

"On all projects for Federal or Federally-assisted construction, in which the total construction cost may be one million dollars or more:

"(1) Each agency shall include, or require the applicant to include, in the specifications for each formally-advertised construction contract, a notice (the form of which is approved by the Office of Federal Contract Compliance) to all prospective bidders stating that, if its bid is one million dollars or more, the low bidder must submit, in writing, (an) acceptable affirmative action program(s) which will have the result of assuring equal employment opportunity in all trades and particularly the better-paid trades (such as electricians, plumbers, pipefitters, sheet metal workers, ironworkers and Operating Engineers) to be used on the job and in all phases of the work, whether or not the work is to be subcontracted.

"(2) Before each contract is awarded, the contracting or administering agency shall make an evaluation of the proposed affirmative action programs submitted with the bid. The evaluation *shall be* conducted by *qualified specialists* regularly involved in equal employment opportunity programs, in cooperation with the OFCC Area Coordinator if one serves the area where the contract will be performed."

Under paragraph 3c each Federal contracting and administering agency is required to submit to the OFCC its program to implement the order.

Existing regulations issued by the Secretary of Labor pursuant to the authority of the Executive Order, which appear in Title 41, Chapter 60, of the Code of Federal Regulations, require that federally assisted construction contracts shall include a clause under which the contractor and subcontractors agree to take various affirmative actions to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin. 41 CFR 60-1.3(b). A proposed revision of 41 CFR Ch. 60 issued by the Office of Federal Contract Compliance pursuant to Executive Order No. 11246, was published in the Federal Register, Vol. 33, No. 32, on February 15, 1968. Requirements for a similar clause in federally assisted construction contracts and subcontracts are stated under Section 60-1.4(b) of the proposed revision, and general requirements of satisfactory affirmative action programs are set forth in Subpart C thereof. Other than the submission of an affirmative action program prior to award, and the requirement for approval thereof by OFCC prior to award, we do not find a substantial basis on which to conclude that the proposed order contemplates that the affirmative actions required of contractors and subcontractors under federally assisted construction contracts will be materially different from those which have been required of such parties after award for several years.

A review of the records of this Office does not show receipt of any cases involving undue restrictions on competition resulting from the requirement for affirmative actions by contractors to ensure compliance with the Equal Employment Opportunity Program in federally assisted construction contracts, or involving contractors having encountered substantially higher costs in satisfactorily complying with equal opportunity requirements than were anticipated in the preparation of their bids. It is further noted that, in the background information quoted above, it is stated that preaward acceptable affirmative action programs have been required by a number of Federal procurement agencies for over two years, and our records fail to show any cases presented to this Office wherein award was not made to the low bidder because of his failure or refusal to submit an acceptable affirmative action program, or involving claims for unanticipated costs resulting from such a program.

While, as noted above, problems in the existing preaward acceptable affirmative action program have not been reflected in our contract work, statements contained in records of your office which you have made available for examination by representatives of this Office reflect that road contractors may be encountering serious problems in connection with the preaward program as it is being administered in the geographical areas mentioned in the proposed order. Such statements indicate that the preaward procedures have in some instances resulted in extended periods of delay in the awarding of contracts; that bidders are furnished inadequate guidelines for the development of an acceptable affirmative action program, and the low responsive (and otherwise responsible) bidder may therefore be required to enter into negotiation procedures on an acceptable program in order to obtain the award; that a program which is acceptable on one contract may not be acceptable on another; that a program which is acceptable at the time the contract is awarded may be unacceptable