.B.E.'s was permissible when Congress authorized such actions by legislation, even though the effect redressing prior discrimination is to cause some innocent parties to bear part of the burden. It should be noted that the 4% tax advantage required by the Act is of a considerably less pervasive nature than the 10% set aside of contracts found to be constitutional in Fullilove.

***2** The Fullilove case gives a clear guide concerning what procedures will comport with Equal Protection when a racial classification is used to remedy the present effects of past discrimination. First, the statute must be within the power of the legislature to enact and it is helpful if it is enacted pursuant to its taxing and spending power. Second, the legislative program must be narrowly tailored to accomplish the specific goal of redressing past discrimination and be limited to a specific time period. Third, any effect the statute might have in causing M.B.E.'s to get contracts or sub-contracts, which might otherwise be awarded to non-minority businesses must be an incidental effect of the act and not its purpose; that is, its primary purpose must be to remedy past discrimination and not give M.B.E.'s preferred status in the bidding process. Fourth, the administrative scheme developed by the legislative must be limited to the legislative purpose (redress of past discrimination) with the assurance that misapplications of Chapter 11 of the act will be remedied promptly through administrative channels. Finally, there must be some legislative finding of past discrimination in the area in question (i.e. State government procurement). In Fullilove, the court found adequate findings of past discrimination to various minorities including 'Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts' in statements made on the floor of the House of Representatives. (See, Fullilove, 100 S.Ct. at 2765, 65 L.Ed.2d at 912). These comments noted a statistical variance between the percentage of government contracts received by M.B.E.'s (1%) and the percentage of minority individuals in the overall population (15–18%). They further noted that for a number of reasons 'difficult to isolate or quantify' minorities had traditionally found access to government contracts difficult and that without some government action the 'historic practices that have precluded minority businesses from effective participation in public contracting' would continue. The Court viewed these statements as findings of the longstanding existence of barriers, impairing access to public contracts and of discrimination against M.B.E.'s. Fullilove, 100 S.Ct. at 2767, 65 L.Ed.2d at 914. The Court also determined that the speakers and Congress in general were fully aware that the M.B.E. provisions there in question were designed for redressing past racial discrimination Fullilove, 100 S.Ct. at 2769, 65 L.Ed.2d at 917, especially in light of a report on M.B.E.'s made to the House Committee on Small Business, Fullilove, 100 S.Ct. at 2768, 65 L.Ed.2d at 915.

It is clear, therefore, that extremely detailed findings of past discrimination are not necessary, but some specific legislative findings will be necessary if the courts later review the purposes of the act.

C. State Constitution.

As a general rule, a State, under the Strictures of its State Constitution, may require higher standards of constitutional review than are required by the Federal Constitution. Pruneyard Shopping Center v. Robins, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980). [See also, Justice Brennan, 'State Constitutional Rights', 90 Har.L.Rev. 489 (1977), for examples of State cases granting greater constitutional rights than the Federal Constitution and rejecting U. S. Supreme Court rulings as State constitutional precedent. See especially, fn. 76 at 500].

***3** It is also arguable that State cases decided solely on State constitutional grounds which afford higher standards of review than are required by the Federal Constitution are not even reviewable by the U. S. Supreme Court. (See eg. Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); Herb v. Pitcarin, 324 U.S. 117, 65 S.Ct. 459, 89 L.Ed. 789 (1945); Whitney Stores v. Summerford, 280 F.Supp. 406 (DSC 1968), aff'd per curiam, 393 U.S. 9 (1968); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, cert. den., 423 U.S. 808 (1975)). Therefore, it might be possible for the Supreme Court of South Carolina to apply a greater standard of review under Article 1, Section 3, of the South Carolina

Constitution than is required by the 14th Amendment and Fullilove. However, were the court to do so, it would not be following its own precedent. The court has consistently judged the delineation of classes for taxing and other purposes by the same standards. The State constitutional guarantee of equal protection requires: (1) That all members of a class be treated alike under similar circumstances; (2) Any classification must bear a reasonable relation to the legislative purpose sought to be effected; and (3) the classification cannot be arbitrary. Marley v. Kirby, 271 S.C. 122; 245 S.E.2d 604 (1978); Broome v. Truluck, 270 S.C. 510, 238 S.E.2d 205 (1977); Daniel v. Cruz, 268 S.C. 11, 231, S.E.2d 293 (1977); United Fidelity and Guaranty Co. v. City of Newberry, 257 S.C. 563, 186 S.E.2d 761 (1972). (See also, Hawkins v. Moss, 503 F.2d 1171 (4th Cir. 1974)).

Therefore, it must be concluded that if the class fits the stricter requirements of Fullilove, the Supreme Court of South Carolina, using its own standard of review, would find no constitutional impairment to the 4% tax advantage.

D. Whether Chapter 11 is constitutional as written.

This question depends on whether or not Chapter 11 fits the strictures of Fullilove in part 'B' above.

The statute will be enacted by the General Assembly pursuant to its taxing and spending power. The purpose of the act is clearly not designed to give any preference to the M.B.E.'s in the bidding process since the bidding process itself is not altered by the act. The benefits of the act are received only for a limited (5-year) period. There is present an administrative scheme to determine which businesses qualify as M.B.E.'s and an administrative channel available to correct mistakes in classification. However, there are no findings present of past discrimination in the area of State procurement. These findings should be made and it would be advisable to incorporate those findings into the act itself as was done in the Low Income Housing Act where a 'Declaration of Legislative Findings and Purpose' was made a part of the Act. See § 31–13–180 of the South Carolina Code of Laws (1976) as amended. Although Fullilove does not require detailed findings, it is preferable that they be as specific as possible, especially in regard to which minorities should be included within the program. This will give clear guidance to the administrators of the act concerning who the General Assembly intends to benefit—i.e., what the exact nature of the class of M.B.E.'s is. In this light, § 62–11–101(1)a of the act should be limited so that the administrative agency may not, without specific guidelines, redefine the class of M.B.E.'s.

CONCLUSION:

***4** Chapter 11 of Proposed Title 62, The South Carolina Consolidated Procurement Code, will not be in violation of the Fourteenth Amendment of the United States Constitution or Article I, Section 3, of the South Carolina Constitution, provided the requirements of Fullilove v. Klutznick, supra, are met as defined above. Particular attention must be paid to: (1) Ensuring that the South Carolina General Assembly makes specific findings of past discrimination in the area of State procurement; and (2) That the General Assembly specifically defines the classes of minorities which it intends to benefit. The minorities intended to be benefited should include only those groups identified in the findings of past discrimination by the General Assembly.

Judith Evans Finuf
Assistant Attorney General

1981 S.C. Op. Atty. Gen. 15 (S.C.A.G.), 1981 S.C. Op. Atty. Gen. No. 81-9, 1981 WL 96536

End of Document