

by providing that rules, regulations and relevant orders of the Secretary of Labor shall include those of his "designee." Such a designation seems inconsistent with Section 401 of the Executive Order. Accordingly, it is recommended that Section 60-1.3(t) as proposed be omitted from the Permanent Regulations.

For the same reasons we recommend that any ruling or interruption of a general nature of Executive Order 11246 or of the Permanent Regulations be made by the Secretary of Labor and not by a designee of his. We recommend that proposed Section 60-1.44 be revised on this basis.

2. The clause to be inserted in Federally-assisted construction contracts has been carried over into Section 60-1.4(b) from Section 60-1.3(b) of the current regulations. However, the current regulations antedated Section 602 of the Civil Rights Act of 1964, which established a statutory procedure to be followed in connection with any withholding of Federal assistance. Section 303(c) of Executive Order 11246 recognized and provided for necessary changes in the Executive Order procedures to accommodate Section 602. We recommend that the final sentence of the language to be inserted in Federally assisted construction contracts be revised as follows: "In addition the applicant agrees that if it fails or refuses to comply with these undertakings, the administering agency may, *in conformity with Section 602 of the Civil Rights Act of 1964 (and the regulations of the administering agency or department issued thereunder)* cancel (etc.)." [Suggested language italicized.]

3. Section 60-1.6(c) as proposed does not provide for publication of agency regulations for the administration of Executive Order 11246 and the Permanent Regulations of OFCC. It is suggested that this section be revised to provide for publication and for an opportunity for public comment in advance of the effective date of such regulations.

4. Section 60-1.26(b) (ii) provides for hearings when the director of OFCC proposes to declare a contractor ineligible for further contracts under Section 209 of Executive Order 11246. At times OFCC and its predecessor have directed that contracts be denied or delayed on the authority of Section 205 or 211 or their predecessor sections. As indicated in *Crown Zellerbach Corp. v. Wirtz* (D.D.C. 1968) Civ. No. 3150-67, such denials are indistinguishable forms of "blacklisting" from that provided for in Section 209(a)(6) of the Executive Order and should involve the same right to a hearing before the sanction is made final. Consequently, Section 60-1.26(b) 2 (ii) should be amended by omitting the reference to Section 209.

5. The provision for designation of a hearing officer in Section 60-1.26(b) (i) does not establish any minimum qualifications for service in that position. We suggest that that Section be amended to provide that the hearing officer selected shall be one who is qualified under Section 11 of the Administrative Procedure Act.

6. Section 60-1.28 would authorize the Director to issue a notice requiring a contractor to show cause why enforcement or other action should not be instituted against him within 30 days. While the proposed section says that the Director shall have reasonable cause to believe the contractor is in noncompliance before he issues such an order, it does not require him to set forth the basis for his belief in his show cause notice to the contractor. We submit that such a requirement should certainly be added to the proposed section.

7. The Proposed Permanent Regulations contain many significant grants of authority to the Director of OFCC; the power to withdraw exemptions (60-1.5(d)), the power to approve agency regulations (60-1.6(c)), the power to require additional information of bidders (60-1.7(b)(2)), the power to assume jurisdiction of matters before agencies and to impose sanctions (60-1.25), the power to review agency determinations (60-1.26(b)(2)(iv)), the power to issue show cause notices (60-1.28), the power to require pre-award procedures in specific cases (60-1.29). In our judgment these powers should not be re-delegated. Therefore, we urge that Section 60-1.46 be omitted from the Permanent Regulations.

We will appreciate your consideration of these comments and hope that they will assist you in developing fair and effective Permanent Regulations.

Sincerely,

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Managing Director, Contractors Division.