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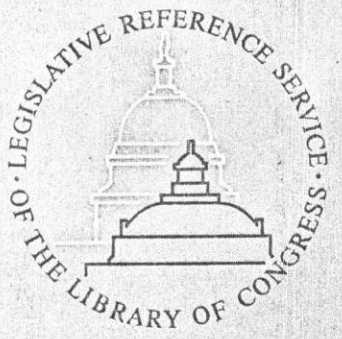

EQUAL EMPLOYMENT OPPORTUNITY IN THE CONSTRUCTION INDUSTRY: THE PHILADELPHIA PLAN, WITH RELATED DOCUMENTS

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Table of Contents

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Authority for the Philadelphia Plan

The Philadelphia plan was developed under authority of Executive Order 11246, issued on September 24, 1965, by President Johnson. This Executive Order is the seventh of a series of equal employment orders for Federal contractors dating back to 1941. The authority for these orders derives from the right of the Federal government to decide with whom and upon what conditions it will do business. In fact, under the reasoning of certain court cases, Federal contracts or assistance to private employers who discriminate would amount to unconstitutional discrimination by the government.

The first Presidential order requiring fair employment practices by government contractors, Executive Order 8802, was issued by President Franklin D. Roosevelt on June 25, 1941. It was issued "following the threat of a Negro march on Washington which would have revealed to the world a divided country at a time when unity was necessary."[1/] Both this order and its successor, Executive Order 9346 issued on May 27, 1943, engendered strong Congressional opposition. The opposition stemmed from the fact that the Committee on Fair Employment Practices established by these two orders had never received an appropriation from the Congress. Financing instead came from Presidential contingency funds. Growing out

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1/ United States Commission on Civil Rights. 1961 Report: Employment. Book 3, p. 10.

of this opposition, an amendment sponsored by Senator Richard Russell of Georgia, passed by the Congress on June 27, 1944, required Congressional approval of all funds for agencies established by Executive order in existence for more than one year. Although the Congress made two appropriations for President Roosevelt's Committee on Fair Employment Practices, the second in July 1945 was specifically earmarked for "liquidating its affairs."[1/]

There followed a six-year lull until December 3, 1951, when President Truman issued Executive Order 10308 establishing the Committee on Government Contract Compliance. The Truman order expired January 1953. Eight months later, on August 13, 1953, President Eisenhower issued Executive Order 10479 establishing the President's Committee on Government Contracts chaired by the Vice President. This order continued in effect throughout the eight years of the Eisenhower administration.

President Kennedy retained the Eisenhower administrative arrangement under the Vice President, but broadened the authority and coverage of the contract compliance program in the two orders which he issued in this area. Executive Order 10925, issued March 6, 1961, was President Kennedy's first official civil rights act and reflected a heavy reliance on executive action. This order for the first time set out strong and highly specific penalties for noncompliance. Kennedy's second order, Executive Order 11114 issued June 22, 1963, extended equal job protection to federally aided construction projects.

1/ Ibid., p. 12.

Although in Executive Order 11246 President Johnson retained the Kennedy policy, he changed the administrative structure of the compliance program. He transferred responsibility from the Vice President to the Secretary of Labor. The Executive order (reproduced in this report as an appendix, pages A. 1 - A. 10) places two major obligations on government contractors unless exempted by the Secretary of Labor. The first is that contractors not discriminate on the basis of race, creed, color, national origin, or sex.[1/] The second goes beyond the passive obligation that they not discriminate and requires that they take affirmative action as well.

Executive Order 11246 does not spell out what is actually required in the way of affirmative action. The U.S. Department of Housing and Urban Development, in instructions issued in 1967 primarily for construction industry employers, offered the following eleven suggested types of "affirmative action:"

> 1. Recruiting through schools and colleges having substantial proportions of minority students;
>
> 2. Maintaining systematic contacts with minority and human relations organizations, leaders, and spokesmen to encourage referral of qualified minority applicants (including those in related work such as fabricating shops and home repair) and minority youths interested in construction occupations;
>
> 3. Encouraging present employees to refer minority applicants.

1/ Executive Order 11246 in its original form did not prohibit employment discrimination because of sex. Later Executive Order 11375, issued October 13, 1967, amended Executive Order 11246 by adding a sex discrimination ban, effective October 13, 1968.

4. Making it known to all recruitment sources that qualified minority members are being sought for consideration for supervisory, journeyman, office, and technical jobs as well as others, whenever the company hires;

5. Where union agreements exist --
   a. cooperating with...unions (perhaps through...contractors' organization) in the development of programs to assure qualified minority persons -- including apprentices -- of equal opportunity for employment in the construction trades;
   b. including an effective non-discrimination clause in new or renegotiated union agreements;

6. Sponsoring and assisting minority youths as well as others to enter pre-apprentice and apprentice training, and making such training available to the maximum extent within your company;

7. Actively encouraging minority employees as well as others to increase their skills and job potential through participation in training and education programs, and helping to assure that such programs are adequate and are in fact available to minority persons;

8. Working with civic, labor, and contractors' organizations (helping to organize a sponsoring group if necessary) to conduct an open-admission training resource for the construction trades in your area;

9. Distributing written questionnaires to all lower-paid employees, inquiring as to their interest and skills with respect to any of the higher-paid trades, followed by assistance, counseling, and effective measures to enable employees with interest and potential to qualify themselves for such trades;

10. Encouraging minority group subcontractors, and subcontractors with minority representation among their employees, to bid for subcontracting work;

11. Counseling and assisting minority craftsmen who have the interest and potential to become subcontractors, with respect to securing performance bonds, writing contracts, and making bids. 1/

Executive Order 11246 states that "each contracting agency shall be primarily responsible for obtaining compliance" (sec. 205). It stipulates that the activities of contracting agencies are to be supervised and coordinated by the Secretary of Labor. The Office of Federal Contract Compliance (OFCC) was established in the Labor Department in January 1966 for this purpose.

Part II of Executive Order 11246 details sanctions and penalties which can be applied against employers who fail to comply with the order. Section 209 allows either the Secretary of Labor or the contracting agencies to "cancel, terminate, suspend . . . any contract, or any portion or portions thereof."

1/ U.S. Department of Housing and Urban Development. Instructions for Contractors Regarding Affirmative Action Under Executive Order 11246. July 1967. p. 2-3.

Fair Employment Programs for Construction, Before the Revised Philadelphia Plan

Enforcement of Executive Order 11246 for construction was neither even nor forceful for the first few years after promulgation of the order. Steps were taken in 1967 by the OFCC to set up compliance programs for Federal construction in selected cities. These were called "special area programs." The first four were in Cleveland, Philadelphia, San Francisco, and St. Louis. In these cities the area coordinator and OFCC officials attempted to have all Federal agencies with construction projects proceed on a unified and intensive basis to increase the number of minority group members employed as construction workers.

The programs in San Francisco and St. Louis were disappointing to government officials, and activity soon tapered off in those cities. The Cleveland and Philadelphia programs proved to be more important. Concerning the Cleveland plan, Solicitor of Labor Laurence Silberman has said:

> The OFCC Cleveland plan, issued March 15, 1967, required the apparent low bidder to submit an acceptable affirmative action program before the award of Federally-assisted construction contracts in the Cleveland area. To be acceptable, the affirmative action program was required to include 'manning tables' which would result in assuring that there would be minority group representation in all trades and in all phases of the work on the Federally-financed construction project. 1/

1/ Legal Memorandum Authority under Executive Order 11246, dated July 15, 1969. p. 6, footnote 17.

> By mid-November [1967], Cleveland contractors had committed themselves to hire 110 minority group craftsmen out of total crews of 475 in the mechanical trades and for the operating engineers. 1/

The original Philadelphia plan, put into effect on November 30, 1967, was substantially similar to the OFCC Cleveland plan. A major administrative difference was that the coordinating agency for the Cleveland plan was the Department of Housing and Urban Development, whereas the Philadelphia plan was coordinated by a Federal Executive Board made up of regional Federal officials. On paper the Philadelphia plan differed from the one in Cleveland in that it required a "representative number" of minorities in each trade rather than representation with the degree unspecified as under the Cleveland plan.

Both the original Philadelphia plan and the Cleveland plan were suspended after an opinion by Comptroller General Elmer Staats that they violated the principles of competitive bidding because no specific standards of acceptability were included in the invitation for bids. The Comptroller General concluded that award would not properly be withheld from the low bidder on the basis of an unacceptable affirmative action program unless prospective bidders had been advised in the invitation for bids of the material requirements of a satisfactory program. The Comptroller General found that contractor commitment to a manning table covering minority group employment had often been worked out after

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1/ Jobs and Civil Rights. Prepared for United States Commission on Civil Rights by the Brookings Institution, Washington, D.C., April 1969. p. 109.

submission of bids.[1/] In a letter to Congressman William J. Green, he stated that "any administratively prescribed standards or requirements to be imposed upon bidders as conditions of a contract must be set out in the invitation for bids."[2/]

1/ Letter of the Comptroller General to Congressman William C. Cramer, dated November 18, 1968. Case no. B-163026.

2/ Quoted in Legal Memorandum Authority under Executive Order 11246, Solicitor of Labor L. H. Silberman, July 15, 1969. p. 25.

The Revised Philadelphia Plan

To meet the objections of the Comptroller General to the original Philadelphia program, the plan was revised to provide for placing definite numerical standards of acceptability in the invitation for bids. The revised Philadelphia plan was issued on June 27, 1969, in an order by Arthur A. Fletcher, Assistant Secretary of Labor for Wage and Labor Standards, under whose jurisdiction the Office of Federal Contract Compliance is located. The order, reproduced in this report as an appendix, pages A.11 - A.25, became effective July 18, 1969. It requires bidders for construction contracts exceeding $500,000 to submit affirmative action plans setting specific goals for utilization of minority employees based on Federally established standards. The plan involves employment in seven of the higher-paying mechanical trades in construction in Bucks, Chester, Delaware, Montgomery, and Philadelphia counties. The trades consist of iron work, plumbing and pipefitting, steamfitting, sheetmetal work, electrical work, roofing and waterproofing, and elevator construction work. Those trades were singled out because in the Philadelphia area they appeared to be without significant minority participation.

Under the revised plan, the area coordinator for the Labor Department's OFCC, in cooperation with other Federal agencies involved, was to determine standards for each of the seven trades to be included

in bid invitations. These standards, which are "non-negotiable" between the Federal government and the bidder in distinction to the situation under the original Philadelphia plan, are to specify the range of minority group employment for each trade during the life of the contract.

The factors to be used in determining the number of minority group members in a given trade are the following: (1) The current extent of minority group participation in the trade; (2) the availability of minority group persons for employment in the trade; (3) the impact of the program on the existing labor force; and (4) the need for training programs in the five-county area and/or the need to assure demand for persons in or from existing training programs. According to the order establishing the revised plan, the term "minority" applies to Negroes, Orientals, American Indians, and those with Spanish surnames (persons of Mexican, Puerto Rican, Cuban, or Spanish heritage).

Public hearings on the revised plan were held in Philadelphia for three days, from August 26 through August 28, 1969, and all interested persons and groups of the community -- contractors, unions, and minority group representatives -- were invited to express their views. These hearings, conducted before a three-member Labor Department panel chaired by Assistant Secretary Fletcher, were primarily intended to gather more detailed data on the area manpower situation for the purpose of setting minority group employment goals and ranges in the crafts affected by the program.

The June 27 order was then supplemented and amended by a second Labor Department order, dated September 23, 1969, addressed to the heads of all Federal agencies from Assistant Secretary Fletcher and John L. Wilks, who had been appointed in August 1969 as Director of the OFCC.[1/] The basic purpose of the September 23 order was to establish numerical ranges for minority group employment for the selected crafts in the Philadelphia area. The earlier June order had provided for the determination of definite standards in terms of such ranges but had not actually specified the ranges. As may be seen from the text of the September 23 order, reproduced in this report as an appendix, pages A. 26-A. 49, the ranges rise over the four-year period through 1973. The lowest range through December 31, 1970, is 4 to 8 percent, for three of the six selected crafts.[2/] The highest range in the fourth year, 1973, is 22 to 26 percent, for iron workers.

1/ The appointment of Wilks to the new position of Deputy Assistant Secretary of Labor for Compliance, and also to direct the Office of Federal Contract Compliance, was announced in a Labor Department press release (USDL-10-616) dated August 6, 1969.

2/ The order dropped one of the seven originally specified trades, roofers and waterproofers, because it had been determined that minority craftsmen "may be adequately represented" in that craft.

Legality of the Revised Philadelphia Plan

From its inception the legality of the revised Philadelphia plan has been at issue. The legality controversy has been discussed generally in terms of whether or not the plan establishes quotas for minority group employees.

The requirement in the plan for establishment of "non-negotiable" standards for minority group participation in seven (later dropped to six) of the higher-paying crafts prompted Senator Fannin to ask Comptroller General Staats for an opinion as to the plan's validity. In a lengthy defense, dated July 15, 1969, submitted at the request of Staats, Solicitor of Labor Laurence Silberman maintained that the program was lawful. Commenting on the accusation that the plan sets minority employment quotas in contravention of the Civil Rights Act, he declared:

> It is granted that the Philadelphia Plan provides for numerical standards and goals. However, such a standard is not a 'quota.' The Plan's numerical standards and goals differ from 'quotas' in at least two respects: in their flexibility and in the consequences of a failure to meet the goals. A quota is 'a fixed number or percentage of minority group members,' as defined by Webster's Unabridged Dictionary, to be admitted into some activity or institution. The Philadelphia range of numerical standards is flexible and is not to be applied in a rigid mechanistic manner. . . . The second distinguishing feature . . . is the consequence of failing to meet the standard or goal. A stronger argument might be made that the Philadelphia Plan

> requires 'quotas' if a failure to meet the numerical goal would, in itself, constitute noncompliance with the Executive Order or the implementing regulations and orders. Such is not the case. Rather than being an absolute requirement, the numbers or percentages provided for in the Plan are used as a starting point in determining good faith compliance. . . . If a contractor does not meet his goal, it is not a per se violation. He is given an opportunity to show he had made good faith efforts to do so. If he can show he had made such efforts, no consequences flow from such failure. In any proceeding where such good faith performance is called in question, the contractor's entire compliance posture shall be reviewed in the process of considering the imposition of sanctions. 1/

Appended to this memorandum of the Labor Solicitor was a brief two-paragraph letter, dated June 26, 1969, addressed to him from Assistant Attorney General Jerris Leonard of the Justice Department's Civil Rights Division. The letter upheld the validity of the revised Philadelphia plan with the following words: "We have reviewed the proposed plan. We find it to be consistent with the Executive Order [11246], the regulations issued pursuant thereto, and with the Civil Rights Act of 1964." This opinion was furnished by Leonard in response to a request for his views, dated June 24, 1969, from the Labor Solicitor.

Comptroller General Staats, however, came to a contrary conclusion, which he expressed in a letter to the Secretary of Labor dated August 5, 1969 (Case no. B-163026). The letter is included in this report as an appendix, pages A. 50-A. 66. The interest of the Comptroller General

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1/ Legal Memorandum Authority under Executive Order 11246, dated July 15, 1969. p. 31-32.

stems from his authority under the Budget and Accounting Act of 1921 (31 U.S. Code 65), which directs him to determine whether financial transactions of the Federal government have been consummated in accordance with laws, regulations, or other legal requirements.

Early in his August 5 letter the Comptroller General stated his basic purpose for writing it:

> Questions have been submitted to our Office by members of Congress, both as to the propriety of the revised Philadelphia Plan and the legal validity of Executive Order 11246 and of various implementing agencies. In view of possible conflicts between the requirements of the Plan and the provisions of Titles VI and VII of the Civil Rights Act of 1964, Pub. L. 88-352, discussions have been held between representatives of our Office, your Department, and the Department of Justice, and your Solicitor has furnished to us a legal memorandum in support of the authority for issuance of the Executive Order as well as the revised Philadelphia Plan promulgated thereunder.

The primary question considered in Comptroller General Staats' decision was whether the revised Philadelphia plan violated the equal employment opportunity provisions of the Civil Rights Act of 1964. He regarded that Act as the basic law governing nondiscrimination in employment and equal employment opportunity obligations of employers, overriding any administrative rules, regulations, and orders which might conflict with it.

He felt that the requirements made upon contractors by the revised Philadelphia plan were unlawful because they used race or national

origin as a basis for employment. Whether these requirements were "quotas" or "goals" is, he stated:

> . . . largely a matter of semantics, and tends to divert attention from the end result of the Plan--that contractors commit themselves to making race or national origin a factor for consideration in obtaining their employees. . . . Further, we believe that requiring an employer to abandon his customary practice of hiring through a local union because of a racial or national origin imbalance in the local unions and, under the threat of sanctions, to make 'every good faith effort' to employ the number of minority group tradesmen specified in his bid from sources outside the union if the workers referred by the union do not include a sufficient number of minority group personnel, are in conflict with section 703 (j) of the [Civil Rights] act (42 U.S.C. 2000e-2(j)) which provides as follows:
>
> > Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because . . . of an imbalance which may exist with respect to the total number or percentage of persons of any race, color . . . or national origin employed by any employer [or] referred . . . for employment by any . . . labor organization . . . in comparison with the total number or percentage of persons of such race, color . . . or national in any community . . . or in the available work force in any community. . . .

Finally, the Comptroller General stated that:

> . . . until the authority for any agency to impose or require conditions in invitations for bids on Federal or federally assisted construction which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees for such construction, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, we must conclude that conditions

> of the type proposed by the revised Philadelphia Plan are in conflict with the Civil Rights Act of 1964, and we will necessarily have to so construe and apply the act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction projects.

On August 6, the day following the Comptroller General's advisory opinion to him, Secretary of Labor Shultz issued a press release (USDL-10-617) stating that since:

> . . . interpretation of the Civil Rights Act has been vested by Congress in the Department of Justice which is the principal executive agency with authority to interpret that law . . . . [and the] Department of Justice has approved the Philadelphia Plan as consistent with the Civil Rights Act . . . . we have no choice but to follow the Executive Order [11246] . . . . to continue to press the Philadelphia Plan and the fight for equal employment opportunity for all Americans.

Up to that time the only Justice Department opinion in the hands of Labor Secretary Shultz was in the form of a short two-paragraph communication, dated June 26, 1969, from Assistant Attorney General Jerris Leonard to Labor Solicitor Laurence Silberman. On September 22, 1969, however, the Attorney General released a lengthier formal opinion, as a letter to Shultz, which was essentially a point-by-point rebuttal of the Comptroller General's opinion. It reached a contrary conclusion to that of the Comptroller General, namely, that the revised Philadelphia plan was not in conflict with any provision of the Civil Rights Act of 1964 and that as a lawful implementation of Executive Order 11246 it might be enforced in the award of Federal contracts. The Attorney General's opinion is reproduced in this report as an appendix, pages A.67-A.86

In his opinion the Attorney General emphasized:

> It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria.
>
> There is no inherent inconsistency between a requirement that each qualified employee and applicant be individually treated without regard to race, and a requirement that an employer make every good faith effort to achieve a certain range of minority employment . . . . Title VII does not prohibit some structuring of the hiring process, such as the broadening of the recruitment base, to encourage the employment of members of minority groups . . . . The obligation of 'affirmative action' imposed pursuant to Executive Order 11246 may require it.

On October 27 and 28, 1969, hearings were held on the revised Philadelphia plan by the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary. As of this writing (early March 1970) these hearings have not yet been printed. Some of the purposes of the hearings were cataloged as follows in an opening statement[1/] by Senator Sam Ervin of North Carolina, who chaired the hearings and has been a critic of the plan:

> 1. We will examine the Plan as it relates to the doctrine of separation of powers and try to determine whether the Labor Department has usurped Congressional authority and violated legislative intent.

1/ Reprinted in the Congressional Record [Daily ed.] November 3, 1969: S13587-S13588.

2. We will ask the Labor Department to explain precisely what it means by 'affirmative action goal' and by 'specific numerical range.'

3. We will ask the Labor Department to make clear what is meant by the 'good faith effort' which is required of contractors under the Philadelphia Plan. Nowhere in the Plan is that term defined.

4. The Subcommittee wants to be shown that the Philadelphia Plan, in forcing contractors to raise the percentage of minority group employment, does not violate Title VII of the 1964 Civil Rights Act.

5. We want the Labor Department to explain why the Philadelphia Plan disregards the intent of Congress that Title VII should not hold contractors responsible for the membership practices of labor unions.

6. We would like the Labor Department to justify the Philadelphia Plan's apparent conflict with the intent of Congress that Title VII should not interfere with union seniority systems.

7. Finally, the Subcommittee has before it S. 931, a bill introduced by Senator Fannin, which would make Title VII the sole means of enforcement and remedy in the field of equal employment. It would suspend the use of Executive Order 11246. We welcome the comments of our witnesses on that bill.

Testifying at the Subcommittee hearings in support of the revised Philadelphia plan were Senator Jacob Javits of New York, Labor Secretary George Shultz, and Assistant Attorney General Jerris Leonard. Testifying against the plan were Representative Roman Pucinski of Illinois, Comptroller General Elmer Staats, and spokesmen from labor and management. Louis Sherman, general counsel of the AFL-CIO Building Trades Department, charged that the plan would force the hiring of men who were not qualified for the purpose of meeting the government's

"numbers game." Thurman Sensing, executive vice president of the Southern States Industrial Council, called the plan unworkable because it placed the burden of hiring minority group members on the contractor whereas the contractor typically hires his men through the union hiring hall. He said that if the government wanted to come to grips with the problem of minority group employment discrimination, then it should attack the problem directly where it exists -- in the construction trades unions.

Testimony of Harry P. Taylor, executive director of the General Building Contractors Association of Philadelphia, was generally consistent with that of Sensing. William E. Naumann, chairman of the Legislative Committee of the Associated General Contractors, suggested a "wait and see" attitude as to whether the Philadelphia plan could increase minority participation in the building trades and whether the plan was consistent with Title VII. In response to Subcommittee questioning, he admitted that in his view the plan established "quotas," which seemed to him inconsistent with Title VII.

Late in the first session of the 91st Congress, an attempt was made by Senate opponents of the Philadelphia plan to kill it through an amendment to a supplemental appropriations bill. The Senate rider -- Section 904 of the Supplemental Appropriations bill, 1970 (H.R. 15209) -- would have scuttled the Philadelphia plan by affirming the Comptroller General's ruling that the program was invalid. Section 904 provided:

> In view of and in confirmation of the authority invested in the Comptroller General of the United States by the Budget and Accounting Act of 1921, as amended, no part of the funds appropriated or otherwise made available by this or any other Act shall be available to finance, either directly or through any Federal aid or grant, any contract or agreement which the Comptroller General of the United States holds to be in contravention of any Federal statute.

After extensive debate on the Senate floor on December 18, 1969 (Congressional Record [Daily ed.], p. S17131-S17222), the Senate voted 52 to 37 that the rider was germane to the supplemental appropriations bill and then voted 74 to 0 to pass the bill with the rider attached.

The AFL-CIO and the building trades unions, which oppose the Philadelphia plan, lobbied for a rider of this type to be added to the supplemental appropriations bill. At a press conference held December 20, Labor Secretary Shultz called the Senate provision an effort by the unions "to block affirmative steps to open skilled and high-paying jobs to Negroes." President Nixon stated that he would consider vetoing H.R. 15209 if the rider rejecting the Philadelphia plan were retained.[1/] On December 22 the House rejected the rider by a vote of 208 to 156 and on the same day the Senate receded from its original position and abandoned the rider by a vote of 39 to 29.[2/]

1/ President Nixon's statement is reprinted in the Congressional Record [Daily ed.] December 22, 1969: S17625; and December 23, 1969: H13074.

2/ The House debate appears in the Congressional Record [Daily ed.] December 23, 1969: H13070-H13090; although the proceedings actually occurred on December 22 and were omitted from the Record of that date. The Senate proceedings appear in the Congressional Record [Daily ed.] December 22, 1969: S17625-S17636.

Other Arguments about the Revised Philadelphia Plan

The statistics included in the September 23, 1969 Labor Department order establishing ranges for the Philadelphia plan (reproduced in this report as an appendix, pages. A. 26 - A. 49) buttress one of the major arguments for the plan. The order indicates that whereas the construction industry in general in the five-county Philadelphia area has a current minority representation of 30 percent and for skilled trades, excluding laborers, a minority representation of approximately 12 percent, the six crafts singled out for treatment in the plan have minority participation averaging only about 1 percent. Minority group representation, according to pages 4-5 of the order, equal 1.4 percent for iron workers, 0.65 percent for steamfitters, 1 percent for sheet-metal workers, 1.76 percent for electricians, 0.54 percent for elevator construction workers, and 0.51 percent for plumbers and pipefitters. The order ascribes these low rates, which it terms "far below that which should have reasonably resulted from participation in the past without regard to race, color and national origin . . . . to the traditional exclusionary practices of these unions in admission to membership and apprenticeship programs and failure to refer minorities to jobs in these trades."

In the words of the Americans for Democratic Action: "Only strong governmental action can reverse long history of exclusion of blacks

from construction industry. Philadelphia plan offers greatest hope for minority employment in skilled construction work."[1/] Senator Edward Brooke reiterated the same general idea on the Senate floor on December 18: "Prohibition of discrimination is not enough; positive action is necessary."[2/] This theme also was stated in one way or another by supporters of the plan during the course of the December Congressional debates.

Another argument for the Philadelphia plan approach is the lack of legal clout and resources available for getting at unfair employment practices through other methods. The Equal Employment Opportunity Commission, established under Title VII of the Civil Rights Act of 1964, has been termed "a poor, enfeebled thing . . . [with] the power to conciliate but not to compel."[3/] The EEOC's only recourse under Title VII in resolving job discrimination complaints against employers, labor unions, employment services, and the sponsors of apprenticeship and other job training programs is to use "informal methods" such as "conference, conciliation, and persuasion." The Attorney General,

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1/ Telegram to Speaker John W. McCormack and Majority Leader Carl Albert from Joseph L. Rauh, Jr., vice chairman, ADA. Reprinted in the Congressional Record [Daily ed.] December 23, 1969: H13089.

2/ Congressional Record [Daily ed.] December 18, 1969: S17151.

3/ Michael I. Sovern. Legal Restraints on Racial Discrimination in Employment (1966), p. 205. Quoted in Jobs and Civil Rights. Prepared for the U.S. Commission on Civil Rights by Brookings Institution, April 1969. p. 14.

however, under Title VII does have the power to go to court to enforce fair employment practices, but he has not, in part because of lack of resources, pursued a policy of vigorous enforcement against employment discrimination cases. 1/

As a matter of fact, one of the chief reservations concerning the Philadelphia plan comes from those who argue the preferability of strengthening alternative, more comprehensive means of creating equal employment opportunity -- specifically, amending Title VII of the Civil Rights Act to provide the EEOC with enforcement powers. Congressman Hawkins has stated this viewpoint as follows:

> Basically the administration has made the Philadelphia plan its program of providing more jobs for Negroes. Serious questions may be raised as to its reason. Why should minority employment be limited in effect to a single industry? And, why only to certain cities in the first instance? If it is in furtherance of Executive order, why has the order not been invoked before? . . . The administration has a golden opportunity to obtain strong powers, including affirmative action, under the EEOC part of the Civil Rights Act, Title VII, by supporting a bill which Mr. Ogden Reid of New York, and I have introduced to give cease and desist power to this Federal Commission. Incidentally, a similar bill is pending in the Senate backed by 35 sponsors. The administration, however, prefers to confuse the issue with a new and different approach unsupported by a single civil rights authority or organization. 2/

1/ Jobs and Civil Rights. Op. cit. Chapters 2 and 3 contain comprehensive discussions of the roles of the EEOC and the Attorney General in enforcing Title VII. Chapter 4 describes the compliance machinery under Executive Order 11246; however this chapter was completed before most of the Philadelphia program evolved.

2/ Congressional Record [Daily ed.] December 23, 1969: H13085.

Congressman Hawkins also introduced a letter from the NAACP supporting the Hawkins-Reid bill.[1/] Hearings on this bill, H.R. 6228, were held on December 1 and 2, 1969, by the General Subcommittee on Labor, House Committee on Education and Labor. Hearings on the Senate bill mentioned by Congressman Hawkins, S. 2453, were held on August 11 and 12 and September 10 and 16, 1969, by the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare. Both bills aim to add cease-and-desist powers to the presently limited EEOC arsenal of weapons against employment discrimination toward minority groups.

The AFL-CIO and the building trades unions have been consistently opposed to the revised Philadelphia plan. Their objections are based on various grounds, in addition to the issue of legality. For one thing, they feel that the minority participation percentages for the six crafts indicated by the Labor Department in its September 23 order for the Philadelphia area are inaccurate and far too low. For another thing, they feel the plan is not feasible since it cannot produce instant mechanics or electricians; in many cases the contractor may have to transfer skilled black workers from non-Federal construction work in order to produce a sufficient number for his Federal contract work. But the major animus stems from labor's attitude that its own programs have been making substantial progress

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1/ From Clarence Mitchell, Director, Washington Bureau, NAACP, to Speaker of the House John McCormack, dated December 22, 1969. Reprinted in the Congressional Record [Daily ed.] December 23, 1969: H13085.

toward eliminating job discrimination and that these programs are preferable to the mandatory government plan. The chief program referred to is the Apprenticeship Outreach project. As of November 1969, there were 5,304 minority group apprentices placed by this program -- 4,998 of them in the building and construction trades -- since the first Outreach program began in early 1967. According to AFL-CIO President George Meany:

> . . . in the regular apprenticeship federally serviced programs, the percentage of minority apprentices is higher in construction than in metal manufacturing, non-metal manufacturing, public utilities and transportation. The 1960 census showed that in the total United States apprenticeship programs, non-whites comprised 2.5 percent of the total. In 1968, the last half of 1968, the only figures we have to date, show that this percentage has gone up to 9.4 percent. It has gone up four times in that period. 1/

The official AFL-CIO description of the Outreach program is as follows: 2/

> Apprenticeship Outreach is a program to recruit, prepare and counsel minority-group youth for entry into apprenticeships in the construction industry. The first Outreach Program was funded by the U.S. Department of Labor in early 1967 and since has spread to 55 cities.
>
> It grew out of the experience of the Workers Defense League, which recruited 28 Negro youngsters to take apprenticeship examinations for the Sheet Metal Workers in New York City -- only to have its highest candidate finish 68th in a race for 65 apprenticeship slots.

1/ Labor and the Philadelphia Plan. A speech by George Meany to the National Press Club, Washington, D.C., January 12, 1970.

2/ Printed as a supplement to George Meany's speech of January 12 to the National Press Club.

This experience prompted the Workers Defense League, the AFL-CIO Department of Civil Rights and the A. Philip Randolph Educational Fund to develop a program which would not only recruit, but also offer preparation for apprenticeship exams and follow through for the first weeks after placement.

Since the Joint Apprenticeship Committee was formed by the WDL and the A. Philip Randolph Education Fund, such programs as the Urban League's Labor Education Advancement Program (LEAP), the Trade Union Leadership Council and the Opportunities Industrialization Center (OIC) have entered into similar agreements with local building trades councils.

Outreach has the distinctive feature of being staffed from both the building trades and the minority community. It includes guarantees to the minority-group member of an avenue to higher-paying jobs and to the building trades member on maintaining the standards of his craft. This has led to mutual cooperation and the rapid expansion of the program.

Although organized labor's emphasis undoubtedly has been primarily on the traditional apprenticeship approach as the avenue to journeyman status as a craftsman -- particularly for the higher-paying trades singled out in the Philadelphia plan -- nevertheless the unions are prepared to go beyond that to accelerate minority group employment. This is evident from points 2 and 3 of the following three policies unanimously adopted by the Building and Construction Trades Department of the AFL-CIO, 55th Convention, September 22, 1969, at Atlantic City, New Jersey: 1/

1. Acceleration and extension of the Outreach Program which has been tested and which has succeeded.

1/ Quoted by President George Meany in his January 12 speech to the National Press Club.

2. Invitation to qualified journeymen to apply for membership in locals and acceptance if they meet ordinary and equally administered requirements for membership. This is to bring people in who picked up the trade outside of the unions with the same rights and under the same conditions as anybody else.

3. The development of training programs for the up-grading of minority workers who are not of apprentice age. This would mean minority workers in the various trades who are working as helpers or assistants or laborers and to up-grade them, to train them and bring them in as full-fledged journeymen.

An example of activity under point 3 of this program was described in a recent Labor Department press release (USDL-10-988), dated January 27, 1970. Under a contract signed on that day by the Labor Department with the United Association of Plumbers and Pipefitters (AFL-CIO) and the National Constructors Association, 500 members of minority groups will be trained as journeymen pipefitters. The union and 33 major construction companies will recruit and train persons who have some experience in the trade but who are beyond apprenticeable age[1/] and may lack scholastic preparation. Those selected for training will be primarily men who have been working in the piping field without benefit of formal training.

Labor writer Victor Riesel, in devoting a column to this contract, stated that the "story is in the breakthrough in the apprenticeship system, the smashing of the age as well as the color barriers, and in the impact all this will have on the welfare system . . . . Thus the

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1/ Apprenticeship standards usually call for an age range for the starting apprentice of at least 16 and preferably not over 26.

hopeless 'aging' black worker of 30 or 35 years of age, or 45 for that matter, now has a chance to get into the trade as a trainee for skilled craftsmanship."[1/]

1/ Plumbers Let Down Union Color Block. Northern Virginia Sun, February 14, 1970: 6.

Present Status of the Revised Philadelphia Plan

The first contract award under the revised Philadelphia plan was announced on October 23, 1969, jointly by Secretary of Labor George Shultz and Secretary of Health, Education and Welfare Robert Finch (Press release USDL-10-759). The award, for erection of a new hospital building adjacent to the University of Pennsylvania Medical School campus, represented the lowest of four bids submitted by eight contractors, some making joint bids. The winning bid was submitted by Bristol Steel and Iron Works of Richmond, Virginia. Secretary Shultz said that all four bids contained "acceptable commitments" for minority employment required by the Philadelphia plan. The contract involved only one construction trade, iron workers.

At the present time (mid-March 1970), fifteen construction projects have been advertised in the five-county area subject to the Philadelphia plan. Of these, eleven are construction projects of the Department of Health, Education and Welfare, three are projects of the Department of Transportation (Federal Highway Administration), and one is an Agriculture Department project. Seven of the fifteen have been awarded while the remaining eight are in various stages of negotiation. Total funds involved in the seven contracts awarded amount to about $20 million. All fifteen advertised contracts are federally assisted ones, that is, with some of the money coming from State, local, or other non-Federal sources.

On January 5, 1970, a complaint was filed by an association of over 80 contractors challenging constitutionality of the plan. On that date U.S. District Judge Charles R. Weiner turned down a request by the complainants for a temporary restraining order against the plan. Instead, he set January 26 as the day for arguments on a permanent injunction. Briefs were submitted and the case was argued on January 26 (Contractors Association of Eastern Pennsylvania v. Shultz et al. and General State Authority of the Commonwealth of Pennsylvania, Eastern District of Pennsylvania, Civil Action No. 70-18). The City of Philadelphia joined the U.S. Justice Department in defending the plan. The Building and Construction Trades Department of the AFL-CIO joined the contractor complainants by submitting a brief contending that the plan would force contractors to violate the Taft-Hartley Act by repudiating referral agreements with unions for hiring in construction projects.

On March 13, 1970, Judge Weiner handed down a decision upholding the legality of the revised Philadelphia plan and denying the plaintiff's injunction request. In a 22-page opinion, Judge Weiner ruled that the plan did not violate the 1964 Civil Rights Act because it required from contractors only good faith efforts to achieve specified ranges of minority group workers; the plan, he stated, did not require the contractor to hire a definite percentage

of a minority group. Robert J. Bray, Jr., attorney for the plaintiff contractors, announced on the day following the ruling that no determination had yet been reached as to whether to appeal the decision.

It should be made clear that the revised Philadelphia plan is the only mandatory government plan now in operation. Other programs currently being publicized, such as the Chicago, Boston, Pittsburgh, and Newark plans, are so-called "hometown solutions" in effect or presently being developed jointly by local contractors, unions, and minority community groups. They are not programs promulgated by the Federal Government. These hometown solutions are outside the scope of this report.

EXECUTIVE ORDER

11246

EQUAL EMPLOYMENT OPPORTUNITY

Under and by virtue of the authority vested in me as President of the United States by the Constitution and statutes of the United States, it is ordered as follows:

PART I - Nondiscrimination in Government Employment

SECTION 101. It is the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons, to prohibit discrimination in employment because of race, creed, color, or national origin, and to promote the full realization of equal employment opportunity through a positive, continuing program in each executive department and agency. The policy of equal opportunity applies to every aspect of Federal employment policy and practice.

SEC. 102. The head of each executive department and agency shall establish and maintain a positive program of equal employment opportunity for all civilian employees and applicants for employment within his jurisdiction in accordance with the policy set forth in Section 101.

SEC. 103. The Civil Service Commission shall supervise and provide leadership and guidance in the conduct of equal employment opportunity programs for the civilian employees of and applications for employment within the executive departments and agencies and shall review agency program accomplishments periodically. In order to facilitate the achievement of a model program for equal employment opportunity in the Federal service, the Commission may consult from time to time with such individuals, groups, or organizations as may be of assistance in improving the Federal program and realizing the objectives of this Part.

SEC. 104. The Civil Service Commission shall provide for the prompt, fair, and impartial consideration of all complaints of discrimination in Federal employment on the basis of race, creed, color, or national origin. Procedures for the consideration of complaints shall include at least one impartial review within the executive department or agency and shall provide for appeal to the Civil Service Commission.

SEC. 105. The Civil Service Commission shall issue such regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this Part, and the head of each executive department and agency shall comply with the regulations, orders, and instructions issued by the Commission under this Part.

PART II - Nondiscrimination in Employment by Government Contractors and Subcontractors

Subpart A - Duties of the Secretary of Labor

SEC. 201. The Secretary of Labor shall be responsible for the administration of Parts II and III of this Order and shall adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof.

Subpart B - Contractors' Agreements

SEC. 202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions:

"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 officer 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 applicants 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. 11246 of Sept. 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 No. 11246 of Sept. 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. 11246 of Sept. , 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 contacting 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. 11246 of Sept. 24 , 1965, and such other sanctions may be imposed and remedies involved as provided in Executive Order No. 11246 of Sept. 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. 11246 of Sept. 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.

SEC. 203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. Compliance Reports shall be filed within such times and shall contain such information as to the practices, policies, programs, and employment policies, programs, and employment statistics of the contractor and each subcontractor, and shall be in such form, as the Secretary of Labor may prescribe.

(b) Bidders or prospective contractors or subcontractors may be required to state whether they have participated in any previous contract subject to the provisions of this Order, or any preceding similar Executive order, and in that event to submit, on behalf of themselves and their proposed subcontractors, Compliance Reports prior to or as an initial part of their bid or negotiation of a contract.

(c) Whenever the contractor or subcontractor has a collective bargaining agreement or other contract or understanding with a labor union or an agency referring workers or providing or supervising apprenticeship or training for such workers, the Compliance Report shall include such information as to such labor union's or agency's practices and policies affecting compliance as the Secretary of Labor may prescribe: Provided, That to the extent such information is within the exclusive possession of a labor union or an agency referring workers of providing or supervising apprenticeship or training and such labor union or agency shall refuse to furnish such information to the contractor, the contractor shall so certify to the contracting agency as part of its Compliance Report and shall set forth what efforts he has made to obtain such information.

(d) The contracting agency or the Secretary of Labor may direct that any bidder or prospective contractor or subcontractor shall submit, as part of his Compliance Report, a statement in writing, signed by an authorized officer or agent on behalf of any labor union or any agency referring workers or providing or supervising apprenticeship or other training, with which the bidder or prospective contractor deals, with supporting information, to the effect that the signer's practices and policies do not discriminate on the grounds of race, color, creed, or national origin, and that the signer either will affirmatively cooperate in the implementation of thepolicy and provisions of this Order or that it consents and agrees that recruitment, employment, and the terms and conditions of employment under the proposed contract shall be in accordance with the purposes and provisions of the Order. In the event that the union, or the agency shall refuse to execute such a statement, the Compliance Report shall so certify and set forth what efforts have been made to secure such a statement and such additional factual material as the contracting agency or the Secretary of Labor may require.

SEC. 204. The Secretary of Labor may, when he deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all of the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order. The Secretary of Labor may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders (1) whenever work is to be or has been performed outside the United States and no recruitment of workers within the limits of the United States is involved; (2) for standard commercial supplies or raw materials; (3) involving less than specified amounts of money or specified numbers of workers; or (4) to the extent that they involve subcontracts below a specified tier. The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: Provided, That such an exemption will not interfere with or impede the effectuation of the purposes of this Order: And provided further, That in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

Subpart C - Powers and Duties of the Secretary of Labor and the Contracting Agencies

SEC. 205. Each contracting agency shall be primarily responsible for obtaining compliance with the rules, regulations, and orders of the Secretary of Labor with respect to contracts entered into by such agency or its contractors. All contracting agencies shall comply with the rules of the Secretary of Labor in discharging their primary responsibility for securing compliance with the provisions of contracts and otherwise with the terms of this Order and of the rules, regulations, and orders of the Secretary of Labor issued pursuant to this Order. They are directed to cooperate with the Secretary of Labor and to furnish the Secretary of Labor such information and assistance as he may require in the performance of his functions under this Order. They are further directed to appoint or designate, from among the agency's personnel, compliance officers. It shall be the duty of such officers to seek compliance with the objectives of this Order by conference, conciliation, mediation, or persuasion.

SEC. 206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor, or initiate such investigation by the appropriate contracting agency, to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. Such investigation shall be conducted in accordance with the procedures established by the Secretary of Labor and the investigating agency shall report to the Secretary of Labor any action taken or recommended.

(b) The Secretary of Labor may receive and investigate or cause to be investigated complaints by employees or prospective employees of a Government contractor or subcontractor which allege discrimination contrary to the contractual provisions specified in Section 202 of this Order. If this investigation is conducted for the Secretary of Labor by a contracting agency, that agency shall report to the Secretary what action has been taken or is recommended with regard to such complaints.

SEC. 207. The Secretary of Labor shall 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 Employment 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.

SEC. 208. (a) The Secretary of Labor, or any agency, officer, or employee in the executive branch of the Government designated by rule, regulation, or order of the Secretary, may hold such hearings, public or private, as the Secretary may deem advisable for compliance, enforcement, or educational purposes.

(b) The Secretary of Labor may hold, or cause to be held, hearings in accordance with Subsection (a) of this Section prior to imposing, ordering, or recommending the imposition of penalties and sanctions under this Order. No order for debarment of any contractor from further Government contracts under Section 209(a)(6) shall be made without affording the contractor an opportunity for a hearing.

Subpart D - Sanctions and Penalties

SEC. 209. (a) In accordance with such rules, regulations, or orders as the Secretary of Labor may issue or adopt, the Secretary or the appropriate contracting agency may;

(1) Publish, or cause to be published, the names of contractors or unions which it has concluded have compiled or have failed to comply with the provisions of this Order or of the rules, regulations, and orders of the Secretary of Labor.

(2) Recommend to the Department of Justice that, in cases in which there is substantial or material violation or the threat of substantial or material violation of the contractual provisions set forth in Section 202 of this Order, appropriate proceedings be brought to enforce those provisions, including the enjoining, within the limitations of applicable law, of organizations, individuals, or groups who prevent directly or indirectly, or seek to prevent directly or indirectly, compliance with the provisions of this Order.

(3) Recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964.

(4) Recommend to the Department of Justice that criminal proceedings be brought for the furnishing of false information to any contracting agency or to the Secretary of Labor as the case may be.

(5) Cancel, terminate, suspend, or cause to be cancelled, terminated, or suspended, any contract, or any portion or portions thereof, for failure of the contractor or subcontractor to comply with the nondiscrimination provisions of the contract. Contracts may be cancelled, terminated, or suspended absolutely or continuance of contracts may be conditioned upon a program for future compliance approved by the contracting agency.

(6) Provide that any contracting agency shall refrain from entering into further contracts, or extensions or other modifications of existing contracts, with any noncomplying contractor, until such contractor has satisfied the Secretary of Labor that such contractor has established and will carry out personnel and employment policies in compliance with the provisions of this Order.

(b) Under rules and regulations prescribed by the Secretary of Labor, each contracting agency shall make reasonable efforts within a reasonable time limitation to secure compliance with the contract provisions of this Order by methods of conference, conciliation, mediation, and persuasion before proceedings shall be instituted under Subsection (a) (2) of this Section, or before a contract shall be cancelled or terminated in whole or in part under Subsection (a) (5) of this Section for failure of a contractor or subcontractor to comply with the contract provisions of this Order.

SEC. 210. Any contracting agency taking any action authorized by this Subpart, whether on its own motion, or as directed by the Secretary of Labor, or under the rules and regulations of the Secretary, shall promptly notify the Secretary of such action. Whenever the Secretary of Labor makes a determination under this Section, he shall promptly notify the appropriate contracting agency of the action recommended. The agency shall take such action and shall report the results thereof to the Secretary of Labor within such time as the Secretary shall specify.

SEC. 211. If the Secretary shall so direct, contracting agencies shall not enter into contracts with any bidder or prospective contractor unless the bidder or prospective contractor has satisfactorily complied with the provisions of this Order or submits a program for compliance acceptable to the Secretary of Labor or, if the Secretary so authorizes, to the contracting agency.

SEC. 212. Whenever a contracting agency cancels or terminates a contract, or whenever a contractor has been debarred from further Government contracts, under Section 209 (a) (6) because of noncompliance with the contract provisions with regard to nondiscrimination, the Secretary of Labor, or the contracting agency involved, shall promptly notify the Comptroller General of the United States. Any such debarment may be rescinded by the Secretary of Labor or by the contracting agency which imposed the sanction.

Subpart E -- Certificates of Merit

SEC. 213. The Secretary of Labor may provide for issuance of a United States Government Certificate of Merit to employers or labor unions, or other agencies which are or may hereafter be engaged in work under Government contracts, if the Secretary is satisfied that the personnel and employment practices of the employer, or that the personnel, training, apprenticeship, membership, grievance and representation, upgrading, and other practices and policies of the labor union or other agency conform to the purposes and provisions of this Order.

SEC. 214. Any Certificate of Merit may at any time be suspended or revoked by the Secretary of Labor if the holder thereof, in the judgment of the Secretary, has failed to comply with the provisions of this Order.

SEC. 215. The Secretary of Labor may provide for the exemption of any employer, labor union, or other agency from any reporting requirements imposed under or pursuant to this Order if such employer, labor union, or other agency has been awarded a Certificate of Merit which has not been suspended or revoked.

PART III - Nondiscrimination Provisions in Federally Assisted Construction Contracts

SEC. 301. Each executive department and agency which administers a program involving Federal financial assistance shall require as a condition for the approval of any grant, contract, loan, insurance, or guarantee thereunder, which may involve a construction contract, that the applicant for Federal assistance undertake and agree to incorporate, or cause to be incorporated, into all construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the provisions prescribed for Government contracts by Section 203 of this Order or such modification thereof, preserving in substance the contractor's obligations thereunder, as may be approved by the Secretary of Labor, together with such additional provisions as the Secretary deems appropriate to establish and protect the interest of the United States in the enforcement of those obligations. Each such applicant shall also undertake and agree (1) to assist and cooperate actively with the administering department or agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with those contract provisions and with the rules, regulations, and relevant orders of the Secretary, (2) to obtain and to furnish to the administering department or agency and to the Secretary of Labor such information as they may require for the supervision of such compliance, (3) to carry out sanctions and penalties for violation of such obligations imposed upon contractors and subcontractors by the Secretary of Labor or the administering department or agency pursuant to Part II, Subpart D, of this Order, and (4) to refrain from entering into any contract subject to this Order, or extension or other modification of such a contract with a contractor debarred from Government contracts under Part II, Subpart D, of this Order.

SEC. 302. (a) "Construction contract" as used in this Order means any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

(b) The provisions of Part II of this Order shall apply to such construction contracts, and for purposes of such application the administering department or agency shall be considered the contracting agency referred to therein.

(c) The term "applicant" as used in this Order means an applicant for Federal assistance or, as determined by agency regulation, other program participant, with respect to whom an application for any grant, contract, loan, insurance, or guarantee is not finally acted upon prior to the effective date of this Part, and it includes such an applicant after he becomes a recipient of such Federal assistance.

SEC. 303. (a) Each administering department and agency shall be responsible for obtaining the compliance of such applicants with their undertakings under this Order. Each administering department and agency is directed to cooperate with the Secretary of Labor, and to furnish the Secretary such information and assistance as he may require in the performance of his functions under this Order.

(b) In the event an applicant fails and refuses to comply with his undertakings, the administering department or agency may take any or all of the following actions: (1) cancel, terminate, or suspend in whole or in part the agreement, contract, or other arrangement with such applicant with respect to which the failure and refusal occurred; (2) refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and (3) refer the case to the Department of Justice for appropriate legal proceedings.

(c) Any action with respect to an applicant pursuant to Subsection (b) shall be taken in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering department or agency issued thereunder), to the extent applicable. In no case shall action be taken with respect to an applicant pursuant to Clause (1) or (2) of Subsection (b) without notice and opportunity for hearing before the administering department or agency.

SEC. 304. Any executive department or agency which imposes by rule, regulation, or order requirements of non-discrimination in employment, other than requirements imposed pursuant to this Order, may delegate to the Secretary of Labor by agreement such responsibilities with respect to compliance standards, reports, and procedures as would tend to bring the administration of such requirements into conformity with the administration of requirements imposed under this Order: Provided, That actions to effect compliance by recipients of Federal financial assistance with requirements imposed pursuant to Title VI of the Civil Rights Act of 1964 shall be taken in conformity with the procedures and limitations prescribed in Section 602 thereof and the regulations of the administering department or agency issued thereunder.

PART IV - Miscellaneous

SEC. 401. The Secretary of Labor may delegate to any officer, agency, or employee in the Executive branch of the Government, any function or duty of the Secretary under Parts II and III of this Order, except authority to promulgate rules and regulations of a general nature.

SEC. 402. The Secretary of Labor shall provide administrative support for the execution of the program known as the "Plans for Progress."

SEC. 403. (a) Executive Orders Nos. 10590 (January 18, 1955), 10722 (August 5, 1957), 10925 (March 6, 1961), 11114 (June 22, 1963), and 11162 (July 28, 1964), are hereby superseded and the President's Committee on Equal Employment Opportunity established by Executive Order No. 10925 is hereby abolished. All records and property in the custody of the Committee shall be transferred to the Civil Service Commission and the Secretary of Labor, as appropriate.

(b) Nothing in this Order shall be deemed to relieve any person of any obligation assumed or imposed under or pursuant to any Executive Order superseded by this Order. All rules, regulations, orders, instructions, designations, and other directives issued by the President's Committee on Equal Employment Opportunity and those issued by the heads of various departments or agencies under or pursuant to any of the Executive orders superseded by this Order, shall, to the extent that they are not inconsistent with this Order, remain in full force and effect unless and until revoked or superseded by appropriate authority. References in such directives to provisions of the superseded orders shall be deemed to be references to the comparable provisions of this Order.

SEC. 404. The General Services Administration shall take appropriate action to revise the standard Government contract forms to accord with the provisions of this Order and of the rules and regulations of the Secretary of Labor.

SEC. 405. This Order shall become effective 30 days after the date of this Order.

LYNDON B. JOHNSON

THE WHITE HOUSE,

September 24, 1965.

# # #

U.S. DEPARTMENT OF LABOR

OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D.C. 20210

June 27, 1969

MEMORANDUM

TO: HEADS OF ALL AGENCIES

FROM: Arthur A. Fletcher AAF.
Assistant Secretary for Wage and Labor Standards

SUBJECT: Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction

1. Purpose

The purpose of this Order is to implement the provisions of Executive Order 11246, and the rules and regulations issued pursuant thereto, requiring a program of equal employment opportunity by Federal contractors and subcontractors and Federally-assisted construction contractors and subcontractors.

2. Applicability

The requirements of this Order shall apply to all Federal and Federally-assisted construction contracts for projects the estimated total cost of which exceeds $500,000, in the Philadelphia area, including Bucks, Chester, Delaware, Montgomery and Philadelphia counties in Pennsylvania.

3. Policy

In order to promote the full realization of equal employment opportunity on Federally-assisted projects, it is the policy of the Office of Federal

Contract Compliance that no contracts or subcontracts shall be awarded for Federal and Federally-assisted construction in the Philadelphia area on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitation for bids, in trades utilizing the following classifications of employees:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

4. Findings.

Enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades. Contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor. Collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working in these classifications are referred to the jobs by the unions. Because of these hiring arrangements,

referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

Because of the exclusionary practices of labor organizations, there traditionally has been only a small number of Negroes employed in these seven trades. These exclusionary practices include: (1) failure to admit Negroes into membership and into apprenticeship programs. At the end of 1967, less than one-half of one percent of the membership of the unions representing employees in these seven trades were Negro, although the population in the Philadelphia area during the past several decades included substantial numbers of Negroes. As of April 1965, the Commission on Human Relations in Philadelphia found that unions in five trades (plumbers, steamfitters, electrical workers, sheet metal workers and roofers) were "discriminatory" in their admission practices. In a report by the Philadelphia Local AFL-CIO Human Relations Committee made public in 1964, virtually no Negro apprentices were found in any of the building trades classes;[1/] (2) failure of the unions to refer Negroes for employment, which has resulted in large measure from the priorities in referral granted to union members and to persons who had work experience under union contracts.

1/ Marshall and Briggs, Negro Participation in Apprenticeship Programs (Dec. 1966), pg. 91.

On November 30, 1967, the Philadelphia Federal Executive Board put into effect the Philadelphia Pre-Award Plan. The Federal Executive Board found that 2/ the problem of compliance with the requirements of Executive Order 11246 was most apparent in Philadelphia in eight construction trades: electrical, sheetmetal, plumbing and pipefitting, steamfitting, roofing and waterproofing, structural iron work, elevator construction and operating engineers; and that local unions representing employees in these trades in the Philadelphia area had few minority group members and that few minority group persons had been accepted in apprenticeship programs. In order to assure equal employment opportunity on Federal and Federally-assisted construction in the Philadelphia area, the plan required that each apparent low bidder, to qualify for a construction contract or subcontract, must submit a written affirmative action program which would have the results of assuring that there will be minority group representation in these trades.

Since the Philadelphia Plan was put into effect, some progress has been made. Several groups of contractors and Local 543 of the International Union of Operating Engineers have developed an area program of affirmative action which has been approved by OFCC in lieu of other compliance procedures, but subject to periodic evaluation. The original Plan was suspended because of an Opinion by the Comptroller General that it violated the principles of competitive bidding.

Equal employment opportunity in these trades in the Philadelphia area is

2/ These findings were based on a detailed examination of available facts relating to building trades unions, area construction volume and demographic data.

still far from a reality. The unions in these trades still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. We find, therefore, that special measures are required to provide equal employment opportunity in these seven trades.

In view of the foregoing, and in order to implement the affirmative action obligations imposed by the equal employment opportunity clause in Executive Order 11246, and in order to assure that the requirements of this Order conform to the principles of competitive bidding, as construed by the Comptroller General of the United States, the Office of Federal Contract Compliance finds that it is necessary that this Order, requiring bidders to commit themselves to specific goals of minority manpower utilization, be issued.

5. Acceptability of Affirmative Action Programs

A bidder's affirmative action program will be acceptable if the specific goals set by the bidder meet the definite standards determined in accordance with Section 6 below. Such goals shall be applicable to each of the designated trades to be used in the performance of the contract whether or not the work is to be subcontracted. However, participation in a multi-employer program approved by OFCC shall be acceptable in lieu of a goal for the trade involved in such training program. In no case shall there be any negotiation over the provisions of the specific goals submitted by the bidder after the opening of bids and prior to the award of the contract.

6. Specific Goals and Definite Standards

a. General. The OFCC Area Coordinator, in cooperation with the Federal contracting or administering agencies in the Philadelphia area, will determine the definite standards to be included in the invitation for bids or other solicitation used for every Federally-involved construction contract in the Philadelphia area, when the estimated total cost of the construction project exceeds $500,000. Such definite standards shall specify the range of minority manpower utilization expected for each of the designated trades to be used during the performance of the construction contract. To be eligible for the award of the contract, the bidder must, in the affirmative action program submitted with his bid, set specific goals of minority manpower utilization which meet the definite standard included in the invitation or other solicitation for bids unless the bidder participates in an affirmative action program approved by OFCC.

b. Specific Goals.

1) The setting of goals by contractors to provide equal employment opportunity is required by Section 60-1.40 of the Regulations of this Office (41 CFR § 60-1.40). Further, such voluntary organization of businessmen as

Plans for Progress have adopted this sound approach to equal opportunity just as they have used goals and targets for guiding their other business decisions (See the Plans for Progress booklet Affirmative Action Guidelines on page 6.)

2) The purpose of the contractor's commitment to specific goals is to meet the contractor's affirmative action obligations and is not intended and shall not be used to discriminate against any qualified applicant or employee.

c. Factors Used in Determining Definite Standards. A determination of the definite standard of the range of minority manpower utilization shall be made for each better-paid trade to be used in the performance of the contract. In determining the range of minority manpower utilization that should result from an effective affirmative action program, the factors to be considered will include, among others, the following:

1) The current extent of minority group participation in the trade.

2) The availability of minority group persons for employment in such trade.

3) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

4) The impact of the program upon the existing labor force.

7. Invitation for Bids or Other Solicitations for Bids

Each Federal agency shall include, or require the applicant to include, in the invitation for bids, or other solicitation used for a Federally-involved construction contract, when the estimated total cost of the construction project exceeds $500,000, a notice stating that to be eligible for award, each bidder will be required to submit an acceptable affirmative action program consisting of goals as to minority group participation for the designated trades to be used in the performance of the contract--whether or not the work is subcontracted. Such notice shall include the determination of the range of minority group utilization (described in Section 6 above) that should result from an effective affirmative action program based on an evaluation of the factors listed in Section 6c. The form of such notice shall be substantially similar to the one attached as an appendix to this Order. To be acceptable, the affirmative action program must contain goals which are at least within the range described in the above notice. Such goals must be provided for each designated trade to be used in the performance of the contract except that goals are not required with respect to trades covered by an OFCC approved multi-employer program.

8. Post-Award Compliance

a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be presumed to be in compliance with the requirements of Executive Order 11246, as amended, unless it comes to the agency's attention that such contractor or subcontractor is not providing equal employment opportunity. In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a

"responsible prospective contractor" within the meaning of the Federal procurement regulations.

b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders.

9. Exemptions

a. Requests for exemptions from this Order must be made in writing, with justification, to the Director, Office of Federal Contract Compliance, U. S. Department of Labor, Washington, D. C., 20210, and shall be forwarded through and with the endorsement of the agency head.

b. The procedures set forth in the Order shall not apply to any contract when the head of the contracting or administering agency determines that such contract is essential to the national security and that its award without following such procedures is necessary to the national security. Upon making such a determination, the agency head will notify, in writing, the Director of the Office of Federal Contract Compliance within thirty days.

c. Nothing in this Order shall be interpreted to diminish the present contract compliance review and complaint programs.

10. Authority

This Order is issued pursuant to Executive Order 11246 (30 F.R. 12319, Sept. 28, 1965) Parts II and III; Executive Order 11375 (32 F.R. 14303, Oct. 17, 1967); and 41 CFR Chapter 60.

11. Effective Date

The provisions of this Order will be effective with respect to transactions for which the invitations for bids or other solicitations for bids are sent on or after July 18, 1969.

APPENDIX

(For Inclusion in the Invitation or Other Solicitation for Bids for a Federally-Involved Construction Contract When the Estimated Total Cost of the Construction Project Exceeds $500,000.)

NOTICE OF REQUIREMENT FOR SUBMISSION OF AFFIRMATIVE ACTION PLAN TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY

1. It has been determined that in the performance of this contract an acceptable affirmative action program for the trades specified below will result in minority manpower utilization within the ranges set forth next to each trade:

Identification of Trade	Range of Minority Group Employment

2. The bidder shall submit, in the form specified below, with his bid an affirmative action program setting forth his goals as to minority manpower utilization in the performance of the contract in the trades specified below, whether or not the work is subcontracted.

The bidder submits the following goals of minority manpower utilization to be achieved during the performance of the contract:

Identification of Trade	Estimated Total Employment for the Trade on the Contract	Number of Minority Group Employees

(The bidder shall insert his goal of minority manpower utilization next to the name of each trade listed.)

3. The bidder also submits that whenever he subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he will obtain from such subcontractor an appropriate goal that will enable the bidder to achieve his goal for that trade. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth in paragraph 1 above, provided, however, that participation by the bidder in multi-employer program approved by the Office of Federal Contract Compliance will be accepted as satisfying the requirements of this Notice in lieu

of submission of goals with respect to the trades covered by such multi-employer program. In the event that such multi-employer program is applicable, the bidder need not set forth goals in paragraph 2 above for the trades covered by the program.

5. For the purpose of this Notice, the term minority means Negro, Oriental, American Indian and Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry.

6. The purpose of the contractor's commitment to specific goals as to minority manpower utilization is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee.

7. Nothing contained in this Notice shall relieve the contractor from compliance with the provisions of Executive Order 11246 and the equal opportunity clause of the contract with respect to matters not covered in this Notice, such as equal opportunity in employment in trades not specified in this Notice.

A. 25

8. The bidder agrees to keep such records and to file such reports relating to the provisions of this Order as shall be required by the contracting or administering agency.

U. S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON, D. C. 20210

September 23, 1969

ORDER

TO: HEADS OF ALL AGENCIES

FROM: Arthur A. Fletcher
Assistant Secretary for Wage and
Labor Standards

John L. Wilks, Director
Office of Federal Contract Compliance

SUBJECT: Establishment of Ranges for the Implementation of the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction

1. Purpose

The purpose of this Order is to implement Section 6 of the Order issued on June 27, 1969 by Assistant Secretary of Labor Arthur A. Fletcher to the Heads of Agencies outlining a "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction." Section 6 of the June 27 Order provides for the determination of definite standards in terms of ranges of minority manpower utilization. This Order also affirms and in certain respects amends the Order of June 27.

2. Background

The June 27 Order requires a bidder on Federal or Federally-assisted construction in the Philadelphia area on projects whose cost

exceeds $500,000 to submit an acceptable affirmative action program which shall include specific goals of minority manpower utilization within the ranges to be established by the Department of Labor, in cooperation with the Federal contracting and administering agencies in the Philadelphia Area, within the following 7 listed classifications:

Iron workers
Plumbers, pipefitters
Steamfitters
Sheetmetal workers
Electrical workers
Roofers and water proofers
Elevator construction workers

Since that time the Department has determined that minority craftsmen may be adequately represented in the classification and title "roofers and water proofers". For this reason, such classification is hereby temporarily excepted from the provisions of the "Revised Philadelphia Plan," subject to further examination of that trade.

Pursuant to a notice of hearing issued on August 16, 1969, representatives of the Department of Labor conducted a public hearing in Philadelphia on August 26, 27, and 28, 1969 for the purpose of obtaining information and data relevant to the establishment of ranges for the purpose of effectuating the above-referred to June 27, 1969 Order. Section 6 of such Order provides that the following factors, among others, will be used in establishing these ranges:

(a) The current extent of minority group participation in the trade.

(b) The availability of minority group persons for employment in such trade.

(c) The need for training programs in the area and/or the need to assure demand for those in or from existing training programs.

(d) The impact of the program upon the existing labor force.

Having reviewed the record of that hearing and additional relevant data gathered and compiled by the Department of Labor, the following findings and Order are made as contemplated by the Order of June 27, 1969.

3. Findings

(a) Minority Participation in the Specified Trades

The over-all construction industry in the five county Philadelphia area has a current minority representation of employees of 30%. Comparable skilled trades, excluding laborers, have a minority representation of approximately 12%. The construction trades in the Philadelphia area have grown and developed under similar conditions concerning manpower availability and under identical economic and cultural circumstances. Despite that fact, there are few minorities in the above-designated six trades. The evidence adduced at the public hearing indicates that the minority

participation in such trades is approximately 1%. In the June 27 Order, it was found that such a low rate of participation is due to the traditional exclusionary practices of these unions in admission to membership and apprenticeship programs and failure to refer minorities to jobs in these trades. The most reliable data available relates to minority participation in membership in the unions representing employees in the six trades. That data reveals the following:

(1) Iron Workers

The total union membership in this craft in the Philadelphia area in 1969 is 850, 12 of whom (1.4%) are minority group representatives.

(2) Steamfitters

Total union membership in the Philadelphia area in 1969 stands at 2,308, 13 of whom (.65%) are minority group representatives.

(3) Sheetmetal Workers

Total union membership in the Philadelphia area in 1969 stands at 1,688, 17 of whom (1%) are minority group representatives.

(4) Electricians

Total union membership in the Philadelphia area in 1969 stands at 2,274, 40 of whom (1.76%) are minority group representatives.

(5) Elevator construction workers

Total union membership in the Philadelphia area in 1969 stands at 562, 3 of whom (.54%) are minority group representatives.

(6) Plumbers & Pipefitters

Total union membership in the Philadelphia area in 1969 stands at 2, 335, 12 of whom (.51%) are minority group representatives.

Based upon these figures it is found and determined that the present minority participation in the six named trades is far below that which should have reasonably resulted from participation in the past without regard to race, color and national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

(b) Availability of Minority Group Persons for Employment

The nonwhite unemployment rate in the Philadelphia area is approximately twice that for the labor force as a whole and the total number of nonwhite persons unemployed is approximately 21, 000. There is also a substantial number of persons in the nonwhite labor force who are underemployed. Testimony adduced at the hearing indicates that there are between 1, 200 and 1, 400 minority craftsmen presently available for employment

in the construction trades who have been trained and/or had previous work experience in the trades. In addition it was revealed at the hearing that there is a pool of 7,500 minority persons in the Laborers Union who are working side by side with journeymen in the performance of their crafts in the construction industry. Many of these persons are working as helpers to the journeymen in the designated trades. Also, testimony at the hearings established that between 5,000 and 8,000 prospective minority craftsmen would be prepared to accept training in the construction crafts within a year's time if they would be assured that jobs were available to them upon completion of such training.

Surveys conducted by agencies of the U. S. Department of Labor have provided additional information relative to the availability of minority group persons for employment in the designated trades.

Based upon the number of minority group persons employed in the designated trades for all industries (construction and non-construction) and those minority group persons who are unemployed but qualified for employment in the designated trades, a survey by the Manpower Administration indicated that minority group persons are now in the area labor market as follows:

Identification of Trades	Number Available
Ironworkers	302
Plumbers, Pipefitters and Steamfitters	797
Sheetmetal workers	250
Electrical workers	745

A survey by the Office of Federal Contract Compliance indicated that the following number of minority persons are working in the designated trades and those who will be trained by 1970 by major Philadelphia recruitment and training agencies and those working in related occupations in non-construction industries who would be qualified for employment in the designated trades with some orientation or minimal training:

Identification of Trades	Number Available
Ironworkers	75
Plumbers, pipefitters	500
Steamfitters	300
Sheetmetal workers	375
Electrical workers	525
Elevator constructors	43

Based upon this information it is found that a substantial number of minority persons are presently available for productive employment.

(c) The Need for Training

Testimony at the public hearing revealed that there is a need for training programs for willing minority group persons at various levels of skill. Such training must necessarily range from pre-apprenticeship training programs through programs providing incidental training for skilled craftsmen who are near the brink of full journeyman status.* As discussed above, between 5,000 and 8,000 minority group persons are in a position to be recruited for such training within a year's time.

*Testimony adduced at the hearings indicates that the traditional duration of training to develop competent workmen in the crafts may be longer than necessary to successfully perform substantial amounts of craft level work.

Testimony at the public hearings revealed the existence of several training programs which have operated successfully to train a number of craftsmen many of whom are now prepared to enter the trades in the construction industry. In order to further assure the availability of necessary training programs, the Manpower Administration of this Department has committed substantial funds for the development of additional apprenticeship outreach programs and journeyman training programs in the Philadelphia area. It plans to double the present apprenticeship outreach program with the Negro Union Leadership Council in Philadelphia. Presently, this program is funded for $78,000 to train seventy persons. An additional $80,000 is being set aside to expand this program. In addition, immediate exploration of the feasibility of a journeyman-training program for approximately 180 trainees will be undertaken. Both these programs will be directed specifically to the designated trades.*

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* Memorandum from Arnold R. Weber, Assistant Secretary for Manpower to Arthur A. Fletcher, Assistant Secretary for Wage and Labor Standards, dated September 18, 1969.

(d) The Impact of the Program Upon the Existing Labor Force.

A national survey of the Bureau of Labor Statistics indicates that the present annual attrition rate of construction trade membership due to retirement is 2.5% per year based upon a total working life of 44 years per employee in each of the above-designated trades.

Based on national actuarial rates for the construction industry published by the National Safety Council, the average disability occurrence rate resulting from death or injury is 1% per year. A conservative estimate of the average rate at which employees leave construction crafts for all reasons other than death, disability and retirement is 4% per year.

Therefore, each construction craft should have approximately 7.5% new job openings each year without any growth in the craft. The annual growth in the number of employees in each craft designated under this "Revised Philadelphia Plan" has been and is projected to be as follows:

(1) Iron Workers. The average annual growth rate since 1963 has been approximately 10%. It is

projected that an average annual growth rate in employment will be 3.69% in the near future.*

(2) Plumbers and Pipefitters. The average annual growth rate since 1963 has been approximately 7.38%. It is projected that an average annual growth rate in employment will be 2.9% in the near future.

(3) Steamfitters. The average annual growth rate since 1963 has been approximately 2.63% and is projected to be approximately 2.5% for each of the next four years.

(4) Sheetmetal workers. The average annual growth rate since 1963 has been approximately 2.06% and is projected to be approximately 2.0% for each of the next four years.

(5) Electricians. The average annual growth rate since 1963 has been approximately 4.98%. It is projected that an average annual growth rate in employment will be 2.2%

*Projections of the annual growth rate in employment in the designated trades is based on a study by the Commonwealth of Pennsylvania, Department of Labor and Industry, Bureau of Employment Security, entitled 1960 Census and 1970, 1975 Projected Total Employment.

in the near future.

(6) Elevator Construction Workers. The average annual growth rate since 1963 has been approximately 2.41% and is projected to be approximately 2.1% for each of the next four years.

Adding the rate of jobs becoming vacant due to attrition to the rate of new jobs due to growth, the total rate of new jobs projected for each craft is as follows:

Identification of Trade	Annual Vacancy Rate
Ironworkers	11.2%
Plumbers and Pipefitters	10.4%
Steamfitters	10%
Sheetmetal workers	9.5%
Electrical workers	9.7%
Elevator construction workers	9.6%

Therefore, it is found and determined that a contractor could commit to minority hiring up to the annual rate of

job vacancies for each trade without adverse impact upon the existing labor force.

(e) Timetable

In an effort to provide practical ranges which can be met by employers in hiring productive trained minority craftsmen, this Order should be developed to cover an extended period of time.

The average length of Federally-involved construction projects in the Area is between 2 and 4 years. Testimony at the hearing indicated that a 4 year duration for the "Plan" is proper.

Therefore, it is found and determined that in order for this Order to effect equal employment to the fullest extent, the standards of minority manpower utilization should be determined for the next four years.

(f) Conclusion of Findings

It is found that present minority participation in the designated trades is far below that which should have reasonably resulted from participation in the past without regard to race, color, or national origin and, further, that such participation is too insignificant to have any meaningful bearing upon the ranges established by this Order.

It is found that a significant number of minority group

persons is presently available for employment as journeymen, apprentices, or other trainees.

It is found that there is a need for training programs for willing minority group persons at various levels of skill. There exist several training programs in the Philadelphia area which have operated successfully to train craftsmen prepared to enter the construction industry and, in addition, the Manpower Administration of this Department has committed substantial funds for the development of other apprenticeship outreach programs and journeyman training programs in the Philadelphia area.

Finally, it is found that a contractor could commit himself to hiring minority group persons up to the annual rate of job vacancies for each trade without adverse impact upon the existing labor force in the designated trades.

Based upon these findings, a range shall be established by this Order which shall require contractors to establish employment goals between a low range figure which could result in approximately 20% of the work-force in each designated trade being minority craftsmen at the end of the fourth year covered by this Order.*

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*Assuming the same proportion of minorities are employed on private construction projects as Federally-involved projects, the lower range should result in 2,000 minority craftsmen being employed in the construction industry in the Philadelphia area by the end of the fourth year.

In addition, trained and trainable minority persons are or shall be available in numbers sufficient to fill the number of jobs covered by these ranges, there being 1200 to 1400 minority persons who have had training and 5000 to 8000 prepared to accept training within a year.

Such minority representation can be accomplished without adversely affecting the present work force. Based upon the projected Annual Vacancy Rate, the lower range figure may be met by filling vacancies and new jobs approximately on the basis of one minority craftsman for each non-minority craftsman.*

4, Order

Therefore, after full consideration and in light of the foregoing, be it ORDERED: That the Order of June 27, 1969 entitled "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Require-

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* The one for one ratio in hiring has been judicially recognized as a reasonable, if not mandatory, requirement to remedy past exclusionary practices. Vogler v. Mc Carty, Inc., 294 F. Supp. 368 (E.D. La. 1967).

ments of Executive Order 11246 for Federally-Involved Construction"

is hereby implemented, affirmed, and in certain respects amended, this

Order to constitute a supplement thereto as required and contemplated by

said Order of June 27, 1969.

FURTHER ORDERED: That the following ranges are hereby

established as the standards for minority manpower utilization for each

of the designated trades in the Philadelphia area for the next four years:

Identification of Trade	Range of Minority Group Employment until December 31, 1970
Ironworkers	5% - 9%*
Plumbers & Pipefitters	5% - 8%
Steamfitters	5% - 8%
Sheetmetal workers	4% - 8%
Electrical workers	4% - 8%
Elevator construction workers	4% - 8%

Identification of Trade	Range of Minority Group Employment for the Calendar Year 1971**
Ironworkers	11% - 15%
Plumbers & Pipefitters	10% - 14%
Steamfitters	11% - 15%
Sheetmetal workers	9% - 13%
Electrical workers	9% - 13%
Elevator construction workers	9% - 13%

*The percentage figures have been rounded.

**After December 31, 1970 the standards set forth herein shall be reviewed to determine whether the projections on which these ranges are based adequately reflect the construction labor market situation at that time. Reductions or other significant fluctuations in federally involved construction shall be specifically reviewed from time-to-time as to their effect upon the practicality of the standards. In no event, however, shall the standards be increased for contracts after bids have been received.

Identification of Trade	Range of Minority Group Employment for the Calendar Year 1972
Ironworkers	16% - 20%
Plumbers & Pipefitters	15% - 19%
Steamfitters	15% - 19%
Sheetmetal workers	14% - 18%
Electrical workers	14% - 18%
Elevator construction workers	14% - 18%

Identification of Trade	Range of Minority Group Employment for the Calendar Year 1973
Ironworkers	22% - 26%
Plumbers & Pipefitters	20% - 24%
Steamfitters	20% - 24%
Sheetmetal workers	19% - 23%
Electrical workers	19% - 23%
Elevator construction workers	19% - 23%

The above ranges are expressed in terms of man hours to be worked on the project by minority personnel and must be substantially uniform throughout the entire length of the project for each of the designated trades.

FURTHER ORDERED: That the form attached hereto as an Appendix is hereby made a part of this Order and in accordance with the findings specified above, amends the Appendix of the Order of June 27, 1969.

Each Federal agency shall include, or require the applicant to include, this form, or one substantially similar, in the invitation for bids or other solicitations used for a Federally-involved construction contract where the estimated total cost of the construction project exceeds $500,000.

5. Criteria for Measuring Good Faith

Section 8 of the June 27 Order provides that a contractor will be given an opportunity to demonstrate that he has made every good faith effort to meet his goal of minority manpower utilization in the event he fails to meet such goal. If the contractor has failed to meet his goal, a determination of "good faith" will be based upon his efforts to broaden his recruitment base through at least the following activities:

(a) The OFCC Area Coordinator will maintain a list of community organizations which have agreed to assist any contractor in achieving his goal of minority manpower utilization by referring minority workers for employment in the specified trades. A contractor who has not met his goals may exhibit evidence that he has notified such community organizations of opportunities for employment with him on the project for which he submitted such goals as well as evidence of their response.

(b) Any contractor who has not met his goal may show that he has maintained a file in which he has recorded the name and address of each minority worker referred to him and specifically what action was taken with respect to each such referred worker. If such worker was not sent to the union hiring hall for referral or if such worker was not employed by the contractor, the contractor's file should document this and the reasons therefor.

(c) A contractor should promptly notify the OFCC Area Coordinator in order for him to take appropriate action whenever the union

with whom the contractor has a collective bargaining agreement has not referred to the contractor a minority worker sent by the contractor or the contractor has other information that the union referral process has impeded him in his efforts to meet his goal.

(d) The contractor should be able to demonstrate that he has participated in and availed himself of training programs in the area, especially those funded by this Department referred to in Section 3(c) of this Order, designed to provide trained craftsmen in the specified trades.

6. Subcontractors

Whenever a prime contractor subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he shall include his goals in such subcontract and those goals shall become the goals of his subcontractor who shall be bound by them and by this Order to the full extent as if he were the prime contractor. The prime contractor shall not be accountable for the failure of his subcontractor to meet such goals or to make every good faith effort to meet them. However, the prime contractor shall give notice to the Area Coordinator of the Office of Federal Contract Compliance of the Department of Labor of any refusal or failure of any subcontractor to fulfill his obligations under this Order. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

7. Exemptions

a. Requests for exemptions from this Order must be made in writing, with justification, to the Director, Office of Federal Contract Compliance, U. S. Department of Labor, Washington, D. C. 20210, and shall be forwarded through and with the endorsement of the agency head.

b. The procedures set forth in the Order shall not apply to any contract when the head of the contracting or administering agency determines that such contract is essential to the national security and that its award without following such procedures is necessary to the national security. Upon making such a determination, the agency head will notify, in writing, the Director of the Office of Federal Contract Compliance within thirty days.

c. Nothing in this Order shall be interpreted to diminish the present contract compliance review and complaint programs.

8. Effect of this Order

In the case of any inconsistency between this Order and the June 27, 1969 Order prescribing a "Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction", this Order shall prevail.

9. Authority

This Order is issued pursuant to Executive Order 11246 (30 F.R. 12319, September 28, 1965) Parts II and III; Executive Order 11375 (32 F.R. 14303, Oct. 17, 1967); and 41 CFR Chapter 60.

10. Effective Date

The provisions of this Order will be effective with respect to transactions for which the invitations for bids or other solicitations for bids are sent on or after September 29, 1969.

APPENDIX

(For inclusion in the Invitation or Other Solicitation for Bids for a Federally-Involved Construction Contract When the Estimated Total Cost of the Construction Project Exceeds $500,000.)

NOTICE OF REQUIREMENT FOR SUBMISSION OF AFFIRMATIVE ACTION PLAN TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY

1. It has been determined that in the performance of this contract an acceptable affirmative action program for the trades specified below will result in minority manpower utilization within the ranges set forth next to each trade:

Identification of Trade	Range of Minority Group Employment until December 31, 1970
Ironworkers	5% - 9%
Plumbers & Pipefitters	5% - 8%
Steamfitters	5% - 8%
Sheetmetal workers	4% - 8%
Electrical workers	4% - 8%
Elevator construction workers	4% - 8%

Identification of Trade	Range of Minority Group Employment for the Calendar Year 1971
Ironworkers	11% - 15%
Plumbers & Pipefitters	10% - 14%
Steamfitters	11% - 15%
Sheetmetal workers	9% - 13%
Electrical workers	9% - 13%
Elevator construction workers	9% - 13%

Appendix - 2

Identification of Trade	Range of Minority Group Employment for the Calendar Year 1972
Ironworkers	16% - 20%
Plumbers & Pipefitters	15% - 19%
Steamfitters	15% - 19%
Sheetmetal workers	14% - 18%
Electrical workers	14% - 18%
Elevator construction workers	14% - 18%

Identification of Trade	Range of Minority Group Employment for the Calendar Year 1973
Ironworkers	22% - 26%
Plumbers & Pipefitters	20% - 24%
Steamfitters	20% - 24%
Sheetmetal workers	19% - 23%
Electrical workers	19% - 23%
Elevator construction workers	19% - 23%

2. The bidder shall submit, in the form specified below, with his bid an affirmative action program setting forth his goals as to minority manpower utilization in the performance of the contract in the trades specified below, whether or not the work is subcontracted.

The bidder submits the following goals of minority manpower utilization to be achieved during the performance of the contract:

Identification of Trade	Estimated Total Employment for the Trade on the Contract Until December 31, 1970	Number of Minority Group Employees until December 31, 1970
Ironworkers		
Plumbers & Pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Appendix - 3

Identification of Trade	Estimated Total Employment for the Trade on the Contract for the Calendar Year 1971	Number of Minority Group Employees for the Calendar Year 1971
Ironworkers		
Plumbers & Pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Identification of Trade	Estimated Total Employment for the Trade on the Contract for the Calendar Year 1972	Number of Minority Group Employees for the Calendar Year 1972
Ironworkers		
Plumbers & Pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Identification of Trade	Estimated Total Employment for the Trade on the Contract for the Calendar Year 1973	Number of Minority Group Employees for the Calendar Year 1973
Ironworkers		
Plumbers & Pipefitters		
Steamfitters		
Sheetmetal workers		
Electrical workers		
Elevator construction workers		

Appendix - 4

(The bidder shall insert his goal of minority manpower utilization next to the name of each trade listed for those years during which it is contemplated that he shall perform any work or engage in any activity under the contract.)

3. The bidder also submits that whenever he subcontracts a portion of the work in the trade on which his goals of minority manpower utilization are predicated, he shall include his goals in such subcontract and those goals shall become the goals of his subcontractor who shall be bound by them to the full extent as if he were the prime contractor The prime contractor shall not be accountable for the failure of his subcontractors to meet such goals or to make every good faith effort to meet them. However, the prime contractor shall give notice to the Area Coordinator of the Office of Federal Contract Compliance of the Department of Labor of any refusal or failure of any subcontractor to fulfill his obligations under this Order. Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 8 of the Order from the Office of Federal Contract Compliance to the Heads of All Agencies regarding the Revised Philadelphia Plan, dated June 27, 1969.

4. No bidder will be awarded a contract unless his affirmative action program contains goals falling within the range set forth in paragraph 1 above, provided, however, that participation by the bidder in multi-employer programs approved by the Office of Federal Contract Compliance will be accepted as satisfying the requirements of this Notice

in lieu of submission of goals with respect to the trades covered by such multi-employer program. In the event that such multi-employer program is applicable, the bidder need not set forth goals in paragraph 2 above for the trades covered by the program.

5. For the purpose of this Notice, the term minority means Negro, Oriental, American Indian and Spanish Surnamed American. Spanish Surnamed American includes all persons of Mexican, Puerto Rican, Cuban or Spanish origin or ancestry.

6. The purpose of the contractor's commitment to specific goals as to minority manpower utilization is to meet his affirmative action obligations under the equal opportunity clause of the contract. This commitment is not intended and shall not be used to discriminate against any qualified applicant or employee. Whenever it comes to the bidder's attention that the goals are being used in a discriminatory manner, he must report it to the Area Coordinator of the Office of Federal Contract Compliance of the U. S. Department of Labor in order that appropriate sanction proceedings may be instituted.

7. Nothing contained in this Notice shall relieve the contractor from compliance with the provisions of Executive Order 11246 and the Equal Opportunity Clause of the contract with respect to matters not covered in this Notice, such as equal opportunity in employment in trades not specified in this Notice.

8. The bidder agrees to keep such records and to file such reports relating to the provisions of this Order as shall be required by the contracting or administering agency.

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

B-163026 August 5, 1969

Dear Mr. Secretary:

We refer to an order issued June 27, 1969, to the heads of all agencies by the Assistant Secretary for Wage and Labor Standards, Department of Labor. The order announced a revised Philadelphia Plan (effective July 18, 1969) to implement the provisions of Executive Order 11246 and the rules and regulations issued pursuant thereto which require a program of equal employment opportunity by contractors and subcontractors on both Federal and federally assisted construction projects.

Questions have been submitted to our Office by members of Congress, both as to the propriety of the revised Philadelphia Plan and the legal validity of Executive Order 11246 and of various implementing regulations issued thereunder both by your Department and by other agencies. In view of possible conflicts between the requirements of the Plan and the provisions of Titles VI and VII of the Civil Rights Act of 1964, Pub. L. 88-352, discussions have been held between representatives of our Office, your Department, and the Department of Justice, and your Solicitor has furnished to us a legal memorandum in support of the authority for issuance of the Executive Order as well as the revised Philadelphia Plan promulgated thereunder.

The memorandum presents the following points in support of the legal propriety of the Plan:

I. The Executive has the authority and the duty to require employers who do business with the Government to provide equal employment opportunity.

II. The passage of the Civil Rights Act of 1964 did not deprive the President of the authority to regulate, pursuant to Executive Orders, the employment practices of Government contractors.

III. The revised Philadelphia Plan is lawful under the Federal Government's procurement policies, is authorized under Executive Order 11246 and the implementing regulations, and is lawful under Title VII of the Civil Rights Act of 1964.

B-163026

Without conceding the validity of all of the arguments advanced under points I and II, we accept the authority of the President to issue Executive Order 11246, and the contention that the Congress in enacting the Civil Rights Act did not intend to deprive the President of all authority to regulate employment practices of Government contractors.

The essential questions presented to this Office by the revised Philadelphia Plan, however, are (1) whether the Plan is compatible with fundamentals of the competitive bidding process as it applies to the awarding of Federal and federally assisted construction contracts, and (2) whether imposition of the specific requirements set out therein can be regarded as a legally proper implementation of the public policy to prevent discrimination in employment, which is declared in the Civil Rights Act and is inherent in the Constitution, or whether those requirements so far transcend the policy of nondiscrimination, by making race or national origin a determinative factor in employment, as to conflict with the limitations expressly imposed by the act or with the basic constitutional concept of equality.

Our interest and authority in the matter exists by virtue of the duty imposed upon our Office by the Congress to audit all expenditures of appropriated funds, which necessarily involves the determination of the legality of such expenditures, including the legality of contracts obligating the Government to payment of such funds. Authority has been specifically conferred on this Office to render decisions to the heads of departments and agencies of the Government, prior to the incurring of any obligations, with respect to the legality of any action contemplated by them involving expenditures of appropriated funds, and this authority has been exercised continuously by our Office since its creation whenever any question as to the legality of a proposed action has been raised, whether by submission by an agency head, or by complaint of an interested party, or by information coming to our attention in the course of our other operations.

The incorporation into the terms of solicitations for Government contracts of conditions or requirements concerning wages and other employment conditions or practices has been a frequent subject of decisions by this Office, many of which will be found enumerated in our decision at 42 Comp. Gen. 1. The rule invariably applied in such cases has been that any contract conditions or stipulations which

B-163026

tend to restrict the full and free competition required by the procurement laws and regulations are unauthorized, unless they are reasonably requisite to the accomplishment of the legislative purposes of the appropriation involved or other law. Furthermore, where the Congress in enacting a statute covering the subject matter of such conditions has specifically prohibited certain actions, no administrative authority can lawfully impose any requirements the effect of which would be to contravene such prohibitions. It is within the framework of these principles that we consider the order promulgating the revised Philadelphia Plan.

The Assistant Secretary's order states the policy of the Office of Federal Contract Compliance (OFCC) that no contracts or subcontracts shall be awarded for Federal and federally assisted construction in the Philadelphia, Pennsylvania, area (including the counties of Bucks, Chester, Delaware, Montgomery, and Philadelphia) on projects whose cost exceeds $500,000 unless the bidder submits an acceptable affirmative action program which shall include specific goals of minority manpower utilization, meeting the standards included in the invitation or other solicitations for bids, in trades utilizing the seven classifications of employees specified therein.

The order further relates that enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 has posed special problems in the construction trades; that contractors and subcontractors must hire a new employee complement for each construction job and out of necessity or convenience they rely on the construction craft unions as their prime or sole source of their labor; that collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; that even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working the specified classifications are referred to the jobs by the unions; and that because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction.

It is also stated that because of the exclusionary practices of labor organizations, there traditionally have been only a small number of Negroes employed in the seven trades, and that unions in

B-163026

these trades in the Philadelphia area still have only about 1.6 percent minority group membership and they continue to engage in practices, including the granting of referral priorities to union members and to persons who have work experience under union contracts, which result in few Negroes being referred for employment. The OFCC found, therefore, that special measures requiring bidders to commit themselves to specific goals of minority manpower utilization were needed to provide equal employment opportunity in the seven trades.

Section 7 of the Assistant Secretary's order of June 27 indicates that the revised Plan is to be implemented by including in the solicitation for bids a notice substantially similar to one labeled "Appendix" which is attached to the order. Such notice would state the ranges of minority manpower utilization (as determined by the OFCC Area Coordinator in cooperation with the Federal contracting or administering agencies in the Philadelphia area) which would constitute an acceptable affirmative action program, and would require the bidder to submit his specific goals in the following form:

Identification of Trade	Est. Total Employment for the Trade on the Contract	Number of Minority Group Employees

Participation in a multi-employer program approved by OFCC would be acceptable in lieu of a goal for the trade involved in such program.

The notice also provides that the contractor will obtain similar goals from his subcontractors who will perform work in the involved trades, and that "Failure of the subcontractor to achieve his goal will be treated in the same manner as such failure by the prime contractor prescribed in Section 6 of the Order * * *." Since Section 6 of the order contains nothing relative to "failure," we assume the intended reference is to Section 8, which reads as follows:

"Post-Award Compliance

"a. Each agency shall review contractors' and subcontractors' employment practices during the performance of the contract. If the goals set forth in the affirmative action program are being met, the contractor or subcontractor will be presumed to be in compliance with the requirements of Executive

Order 11246, as amended, unless it comes to the agency's attention that such contractor or subcontractor is not providing equal employment opportunity. In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions. Where the agency finds that the contractor or subcontractor has failed to comply with the requirements of Executive Order 11246, the implementing regulations and its obligations under its affirmative action program, the agency shall take such action and impose such sanctions as may be appropriate under the Executive Order and the regulations. Such noncompliance by the contractor or subcontractor shall be taken into consideration by Federal agencies in determining whether such contractor or subcontractor can comply with the requirements of Executive Order 11246 and is therefore a 'responsible prospective contractor' within the meaning of the Federal procurement regulations.

"b. It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. It is the longstanding uniform policy of OFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in Federally-involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders."

B-163026

It is our opinion that the submission of goals by the successful bidder would operate to make the requirement for "every good faith effort" to attain such goals a part of his contractual obligation upon award of a contract. The provisions of Section 8 of the order would therefore become a part of the contract specifications against which the contractor's performance would be judged in the event he fails to attain his stated goals, just as must as his stated goals become a part of the contract specifications against which his performance will be judged in the event he does attain his stated goals.

As indicated at page 4 of the order, the original Philadelphia Plan was suspended because it contravened the principles of competitive bidding. Such contravention resulted from the imposition of requirements on bidders, after bid opening, which were not specifically set out in the solicitation. The present statement of a specific numerical range into which a bidder's affirmative action goals must fall is apparently designed to meet, and reasonably satisfies, the requirement for specificity.

However, we have serious doubts covering the main objective of the Plan, which is to require bidders to commit themselves to make every good faith effort to employ specified numbers of minority group tradesmen in the performance of Federal and federally assisted contracts and subcontracts.

The pertinent public policy with respect to employment practices of an employer which may be regarded as constituting unlawful discrimination is set out in Titles VI and VII of the Civil Rights Act. Title VI, concerning federally assisted programs, provides in section 601 (42 U.S.C. 2000d) that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

Section 703(a) (42 U.S.C. 2000e-2(a)) of Title VII states the public policy concerning employer employment practices by declaring it to be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees in any way which

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. Section 705(a) (42 U.S.C. 2000e-4(a)) creates the Equal Employment Opportunity Commission, and section 713(a), Rules and Regulations (42 U.S.C. 2000e-12(a)), provides that the Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of that title.

The public policy regarding labor organization practices is delineated in section 703(c) (42 U.S.C. 2000e-2(c)) wherein it is stated that it shall be an unlawful employment practice for a labor organization (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of that section.

Whether the provisions of the Plan requiring a bidder to commit himself to hire--or make every good faith effort to hire-- at least the minimum number of minority group employees specified in the ranges established for the designated trades is, in fact, a "quota" system (and therefore admittedly contrary to the Civil Rights Act) or is a "goal" system, is in our view largely a matter of semantics, and tends to divert attention from the end result of the Plan--that contractors commit themselves to making race or national origin a factor for consideration in obtaining their employees.

We view the imposition of such a requirement on employers engaged in Federal or federally assisted construction to be in conflict with the intent as well as the letter of the above provisions of the act which make it an unlawful employment practice to use race or national origin as a basis for employment. Further, we believe that requiring an employer to abandon his customary practice of hiring

B-163026

through a local union because of a racial or national origin imbalance in the local unions and, under the threat of sanctions, to make "every good faith effort" to employ the number of minority group tradesmen specified in his bid from sources outside the union if the workers referred by the union do not include a sufficient number of minority group personnel, are in conflict with section 703(j) of the act (42 U.S.C. 2000e-2(j)) which provides as follows:

> "Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." (Underscoring added.)

While the legislative history of the Civil Rights Act is replete with statements by sponsors of the legislation that Title VII prohibits the use of race or national origin as a basis for hiring, we believe a reference to a few of such clarifying explanations will suffice to further show the specific intent of Congress in such respect when enacting that title. At page 6549, Volume 110, Part 5, of the Congressional Record, the following explanation by Senator Humphrey is set out:

> "* * * As a longstanding friend of the American worker, I would not support this fair and reasonable equal employment opportunity provision if it would have any harmful effect on unions. The truth is that this

title forbids discriminating against anyone on account of race. This is the simple and complete truth about title VII.

"The able Senators in charge of title VII (Mr. Clark and Mr. Case) will comment at greater length on this matter.

"Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to the Commission or to any court to require hiring, firing, or promotion of employees in order to meet a racial 'quota' or to achieve a certain racial balance.

"That bugaboo has been brought up a dozen times; but it is nonexistent. In fact, the very opposite is true. Title VII prohibits discrimination. In effect, it says that race, religion, and national origin are not to be used as the basis for hiring and firing. Title VII is designed to encourage hiring on the basis of ability and qualifications, not race or religion." (Underscoring added.)

In an interpretative memorandum of Title VII submitted jointly by Senator Clark and Senator Case, floor managers of that legislation in the Senate, it is stated (page 7213, Volume 110, Part 6, Congressional Record):

"With the exception noted above, therefore, section 704 prohibits discrimination in employment because of race, color, religion, sex, or national origin. It has been suggested that the concept of discrimination is vague. In fact it is clear and simple and has no hidden meanings. To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section 704 are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.

"There is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance, whatever such a balance may be, would involve a violation of title VII because maintaining such a balance would require an employer to hire or to refuse to hire on the basis of race. It must be emphasized that discrimination is prohibited as to any individual. While the presence or absence of other members of the same minority group in the work force may be a relevant factor in determining whether in a given case a decision to hire or to refuse to hire was based on race, color, etc., it is only one factor, and the question in each case would be whether that individual was discriminated against.

"There is no requirement in title VII that employers abandon bona fide qualification tests where, because of differences in background and education, members of some groups are able to perform better on these tests than members of other groups. An employer may set his qualifications as high as he likes, he may test to determine which applicants have these qualifications, and he may hire, assign, and promote on the basis of test performance.

"Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all-white working force, when the title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged--or indeed, permitted--to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination.)" (Underscoring added.)

B-163026

At page 7218 of Volume 110 the following objections, which had been raised during debate to the provisions of Title VII, and answers thereto by Senator Clark are printed:

> "Objection: Under the bill, employers will no longer be able to hire or promote on the basis of merit and performance.
>
> "Answer: Nothing in the bill will interfere with merit, hiring, or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote.
>
> * * * * *
>
> "Objection: The bill would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area.
>
> "Answer: Quotas are themselves discriminatory."

While, as indicated above, we believe that the provisions of the Plan affecting employers who hire through unions conflict with section 703(j) of Title VII, and that the above statement by Senator Humphrey further indicates that the act was not intended to affect valid collective bargaining agreements, we further believe that the appropriate direction of any administrative action to be taken where it is the policy of a union to refer only white workers to employers on Federal or federally assisted construction is indicated in the following question and answer set forth in the interpretative memorandum by Senator Clark and Senator Case (page 7217, Volume 110):

> "Question. If an employer obtains his employees from a union hiring hall through operation of his labor contract is he in fact the true employer from the standpoint of discrimination because of race, color, religion, or national origin when he exercises no choice in their selection? If the hiring hall sends only white males is the employer guilty of discrimination within the meaning of this title? If he is not, then further safeguards must be provided to protect him from endless prosecution under the authority of this title.

B-163026

"Answer. An employer who obtains his employees from a union hiring hall through operation of a labor contract is still an employer. If the hiring hall discriminates against Negroes, and sends him only whites, he is not guilty of discrimination--but the union hiring hall would be."

We believe it is especially pertinent to note that the "Findings" stated in section 4 of the order of June 27 as the basis for issuance thereof, consist almost entirely of a recital of practices of unions, rather than of contractors or employers. Thus, in attempting to place upon the contractors the burden of overcoming the effects of union practices, the order appears to evince a policy in conflict with the interpretation of the legislation as stated by its sponsors.

In this connection your Solicitor's memorandum contends that the principle of imposing affirmative action programs on contractors for employment of administratively determined numbers of minority group tradesmen, when such programs are for the purpose of correcting the effects of discrimination by unions prior to the Civil Rights Act of 1964, is supported by the decisions in Quarles v. Philip Morris, 279 F. Supp. 505; U.S. v. Local 189, U.P.P and Crown Zellerbach Corp., 282 F. Supp. 39; and Local 53 of Heat and Frost Insulators v. Vogler, 407 F. 2d 1047. We find, however, that decisions of the courts have differed materially in such respect; see Griggs v. Duke Power, 292 F. Supp. 243; Dobbins v. Local 212, 292 F. Supp. 413; and U.S. v. Porter, 296 F. Supp. 40.

Additionally, your Solicitor's memorandum cites cases involving affirmative desegregation of school faculties (U.S. v. Jefferson County, 372 F. 2d 836 (1966), and U.S. v. Montgomery County, 289 F. Supp. 647, affirmed 37 LW 4461 (1969) in particular). However, there is a clear distinction between the factual and legal situations involved in those cases and the matter at hand. The cited school decisions required reallocation of portions of existing school faculties in implementation of the requirement for desegregation of dual public school systems, which had been established on the basis of race, as such requirement was set out in the 1954 and 1955 decisions of the Supreme Court in the Brown v. Board of Education cases (347 U.S. 483 and 349 U.S. 294). In the Brown cases desegregation of faculties was regarded as one of the keys to desegregation of the schools, and in the Jefferson County case the court read Title VI of the Civil Rights Act as a congressional mandate for a change in pace and method of enforcing the desegregation of racially segregated school systems, as required by the Brown decisions.

B-163026

The requirements of the revised Philadelphia Plan do not involve a comparable situation. Even if the present composition of an employer's work force or the membership of a union is the result of past discrimination, there is no requirement imposed by the Constitution, by a mandate of the Supreme Court, or by the Civil Rights Act for an employer or a union to affirmatively desegregate its personnel or membership. The distinction becomes more apparent when it is recognized that the order of June 27 pertains to hiring practices of an employer. Hiring was not at issue in the school cases, and those cases do not purport to hold that a school district must, or even may, correct a racial imbalance in its faculty by affirmatively requiring that a stated proportion of its teachers shall be hired on the basis of race. To the contrary, the court recognized in its decision in the Jefferson County case (page 884)that the "mandate of Brown * * * forbids the discriminatory consideration of race in faculty selection," and such consideration is expressly prohibited by section VIII of the court's decree in Appendix A of that case.

The recital in section 6b.2 of the order (and in the prescribed form of notice to be included in the invitation) that the contractor's commitment "is not intended and shall not be used to discriminate against any qualified applicant or employee" is in our opinion the statement of a practical impossibility. If, for example, a contractor requires 20 plumbers and is committed to a goal of employment of at least five from minority groups, every nonminority applicant for employment in excess of 15 would, solely by reason of his race or national origin,be prejudiced in his opportunity for employment, because the contractor is committed to make every effort to employ five applicants from minority groups.

In your Solicitor's memorandum it is argued that the "straw man" sometimes used in opposition to the Plan is that it "would require a contractor to discriminate against a better qualified white craftsman in favor of a less qualified black." We believe this obscures the point involved, since it introduces the element of skill or competence, whereas the essential question is whether the Plan would require the contractor to select a black craftsman over an equally qualified white one. We see no room for doubt that the contractor in the situation posed above would believe he would be expected to employ the black applicant, at least until he had reached his goal of five nonminority group employees, and that if he

B-163026

failed to achieve that goal his employment of a white craftsman when an equally qualified black one was available could be considered a failure to use "every good faith effort." In our view such preferential status or treatment would constitute discrimination against the white worker solely on the basis of color, and therefore would be contrary to the express prohibition both of the Civil Rights Act and of the Executive order.

It is also contended in your Solicitor's memorandum that substantial judicial support for administrative affirmative action programs requiring commitments for contractors for employment of specified numbers of minority group tradesmen is contained in the decision of the Ohio Supreme Court in Weiner v. Cuyahoga Community College District, 19 Ohio St. 2d ___ (July 2, 1969). That decision upheld the award of a federally assisted construction contract to the second low bidder, as a proper action in implementation of the policies of the Civil Rights Act of 1964, after approval of award to the low bidder was withheld by the Federal agency involved for failure of the low bidder to submit an affirmative action program (including manning tables for minority group tradesmen) which was acceptable to that agency pursuant to an OFCC plan established for Cleveland, Ohio.

While the decision in Weiner case (which was a majority opinion by five of the justices with dissenting opinions by two) has some bearing on the issues here involved, since the decision appears to be based in substantial part on the conflicting opinions of Federal courts cited earlier we do not believe the decision can be considered as controlling precedent for the validity of the revised Philadelphia Plan.

In support of the required procedure, which is admitted at page 33 of the Solicitor's memorandum to require contractors to take actions which are based on race, the memorandum relies upon the acceptance by the courts, in school, housing and voting cases, of the use of race as a valid consideration in fashioning relief to overcome the effects of past discrimination. Aside from other distinctions, we believe there is a material difference between the situation in those cases, where enforcement of the rights of the minority individuals to vote or to have unsegregated educational or housing facilities does not deprive any member of a majority group of his rights, and the situation in the employment field, where the hiring of a minority worker, as one of a group whose number is limited by the employer's needs, in preference to one of the majority group precludes the employment of the latter. In other words, in those cases there is present no element of reverse

discrimination, but only the correction of the illegal denial of minority rights, leaving the majority in the full exercise and enjoyment of their corresponding rights.

In addition it may be pointed out that in those cases the judicial relief ordered is directed squarely at the parties responsible for the denial of rights, and we therefore do not consider them as supporting requirements to be complied with by contractors who, under the findings of the Plan, are themselves more the victims than the instigators of the past discriminatory practices of the labor unions. Moreover, in the court cases the remedies are applied after judicial determination that effective discrimination is in fact being practiced or fostered by the defendants, whereas the Plan is a blanket administrative mandate for remedial action to be taken by all contractors in an attempt to cure the evils resulting from union actions, without specific reference to any past or existing actions or practices by the contractors.

While it may be true, as stated in the Plan, "that special measures are required to provide equal employment opportunity in these seven trades," it is our opinion that imposition of a responsibility upon Government contractors to incur additional expenses in affirmative action programs which are directed to overcoming the present effects of past discrimination by labor unions, would require the expenditure of appropriated funds in a manner not contemplated by the Congress. If, as stated in the Plan, discrimination in referral is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964, it is our opinion that the remedies provided by the Congress in those acts should be followed. See also in this connection section 207 of Executive Order 11246.

While, as indicated in the foregoing opinions and in your Solicitor's memorandum, the President is sworn to "preserve, protect and defend the Constitution of the United States," we question whether the executive departments are required, in the absence of a definitive and controlling opinion by the Supreme Court of the United States, to assess the relative merits of conflicting opinions of the lower courts, and embark upon a course of affirmative action, based upon the results of such assessment, which appears to be in conflict with the expressed intent of the Congress in duly enacted legislation on the same subject.

In this connection, it should be noted that, while the phrase "affirmative action" was included in the Executive order (10925)

which was in effect at the time Congress was debating the bills which were subsequently enacted as the Civil Rights Act of 1964, no specific affirmative action requirements of the kind here involved had been imposed upon contractors under authority of that Executive order at that time, and we therefore do not think it can be successfully contended that Congress, in recognizing the existence of the Executive order and in failing to specifically legislate against it, was approving or ratifying the type or methods of affirmative action which your Department now proposes to impose upon contractors.

We recognize that both your Department and the Department of Justice have found the Plan to be legal and we have given most serious consideration to their positions. However, until the authority for any agency to impose or require conditions in invitations for bids on Federal or federally assisted construction which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees for such construction, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, we must conclude that conditions of the type proposed by the revised Philadelphia Plan are in conflict with the Civil Rights Act of 1964, and we will necessarily have to so construe and apply the act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction projects.

In this connection it is observed that by section 705(d) of the act, Congress charges the Equal Employment Opportunity Commission with the specific responsibility of making reports to the Congress and to the President on the cause of and means of eliminating discrimination and making such recommendations for further legislation as may appear desirable. That provision, we believe, not only prescribes the procedure for correcting any deficiencies in the Civil Rights Act, but also shows the intent of Congress to reserve for its own judgment the establishment of any additional unlawful employment practice categories or nondiscrimination requirements, or the imposition upon employers of any additional requirements for assuring equal employment opportunities.

We realize that our conclusions as set out above may disrupt the programs and objectives of your Department, and may cause concern among members of minority groups who may believe that racial balance or equal representation on Federal and federally assisted construction projects is required under the 1964 act, the

B-163026

Executive order, or the Constitution. Desirable as these objectives may be, we cannot agree to their attainment by the imposition of requirements on contractors, in their performance of Federal or federally-assisted contracts, which the Congress has specifically indicated would be improper or prohibited in carrying out the objectives and purposes of the 1964 act.

Sincerely yours,

(Signed) Elmer B. Staats

Comptroller General
of the United States

The Honorable
The Secretary of Labor

Office of the Attorney General
Washington, D. C. 20530

September 22, 1969

The Honorable

The Secretary of Labor

My dear Mr. Secretary:

You have requested my opinion as to the legality of the Department of Labor's order of June 27, 1969, the Revised Philadelphia Plan for Compliance with Equal Employment Opportunity Requirements of Executive Order 11246 for Federally-Involved Construction.

The Philadelphia Plan has been issued to implement Executive Order 11246 of September 24, 1965, as amended (30 F.R. 12319, 32 F.R. 14303, 34 F.R. 12986), in which the President has directed that Federal Government contracts and federally-assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate in employment because of race, color, religion, sex, or national origin. 1/

1/ The essential part of the contractor's obligation under this order is:

"The contractor will not discriminate against any employee or applicant for employment because of race, color,

(Cont'd. p. 2)

The Secretary of Labor is responsible for the administration of Executive Order 11246 and is authorized to "adopt such rules and regulations and issue such orders as he deems necessary and appropriate to achieve the purposes thereof." E.O. 11246, § 201.

Among the undertakings required of contractors by Executive Order 11246 is to "take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin." E.O. 11246, § 202(1). The obligation to take "affirmative action" imports something more than the merely negative obligation not to discriminate contained in the preceding

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1/ (Cont'd. from p. 1) religion, sex, 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, color, religion, sex 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. * * *." E.O. 11246, § 202(1).

In addition the contractor agrees to furnish required information and reports, to comply with orders and regulations implementing the Executive order, and to include these contractual provisions in subcontracts.

sentence of the standard contract clause. It is given added definition by the Secretary's regulations, which require that contractors develop written affirmative action plans which shall "provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of minority groups, including, when there are deficiencies, the development of specific goals and time tables for the prompt achievement of full and equal employment opportunity." 41 C.F.R. 60-1.40.

The Department of Labor order of June 27th is based upon stated findings relating to the enforcement of the nondiscrimination and affirmative action requirements of Executive Order 11246 with respect to the construction trades in the Philadelphia area. The Department of Labor has found that contractors must ordinarily hire a new employee complement for each construction job and that whether by contract, custom, or convenience this hiring usually takes place on the basis of referral by the construction craft unions. The Department of Labor has found further that exclusionary practices on the part of certain of these unions, including a refusal to admit Negroes to membership

in unions or in apprenticeship programs, and a preference in work referrals to union members and to those who have worked under union contracts, have resulted in the employment of only a small number of Negroes in the six construction trades in the area affected by the Philadelphia Plan. Accordingly, the Department of Labor has found that special measures were required in the Philadelphia area to provide equal employment opportunity in these six specified construction trades. 2/

The Revised Philadelphia Plan requires that with respect to construction contracts in the Philadelphia area which are subject to Executive Order 11246 and where the estimated total cost of the construction project exceeds $500,000, each bidder must, in the affirmative action program submitted with his bid, "set specific goals of minority manpower utilization which meet the definite standard" included in the invitation for bids. This standard will be a range of minority manpower utilization for the trades covered by the Plan and will be determined prior to the invitation for bids by the Department's area coordinator

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2/ The order of June 27, issued by the Assistant Secretary for Wage and Labor Standards, is reprinted at 115 Cong. Rec. S 8837-39. All of the findings summarized above appear in section 4 of the order, 115 Cong. Rec. S 8838. The order originally extended to seven construction trades, but one trade has been removed from coverage.

on the basis of the extent of minority group participation in the trade, the availability of minority group persons for employment in such trade, and other stated factors. As an alternative to setting such specific goals, the bidder may agree to participate in a multi-employer affirmative action program which has been approved by the Department of Labor's Office of Federal Contract Compliance.

The Plan provides that the contractor's commitment to specific goals "is not intended and shall not be used to discriminate against any qualified applicant or employee," (§ 6(b)(2)). Furthermore, the obligation to meet the goals is not absolute. "In the event of failure to meet the goals, the contractor shall be given an opportunity to demonstrate that he made every good faith effort to meet his commitment. In any proceeding in which such good faith performance is in issue, the contractor's entire compliance posture shall be reviewed and evaluated in the process of considering the imposition of sanctions," (§ 8(a)).

In response to Congressional inquiries the Comptroller General has, in his letter to you of August 5, 1969, expressed the opinion that the provision of the Philadelphia Plan for

commitment to specific goals for minority group participation is in conflict with Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., and consequently unlawful, and he has indicated further that such illegality may affect the lawfulness of expenditures of appropriated funds under contracts entered into under the terms and procedures of the Philadelphia Plan. Cf. 42 Comp. Gen. 1 (1962).

I have reached a contrary result, and conclude that the Revised Philadelphia Plan is not in conflict with any provision of the Civil Rights Act, that it is a lawful implementation of the provisions of Executive Order 11246, and that it may be enforced in accordance with its terms in the award of Government contracts.

Before undertaking detailed analysis of the contentions involved, it is important to consider the functions of the Executive order and the Philadelphia Plan, as well as the provisions of the Plan itself. Executive Order 11246 is a lawful exercise of the Federal Government's authority to determine the terms and conditions on which it is willing to enter into contracts. 3/ That order lays down a rule

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3/ The order is generally similar to its predecessor, Executive Order 10925 of March 6, 1961, which, in 42 Ops. A.G. No. 21 (1961), was held to be a valid exercise of presidential

(Cont'd. p. 7)

which governs only those employers who enter into contracts with the United States, construction contracts financed with Federal assistance, or subcontracts arising under such Federal or federally-assisted contracts. Neither the order nor the Philadelphia Plan, which implements the order with respect to certain construction contracts, regulates the practices of employers generally. While the power of the Government to determine the terms which shall be included in its contracts is subject to limitations imposed by the Constitution or by acts of Congress, the existence of such power does not depend on an affirmative legislative enactment. In evaluating the Comptroller General's challenge to the Philadelphia Plan on the basis of conflict with Title VII of the Civil Rights Act, it is important to distinguish between those things prohibited by Title VII as to all employers covered by that act, and those things which are merely not required of employers by that act. The

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3/ (Cont'd. from p. 6) authority. See also 40 Comp. Gen. 592 (1961); Farkas v. Texas Instrument, Inc., 375 F. 2d 629, 632 (C.A. 5, 1967). The contract compliance program under these Executive orders has received legislative recognition in the Civil Rights Act of 1964, § 709(d), 42 U.S.C. 2000e-8(d), and in subsequent appropriations legislation. The Comptroller General does not challenge the validity of Executive Order 11246, as such, but concludes that the Revised Philadelphia Plan is not a permissible implementation of the order because of an asserted conflict with Title VII of the Civil Rights Act.

United States as a contracting party may not require an employer to engage in practices which Congress has prohibited. It does not follow, however, that the United States may not require of those who contract with it certain employment practices which Congress has not seen fit to require of employers generally.

The requirements which the Plan would impose on contractors may be briefly summarized.[4/] The contractor must

(a) in his proposal set specific goals for minority group hiring within certain skilled trades, which goals must be within the range previously determined to be appropriate by the Secretary;

(b) he must make "every good faith effort" to meet these goals;

(c) but he may not, in so doing, discriminate against any qualified applicant or employee on grounds of race, color, religion, sex or national origin.

4/ I put to one side the bidder's option of participating in an OFCC-approved multi-employer program, since the details of such programs have yet to be worked out and the legality of such programs has not been called into question.

If a plan such as this conflicts with Title VII of the Civil Rights Act, its validity concededly cannot be sustained. But in my view no such conflict exists. Section 703(a) of the Civil Rights Act makes it an unlawful employment practice for an employer -

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Nothing in the Philadelphia Plan requires an employer to violate section 703(a). The employer's obligation is to make every good faith effort to meet his goals. A good faith effort does not include any action which would violate section 703(a) or any other provision of Title VII. If the provisions of the Plan were ambiguous on this point, its interpretation would be governed by the principle that "where two constructions of a written contract are possible, preference will be given to that which does not result in

violation of law," Great Northern Ry. Co. v. Delmar Co., 283 U.S. 686, 691 (1931). However, to remove any doubt the Plan specifies that the contractor's commitment shall not be used to discriminate against any qualified applicant or employee.

Nevertheless, it might be argued - and the Comptroller General appears to take this position - that the obligation to make good faith efforts to achieve particular goals is meaningless if it does not contemplate deliberate efforts on the part of the contractor to affect the racial composition of his work force, that this necessarily involves a commitment "to making race or national origin a factor for consideration in obtaining [his] employees," and that any such action would violate Title VII.

It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require

and, in some circumstances, may not permit obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria. Gaston County v. United States, 395 U.S. 285 (1969) (voting); Offermann v. Nitkowski, 378 F. 2d 22 (C.A. 2, 1967) (schools); Local 189, United Papermakers, etc. v. United States, F. 2d , 60 L.C. ¶ 9289 (C.A. 5, 1969) (employment).

There is no inherent inconsistency between a requirement that each qualified employee and applicant be individually treated without regard to race, and a requirement that an employer make every good faith effort to achieve a certain range of minority employment. The hiring process, viewed realistically, does not begin and end with the employer's choice among competing applicants. The standards he sets for consideration of applicants, the methods he uses to evaluate qualifications, his techniques for communicating information as to vacancies, the audience to which he communicates such information, are all factors likely to have a real and a predictable effect on the racial composition of his work force. Title VII does not prohibit some structuring of the hiring process, such as

the broadening of the recruitment base, to encourage the employment of members of minority groups. Local 189, etc. v. United States, supra at ; see Offermann v. Nitkowski, supra at 24. The obligation of "affirmative action" imposed pursuant to Executive Order 11246 may require it. 41 C.F.R. 5-12.805-51(b), (c); Matter of Allen-Bradley Co., CCH Empl. Prac. Svce. ¶ 8065 (1968).

Viewed in this light, the example cited in the Comptroller General's opinion is not an argument against the legality of the Plan. The Comptroller General poses the example of a contractor requiring twenty plumbers, with a specified "goal" that five of these plumbers be from minority groups. If the contractor has filled fifteen of these posts with nonminority plumbers, says the Comptroller General, the next white applicant for one of the five vacancies will inevitably be discriminated against by reason of the fact that he is not a member of a minority group. Doubtless a part of the good faith effort required of the contractor to achieve the stated goals would have been to avail himself of manpower sources which might be expected to produce a representative number of minority applicants, so that the situation posed in the Comptroller General's

example would arise but infrequently. Yet, quite clearly, if notwithstanding the good faith efforts of the employer such a situation does arise, the qualified nonminority employee may be hired. The fact that the minority employment goal was to this extent not reached would not in itself be sufficient ground for concluding that the contractor had not exerted good faith efforts to reach it.

The Philadelphia Plan addresses itself to a situation in which, according to the Department of Labor's findings, the contractors have in the past delegated an important part of the hiring function to labor organizations by selecting their work force on the basis of union referrals. The referral practices of certain unions, whether or not amounting to violations of Title VII, have in fact contributed to the virtual exclusion of Negroes from employment in certain trades in the Philadelphia area. Continued reliance by contractors on established hiring practices may reasonably be expected to result in continued exclusion of Negroes. The purpose of the Philadelphia Plan is to place squarely upon the contractor the burden of broadening his recruitment base whether within or without the existing union referral system, as he shall determine. The contractor's obligation

is phrased primarily in terms of goals; the choice of methods is his, provided only that he does not discriminate against qualified employees or applicants. Unless it can be demonstrated that the hiring goals cannot be achieved without unlawful discrimination,[5/] I fail to see why the Government is not permitted to require a pledge of good faith efforts to meet them as a condition for the award of contracts.

The Comptroller General argues that inasmuch as Title VII does not require labor organizations to achieve a racial balance in their membership or in referrals (§ 703(j)), Executive Order 11246 cannot be used to require an employer "to abandon his customary practice of hiring through a local union" even though experience has demonstrated that the union refers very few members of minority groups. I confess I find this argument difficult to follow. Since, as stated above, the obligation of affirmative action comprehends more than bare compliance with Title VII and may under proper circumstances include

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5/ The Plan provides that the goals will be determined with particular attention to the factual situation in each affected trade. Accordingly, there is every reason to assume that the goals will represent an informed administrative judgment of what an effective affirmative action plan may be expected to achieve.

an obligation on the part of the employer to broaden his recruitment base, the order would be an exercise in futility if the employer may evade this obligation by contracting away his power to perform it. Whether or not the law permits him to accept referrals only from unions which are or may be discriminating, 6/ the law does not require him to do so. To comply with his affirmative action obligation an employer may be forced to depart from his customary reliance on union referrals (though this will depend to a great extent on the unions' own response to the Plan), but since the law permits an employer to obtain employees from additional sources, I see no reason why the Government is not free to bargain for his assurance to do so. In other words, the employer may have a right to refuse to abandon his customary hiring practices, but he has no right to contract with the Government on his own terms. Perkins v. Lukens Steel Co., 310 U.S. 113 (1940); Copper Plumbing & Heating Co. v.

6/ On the facts before me it is impossible to determine whether the present practices of the unions affected by the Philadelphia Plan are in violation of Title VII and such a determination is not necessary to the resolution of the question of the legality of the Plan.

Campbell, 290 F. 2d 368, 370-71 (C.A. D.C. 1961). Accordingly, I conclude that the Philadelphia Plan is not inconsistent with any provision of Title VII of the Civil Rights Act.

Another argument might be urged against the legality of the Philadelphia Plan. Let it be conceded, this argument runs, that the Government may lawfully require a contractor to take certain forms of affirmative action to increase employment of members of minority groups, and conceded further that on its face the Philadelphia Plan requires no more than legally permissible forms of affirmative action to achieve the goals set by the contractor in response to the bidding invitation. Nevertheless, by stating the contractor's primary obligation in terms of a numerical result, by failing to specify what "good faith efforts" will be acceptable in lieu of the achievement of such result, and by placing upon the contractor who has failed to achieve his "goal" the burden of proving that, in effect, he did all that was legally permissible to meet it, the Government so weights the procedural scales against the nonachieving contractor as to coerce him in fact, if not in law, into discriminating. In other words, although the substance of the contractor's

obligation under the Philadelphia Plan may be permissible, the Plan does not provide a fair method for resolving questions regarding compliance. Cf. Speiser v. Randall, 357 U.S. 513, 520-26 (1958).

This argument appears to me to be premature and speculative at this time. It is true that the Philadelphia Plan might be clearer if it were to state what good faith efforts are expected of contractors. But the general requirements of affirmative action, particularly in the area of recruitment, have been stated elsewhere in regulations, 41 C.F.R. 5-12.805-51(b), (c), and other publications, and there is no reason to believe that the Department of Labor officials administering the Plan would be unwilling to describe to any interested contractor the kind of actions expected of him. In short, I cannot assume that any contractor who desires to participate in good faith in the Philadelphia Plan will be forced, as a practical matter, to choose between noncompliance with his affirmative action obligation and violation of Title VII. If unfairness in the administration of the Plan should develop, it cannot be doubted that judicial remedies are available. Cf. Copper Plumbing & Heating Co. v. Campbell, supra.

Finally, the Comptroller General appears to suggest that although Title VII contemplated the continued operation of the contract compliance program under Executive orders, nevertheless the substantive provisions of Title VII somehow limit and preempt those of the order. The basis for this conclusion is nowhere explained. There is no question that the Executive order cannot require what Title VII forbids, but as has been pointed out above, the Philadelphia Plan does not seek to do so. The Comptroller General argues further, in effect, that the Executive order can neither require nor forbid actions or practices which Title VII declines to interfere with. This is the inference which must be drawn from the Comptroller General's references to expressions in the legislative history of the Civil Rights Act regarding what Title VII would not do. 7/ But Title VII is not and was not understood by Congress to be the exclusive remedy for racially discriminatory practices in employment, Local Union No. 12 v. NLRB, 368 F. 2d 12, 24

7/ On the view I take of the question before me, it is not necessary to consider the correctness of all the Comptroller General's conclusions regarding the scope of Title VII, and my failure to do so implies neither agreement nor disagreement with such conclusions.

(C.A. 5, 1966), cert. denied, 389 U.S. 837 (1967), rehearing denied, 389 U.S. 1060 (1968). Nothing in the language or legislative history of that statute suggests that "affirmative action" may not be required of Government contractors under the Executive order above and beyond what the statute requires of employers generally.[8/]

It is, therefore, my view that the Revised Philadelphia Plan is legal and that your Department is authorized to require Federal contracting and administering agencies to implement the Plan in accordance with its terms in the award of contracts in the Philadelphia area. E.O. 11246, §§ 201, 205. Where a contractor submits a bid which does not comply with the invitation for bids issued pursuant to the Plan, such a bid may be rejected as not responsive. 38 Ops. A.G. 555 (1937); Graybar Electric Co. v. United States, 90 C. Cls. 232, 244 (1940). I hardly need add that the conclusions expressed herein may be relied on by your Department and other contracting agencies and their accountable officers in the administration of Executive Order 11246.

8/ In the one instance where the statute deals with the overlap of Title VII and the Executive order, reporting requirements, it is the order and not the statute which is accorded priority. § 709(d).

28 U.S.C. 512, 516; 37 Ops. A.G. 562, 563 (1934); 38 Ops. A.G. 176, 178-81 (1935); Smith v. Jackson, 241 Fed. 747, 773 (C.A. 5, 1917), aff'd, 246 U.S. 388 (1918).

Sincerely,

Attorney General