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Opinion Committee

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January 29, 1993

MBJ
FILE # ML-18774-93

John W. Segrest
Criminal District Attorney

Hon. Dan Morales
Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

I.D.# 18774
RQ-498

RE: REQUEST FOR ATTORNEY GENERAL OPINION
MINORITY / WOMEN OWNED BUSINESS INVOLVEMENT POLICY

Dear General Morales:

I have received a request for an opinion regarding the adoption of a Minority/Woman Owned Business Involvement Policy from McLennan County Judge Jim Lewis. A copy of the proposed policy is attached for your reference.

On the attached pages, there are **four issues presented which we would like the Attorney General to address**, along with relative authorities and discussion for each issue.

Your prompt consideration, consistent with the standards of due process, is greatly appreciated.

Respectfully Submitted:

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Re: MINORITY / WOMAN OWNED BUSINESS INVOLVEMENT POLICY

ISSUES TO BE ADDRESSED BY THE ATTORNEY GENERAL:

ISSUE 1:

Whether a county may legally take into consideration a bidder's social responsibility in the award of contracts based on competitive bids.

AUTHORITIES / DISCUSSION:

The Attorney General's Office has made it clear in Texas Attorney General Opinion No. DM-113 (1992) that a bidder's social responsibility (i.e. use of minority and woman contractors, community involvement, etc.) is not a factor that may legally be considered in awarding contracts pursuant to the competitive bidding process in the absence of clear statutory authority.

In that Opinion, the Attorney General opined that the Board of Trustees of the Dallas Independent School District could not, in the absence of clear statutory authority, consider a bidder's compliance with the school district's minority and women enterprise contracting program in the award of contracts pursuant to the competitive bidding process. If the analysis were to stop there, it would be clear that such factors may not be taken into consideration and that a county may not adopt policies rewarding bidders for their social responsibility.

However, in 1989, the 71st Legislature enacted Section 381.004 of the Local Government Code. That section provides in relevant part that the commissioners court of a county may develop and administer a program to improve the extent to which women and minority businesses are awarded county contracts (Section 381.004(b)(4), Local Government Code). The extent to which this statutory authorization would allow the county to implement policies requiring bidders to submit evidence of socially responsible contracting practices for consideration in the process of awarding contracts is unclear.

In Texas Attorney General Opinion No. DM-113, it was stated that "whether such conduct should be considered in the competitive bidding process is a matter that must be addressed by the Legislature". This is precisely what the Legislature did when it enacted 6C(h) of V.T.C.S., Article 1118X, which authorizes certain metropolitan rapid transit authorities to "adopt programs designed to reasonable increase participation by minority business enterprises in public contract awards." A review of the statute referred to by the Attorney General shows that statute contains language very similar in many respects to Section 381.004 of the Local Government Code.

Thus, the question arises, is Section 381.004 of the Local Government Code the type of specific legislative authorization referred to by the Attorney General that would allow the consideration of the social responsibility of bidders.

ISSUE 2:

What are the parameters, if any on a county's power under Section 381.004 of the Local Government Code to establish programs to improve the extent to which women and minority businesses are awarded county contracts.

AUTHORITIES / DISCUSSION:

Section 381.004 of the local Government Code provides in relevant part that the commissioners court of a county may develop and administer a program to improve the extent to which woman and minority businesses are awarded county contracts. See Section 381.004(b)(4), Local Government Code. That statute further provides that, "a program established under this section may be designed to reasonable increase participation by minority and women-owned businesses in public contract awards by the county by establishing a contract percentage goal for those businesses". See Section 381.004(d), Local Government Code.

How far may county programs go in establishing programs to increase involvement of minorities and women in the contracting process? Counties need guidance on the type of programs that they can or cannot implement.

ISSUE 3:

Is the proposed McLennan County Minority / Woman Owned Business Involvement Policy legal and, if not, what portions of the policy must be removed or amended to make the policy valid?

AUTHORITIES / DISCUSSIONS:

Section 381.004 of the Local Government Code appears to authorize the commissioners court of a county to develop and administer a program to improve the extent to which women and minority businesses are awarded county contracts.

One of the commissioners on the McLennan County Commissioners Court has proposed such a policy, which is attached as Exhibit "A". The extent to which this policy is legal and valid is to a great extent determined by your decision on Issues 1 and 2 above. However, to the extent that the proposed policy contains provisions which are not otherwise addressed by your answer to Issues 1 and 2 above, an opinion is respectfully requested on those provisions of the proposed policy.

ISSUE 4:

Does Section 381.004 violate the Equal Protection Clause of the 14th Amendment to the United States Constitution?

AUTHORITIES / DISCUSSION:

In Texas Attorney General Opinion No. DM-113 (1992), the Attorney General's Office was asked whether the Dallas Independent School District's policy rewarding bidders who complied with its minority and women owned business program violated the Equal Protection Clause of the 14th Amendment under the United States Supreme Court's ruling in City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989).

The Attorney General's Office did not decide that issue since you determined that the school district was not authorized to consider a bidder's social responsibility under state law. Thus, if it is determined that Section 381.004 of the Local Government Code allows consideration of a bidder's social responsibility (i.e. historical contracting practices, pledge to use minority contractors, etc.) does it violate the Equal Protection Clause?