



PACIFIC LEGAL FOUNDATION

November 3, 2011

Chairman Thomas J. Umberg and Board Members
Mr. Roelof van Ark, Chief Executive Officer
California High-Speed Rail Authority
770 L Street, Suite 800
Sacramento, CA 95814

Re: Decision from Calvin Gibson, Director, Office of Civil Rights for the U.S. Department of Transportation dated September 15, 2011, causes a conflict with the Peremptory Writ of Mandate Issued by the Superior Court of California, County of Sacramento. The Writ prohibits the State of California, including the California High Speed Rail Authority, from violating Article I, Section 31, of the California Constitution by refraining the State and Its Public Agencies from implementing or enforcing Public Contract Code §§ 10115.2, 10115.15, 10471, and 10472 to the extent these statutes require the use of goals for the participation of minority- and women-owned business enterprises

Dear Mr. Van Ark:

On behalf of Mr. Ward Connerly and the American Civil Rights Foundation, I am submitting these comments in response to the September 15, 2011, decision by Mr. Gibson, Director of the Office of Civil Rights for the U.S. Department of Transportation, regarding the complaint of the Associated Professionals and Contractors. This letter brings to the attention of the California High Speed Rail Authority (Authority) that adopting a Disadvantaged Business Enterprise (DBE) program that grants preferences to minority- and women-owned businesses may violate a writ issued by the Superior Court of California against the State of California and all its public agencies.

**I. THE CALIFORNIA HIGH SPEED RAIL AUTHORITY,
THE DEPARTMENT OF GENERAL SERVICES, AND ALL
CALIFORNIA PUBLIC AGENCIES, ARE PROHIBITED
FROM ADOPTING A RACE- AND SEX-BASED DBE PROGRAM**

On January 6, 2010, Mr. Connerly and the American Civil Rights Foundation filed a complaint and petition for writ of mandate against the State of California and the Department of General Services, among others, challenging Public Contract Code §§ 10115.2, 10115.15, 10471, and 10472 as violating Article I, Section 31, of the California Constitution (also known as Proposition 209) because they require state contracts to include participation quotas for minority-owned business enterprises (MBEs) and women-owned business enterprises (WBEs). The lawsuit did not challenge

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the disabled veteran business enterprise quota. *Connerly v. State of California*, No. 34-2010-80000412 (Sacramento County Super. Ct. filed Jan. 6, 2010). This lawsuit resulted in a judgment against the State of California and all its public agencies, and a writ of mandate issued. The writ provides:

YOU ARE HEREBY COMMANDED immediately upon receipt of this writ to follow the mandates of Article I, section 31, of the California Constitution, by refraining from implementing or enforcing Public Contract Code sections 10115.2 and 10115.15 to the extent that these statutes require *the state, its agencies, and its officials* to make efforts to meet statutory goals for the participation of minority and woman business enterprises in contracts awarded by the State of California. This writ shall not preclude enforcement of the disabled veteran business enterprise goals of Public Contract Code sections 10115.2 and 10115.15.

YOU ARE FURTHER COMMANDED immediately upon receipt of this writ to follow the mandates of Article I, section 31, of the California Constitution, by refraining from implementing or enforcing Public Contract sections 10471 and 10472 in their entirety.

(Emphasis added.) A copy of the Peremptory Writ of Mandate is attached hereto. The State of California was properly served with this Writ. An identical writ was served on the Department of General Services.

As the writ expressly provides, it applies to *all* of the agencies of the State of California including California High-Speed Rail Authority. It prohibits the Authority from adopting a DBE program that includes race- and sex-based goals, targeted outreach, quotas, or timetables. There is no question that such programs would violate Article 1, Section 31, of the California Constitution, which provides in pertinent part:

The State shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Cal. Const. art. I, § 31(a).

Certainly, a federal agency cannot require the Authority to take action to adopt a DBE program that would violate a writ of mandate issued by the Court.

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II. THE FEDERAL RAILROAD ADMINISTRATION DOES NOT HAVE A DISADVANTAGED BUSINESS ENTERPRISE REQUIREMENT

The Authority has entered into Agreements with the Federal Railroad Administration. These Agreements *do not require* the Authority to adopt a discriminatory DBE program, nor could the Agreements do so. Congress has not provided the Federal Railroad Administration with the authority to adopt regulations requiring a DBE program. In fact, prominently displayed on the Federal Railroad Administration's website is the following statement:

The Federal Railroad Administration (FRA) *does not* currently have a Disadvantaged Business Enterprise program like those in place at the Federal Highway Administration The FRA does not have the statutory authority to administer a DBE program. The FRA fully supports the objectives of DBE programs and all FRA's grantees are required to avoid discrimination in contracting.

(Emphasis added.) Available at <http://www.fra.dot.gov/Pages/124.shtml> (last visited Nov. 2, 2011).

Thus, Mr. Gibson's demands are inconsistent with the FRA's own authority.

III. A RACE-NEUTRAL PROGRAM IS CONSISTENT WITH TITLE VI

Mr. Connerly and the American Civil Rights Foundation fully support the Federal Railroad Administration's statement that "all FRA's grantees are required to avoid discrimination in contracting." The FRA's statement is consistent with the mandate of Article I, Section 31, of the California Constitution and Title VI of the Civil Rights Act of 1964 to prohibit discrimination in public contracting. Title VI provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d. The plain language of Title VI does not compel government to grant benefits or withhold those benefits on the basis of the applicant's race. Indeed, a plain language interpretation of the section precludes such action. In this regard, the language of Title VI is not far different from the language of Article I, Section 31, of the California Constitution. In *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal. 4th 537, 562-65 (2000), the California Supreme Court held San Jose's public contracting program was unconstitutional because it mandated participation goals for, and preferential outreach to, MBEs and WBEs. Like the Civil Rights Act of 1964, the California Supreme Court interpreted Section 31 to end the use of race- and sex-based preferences

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and prohibit discrimination in the operation of public contracting, public education, and public employment. *Hi-Voltage*, 24 Cal. 4th at 562.

Further, the federal district court in *Coalition for Economic Equity v. Wilson*, 946 F. Supp. 1480, 1518 (N.D. Cal. 1996), held that Title VI did not preempt anything in Section 31. “[N]othing on the face of Titles VI or IX indicates that Congress intended to maintain voluntary affirmative action under the two statutes.” *Id.* at 1517. There is no question that Title VI does not require the Authority to violate Article I, Section 31, of the California Constitution by adopting a race- and sex-based DBE program.

IV. FEDERAL REGULATIONS DO NOT REQUIRE A RACE- AND SEX-BASED DBE PROGRAM

Mr. Gibson’s decision encourages the Authority to look to 49 C.F.R. Part 26 for elements of a DBE program. But nothing in the regulations requires the Authority to enact a discriminatory DBE program. And, nothing in case law construing 49 C.F.R. Part 26 requires the Authority to enact a discriminatory DBE program.

In *Coral Construction, Inc. v. City and County of San Francisco*, 50 Cal. 4th 315, 333-35 (2010), the California Supreme Court looked at federal regulations, including 49 C.F.R. Part 26 to determine whether they require race- and sex-based affirmative action. The Court recognized that the “Secretary of Transportation . . . issued regulations forbidding discrimination in the projects they fund and requiring ‘affirmative action’ in specified circumstances.” *Coral*, 50 Cal. 4th at 334. The Court found that the U.S. Department of Transportation’s regulations use the broad, undefined term affirmative action and the plain language of the regulations show that there is no intent to require racial preferences. *Id.* The Court goes on to say:

The Secretary of Transportation’s regulation more broadly requires the recipients of federal funds to take “affirmative action to assure that no person is excluded from participation” in a federally funded program “[e]ven in the absence of prior discriminatory practice or usage” (49 C.F.R. § 21.5(b)(7) (2009).) The regulation also mentions race-based remedies but is on this point expressly permissive, stating that it “*does not prohibit the consideration of race . . . to . . . overcome the consequences*” of past discrimination. The unmistakable import of this language is not that race-based remedies are required, but simply that they are permitted, so far as the Secretary is concerned, if no other law precludes them.

Id. at 334-35 (citation omitted).

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In short, the California Constitution and the Writ issued by the Superior Court prohibit the Authority from adopting a race- and sex-based DBE program. As explained below, there is no reason to believe that the Authority cannot comply with the antidiscrimination mandates of Title VI and Article I, Section 31, of the California Constitution by adopting a race-neutral public contracting program.

V. RACE-NEUTRAL ALTERNATIVES EXIST TO COMBAT DISCRIMINATION IN PUBLIC CONTRACTING

The Authority can combat discrimination and comply with both federal and state laws through race-neutral mechanisms. As the United States Supreme Court stated in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989): “Many of the barriers to minority participation in the construction industry . . . appear to be race neutral.” In a report entitled *Federal Procurement After Adarand*, the United States Civil Rights Commission identified five race-neutral contracting strategies which are applicable to state and local governments:

- Strictly enforce nondiscrimination laws in all facets of public contracting;
- Increase knowledge about opportunities to contract with the government;
- Provide education or technical assistance to impart business skills, knowledge of procurement, and strategies to win government contracts;
- Provide financial aid or adjustments to offset the difficulties struggling firms encounter; and
- Expand contracting opportunities and promote business development in underutilized geographic regions.

U.S. Commission on Civil Rights, *Federal Procurement After Adarand* 31 (Sept. 2005) (available at http://www.usccr.gov/pubs/080505_fedprocadarand.pdf (last visited Nov. 2, 2011)). As mentioned above, these race-neutral alternatives apply equally to state and local contracting and subcontracting programs.

In short, at every step of the contracting process there are better tailored remedies than racial preferences. If companies are being excluded from bidding because of unrealistic or irrational bonding or bundling requirements, then those requirements should be changed for *all* companies, regardless of the race or sex of the owner. If companies who could be submitting bids are not doing so, then the publication and other procedures used in soliciting bids should be opened up—but again, to *all* potential bidders, regardless of race or sex. Even in the extreme case where it can be shown

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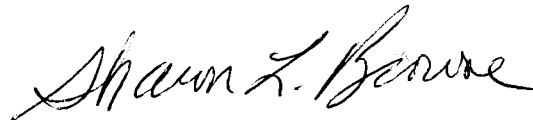
that contracts have been denied to the lowest qualified bidder because of that bidder's race or sex, sanctions and safeguards against the repetition of such behavior can often be implemented so as to protect *all* bidders.

CONCLUSION

It is puzzling indeed why Mr. Gibson would encourage the Authority to adopt a race- and sex-based DBE program when the Federal Railroad Administration expressly recognizes that it lacks the authority to require federal funding recipients to adopt such programs and a Writ prohibits such action. As the Authority develops a program, we urge it to comply with the Superior Court Writ, the California Constitution, and case law to avoid unnecessary litigation.

If you have any questions, please do not hesitate to contact me.

Sincerely,



SHARON L. BROWNE
Principal Attorney

Attachment

cc: Mr. Ward Connerly
American Civil Rights Foundation

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

WARD CONNERLY, a taxpayer, and
AMERICAN CIVIL RIGHTS FOUNDATION,
a nonprofit public benefit corporation,

Plaintiffs and Petitioners,

v.

STATE OF CALIFORNIA; GOVERNOR ARNOLD
SCHWARZENEGGER; STATE OF CALIFORNIA
ATTORNEY GENERAL EDMUND G. BROWN JR.;
the CALIFORNIA DEPARTMENT OF GENERAL
SERVICES; RON DIEDRICH, Acting Director of
the California Department of General Services;
the DEPARTMENT OF CORRECTIONS AND
REHABILITATION; MATTHEW CATE, the
Secretary of the Department of Corrections and
Rehabilitation; and BERNARD WARNER, the Chief
Deputy Secretary for the Division of Juvenile Justice,

Defendants and Respondents.

No. 34-2010-80000412

**PEREMPTORY WRIT OF
MANDATE TO RESPONDENT
STATE OF CALIFORNIA**

Place: Department 19
Judge: The Hon. Patrick Marlette

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TO RESPONDENT STATE OF CALIFORNIA:

Judgment having been entered pursuant to the ruling and directions of this Court, ordering that a peremptory writ of mandate be issued from this Court,

YOU ARE HEREBY COMMANDED immediately upon receipt of this writ to follow the mandates of Article I, section 31, of the California Constitution, by refraining from implementing or enforcing Public Contract Code sections 10115.2 and 10115.15 to the extent that these statutes require the state, its agencies, and its officials to make efforts to meet statutory goals for the participation of minority and woman business enterprises in contracts awarded by the State of California. This writ shall not preclude enforcement of the disabled veteran business enterprise goals of Public Contract Code sections 10115.2 and 10115.15.

YOU ARE FURTHER COMMANDED immediately upon receipt of this writ to follow the mandates of Article I, section 31, of the California Constitution, by refraining from implementing or enforcing Public Contract sections 10471 and 10472 in their entirety.

DATED: **JUL 20 2010**

CLERK OF THE SUPERIOR COURT



By B. Frates
B. FRATES