PACIFIC LEGAL FOUNDATION

April 13, 2009

Ms. Arlene Prince
Director, Business Development and Special Programs
SCDOT
955 Park Street
P.O. Box 191
Columbia, SC 27202-0191

Re: Disparity Study

Dear Ms. Prince:

We write to inform you that the disparity study, *A Study of Minority and Women-Owned Business Participation in the South Carolina Department of Transportation's Construction Contracts* (MGT, July 1995), your government commissioned can no longer be regarded as a constitutionally sound predicate for the use of any racial, ethnic, or gender requirements, goals, or preferences in the awarding of your contracts.

The recent unanimous Federal Circuit Court of Appeals decision in *Rothe Development Corporation v. Department of Defense*, 545 F.3d 1023 (Fed. Cir. 2008), declared 10 U.S.C. § 2323, the Federal Section 1207 DOD race-preferential program, unconstitutional on its face. The Department of Justice elected not to appeal that decision en banc or to petition for a writ of certiorari, and the final order in the case has been issued. For a description of this case, *see* George R. La Noue, *A New Era in Federal Preferential Contracting? Rothe Development Corporation v. U.S. Department of Defense and Department of the Air Force*, *available at* http://www.fed-soc.org/doclib/20090216_LaNoueEngage101.pdf (last visited Apr. 7, 2009).

In making its decision, the Federal Circuit considered the validity of dozens of disparity studies incorporated in the 1996 Department of Justice report used to create a predicate for federal post-*Adarand* procurement and six recent disparity studies at the state (Virginia) and local (Cincinnati; Dallas; New York City; Alameda County, Cal.; and Cuyahoga County, Ohio) levels. The court created several principles to be used in the strict scrutiny review required in such cases.

The Federal Circuit faulted the six recent disparity studies it reviewed, including those prepared by Mason Tillman Associates, MGT of America, and Griffin and Strong, because those studies failed to measure properly the ability or capacity of minority and nonminority firms in calculating disparity

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ratios. The Federal Circuit found that it was not enough to establish a threshold of being able to bid on one contract because that failed to account for "the relative capacities of businesses to bid for *more than one contract at a time*." *Rothe*, 545 F.3d at 1044. This is not new law. Similar rulings have been made by the Sixth Circuit, the Ninth Circuit, and the Eleventh Circuit. But the Federal Circuit's invalidation of several disparity studies for their failure to measure firm capacity properly is the clearest articulation of a commonsense rule that a study must distinguish between disparities based on race and those based on nonracial characteristics such as size, specialization, etc.

According to these principles, your study has miscalculated the concept of firm ability or capacity in creating disparity ratios so that those ratios are not an accurate reflection of your local market. It can no longer be relied on as the basis for any race-conscious procurement programs.

We urge you, therefore, to end immediately any use of race, ethnicity, or sex in your procurement program to make or influence contracting awards, and instead to consider race-neutral ways to ensure that discrimination does not occur and that contracting opportunities are widely publicized and open to a variety of bidders and subcontractors. The latter approach is not only required by law, but also avoids the unfairness and divisiveness of preferential programs. It will also save your taxpayers money, which is lost when a contract is not awarded to the lowest bidder. Further, it will save you the cost of expensive litigation and the payment of plaintiff attorney fees. In the *Rothe Development* decision, mentioned earlier, the plaintiff's attorneys' fees amounted to $1.3 million.

If you have any questions or wish to discuss possible race-neutral alternatives that may broaden contracting opportunities in your procurement process without violating constitutional law, please let us know. Sharon Browne can be reached at (916) 419-7111 and Roger Clegg at (703) 442-0066.

Respectfully submitted,

Sharon L. Browne

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cc: Ms. Carolyn Burton