CITY OF MIAMI
OFFICE OF THE CITY ATTORNEY
MEMORANDUM

TO: Joe Arriola, City Manager

FROM: Jorge L. Fernandez, City Attorney

DATE: March 30, 2005

RE: **Request for a Legal Opinion Regarding Set-Asides to Enhance the Participation of Minority-and-Women-Owned Businesses in Fulfilling the City's Procurement Needs (MIA-0500001)**

Pursuant to your February 17, 2005 written request for a legal opinion, a copy of which is attached, we offer the following response on the following issues of local government law:

1. Whether the City of Miami ("City") may insert "set-aside" type programs in their invitations to bid and strongly encourage that they be followed?
2. Whether the City may apply a non-binding target goal within these "set-aside" programs for a specific bid? (i.e. 10% minority, women, small, disadvantaged or local firms requirement for a specific contract).
3. Can the various factors specified in the City's "set-aside" programs be used as evaluation criteria? Can the City assign a point score system as to how each party responds and participates with the target "set-aside" goals?

In answering your questions: 1) If the City wishes to include its "set-aside" programs in its invitations to bid, requests for proposals and the like, we recommend it do so, but only for informational purposes in a non-binding, non-mandatory and non-encouraged way; 2) We also advise the City not to apply a non-binding target goal in any bid or contract unless it is for informational purposes only; and 3) We strongly encourage the City not to use the various factors specified in the "set-aside" programs as evaluation criteria. In a nutshell, in order to avoid any probable potential problems with the "set-aside" programs, we recommend these "set-aside" programs be non-binding, and solely used for informational or fact gathering purposes in procurement documents.

Because we are dealing with race, gender and ethnicity, strict scrutiny is applied when analyzing "set-aside" programs. In *Adarand Constructors v. Pena, 515 U.S. 200 (1995),* a subcontractor that was not awarded a guardrail portion of a federal highway project brought action challenging the constitutionality of a federal program designed to provide highway contracts to disadvantaged business enterprises. The Supreme Court in *Adarand Constructors v. Pena, Id.,* held that "All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by the reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand Constructors v. Pena Id. at 2099* The

various situations under which local governmental entities may implement "set-aside" programs for certain classes of individuals are somewhat vague. However, in order for a governmental entity to justify a "set-aside" program, two requirements must be met: 1) the need to use a plan to remedy past discrimination must be supported by specific and substantial evidence proving past discrimination to a specific class of individuals; and 2) the plan must be narrowly tailored to remedy the damage caused by past discrimination to that specific class of individuals.

In answering the first prong of the aforementioned two prong test, in *Engineering Contractors Association v. Metropolitan Dade County, 943 F. Supp 1546 (S.D. Fla. 1996)*, the court invalidated a Miami-Dade County affirmative action program used to award construction contracts to minority groups as being unconstitutional. The court in *Engineering Contractors Association v. Metropolitan Dade County, Id.*, concluded that there was a violation of the Fourteenth Amendment's equal protection clause because the local government failed to prove with specific and substantial evidence that the minority groups within the "set-aside" program had been subjected to past discrimination. "To justify a program of set-asides, local governmental authority must show that it had become a passive participant in system of racial exclusion practiced by that specific local industry." *Engineering Contractors Association v. Metropolitan Dade County Id. at 1546.* In *Hershell Gill Consulting Engineers v. Metropolitan Dade County, 333 F. Supp.2d 1305 (S.D. Fla. 2004)*, the court found that Miami-Dade County lacked the requisite evidence of past discrimination against Black, Hispanic and Women-owned Architectural and Engineering firms which was sufficient to justify the application of County affirmative action type programs. However, in *Hershell Gill Consulting Engineers v. Metropolitan Dade County, Id.*, the court also set forth what a municipal government may do in order to prove that there was an actual past discrimination for that specific class of individuals. "The Municipality can justify affirmative action under the Equal Protection Clause by demonstrating gross statistical disparities between the proportion of minorities awarded contracts and the proportion of minorities willing and able to do the work." *Hershell Gill Consulting Engineers v. Metropolitan Dade County Id. at 1306.*

The two aforementioned cases involved Miami-Dade County and in both situations the County was unable to prove that the reason behind their "set-aside" programs was to remedy past discrimination. The County simply was not able to prove that there in fact was discrimination against that specific class of individuals. Because of these same reasons, unless the City of Miami, with the requisite statistical analysis as backup, can prove that the intent behind these "set-aside" programs is to remedy past discrimination that can be proven with substantial evidence, we recommend the City not use these programs.

After a local municipal government has proven that there actually was a past discrimination, it must then prove that the "set-aside" plan has been narrowly tailored to remedy the existing problem. In *City of Richmond v. J.A. Corson Company, 488 U.S. 469 (1989)* the court found that the City's set-aside plan of requiring contractors to sub-contract at least 30% of each contract to one or more "Minority Business Enterprises" was unconstitutional because it was not narrowly tailored to remedy past discrimination. In *City of Richmond v. J.A. Corson Company, Id.*, the court stated that the "30% quota could not be said to be narrowly tailored to any goal, except perhaps outright racial balancing." *City of Richmond v. J.A. Croson Company,*

Id. at 469. In *Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999),* the court set forth various factors that can be used in determining whether a race or ethnicity-conscious program is narrowly tailored for equal protection purposes. These factors are: (1) necessity for the relief and the efficacy of alternative remedies; (2) the flexibility and duration of the relief, including availability of waiver provisions; (3) the relationship of numerical goals to the relevant labor market; and (4) the impact on the rights of innocent third-parties. In *Webster v. Fulton County, Id.,* the court invalidated the county's minority and female business enterprise programs because they were directly violating the fourteenth amendment's equal protection clause.

As stated above, unless the City can establish that there was a past discrimination against a specific class of individuals, these "set-aside" programs should not be used. If there is no way in proving the requisite past discrimination, as was the case with the above mentioned Miami-Dade County cases, then there is no point in determining whether the City's "set-aside" programs have been narrowly tailored to remedy the harm done. If the harm done cannot be proven or does not exist, then its narrowly tailored remedy simply cannot be analyzed.

However, please note that the City may want to commission a statistical study in order to justify a race, ethnic or gender-based program. In conducting this study, "the County must demonstrate that gross statistical disparities exist between the proportion of minorities and women awarded county contracts and the proportion of minorities or women in the local industry willing and able to do that specific work." *Engineering Contractors Association v. Metropolitan Dade County Supra at 1549.* In conducting this statistical study, please note that the statistical evaluation must limit itself to the geographic limits of the jurisdiction in question. These studies must also narrowly focus on the group in question. (i.e. Race, ethnic and gender) Please be aware that the execution of a statistical study does not automatically mean that a race, ethnic or gender-based program has been justified. It is simply a solid way of creating prima facie proof that a pattern or practice of discrimination has occurred and is present.

The City may also want to refer to the existing Miami-Dade County programs (i.e. CSBE "Community Small Business Enterprises") that have been created as a result of the above mentioned Miami-Dade County cases that have invalidated race, ethnic and gender based set-aside programs because they were insufficiently justified through statistical analysis.

Even though it is recommended that "set-aside" programs not be used or encouraged because they typically have been invalidated by the courts, we see no problem in including them in any invitation to bid, request for proposal, or similar City document, as long as they are included for informational purposes only. We further recommend the City not to apply a non-binding target goal in any bid or contract unless it is for informational purposes only as well. Finally, we strongly encourage the City not to use the various factors specified in the "set-aside" programs as evaluation criteria. These "set-aside" programs must be applied in a non-binding, non-mandatory and non-encouraged way. Please contact this office if you have any further questions, comments or concerns regarding this matter.

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c: Glenn Marcos, Chief Procurement Officer
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MEMORANDUM

TO: Honorable Chairperson Barbara Carey-Shuler, Ed.D. and Members, Board of County Commissioners

Hon. Alex Penelas,
Mayor, Miami-Dade County

George M. Burgess
County Manager

DATE: August 23, 2004

FROM: Robert A. Ginsburg
County Attorney

SUBJECT: Hershell Gill Consulting Engineers, Inc. et al., v. Metropolitan Dade County (Affirmative Action case – Architectural and Engineering services)

Late Friday, I transmitted to you a copy of U.S. District Judge Adalberto Jordan's order finding the architectural and engineering aspects of the County's Black, Hispanic and Women Business Enterprise (B/H/WBE) programs unconstitutional.

This is the second federal case finding that the County's B/H/WBE programs do not meet the rigorous prerequisites required for the application of race, ethnic and gender-conscious measures to county contracting. The first case pertained to *construction* contracts.[1] Friday's order pertains to *architectural and engineering* contracts.[2] The Court found the County lacks the required evidence of discrimination against Black, Hispanic and Women-owned architectural and engineering firms sufficient to justify application of the B/H/WBE programs to the County's acquisition of architectural and engineering services. The Court's order also found that the programs' measures (i.e., set-asides, subconsultant goals and selection factors) are not narrowly tailored to remedy any discrimination

[1] *Engineering Contractors Ass'n v. Metropolitan Dade County,* 943 F.Supp. 1546 (S.D. Fla. 1996), *aff'd,* 122 F.3d 895 (11th Cir. 1997). As a result, the county has not applied B/H/WBE measures to construction contracts for the past 7 years.

[2] The court previously entered a preliminarily injunction against the County's application of the B/H/WBE programs to its purchase of architectural and engineering services. Thus, for the past 3 years, the County has not applied measures for these services.

practiced against BBE and HBE firms and are not substantially related to remedying discrimination against WBE firms.

The B/H/WBE programs are based on the results of disparity studies done in the early 1990's. Two federal judges have now found those studies, as supplemented by post enactment studies done for trial, constitutionally insufficient.

The plaintiffs in this second federal case claimed that the County Commissioners should each be subjected to punitive damages, but Judge Jordan declined to award them. His order, however, noted that there is another County case[3] pending before him challenging application of the B/H/WBE programs to the purchase of security guard services, and stated that "Should that case proceed to trial, and should the record be as constitutionally deficient as it was here, punitive damages will be a virtual certainty."

The effect of these two federal court rulings, applying the law enunciated by the U.S. Supreme Court in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), is that the B/H/WBE programs *can no longer be applied* to the bid and award of any County contract.

The County Manager, therefore, is directed, as a matter of law, to issue addenda deleting BBE, HBE and WBE measures from all County solicitations currently out for bid. For those solicitations containing BBE, HBE or WBE measures for which bids have already been opened and no award has been made, the County Manager is directed to cancel those solicitations and re-bid them without measures. Awarded contracts containing BBE, HBE or WBE measures are unaffected by this direction and such measures may be enforced in accordance with the terms of the awarded contract.

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[3] *50 State Security, et al. v. Miami-Dade County et al.*, No. 01-268-Civ-Jordan.