

William & Mary Law Review

Volume 10 (1968-1969)
Issue 1

Article 3

October 1968

Equal Employment in the Construction Industry

Harold F. Blasky

Follow this and additional works at: <https://scholarship.law.wm.edu/wmlr>



Part of the [Government Contracts Commons](#)

Repository Citation

Harold F. Blasky, *Equal Employment in the Construction Industry*, 10 Wm. & Mary L. Rev. 3 (1968), <https://scholarship.law.wm.edu/wmlr/vol10/iss1/3>

Copyright c 1968 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmlr>

EQUAL EMPLOYMENT IN THE CONSTRUCTION INDUSTRY

HAROLD F. BLASKY*

INTRODUCTION

Evidence over the past several years bears witness to the unhappy fact that civil rights for minority groups are virtually meaningless unless coupled with employment opportunities on the broadest possible scale. It needs nothing more than a walk through the business and financial districts of any major city to see that much has been accomplished; it needs nothing more than a walk through the black ghettos of that same city to see that much more has to be accomplished before we can begin to see the end of the problem of job discrimination and its inevitable by-product, mass poverty. The United States Government is by far the largest employer of people and the largest purchaser of goods and services. Included in these goods and services is a vast volume of construction, both civil and military, financed in whole or in part by federal funds. Our purpose is to examine the steps taken by the federal government to ensure that all of its citizens, regardless of race, color, creed, or national origin, secure the benefits of these expenditures.

ATTEMPTED SOLUTION BY EXECUTIVE ORDERS

For well over a quarter of a century the United States has been committed to a policy barring racial discrimination in employment. Before our entry into World War II, President Roosevelt had issued Executive Order 8802,¹ requiring that Government contracts contain a clause barring discrimination based on race or religion. In 1943, Executive Order 9346² established the Fair Employment Practices Committee to oversee compliance with the contract clause. Other Executive Orders followed in fairly rapid succession,³ but without establishing

* B.S., 1935, Lehigh University; LL.B., 1938, Harvard University. Senior partner—Max E. Greenberg, Trayman, Harris, Cantor Reiss & Blasky.

1. 6 Fed. Reg. 3109 (1941).

2. 8 Fed. Reg. 7183 (1943).

3. See Whelan & Pearson, *Underlying Value In Government Contracts*, 10 J. PUB. L. 298, 304, n. 20, 32 (1961) for an excellent chronology of the earlier Executive Orders dealing with non-discrimination.

any truly comprehensive system for ensuring compliance beyond conferring enforcement responsibilities on the heads of the contracting agencies. On March 6, 1961, President John F. Kennedy issued Executive Order 10925,⁴ which abolished all previous committees in favor of the President's Committee on Equal Employment Opportunity. The order vested in that Committee full responsibility for accomplishing its objectives, and moved for the first time beyond the contractual obligation not to discriminate to the additional requirement that "affirmative action"⁵ be taken to obtain such nondiscrimination. The Vice President was designated to serve as Chairman of the Committee, which was composed of Cabinet officers and agency heads, with provision for alternates. Executive Order 11114,⁶ in addition to certain clarifying amendments, extended the requirements of the previous Order to federally-assisted contracts for construction.⁷ In 1965, President Lyndon B. Johnson, who as Vice President had headed the President's Committee, abolished it by Executive Order 11246,⁸ placing primary responsibility for the administration of the program (insofar as it related to Government contractors) upon the Secretary of Labor. Each agency was made primarily responsible for obtaining compliance with the

4. 26 Fed. Reg. 1977 (1961).

5. Subparagraph (1), identical with that in the present clause, provides:

The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause.

6. 3 C.F.R. § 774 (1959-1963 Comp.).

7. Section 60-1.3 (k) defines "Federally-assisted construction contract" as including:

Any agreement or modification thereof between any applicant and person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed, on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

8. 30 Fed. Reg. 12319 (1965).

purposes of the Executive Order, and each agency was permitted (subject to approval) to initiate its own programs and procedures. The Office of Federal Contract Compliance (OFCC) was established within the Department of Labor to manage the program and to give overall administrative direction.

Notwithstanding the abolishment of the President's Committee on Equal Employment Opportunity, the regulations promulgated by the Committee continued in full force and effect from 1965 to July 1, 1968,⁹ at which time a new set of regulations issued by the Secretary of Labor on May 21, 1968 became effective.¹⁰ These new regulations apply to all contracting agencies of the Government, and to all contractors and subcontractors who perform work under Government contracts or federally-assisted construction contracts.

REQUIREMENT OF AFFIRMATIVE ACTION

Although the new regulations made substantial revisions in the procedures established for implementing the program, the basic requirement of affirmative action remains unchanged. Much of the difficulty and confusion that has plagued the program can be attributed to the broad generality of this concept.

Nowhere in the Executive Order or in the implementing regulations is the term "affirmative action" defined with any degree of precision. The only express guidance given is in the language of the contract clause itself,¹¹ where it is indicated that affirmative action applies to, but

9. 30 Fed. Reg. 13441 (1965).

10. 41 C.F.R. § 60.

11. The full Equal Opportunity clause as prescribed by section 201 of Executive Order 11246, is as follows:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officers setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified ap-

is not limited to, employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; lay-off or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. It seems clear, however, that what the Government is seeking from the contractor is something more than a direct acceptance of the status quo; what the Government is seeking is positive activism on the part of the contractor to move forward by taking definite steps to bring Negroes and other minority groups into his labor force on a nondiscriminatory employment basis.

plicants will receive consideration for employment without regard to race, creed, color, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11,246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order 11,246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11,246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11,246 of September 24, 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11,246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of Paragraphs (1) through (7) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11,246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Section 60-1.40

Section 60-1.40 of the new regulations require each prime contractor and subcontractor with fifty or more employees and a contract of \$50,000 or more to develop a written affirmative action compliance program, providing in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups. This includes "where there are deficiencies the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity." In addition, the contractor is required to identify and to analyze the problem areas inherent in minority employment and to evaluate the opportunities available for utilization of minority group personnel. The study should include:

- (1) An analysis of minority group representation in all job categories;
- (2) an analysis of hiring practices for the past year, including recruitment sources and testing, to determine whether equal employment opportunity is being afforded in all job categories;
- (3) an analysis of upgrading, transfer and promotion for the past year to determine whether equal employment opportunity is being afforded.

No distinction is made in this section of the regulations between the industrial supplier who employs a relatively stable labor force at a fixed geographic location and the construction contractor, whose need for labor varies sharply both because of seasonal variations in the industry and as the particular stage of construction dictates the need for the various crafts. However, the nature of the criteria suggested by this section clearly seems oriented to the fixed supply type of labor force, rather than the interim employment typical of construction work.

NEGRO REPRESENTATION IN UNIONS

Today, racial discrimination against Negroes in the construction industry represents one of the nation's major problem areas. Except for the laborers' and bricklayers' unions, few craft unions have shown any inclination to open their membership rolls to Negroes. A few examples will suffice to illustrate the racial picture.

Local 17 of the Iron Workers Union in the Cleveland area has over

1,800 members, and no Negroes.¹² Local 189 of the Plumbers and Pipefitters Union in Central Ohio is understood to have 900 members, and no Negroes.¹³ The New Detroit Committee—a coalition of labor, business, civic, and religious leaders seeking ways to avoid a repetition of the 1967 riots—recently reported that in the Detroit area in 1962, only 10 of 1,314 apprentices in the construction trades were Negroes. In February, 1968, the total apprentice enrollment in the same area was 2,696, only 90 of whom were Negroes, including an increase of Negro apprentices from 0 to 1 in the Iron Workers Union and from 4 to 5 in the Electrical Workers Union.¹⁴ Similarly, an investigation in the Buffalo, New York area, conducted by the New York State Commission for Human Rights,¹⁵ indicated that the union membership in the area totaled 13,222, including journeymen, apprentices, and helpers, of which number 914 or 6.9% were Negro. However, 75% of the 914 belonged to the laborers' union and did not hold journeymen status. The remaining 25% were concentrated in five unions—bricklayers, carpenters, cement masons, joiners, and roofers. The Commission's report noted that: "In 1965, Negroes represented 1.2% of the construction industry workforce when the laborers' union is excluded from the tally. By 1967, this proportion had risen to only 2.0% or, in terms of numbers, from 171 to 224 Negroes." It is evident that in Buffalo, as elsewhere, progress has been painfully slow.

APPLYING PRESSURE TO THE CONTRACTOR TO END UNION DISCRIMINATION

But despite these unhappy statistics, which serve to dramatize a situation as it exists on a nationwide basis, the federal program is making a beginning at meeting the problem. The instrument it has chosen to use is the construction contractor, an unhappy middleman between the Government demand for change and the old-line union resistance to anything that threatens to alter the status quo. From the Government's point of view, the affirmative action concept serves as a pragmatic means of applying leverage where it can most readily be applied, against the construction contractor. The reasoning is that the Government contracts with the contractor, and the contractor contracts with

12. The Wall St. J., Oct. 16, 1967.

13. Engineering News-Record, May 23, 1968.

14. *Id.*, May 2, 1968.

15. *Id.*, Feb. 1, 1968.

the unions, so that the pressure applied to the contractor ultimately will be transmitted to the union and eventually will achieve the desired result.

The reason for this type of approach is obvious. The vast majority of construction contractors doing Government business, either directly or through federally-assisted contracts, utilize union labor and are subject to the hiring hall or referral systems which are the established ways of getting union labor to the construction site.

Although subject to variations according to the particular union and local custom, in most areas a union contractor is required to utilize the union hiring hall as the exclusive source of craft labor. Applicants for work are generally broken down into several groups. The first group consists of local union members, in order of seniority; the second group are members of neighboring unions who have travel cards permitting them to work outside of their geographical area; and the third group are non-union applicants who have been screened and tested by a joint hiring hall committee and, if found qualified, have been sent to the union for referral on a permit card basis. Under these circumstances, it is legitimate to ask how a construction contractor can demonstrate affirmative action in employment of Negroes and other minority groups who have been excluded from membership in the unions whose labor the contractor requires.¹⁶

16. The Equal Opportunity clause contains the following requirements:

The Contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the Agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under Section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

Section 207 of Executive Order 11246 requires the Secretary of Labor to:

. . . use his best efforts, directly and through contracting agencies, other interested Federal, state and local agencies, contractors and all other available instrumentalities to cause any labor union engaged in work under Government contracts or any agency referring workers or providing or supervising apprenticeship or training for or in the course of such work to cooperate in the implementation of the purposes of this Order. The Secretary of Labor shall, in appropriate cases, notify the Equal Opportunity Commission, the Department of Justice, or other appropriate federal agencies whenever it has reason to believe that the practices of any such labor organization or agency violate Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law.

A study of section 60-1.9¹⁷ confirms the view that, at least initially, the Government would prefer that the construction contractor deal, by persuasion or otherwise, directly with the unions in an effort to secure their co-operation, with OFCC lending only their "best efforts," reserving for later more drastic measures under Title VII of the Civil Rights Act of 1964.¹⁸ The reasoning behind this approach is that the

17. Section 60-1.9 of the current regulations provides that:

(a) Whenever compliance with the equal opportunity clause may necessitate a revision of a collective bargaining agreement, the labor union or unions which are parties to such an agreement shall be given an adequate opportunity to present their views to the Director.

(b) The Director shall use his best efforts, directly and through agencies, contractors, subcontractors, applicants, State and local officials, public and private agencies, and all other available instrumentalities, to cause any labor union, recruiting and training agency or other representative of workers who are or may be engaged in work under contracts and subcontracts to co-operate with, and to comply in the implementation of, the purposes of the Order.

(c) In order to effectuate the purposes of paragraph (a) of this Section, the Director may hold hearings, public or private, with respect to the practices and policies of any such labor union or recruiting and training agency.

(d) The Director may notify any Federal, State, or local agency of his conclusions and recommendations with respect to any such labor organization or recruiting and training agency which in his judgment has failed to co-operate with himself, agencies, prime contractors, subcontractors, or applicants in carrying out the purposes of the Order. The Director also may notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever he has reason to believe that the practices of any such labor organization or agency violates Title VII of the Civil Rights Act of 1964 or other provisions of Federal law.

18. 42 U.S.C. § 2000 (e) *et seq.* (1964). Title VII, administered by the Equal Employment Opportunity Commission, bans racial discrimination by all employers with twenty-five or more employees, all unions which operate hiring halls or referral systems and joint apprenticeship committees. I have been advised by the Equal Employment Opportunity Commission that as of July 19, 1968, eleven suits have been filed against the building trades unions for violation of the nondiscriminatory requirements of Title VII, and that others are under consideration. The eleven suits filed are as follows:

United States v. Wood Lathers, Local 46, (S.D. N.Y., May 22, 1968).

United States v. Ironworkers Local 1 (N.D. Ill., April 12, 1968).

United States v. Ironworkers Locals 44 and 372 (S.D. Ohio, Dec. 7, 1967).

United States v. IBEW Local 38 (N.D. Ohio, Aug. 8, 1967).

United States v. IBEW Local 212 (S.D. Ohio, July 24, 1967).

United States v. IBEW Local 683 (S.D. Ohio, April 14, 1967).

United States v. Plumbers and Pipefitters Local 73 (S.D. Ind., Feb. 8, 1968).

United States v. Building and Constr. Trades Council of St. Louis, Missouri (E.D. Mo., Feb. 4, 1966).

contractor, either by himself or in association with others similarly situated, can voluntarily enter into collective bargaining agreements with the various unions, and that pursuant to the affirmative action requirement imposed by the Government contracts, it will be incumbent upon the contractor to insist as a part of the negotiations leading to the collective bargaining agreement that the union in turn take some form of affirmative action to eliminate discriminatory practices.

A necessary corollary to such an approach, however, would require the contractor to refuse to enter into a collective bargaining agreement with a union that practices discrimination and shows no inclination to change its course. But it is most unrealistic to place a contractor in such a dilemma. If he refuses to enter into a collective bargaining agreement with a discriminating union, his only alternative would be to bring non-union workers onto the construction site. This undoubtedly would result in the unions placing a picket line around the site, which would not be crossed by the other trades working on the project. Thus, the job would be closed.¹⁹

PRE-AWARD COMPLIANCE REVIEW TECHNIQUE

Although statistics are unavailable, it seems clear that OFCC has recognized the impracticality of an approach that would compel a union contractor to become an open shop contractor as a means of achieving a federal purpose, because few, if any, construction contracts have been terminated under circumstances where the contractor had entered into a bona fide collective bargaining agreement with a discriminating union. Instead, increasing emphasis is being placed upon the pre-award compliance review technique.

Section 60-1.20 of the regulations explains that the purpose of a compliance review is to determine if the prime contractor or subcontractor is maintaining nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are

United States v. IBEW Local 357 (D.C. Nev., Feb. 19, 1968).

United States v. Plumbers and Pipefitters Local 250 (C.D. Cal., Feb. 7, 1968).

United States v. Local 53, Heat and Frost Insulators and Asbestos Workers (pending appeal in 5th Cir. Court of Appeals).

19. See *T. C. Bateson Constr. Co. v. United States*, 319 F.2d 135, 162 Ct. Cl. 145 (1963) where insistence on the part of the Air Force that Government employees take over the operation of the heating plant resulted in a strike by the Plumbers and Steamfitters' local. A picket line was formed outside of all entrances and all work was completely closed down until the strike was resolved.

employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, creed, color, or national origin. The review is to consist of a "comprehensive analysis" of the actual employment practices and conditions, and where deficiencies are found to exist, the contractor is required to make a specific commitment in writing to correct such deficiencies. He also is required to state the precise action he will take and the timetable he will follow to accomplish such corrective action. In the case of a supply contract where the bid may be expected to be in excess of \$1,000,000, provision is made for a pre-award compliance survey, but no express mention is made in this section applying the pre-award procedure to construction contracts.

Section 60-1.29, however, does permit the OFCC Director to ask procuring agencies not to enter into or approve a contract or sub-contract with any bidder designated by the Director until a pre-award compliance review has been conducted and an affirmative determination made that the proposed contractor or subcontractor will be able to comply with the provisions of the Equal Opportunity clause. This section does not single out supply contracts, and therefore undoubtedly applies to construction as well as supply, presumably serving as the legal basis for the current requirement of pre-award compliance surveys of construction awards in selected geographical areas.

Implementation of Section 60-1.29

For over two years OFCC, in selected target areas (Cleveland, St. Louis, San Francisco and Philadelphia), has required the apparent low bidder on contracts above a stated amount to submit, before award can be made, a detailed affirmative action plan specifying how and where and in what numbers he proposes to employ Negroes and other minority group workers in skilled jobs.²⁰ In many instances, substan-

20. One of the most controversial aspects of the pre-award compliance survey procedure has been the use of manning tables requiring the contractor to set out in detail how many workers of each craft he plans to use to staff the project, and to specify the number of minority workers he anticipates he will place on the job. It has been charged that in application the manning tables constitute a quota system obligating the contractor to employ Negroes and other minority group workers in proportion to the population ratio of such workers in the area. This has been denied by OFCC. (See letter dated December 18, 1967 from Vincent G. Macaluso, Assistant Director for Construction, to Mr. William E. Dunn, Executive Director, Associated General Contractors of America, Inc.)

tial awards have been delayed for extended periods of time.²¹ The approach has been subjected to charges that it constitutes reverse discrimination,²² but it is now clear that for the first time concrete results have been achieved.²³ Although details differ somewhat for each target area and each approach has been to some extent experimental, the Cleveland plan can serve to demonstrate the nature of the program.

On February 10, 1967, OFCC issued an Order requesting that all federal agencies active in contract construction in the Cleveland area conduct pre-award compliance surveys in connection with all bids and applications in which total construction costs exceed one-half million dollars. The Order specified that the surveys should include applicants for federally-assisted programs, general contractors, and major subcontractors and should be designed to assure full compliance with the equal employment opportunity provisions of the contract. Contractors and major subcontractors were to be required to submit affirmative action programs which would have the result of assuring minority group representation in all trades on the job and in all phases of the work.

21. *The Wall St. J.*, Oct. 16, 1967, reports that by holding up federal contracts in Ohio totalling \$83 million and thus delaying hospital, school, urban renewal and other projects, the OFCC had forced builders to open up scores of skilled union jobs for Negroes.

22. *Engineering News-Record* reported on May 30, 1968, that Local 90 of the International Brotherhood of Electrical Workers had filed a formal complaint with the Philadelphia Human Relations Commission charging that three of its white members were refused employment on a federal project because of race. The complaint alleged that the three were qualified to work on the project, but that three Negroes had been hired in their place. The complaint stated that "the contractors have publicly announced and admitted that they intend to use race as the primary factor in determining the immediate hiring of journeymen electricians. The *Engineering News-Record* observes:

Behind the squabble is the government's effort to enforce those laws and orders which require that members of minority groups (whether union or non union) be given an equal chance with whites to get the jobs that are generated by the expenditure of public funds. Government agencies in the Philadelphia area are co-ordinating their enforcement efforts through what is known as the "Philadelphia Plan." Under that Plan, Government contractors are supposed to have a representative number of minority group workers in all trades on all Government projects.

23. *The Washington Post* issue of December 31, 1967, reported that in Cleveland as of the end of 1967 there were 112 Negroes out of 474 workmen on Federal projects, as compared to the past record of only a few Negroes, none of whom worked in crews in the high skills.

Operational Plan

This Order was followed on March 15, 1967, by a detailed Operational Plan, calling to the attention of all procuring activities certain historical facts. These facts can be summarized as follows:

1. There are few, if any, unemployed journeyman in any of the higher paid building trades in the Cleveland area, and the supply of apprentices who are about to graduate is small compared to the current and prospective demands for their services. Because of the high level of construction activity in most other urban areas of the country, it is unlikely that construction needs could be met by skilled craftsmen imported from elsewhere.

2. There is and will be for several years a significantly high level of federally-involved construction in the area, conservatively estimated to exceed \$123,000,000, or more than 50% of the total construction in the area.

3. The population of the City of Cleveland is about 35% Negro, while Lorain County, an industrialized section adjacent to Cleveland is comprised of 10% Puerto Ricans and 8% Negroes.

The Operational Plan called to the attention of the agency heads that notwithstanding what could be called full employment in the construction industry, very few Negroes were being furnished by the higher paid unions. It was noted that Local 55 of the Plumbers and Pipefitters Union, with approximately 1,400 members, had only one Negro journeyman, and that out of 202 apprentices there was only one Negro; Local 120 of the same Union had no Negroes out of 1,500 members, and no Negro apprentices; Local 38 of the Electrical Workers had 1,450 journeymen and 200 apprentices, with one Negro in each group; Local 65 of the Sheet Metal Union had 1,250 journeymen, with no Negroes, and 60 apprentices, including three Negroes; Local 17 of the Iron Workers had 1,500 journeymen and no Negroes, and 77 apprentices with three Negroes; and the Operating Engineers, with 3,500 members, had three Negroes and no apprentices.

In view of these statistics, the Operational Plan clearly stated that no program could be considered acceptable which did not deal satisfactorily and specifically with the higher paid trades if the contractor or subcontractor intended to use them. The Plan fixed responsibility firmly upon the contractor and subcontractors to design an affirmative action program that would result in equal employment opportunity, and they were told expressly that they were expected to exercise "the same im-

agination and ingenuity in solving these problems as they do in any other aspect of their management." While it was recognized that there would be some elements of affirmative action which might best be carried out by a common agent of the contractors, such as a contractor association or a Joint Apprenticeship Committee, the contractor was warned that he would not be able to shift responsibility to such an association or agent, and that an affirmative action program utilizing the contractor association or Joint Apprenticeship Committee would be acceptable only if there was sufficient evidence that the agent's portion of the program would be performed. Sufficiency of evidence was to be measured by the extent to which the association or other agent had defined, financed, and staffed his program. A mere statement by a low bidder that its contractor association and Joint Apprenticeship Committee would carry out a given program would not be acceptable as affirmative action, no matter how sound the program might look, unless the procuring agency was satisfied completely that the association and committee had the will and the means to carry out the program.

From a pragmatic point of view, if results are the sole criteria, the pre-award compliance review technique has accomplished its purpose of placing Negroes and other minority groups on construction payrolls where federal work is involved. It would also seem to be superior to first awarding a contract and then threatening to terminate it because of an alleged breach of the affirmative action requirement of the Equal Opportunity clause. At the very least, the pre-award compliance procedure affords the Government an opportunity to talk over the situation with all interested parties prior to making an award in a given area, so that hopefully there can be a clear understanding of what steps have to be taken by everybody to meet the affirmative action requirements of the program.

The OFCC has been considering a proposed order that would extend the pre-award compliance review procedure to all construction awards of \$1,000,000 or more, but its issuance has been halted, at least temporarily, pending study of a recent Comptroller General's decision pertaining to the legal propriety of such an order.²⁴ In this opinion, the Comptroller General, after noting that the possibility of increased costs and delayed awards does not of itself affect the legality of the proposed order, raised a serious question as to whether under the proposed system, bidders were being adequately advised in advance about all material

24. Comp. Gen. B-162036 (May 22, 1968).

requirements affecting their costs or ability to perform. In discussing this aspect, the Comptroller General observed that:

Statutory provisions such as that contained in 23 U.S.C. 112, for competitive bidding in the award of contracts have been interpreted to require award after advertising to the lowest responsible bidder whose bid is responsive to the terms of the invitation, and it is elementary that bidders must be adequately advised beforehand of all material requirements which will affect their costs or ability to perform. Invitations for bids were designed to secure a firm commitment upon which award could be made for securing the Government's requirements described therein, and not as a first step for subsequent negotiation procedures. In view thereof, there would appear to be a technical defect in an invitation's requirement for submission of a program subject to Government approval prior to contract award which does not include or incorporate definite standards on which approval or disapproval will be based. We believe that the basic principles of competitive bidding require that bidders be assured that award will be made only on the basis of the low responsive bid submitted by a bidder meeting established criteria of responsibility, including any additional specific and definite requirements set forth in the invitation, and that award will not thereafter be dependent upon the low bidder's ability to successfully negotiate matters mentioned only vaguely before the bidding. We are therefore advising the Secretary of Labor that if the proposed order is adopted it should be appropriately implemented before becoming effective, by regulations which should include a statement of definite minimum requirements to be met by the bidder's program, and any other standards or criteria by which the acceptability of such program will be judged.

Since a salient part of the pre-award compliance procedure—at least as exemplified by the Cleveland Plan—is the ability to analyze the efficacy of the proposed affirmative action plan as the plan relates to the circumstances applicable to the individual contractor, the employment situation in the general area, the union membership composition, and the crafts which would have to be utilized, coupled with the type of give-and-take adjustments that normally accompany the negotiation technique, the inclusion in the bid invitation of precise or static requirements common to all construction procurements would not appear either feasible or desirable. On the other hand, there is no reason why gen-

eral guidelines stating minimum acceptable requirements and other criteria, somewhat similar to the program requirements referred to in the Operational Plan for the Cleveland area, would not suffice to put all prospective contractors on the necessary level of bidding equality. Surely it is to be hoped that doctrinaire thinking about the sanctity of competitive bidding will not be permitted to frustrate an overriding social need. As of this writing, it is understood that OFCC is actively studying the problem in anticipation of reaching a solution that will meet the requirements set down in the Comptroller General's decision.

CONCLUSION

It is suggested that all the elements compelling a solution to the problem of equal employment opportunity in the construction industry are now present. The catharsis of race riots and the penetrating analysis of their causes by the Kerner Commission;²⁵ the growing shortage of journeymen in the various old-line craft unions; the vast amount of federal funds available for expenditure in federal and particularly in federally-assisted construction; and a dawning awareness on the part of public officials and private persons that the alternatives to equal employment are far more costly to our national and individual welfare—all combine to give immediacy to the need for a rational solution to the problem. Affirmative action is more than merely a contract requirement—it is a call for all America!

²⁵ National Advisory Commission on Civil Disorders, created by Executive Order 11365, July 29, 1967.