Mr. Carter
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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-198797 September 4, 1980

The Honorable Tony Coelho
House of Representatives

Dear Mr. Coelho:

We are writing in further response to your letters of June 24, and April 29, 1980, with enclosures, questioning the definition of "minorities" used in assessing eligibility for participation as a minority business enterprise under contracts for the construction of the Fort McHenry highway tunnel under Baltimore harbor. The tunnel project is partially funded by a grant from the Federal Highway Administration (FHWA) to the State of Maryland Department of Transportation with a subgrant to the Interstate Division of Baltimore City.

Your letter and the accompanying materials indicate that the FHWA required that a more restrictive definition of minorities be used than would have been applicable under Maryland law. You suggest that FHWA's imposition of its own definition of minorities violates the terms of Attachment O to Office of Management and Budget (OMB) Circular A-102, revised August 1979, with the result that certain Maryland-certified minority (Portuguese) business enterprises have been unlawfully excluded from participation as minority businesses under this grant.

With your approval, we asked both the Office of Federal Procurement Policy of OMB and the FHWA for their views on the questions raised in your letter. Copies of their replies are enclosed.

In 1975, the FHWA established a minority business preference program embodying the general principles of Executive Order 11625, dated October 13, 1971, by publishing regulations to promote minority business participation in Federal-aid highway projects. These regulations, codified at 23 C.F.R. part 230, subpart "B" (1979), neither provide for waiver in favor of a

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State-originated minority business program nor include persons of a Portuguese cultural background within the definition of minority group members. It is these regulations which governed this grant.

You question the FHWA's authority to issue a regulation containing a definition of minorities more restrictive than that expressed in Executive Order 11625, which defines minorities as "socially or economically disadvantaged persons" including, but not limited to, the members of certain named ethnic groups. We believe, however, that this Executive order does not either mandate or require the adoption of the minority definition contained in the order, but instead establishes the principles upon which agencies may base their own minority business programs.

The FHWA, in implementation of its minority business program, issued the regulations involved here under the statutory authority granted by 23 U.S.C. § 315 (1976) to "prescribe and promulgate all needful rules and regulations" to carry out the purposes of the Federal-aid highway program. We believe that these regulations are the product of an authorized exercise of judgment and discretion by the FHWA in its effort to effect the national policy of promoting minority business efforts reflected in Executive Order 11625.

We also agree with both the FHWA and the Office of Federal Procurement Policy that the FHWA's imposition of a more restrictive definition of minorities than that which would have been applicable under Maryland law does not conflict with the provisions of Attachment O to OMB Circular A-102. Attachment O requires grantees to ensure the participation of small and minority businesses in grants but does not define either "minority" or "participation," leaving such questions to the grantor agency. The FHWA's standards for assessing eligibility for minority business participation were not "additional requirements or regulations" in contravention of Attachment O, but were definitions identifying those businesses eligible to participate as minority businesses in this project under FHWA's own minority business program.

Moreover, the FHWA's regulation did not provide for waiver in favor of a grantee-originated program and we believe the subject matter of your inquiry adequately demonstrates that Maryland's minority business program was inconsistent with the FHWA minority business program applicable to this grant. Attachment O does not require grantors to defer to State rules or regulations which do not conform to the applicable Federal rule or regulation. We note also that the decisions of this Office cited in your letter would not require a different result; these cases stand for the general proposition that State procurement procedures and practices govern procurements under grants, a matter which we consider distinguishable from the implementation of Federal policy through grants.

Furthermore, we can find no basis upon which we might conclude that FHWA's failure to defer to Maryland's minority business program was otherwise unlawful or improper. It is well established that the Federal Government has the right to impose conditions on its grants to the States. As stated by the Supreme Court in King v. Smith, 392 U.S. 309 (1968), at page 333, note 34:

> "There is of course no question that the Federal Government, unless barred by some controlling constitutional prohibition, may impose the terms and conditions upon which its money allotments to the States shall be disbursed, and that any state law or regulation inconsistent with such federal terms and conditions is to that extent invalid. * * *"

We note that effective April 31, 1980, the FHWA regulations were superseded by Department-wide regulations issued by the Secretary of Transportation, 45 Fed. Reg. 21171, et seq., March 31, 1980, which will govern future FHWA grants. These regulations define "Hispanic" as "a person of Spanish or Portuguese culture with origins in Mexico, South or Central America, or the Caribbean Islands, regardless of race." This also excludes persons of European ancestry. Unlike FHWA's superseded regulations, however, the new Department-wide regulations provide for the inclusion of groups

or individuals found to be economically and socially disadvantaged by the Small Business Administration under section 8(a) of the Small Business Act, 15 U.S.C. § 637(a) (1976), and also permit the use of grantee-originated minority business programs with the concurrence of the granting agency.

If we can be of further assistance in this matter, please advise us.

Sincerely yours,

Harry R. Van Cleve

For The Comptroller General
of the United States

Enclosures