



THE PHILADELPHIA PLAN FOR INCREASING
MINORITY GROUP EMPLOYMENT IN FEDERAL CONSTRUCTION PROJECTS

an address by
Paul G. Dembling
General Counsel

U. S. General Accounting Office
before

The Association of the Bar of the City of New York
February 16, 1970

D. 809

2
GAs-1

I appreciate the opportunity this occasion affords me to explain the position of the Comptroller General of the United States and the General Accounting Office with respect to the revised Philadelphia Plan. At the outset I wish to state that unfortunately the Philadelphia Plan situation has in some ways devolved into a division of those for and those against affirmative action to eliminate improper discrimination in employment. Nothing could be further from the case so far as the General Accounting Office is concerned. I state categorically that the Comptroller General and the General Accounting Office are not against greater opportunities for minority groups--are not opposed to civil rights--quite the contrary! It is painful to us that the determination of the legal issues posed by the Plan's requirements has tended to cast an unfavorable light on the actions taken.

As a result of the widespread publicity the Plan received, many individuals have concluded that the Plan is either good or bad, legal or illegal. However, I am constantly surprised that in speaking with people who have reached these conclusions--particularly those who view the Plan as legal--how few of them have read the basic decision issued by the Comptroller General. Therefore, I will attempt to present the issues underlying the Philadelphia Plan controversy as we in the General Accounting Office view them.

~~710106~~

094462

The basic foundation for the controversy is as follows:

(1) The Department of Labor issued an order requiring that major construction contracts in the Philadelphia area, which are entered into or financed by the United States, must include commitments by the contractors to goals of employment of minority workers in specified skilled trades;

(2) By a decision dated August 5, 1969, the Comptroller General advised the Secretary of Labor that the Plan was considered to be in contravention of the Civil Rights Act of 1964 and would be required to so hold in passing upon the legality of expenditures of appropriated funds under contracts made subject to the Plan; and

(3) The Attorney General on September 22, 1969, issued an opinion to the Secretary of Labor advising him that the Plan is not in conflict with any provision of the Civil Rights Act; that it is authorized by Executive Order No. 11246; and that it may be enforced in awarding Government contracts.

The revised Philadelphia Plan was issued on June 27, 1969, with the announcement that it was designed to meet GAO's objections to a lack of specificity in a prior plan. The new plan is frank and direct in stating its purpose. It provides a history of alleged discriminatory practices by the Philadelphia construction unions in admitting members; it states that the percentage of minority group membership in the unions and the construction trades is far below the ratio of minority group population to the total Philadelphia population; and it advises that the

purpose of the Plan is to achieve greater participation of minority group members in the construction trades.

The Plan states that there shall be included in invitations for bids (IFBs) on both Federal and federally assisted construction contracts in the Philadelphia area, specific ranges of minority group employees in each of six skilled construction trades; that each bidder must designate in his bid the specific number of minority group employees, within such ranges, that he will employ on the job; and that failure of the contractor to "make every good faith effort" to attain the minority group employment "goals" he has established in his bid may result in the imposition of sanctions, which might include termination of his contract.

The primary question considered in the decision of August 5 was whether the revised Plan violated the equal employment opportunity provisions of the Civil Rights Act of 1964.

In the formulation of that decision, the Civil Rights Act of 1964 was regarded as the law governing nondiscrimination in employment and equal employment opportunity obligations of employers. Therefore the 1964 Act was considered as overriding any administrative rules, regulations, and orders which conflicted with the provisions of that Act or went beyond such law and purported to establish, in effect, additional unlawful employment practices for employers who engaged in Federal or federally assisted construction.

The basic policy of the equal employment opportunity part of the Act is set out in section 703(a) as follows:

"It shall be an unlawful employment practice for any employer -

- (1) to fail or refuse to hire * * * any individual * * * because of such individual's race, color, religion, sex, or national origin."

The basic policy of the Act as it relates to federally assisted contracts, is stated in section 601:

"No person * * * 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."

Another provision of the Act is set out in section 703(j), which provides in part as follows:

"Nothing contained in this title 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 * * * 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 * * * or national origin in any community * * * or in the available work force in any community * * *."

This part of the law is known as the prohibition against "quotas"; that is, the prohibition against requiring an employer to hire a specified proportion or percentage of his employees from certain racial or national origin groups.

The legislative history of the 1964 Civil Rights Act is replete with statements by the sponsors and floor managers of that legislation explaining that Title VII is intended to prohibit the use of race or national origin as a basis for hiring. For example, former Senator Hubert Humphrey explained Title VII as follows:

"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 qualification, not race or religion." (110 Cong. Rec. 6549)

In an interpretative memorandum of Title VII submitted by Senators Joseph Clark and Clifford Case, floor managers of that legislation in the Senate, it is stated:

"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 70c are those which are based on any of the five forbidden criteria; race, color, religion, sex, and national origin . . .

"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 has been generally accepted by the Departments of Justice and Labor and minority group spokesmen that "quotas" are illegal. However, in defense of the Philadelphia Plan the Labor Department argued that "goals" for minority group employees would not violate the Civil Rights Act of 1964 because--

1. A quota is a fixed number or percentage of minority group members, whereas ranges to be established under the Plan are flexible in that the bidder may choose as his goal any number or percentage within the ranges set out in the IFB.
2. Failure to attain the "goals" does not constitute noncompliance, since such failure can be waived if

the contractor can show that he made "every good faith effort" to attain the goals.

3. The Philadelphia Plan was promulgated under Executive Order 11246, not under the Civil Rights Act of 1964, and affirmative action programs under the Executive Order may properly require consideration of race or national origin if such consideration is necessary to correct the present results of past discrimination.
4. The Plan provides that the contractor's commitment to specified goals of minority group employment shall not be used to discriminate against any qualified applicant or employee.

In the August 5th decision it was stated that the distinction between quotas and goals is largely a matter of semantics. A writer for the Washington Evening Star stated it thus: "These quotas are called goals in the most transparent semanticism since legs were called limbs." The plain facts are that the Plan sets a definite minimum percentage requirement for employment of minority workers; requires an employer to commit himself to employ at least a corresponding minimum number of minority workers; and provides for sanctions for a failure to employ that number (unless the contractor can satisfy the agency personnel concerned that he has made every good faith effort to attain such number).

In essence, the goals established increase annually over a four-year period. By 1973 contractors will be expected to establish and meet

goals of minority group employment which are within the following ranges:

Ironworkers	22-26%
Plumbers, pipefitters and steamfitters	20-24%
Sheetmetal workers, electrical workers and elevator construction workers	19-23%

It follows, therefore, that when such sanctions are applied they will be a direct result of the contractor's failure to meet his specified number of minority employees.

The decision also pointed out that the basic philosophy of the equal employment opportunities portion of the Civil Rights Act is that it shall be an unlawful employment practice to use race or national origin as a basis for hiring, or refusing to hire, a qualified applicant--the Plan would necessarily require contractors to consider race and national origin in hiring.

The legislative history of the Civil Rights Act shows beyond question that Congress in legislating against discrimination in employment recognized the discrimination that is inherent in a quota system, and regarded the term "discrimination" as including the use of race or national origin as a basis for hiring; the assignment of numerical ratios based on race or national origin; and the maintaining of any racial balance in employees.

Examination of the court cases cited by the Labor Department showed that the majority involved questions of education, housing, and voting. A material difference could be noted between the circumstances in those cases and the circumstances which gave rise to the Philadelphia Plan. Enforcement of the

rights of the minority to vote, or to have unsegregated housing, or unsegregated school facilities, does not deprive members of the majority group of similar rights, whereas in the employment field, each mandatory and discriminatory hiring of a minority group worker would preclude the employment of a member of the majority group. Those cases which did involve Title VII of the Civil Rights Act of 1964, were concerned with practices of labor unions or with treatment by employers of their employees in matters of seniority and promotion, and even in such circumstances, the courts are divided.

The decision also pointed out that the effect of the Plan was to require an employer to abandon his customary practice of hiring through a local union if there is a racial or national origin imbalance in the membership of such union, and it was concluded that such a requirement would be in violation of section 703(j) of the Act.

It appeared to be improper to impose requirements on contractors to incur additional expenses in programs designed to correct discriminatory practices of unions, since such requirements would result in the expenditure of appropriated funds in a manner not contemplated by Congress. It was pointed out that if unions were, in fact, discriminating they could be required to correct their discriminatory practices under provisions of the National Labor Relations Act, under Title VII of the Civil Rights Act, and under section 207 of Executive Order 11246. The use of these remedies was suggested in the decision.

Finally, it was concluded that until the authority for any agency to impose or require conditions in invitations for bids which obligate bidders, contractors, or subcontractors, to consider the race or national origin of their employees or prospective employees, is clearly and firmly established by the weight of judicial precedent, or by additional statutes, conditions of the type proposed by the revised Philadelphia Plan must be considered to be in conflict with the Civil Rights Act of 1964, and that the GAO would 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.

The day after the decision of August 5, the Secretary of Labor held a press conference at which he expressed the opinion that "interpretation of the Civil Rights Act has been vested by Congress in the Department of Justice"; that Justice had already decided that the Philadelphia Plan was not in conflict with the Act; that GAO properly could pass only upon whether the Philadelphia Plan violated procurement law; and that Labor therefore had no choice but to follow the opinion of Justice and proceed to implement the Plan.

Actually, the Attorney General issued his formal opinion on September 22, 1969. This opinion rests fundamentally upon the view that the Executive has authority to include in contracts any terms and conditions which are not contrary to a statutory prohibition or limitation on contractual authority and that the requirements imposed upon contractors by the Philadelphia Plan are not prohibited by the Civil Rights Act.

It is recognized that the Executive agencies may, in the absence of contrary legislative provisions, perform their authorized functions and programs by any appropriate means, including the use of contracts. In doing so, however, they are bound to observe all statutory provisions applicable to the making of public contracts. The Attorney General's opinion states that 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, but that existence of the power does not depend upon an affirmative legislative enactment.

One of the most important statutory limitations on contracts is that "No contract . . . shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment" (41 U.S.C. 11). Another significant congressional expression on contracting is the requirement that Government contracts shall be made or entered into only after public advertising and competitive bidding, on such terms as will permit full and free competition. The purpose of the advertising statutes is not only to prevent fraud or favoritism in the award of public contracts, but also to secure for the Government the benefits of full and free competition.

The Supreme Court of the United States has recognized that competitive bidding should obtain the needs of the Government at prices calculated to result in the lowest ultimate cost to the Government. (Paul v. United States, 371 U.S. 245, 252 (1963)). Even before this Supreme Court decision, the rule generally applied by the accounting officers of Government and at least one Attorney General and, so far

as I know, never contested by any prior Attorney General, is that the inclusion in any contract of terms or conditions, not specifically authorized by law, which tend to lessen competition or to increase the probable cost to the Government, are unauthorized and illegal. The situations in which this rule has been applied have most frequently involved proposals to impose stipulations concerning employment conditions or practices.

In 1890 the Attorney General advised the President as follows, with respect to a request of a labor organization for implementation of the act of June 25, 1868, which provided that eight hours shall constitute a day's work:

"Again sections 3709, etc., require contracts for supplies or services on behalf of the Government, except for prisoners' services, to be made with the lowest responsible bidder, after due advertisement. These statutes make no provision for the length of the day's work by the employes of such contractors, and a public officer who should let a contract for a larger sum than would be otherwise necessary by reason of a condition that a contractor's employees should only work eight hours a day would directly violate the law.

"In short, the statutes do not contain any such provision as would authorize or justify the President in making such an order as is asked. Nor does any such authority inhere in the Executive office. The President

has, under the Constitution and laws, certain duties to perform, among these being to take care that the laws be faithfully executed; that is, that the other executive and administrative officers of the Government faithfully perform their duties; but the statutes regulate and prescribe these duties, and he has no more power to add to, or subtract from, the duties imposed upon subordinate executive and administrative officers by the law, than those officers have to add or subtract from his duties.

"The relief asked in this matter can, in my judgment, come only through additional legislation."

On the same principle, the General Accounting Office has held on numerous occasions that various proposed contract provisions could not properly be utilized. These include provisions involving such matters as minimum wages (10 Comp. Gen. 294 (1931); 17 Comp. Gen. 471 (1937)); compliance with the National Labor Relations Act of 1935 (17 Comp. Gen. 37 (1937)); reporting of payroll statistics (17 Comp. Gen. 585 (1938)); collective bargaining (18 Comp. Gen. 285 (1938)); compliance with the Fair Labor Standards Act (20 Comp. Gen. 24 (1940)); use of union labor (31 Comp. Gen. 561 (1952)); length of work-week (33 Comp. Gen. 477 (1954)); and wage, hour, and fringe benefits (42 Comp. Gen. 1 (1962)).

Of course, many of those proposed requirements were subsequently authorized by Congressional enactment and, together with other similar requirements, are today accepted socio-economic features of Government contracting. The point is, that they were not permitted until the

Congress, rather than the Executive, had determined that they should be. So far as I know there was no attempt in any of those instances by the Executive branch to disregard the decisions of the Comptroller General.

In the face of this history, the GAO does not agree with the Attorney General that the Executive may impose upon contractors any conditions not specifically prohibited.

In contending that the Plan is not in conflict with any provision of the Civil Rights Act, the Attorney General states that the Plan only requires the contractor to set specific goals for minority group hiring, and to make "every good faith effort" to meet these goals. This, however, he says does not require the contractor to discriminate, because the Plan includes the express statement that he may not in attempting to meet his goals discriminate against any qualified employee on grounds of race, color, religion, sex, or national origin. As stated in the August 5th decision this is a statement of a practical impossibility. The provision is, in effect, no more than a statement of the provisions of the Civil Rights Act, and it is difficult to avoid the conclusion that the Attorney General is saying that no requirement, obligation or duty can be considered contrary to law if it is accompanied by a statement that in meeting it the law will not be violated.

Finally, the Attorney General states that, while the Plan might be clearer if it stated what "good faith efforts" are expected, it must be assumed that the Plan will be so fairly administered that no contractor will be forced to choose between noncompliance with his obligation to achieve his goal and violation of the Act. Therefore, he

concludes, it is premature to assert the invalidity of the Plan because of what may occur in its enforcement; any unfairness in administration should be left for judicial remedy.

The foregoing would indicate that the Attorney General does not fully recognize the pressure which the Plan will impose upon contractors to attain their minority group employee goals. A failure to achieve such goals will immediately place the contractor in the role of defendant, and to avoid sanctions he must then provide complete justification for his failure. Furthermore, in the first instance at least, the question whether he made every good faith effort will be determined by the same Federal personnel who imposed the requirement. It appears that the coercive features inherent in the Plan cannot help but result in discrimination in both recruiting and hiring by contractors subject to the Plan.

In the decision, the Secretary of Labor was informed that the General Accounting Office would regard the Plan as a violation of the Civil Rights Act in passing upon the legality of matters involving expenditures of appropriated funds for Federal or federally assisted construction. The jurisdiction of the Comptroller General in that respect is derived from the authority and duty to audit and settle public accounts which is vested in and imposed upon the accounting officers of the Government (the act of March 3, 1817, 3 Stat. 366, and transferred to the General Accounting Office by the Budget and Accounting Act, 1921, 42 Stat. 24). Also section 304 of that Act (31 U.S.C. 74) provides that "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive

Branch of the Government." This was disregarded in the Attorney General's opinion.

Basically, it has been the position of the GAO that the law is to be construed as written and enforced in accordance with the legislative intent when it was enacted. This it is believed is what the law requires. It appears that this approach is the only proper one GAO can take--recognizing also that it is part of the Legislative branch of the Government.

If, following enactment of a law, it should occur that social conditions, economic conditions, the political atmosphere, or any other circumstances should change to such an extent that different treatment should be given, that different objectives should be established, or that different results should be obtained, it has always been the position of the GAO that the arguments in favor of change should be presented to the Congress, - - - and if the Congress, in its wisdom, agrees that circumstances so dictate, it will enact legislation to permit or require the Executive branch to take necessary action to attain new objectives. This is the very procedure which Congress directed should be followed in this particular situation. As was pointed out in the decision of August 5, 1969, by section 705(d) of the Civil Rights Act of 1964, Congress charged the Equal Employment Opportunity Commission with the specific responsibility for 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.

The Executive branch has much authority to establish and carry out social programs or policies which are not contrary to public policy, as that policy may be stated or necessarily implied by the Constitution, by Federal statutes, or by judicial precedent. However, where a statute, such as the Civil Rights Act of 1964, clearly enunciates Federal policy and the methods for enforcing such policy, the Executive may not institute programs designed to achieve objectives which are beyond those contemplated by the statute by means prohibited by the statute.

In conclusion, I wish to point out that the General Accounting Office has never considered itself omniscient on the Philadelphia Plan-- or on any other of its decisions for that matter. From the outset, the GAO has made it clear that in the discharge of its responsibilities it was ruling on the basis of the law, objectively construed--but that if the Congress or the courts were to express a different view, the General Accounting Office would, of course, be bound by such a determination. In this connection, we are awaiting the outcome of the decision in the case presently pending in the United States District Court for the Eastern District of Pennsylvania. (Contractors Ass'n of Eastern Pa. v. The Secretary of Labor, et al, Civil Action 70-18).

Thank you very much.