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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
AUGUSTA, MAINE 04333

July 28, 1980

George N. Campbell, Commissioner
Department of Transportation
State House
Augusta, Maine 04333

Dear Mr. Campbell:

This is in response to your letter of June 26, 1980, with attached memorandum, asking various constitutional and other legal questions with regard to your proposed Minority Business Enterprise Program. I understand that your major practical concern about this program is that if you adopt it, you may be subject to legal action on the part of individual contractors who might be disadvantaged by it. I further understand from my Assistant, Mr. Howard, that by the questions which your memorandum poses, you are principally interested in knowing whether the program as a whole is constitutional, as well as your authority to implement it in view of the bidding requirements of 23 M.R.S.A. § 753.

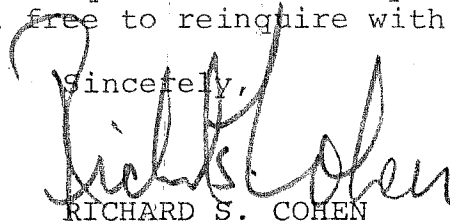
With regard to the first of these questions, as Mr. Howard has indicated to you, we believe that a full exploration of the constitutionality of the program would require substantial research which would not, regardless of its result, be likely to forestall the filing of any lawsuit against you by a contractor. Consequently, we would suggest that we postpone such work until such time as an actual controversy arises. As I am sure you are aware, however, shortly after your request was received by our office, the United States Supreme Court decided the case of Fullilove v. Klutznick, --U.S.--, 48 U.S.L.W. 4979 (July 2, 1980), in which a minority business

enterprise provision of the Public Works Employment Act of 1977 was sustained against arguments both that the Congress was without authority to require its promulgation and that it violated the Equal Protection Clause of the Federal Constitution. Without undertaking a detailed comparison of the program involved in Fullilove and your program, it would appear that there would be a great deal to say on behalf of your program should litigation actually ensue.

With regard to the effect of Section 753 on the program, we would think that there is no conflict between the two. While Section 753 does require that any contract open to competitive bidding shall be awarded to the "lowest responsible bidder," it also provides that the Department may reject the bid "if in its opinion good cause exists." We would think that a failure of a contractor to comply with the Department's Minority Business Enterprise Program, when the adoption of such a program is necessary to obtain federal funding of the very contract at issue, would certainly constitute "good cause" for the Department to reject such a contractor's bid.

I hope this response is satisfactory for your present needs. If not, or if you have any other questions which you would like to have answered, please feel free to reinquire with me.

Sincerely,



RICHARD S. COHEN
Attorney General

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