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Illinois Fair Employment Practices Commission Rules and Regulations for Public Contracts

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ILLINOIS FAIR EMPLOYMENT PRACTICES COMMISSION RULES AND REGULATIONS FOR PUBLIC CONTRACTS

The problems created by longstanding discrimination in employment —unemployment and underemployment—are by now familiar and efforts to solve these problems continue to occupy government attention at both the federal and state level. The Civil Rights Act of 1964[1] and the Illinois Fair Employment Practices Act,[2] passed in 1961, provided some legal protection by requiring equal employment opportunity.

While there has been progress, as a whole, minority workers have not been integrated into our national economy. This is in part due to the inherent inadequacy of reliance on legislation to cure social ills, and in part to deficiencies in the legislation itself. For example, Title VII of the Civil Rights Act provides that nothing in the Act requires that an employer give preferential treatment to minority workers.[3] Similarly, the Illinois Act provides that an employer is not precluded from selecting a non-minority worker of equal ability and merit.[4]

In an effort to overcome the effects of past discrimination, the federal executive, utilizing funding and purchasing power, has taken steps to force employers to affirmatively recruit minority workers. By executive order, a contractor is now required to prove that the effects of past discrimination in its employment practices have or will be eliminated before being allowed to enter into a contract with the federal government.[5] The Rules and Regulations adopted by the Illinois Fair Employment Practices Commission in November, 1972,

1. 42 U.S.C. §§ 2000e *et. seq.* (1964).
2. ILL. REV. STAT. ch. 48 §§ 851-867 (1971). Prior to the enactment of the FEPA, a prohibition against discriminatory practices had been required to be incorporated in every contract for construction of public buildings or public works. ILL. REV. STAT. ch. 29 § 17 (1971).
3. 42 U.S.C. § 2000e-2(j) (1964).
4. ILL. REV. STAT. ch. 48 § 851 (1971).
5. EXEC. ORDER No. 11246, 3 C.F.R. 418 (1972). For a good study of the federal program *see* Coney, *Affirmative Action Dents the National Labor Policy*, 10 DUQ. L. REV. 1 (1971).

will require similar proof on the part of companies who contract with the State. While it is not the purpose here to attempt a thorough review of the federal affirmative action program, a brief description of it may help illuminate the new Illinois Rules and Regulations.

After passage of the Civil Rights Act of 1964, President Lyndon Johnson signed Executive Order 11246 on September 4, 1964.[6] The Executive Order required that all government contractors take affirmative action to eliminate the effects of past discrimination within their organizations. The Executive Order transferred compliance supervision from the President's Committee on Equal Employment Opportunity to the Secretary of Labor, who in turn, created the Office of Federal Contract Compliance (OFCC).[7] In 1968, the Secretary of Labor transfered all of his authority to the OFCC.[8]

The federal program[9] requires government contractors to develop written plans for each of their facilities.[10] Each plan must include an analysis and identification of problem areas inherent in minority employment and must outline the specific steps which will be taken to achieve equal employment.[11] The compliance program must be taken into consideration when any new facility is opened by the contractor.[12]

If a contractor fails to comply, the Executive Order provides for a number of sanctions, varying in degree of severity: the contract may be canceled, in whole or part; or its continuance may be conditioned upon the acceptance by the OFCC of a program for future compliance; or the contractor may be debarred from future contracts until such time as the Secretary of Labor is satisfied that the contractor will carry out personnel and employment policies in compliance with provisions of the Order.[13]

Since the federal government is the single largest consumer of goods and services,[14] the practical effect of vigorous enforcement by the OFCC could be to drastically reduce the unemployment and underem-

6. 3 C.F.R. 418 (1972).
7. 31 Fed. Reg. 6921 (1966).
8. Secretary's Order No. 15-68 (August 8, 1968).
9. OFCC Rules and Regulations, 41 C.F.R. § 60-1 (1970).
10. Only those companies which employ 50 or more persons and whose contracts are in excess of $50,000 are required to furnish written programs. For contracts ranging between $10,000 and $50,000 the contractors must maintain an affirmative action profile. Contracts under $10,000 are exempted. *Id.* § 60.140.
11. *Id.*
12. *Id.*
13. EXEC. ORDER No. 11246, ch. II § 209, 3 C.F.R. 422 (1972).
14. The federal government has estimated that federal contracts cover approximately 40,000 employers and some 20 million employees. *See* Jenkins, *Study of Federal Effort to End Job Bias: A History, a Status Report, a Prognosis,* 14 How. L. J. 259, 263 (1968).

ployment of minority workers. Faced with the sanction of debarrment a contractor might find it financially impossible to refuse to bring its employment practices into line. Most importantly, the federal program shifts the burden for eliminating the effects of discriminatory practices from the government to the contractor.

Illinois FEPC Rules and Regulations for Public Contracts

In 1973, Illinois became the first state to require affirmative action as a condition in *all* contracts signed with the State.[15] The new Rules and Regulations adopted by the Commission on November 9, 1972 will become fully operative on July 1, 1973.[16] The purposes of the Rules and Regulations are to:

> . . . promote and insure equal opportunity without regard to race, color, religion, sex, national origin or ancestry in employment related to all contracts with the State of Illinois or any of its political subdivisions or municipal corporations.[17]

The Commission promulgated the Rules and Regulations under the authority vested in it by Sections 4 and 4A of the Fair Employment Practices Act:

> Every contract to which the State, any of its political subdivisions or any municipal corporation is a party shall be conditioned upon the requirement that the supplier of materials or services or the contractor and his subcontractors, and all labor organizations furnishing skilled, unskilled, and craft union skilled labor, or who may perform any such labor or services, as the case may be, shall not commit an unfair employment practice in this State as defined in this Act. To the full extent to which the State may have authority with respect to such contracts, this Section shall be applicable.[18]
>
> The Commission shall have the authority to issue rules and regulations for the purposes of enforcement and administration of Section 4 of this Act and rules and regulations adopted hereunder.

15. Technically, the Rules and Regulations apply to all contracts regardless of their value. However, enforcement activity will be applied only to contracts subject to the requirements of the Illinois Purchasing Act, ILL. REV. STAT. ch. 127 § 132.1 *et. seq.* (1969). The Purchasing Act applies to contracts in excess of $1500. The reason the Commission did not set up a dollar cutoff similar to the federal program is threefold:

1. the FEPA specifies all contracts;
2. the Rules and Regulations would not reach the contractor who performed multiple contracts with the State, all of which were individually below the cutoff, but taken together exceeded it;
3. it gives the Commission the flexibility it wants to set in-house cutoffs.

16. Requirements peculiar to construction contracts discussed *infra* at 397 became effective on April 1, 1973.

17. FEPC Rules and Regulations for Public Contracts, Article I Purpose.

18. ILL. REV. STAT. ch. 48 § 854 (1971).

> All rules and regulations adopted under this Section shall be consistent with Section 4.
>
> No contract shall be awarded by the State to any employer found by the Commission to have violated its rules and regulations until the Commission shall certify that the violation has ceased. For each violation that occurs there may be deducted [from the amount payable to the contractor by the state of Illinois] a penalty of $5 for each calendar day that the violation persists. Further, the State, any of its political subdivisions or any municipal corporation may avoid any such contract at its option and it may sue and shall recover the profits earned on such contract.[19]

In brief, the Illinois program will require State contractors to review their employee rosters and determine whether or not minorities and women are represented in numbers proportionate with their availability for employment. For contracts in excess of $1500, the contractor is required to supply the Commission with information concerning its work force and must be pre-qualified before being allowed to bid.[20] If its work force reflects unsatisfactory numbers of minorities and women, the contractor will be required to develop and implement an affirmative action program before being allowed to bid on any future contracts.[21] If the contractor refuses, it will be debarred from all State contracts.[22]

Central to the Illinois program is the Equal Employment Opportunity Clause. The Rules and Regulations require that each contract entered into by or on behalf of the State, whether or not competitive bidding is required, contain the Equal Employment Opportunity Clause.[23] The contracting agency is entrusted with the responsibility of seeing that it is included.[24] The Clause provides in part:

> During the performance of this contract, the contractor agrees as follows:
>
> That it will not discriminate against any employee or applicant for employment because of race, color, religion, sex, national origin or ancestry; and further that it will examine all job classifications to determine if minority persons or women are underutilized and will take appropriate affirmative action to rectify any such underutilization.
>
> That, if it hires additional employees in order to perform this contract or any portion hereof, it will determine the availability

19. *Id.* § 854A.
20. FEPC Rules and Reg's § 5.1.
21. *Id.*
22. *Id.* § 5.4(a).
23. *Id.* § 3.1.
24. *Id.*

> of minorities and women in the area(s) from which it may reasonably recruit and it will hire for each job classification for which employees are hired in such a way that minorities and women are not underutilized.
>
> That it will send to each labor organization or representative of workers with which it has or is bound by a collective bargaining or other agreement or understanding, a notice advising such labor organization or representative of the contractor's obligations under the Illinois Fair Employment Practices Act and the Commission's Rules and Regulations for Public Contracts. If any such labor organization or representative fails or refuses to cooperate with the contractor in its efforts to comply with such Act and Rules and Regulations, the contractor will promptly so notify the Illinois Fair Employment Practices Commission and the contracting agency and will recruit employees from other sources when necessary to fulfill its obligations thereunder.[25]

The Clause is to be treated as a material term of each contract and will be considered as incorporated, whether or not it is physically included.[26] In addition, the contractor is responsible for seeing that each contract let by him or by his subcontractor includes the Clause.[27]

The Equal Employment Opportunity Clause sets out the Commission's goal and what the contractor will be required to do. The remaining Rules and Regulations describe and detail the duties of the contractor, the procedures for compliance, the sanctions for non-compliance, and procedures for review.

Duties of the Contractor[28]

The contractor under both the Rules and Regulations and the Fair Employment Practices Act is required to refrain from engaging in unfair labor practices, such as maintaining segregated facilities or discriminating in hiring, in conditions of employment or in availability of training and apprentice programs.[29] Additionally, the Rules and Regulations require that in recruiting employees, the contractor must inform potential employees, employment agencies and labor organizations, with whom he may have collective bargaining agreements, about his obligations under the Rules and Regulations and about any affirmative action plan in operation at the time.[30]

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25. Paragraphs 3, 5, 6 and 7 are not included. FEPC Rules and Reg's § 3.1.
26. Incorporation may be by reference. *Id.* § 3.2.
27. If the subcontract is a supply subcontract involving the furnishing of supplies or services only the first paragraph is applicable. *Id.* § 3.3.
28. Contractor as used in this note includes subcontractor.
29. Facilities may be segregated as required by sex. FEPC Rules and Reg's § 4.6.
30. *Id.* § 4.5.

If the labor organization should refuse to cooperate with the contractor in his attempt to comply with his affirmative action plan, the contractor must seek workers from another source irrespective of any collective bargaining agreement.[31] This will be one of the greatest obstacles in effecting the Rules and Regulations, since, in order to be in compliance with the provisions of a State contract, the contractor may have to breach its collective bargaining agreement with all the attendant difficulties inherent in that action.[32]

The Rules and Regulations also require that the contractor examine all of its job classifications to determine whether or not there is an underutilization of minority workers or women. Underutilization means having fewer minorities or women in a particular job classification than would reasonably be expected by their availability.[33] It is the contractor's responsibility to ascertain the availability of minority and women workers. In making that determination for minorities, the contractor must take into consideration the percentage of the minority population in the area and the percentage of minority unemployment versus the percentage of nonminority unemployment.[34] The factors to be considered for women, are the number of women seeking employment and the unemployment rates for women as compared to the unemployment rates for men in the area.[35] Where the unemployment rates are not chronic, the overriding consideration will be the availability of minority and women workers in numbers sufficient for the contractor to meet its plan's goal.[36]

The Commission suggests that sources for the information might include the federal and State departments of labor, the FEPC itself, minority and women's organizations, local clergy, and the local state unemployment office. The Commission will be the judge of the accuracy and completeness of the information collected. As under the federal procedures, then, the burden is placed on the employer to support its position with acceptable statistics.

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31. *Id.*
32. See *infra* at 400-401 for discussion of federal courts position on this problem.
33. FEPC Rules and Reg's § 2.13.
34. *Id.* § 4.2(a).
35. *Id.* § 4.2(b).
36. The contractor must also consider:
    1. the number of minorities and women who have the necessary skills;
    2. the promotable and transferable minorities and women within the contractor's organization;
    3. the existence of training institutions capable of training persons in the necessary skills;
    4. the degree of training which the contractor himself could provide to open up jobs for minorities and women. *Id.* § 4.2.

Requiring the contractor to undertake a review of all its job classifications could, technically, include facilities located outside of the boundaries of Illinois. However, such a requirement is probably outside the Commission's statutory authority. The Commission intends, for the present, to enforce these Rules and Regulations primarily against a company's Illinois offices and facilities.[37]

If the contractor, after making its review, determines that women and minorities are underutilized, it must then take steps to correct the underutilization by adopting an affirmative action program. Unlike the rules and regulations which were originally adopted by the OFCC pursuant to Executive Order 11246, the FEPC Rules and Regulations contain guidelines for what the Commission will consider an acceptable affirmative action plan.[38] A plan is acceptable if it includes (1) the workforce analysis required to determine underutilization and (2) the goals and timetables the contractor intends to govern its efforts to end the identified underutilization.[39] In order to avoid the burden of possible duplication, the Commission may accept an affirmative action plan as required by another governmental program.[40]

Procedure

The Rules and Regulations require companies and individuals to be pre-qualified by the Commission before being allowed to enter bids on contracts subject to competitive bidding.[41] In order to be pre-qualified, the contractor must submit to the Commission a sworn completed Em-

37. Interview with Linda G. Mayer, Director, Public Contract Division, FEPC offices in Chicago, February 15, 1973.

38. Failure to define what was meant by an affirmative action plan was a major problem with the federal program. Guidelines were finally added in 1970 by the OFCC, three years after the regulations went into effect. 41 C.F.R. § 60-2 (1970).

39. Other items suggested but not required include:
1. programs specifically designed to more vigorously and effectively recruit minorities and/or women;
2. plans to solicit labor organizations, apprenticeship and training programs for support and participation;
3. examples of how the contractor has disseminated its equal employment policy among his employees and potential sources of minority and/or female applicants;
4. a thorough re-evaluation of current hiring and promotion criteria, techniques and procedures for relevant job classifications;
5. development of training programs by the contractor himself specifically aimed to instruct minorities and women in skills necessary for employment and advancement;
6. plans to utilize minority and/or female subcontractors and commercial institutions. FEPC Rules and Reg's § 4.3.

40. *Id.*

41. 10 days before bidding is opened, the prospective contractor must have been pre-qualified as to equal employment responsibility, or have an application pending before the Commission. In the latter case, the contractor must not be subject to a current Order of Noncompliance. *Id.* § 5.1(a)(1) & (2).

ployer Report Form—Prequalification.[42] The Commission will review the form, and, if it determines that the contractor is in compliance as to equal employment responsibility,[43] it will pre-qualify the contractor. In reviewing the form, the Commission is empowered to make whatever additional inquiry it deems necessary, including visits to the facilities and operation of the applicant.[44] If the contractor is deemed to be non-responsible, it is required to submit an affirmative action plan acceptable to the Commission or an Order of Noncompliance will be issued.[45]

If it is determined that it is in the public interest to exempt a particular contractor from the requirement of submitting a form, the Commission may do so on the written request of the contracting agency.[46]

The Rules and Regulations require that an additional form be submitted for construction contracts.[47] This form is submitted with bids made by pre-qualified contractors and includes a projection and breakdown of the total work force intended to be hired, including a projection of minority and female employee utilization. The contracting agency has the responsibility for reviewing the form and determining whether or not the contractor's projections reflect underutilization. The construction contractor will, however, have submitted the projection in duplicate and a copy of it will be sent to the FEPC upon receipt of the bid by the contracting agency. The Commission will be working closely with the contracting agencies during the implementation of the Rules and Regulations, to avoid confusion as to criteria upon which to base approval and to avoid the proliferation of standards differing greatly from agency to agency. Each agency has been asked to appoint an Equal Employment Opportunity liaison officer to handle compliance review.[48]

If the projection reflects an underutilization in any State contract, the contractor is considered to be in breach of contract and will be re-

42. FEPC Form PC-1.
43. The Regulations define "responsible" as a person who conforms to the equal employment opportunity requirements of the Rules and Regulations and is therefore eligible to bid on or be awarded a contract or subcontract. FEPC Rules and Reg's § 2.9.
44. *Id.* § 5.3.
45. *Id.* § 5.1(c).
46. *Id.* § 5.1(e).
47. Bidders Employee Utilization Form—Construction, FEPC Form PC-2.
48. Purchasing for the State is done primarily through the Department of General Services, which has E.E.O. personnel in operation. The newly created Capital Development Board will be responsible for state construction and will designate staff for review of the projection forms. The Department of Transportation, which lets contracts for highway and airport construction has a staff of 15 assigned to equal employment opportunity activities. A majority of State contracts are handled by these departments and this should limit much of the potential coordination difficulties.

quired to submit an acceptable affirmative action plan to correct the underutilization prior to the commencement of the work. The plan must include a timetable geared to the completion of the contract.[49]

Sanctions and Appeal

If a pre-qualified contractor is found to be in non-compliance during the life of the contract, the Commission will issue an Order of Noncompliance and take appropriate legal sanctions. In addition to the usual common law remedies for breach of contract, the Fair Employment Practices Act provides other specific sanctions.[50]

An appeal from an Order of Noncompliance must be taken within ten days of the date on which the contractor is served with the Order.[51] The Rules and Regulations set a timetable so that a hearing is held within seven to thirty days of filing and an Order and Decision is entered within sixty days of the hearing.[52] Judicial review may be sought from any Order and Decision of the Commission.[53]

Potential Challenges to the Regulations

If Illinois' affirmative action program is challenged, the challenge will probably be based upon one or all of the following theories:

> The Rules and Regulations exceed the authority of the Commission under the Fair Employment Practices Act;
> The Rules and Regulations are unconstitutional because they require reverse discrimination;
> The Rules and Regulations conflict with national and State labor policies by encouraging contractors to violate their collective bargaining agreements.

The argument that the Commission has exceeded its authority is perhaps the most tenable. Unlike some state statutes,[54] the Illinois Fair

49. FEPC Rules and Reg's § 5.4(a).
50. ILL. REV. STAT. ch. 48 § 854A (1971) provides that the State may avoid the contract at its option, sue and recover any profits made by the contractor on the contract, or assess a statutory penalty of $5 for each calendar day that the violation persists (contractor is in noncompliance). The amount will be deducted from that owed the contractor under the contract.
51. If no appeal is taken within that period of time, the Order of Noncompliance becomes an Order and Decision of the Commission. FEPC Rules and Reg's § 5.4(b).
52. *Id.* §§ 5.5, 5.6.
53. *Id.* Article VII.
54. The California Fair Employment Practices Act provides that the California FEPC may engage in affirmative actions with employers, employment agencies and labor organizations in furtherance of the purposes expressed in § 1411. § 1411 provides:

> It is hereby declared as the public policy of this state that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgment on account of race, religion, color, national origin, ancestry or sex.

CAL. GEN. LAWS. ANN. art. §§ 1141, 1431(a) (1969).

Employment Practices Act does not specify that the Commission may require affirmative action to correct racial and sexual imbalance in the ranks of their employees by State contractors. In addition, underutilization is not included within the definition of unfair employment practices.[55]

In defense of the Rules and Regulations, the lack of precise statutory language is not in and of itself conclusive that the Commission has exceeded its authority. In fact, the Act authorizes the Commission to require affirmative action to eliminate the effects of an unfair labor practice as to the individual complainant once a violation has been proved.[56] In addition it must, by now, be recognized that without some sort of preferential treatment, it will take years to effect full integration of minorities into the economy. And as long as the effects of past discrimination continue to be barriers to equal employment opportunity, the statutory promises remain unfulfilled. The intent of the Illinois Fair Employment Practices Act, under which the Rules and Regulations were promulgated, is to end discrimination. It is reasonable to conclude that that intent includes determination to end the effects of longstanding discrimination. This argument was advanced in *Southern Illinois Builders Association v. Ogilvie*[57] where the court sanctioned preferential hiring to increase minority participation in the construction trades:

> Discriminatory practices have taken place, and something must be done in order to rectify the situation. Such practices must be eliminated by responsible and responsive governmental agencies acting pursuant to the best interests of the community. Basic self-interests of the individual must be balanced with social interests, and in circumstances where blacks have been discriminated against for years, there is no alternative but to require that certain minorities be taken into consideration with respect to the minority percentage of the population in a given area in order to provide a starting point for equal employment opportunities.[58]

Little difficulty should be encountered if the Rules and Regulations are challenged on a constitutional basis. The Illinois Constitution does not merely prohibit discrimination in employment, it creates the *right* in the individual citizen to be "free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer."[59] Without action to correct the effects of past discrimination, that right has little value.

55. ILL. REV. STAT. ch. 48 § 853(a) (1971).
56. *Id.* § 858(f).
57. 327 F. Supp. 1154 (S.D. Ill. 1971).
58. *Id.* at 1159.
59. ILL. CONST. art. I, § 17.

The courts have rejected arguments that affirmative action conflicts with either the Civil Rights Act of 1964 or the National Labor Relations Act, and have consistently upheld OFCC regulations and programs developed under them in cooperation with several states, including Illinois. Both of these arguments were advanced in *Contractors Association of Eastern Pa. v. Sec. of Labor*,[60] in which the Philadelphia Plan[61] was challenged and in *Southern Illinois Builders Assoc. v. Ogilvie*[62] which challenged the Ogilvie Plan.[63]

The plaintiffs in these cases argued that affirmative action was inconsistent with the Civil Rights Act of 1964 and violated the fifth and fourteenth amendments because it required discrimination in favor of minorities at the expense of whites. The lower court in *Contractors Ass'n* found that the Philadelphia Plan did not conflict with the '64 Act because it did not require contractors to hire specific percentages of minority workers and if the contractor was unable to meet his commitment, he was excused on the showing of a good faith effort. The Court of Appeals reached the same conclusion, but for different reasons. It held that the prohibition against discrimination in favor of minorities in Title VII was a limitation on the 1964 Act and that Congress had not meant thereby to occupy the entire field of civil rights. Therefore, in view of the long history of executive activity in the area of civil rights,[64] by issuing Executive Order 11246, the Executive Branch continued to occupy that portion of the field which Congress had not.

60. 442 F.2d 159 (3rd Cir.), *cert. denied*, 404 U.S. 854 (1971), *affg* 311 F. Supp. 1002 (E.D. Pa. 1970).

61. The Philadelphia Plan was instituted in 1969 to eliminate discrimination in six trade unions in the Philadelphia area. It differed from prior activity of the OFCC because it was applied to all construction contracts in excess of $500,000 which *received federal assistance*. Bidders were required to submit affirmative action plans which were to include specific goals for the utilization of minority manpower in the following crafts: ironworkers, steamfitters, sheetmetal workers, plumbers and pipefitters, electrical workers and elevator construction workers.

62. The Court here relied principally on the reasoning of the Court in *Contractors Ass'n*.

63. In July of 1968, the U.S. Department of Transportation instituted a freeze on federally assisted highway construction in Madison and St. Clair Counties because of high costs and the fact that blacks did not have equal employment opportunities as required by Executive Order 11246. Meetings were held between labor unions and the federal government to come up with an acceptable affirmative action program, including the State of Illinois. In August of 1968, the Federal Aid Highway Act was passed by Congress. It required that states who received federal funds for highway construction certify that training programs existed in trades involved in highway construction sufficient to provide equal employment opportunity. The Ogilvie Plan was implemented to accomplish the goals required by the federal act. The SIBA brought suit for a declaratory judgment as to the constitutionality of the Ogilvie Plan.

64. The first Executive Order, whose subject was civil rights, was issued in 1941 by President Roosevelt. Each succeeding Chief Executive has added to the advancement of civil rights by issuing additional Executive Orders. The words affirmative action appeared for the first time in an Executive Order signed by President Kennedy in 1961.

The court was equally unimpressed by the due process arguments raised. The plaintiffs contended that the Philadelphia Plan imposed contradictory duties impossible to attain since they were required to meet certain goals of minority employment while not discriminating against qualified applicants. The court dismissed this argument as "sophistry" noting that the goals could be met without an adverse impact on the existing labor force.

Plaintiffs also contended that the Plan interfered with the exclusive union referral systems to which the contractor was bound by collective bargaining agreements and therefore violated the National Labor Relations Act. The court noted that although these arrangements were permitted by federal law, they were not *required* by it:

> Nothing in the National Labor Relations Act purports to place any limitation upon the contracting power of the federal government. If the Plan violates neither the Constitution nor federal law, the fact that its contractual provisions may be at variance with other contractual undertakings of the contractor is legally irrelevant.[65]

Contractors Ass'n is currently the leading case on affirmative action. The only substantial difference between the OFCC regulations considered there and the FEPC Rules and Regulations is the "good faith" defense available in the former. The Rules and Regulations are, however, bottomed on the concept of *availability* of minority workers and women. If insufficient numbers are available to meet the contractors goal, he will be excused. The Illinois standard of availability is more objective and easier to determine than the standard of a good faith effort, and should be equally acceptable to the courts.

Based on the foregoing discussion then, if the FEPC Rules and Regulations are challenged and the Illinois courts follow the federal lead, they should get a sympathetic hearing.

CONCLUSION

Although it is premature to draw conclusions as to the success of the new FEPC Rules and Regulations, a few comments may be in order. Initially, the Commission distributed some 37,000 pre-qualification forms to contractors who have, in the past, entered bids on State contracts. The Public Contract Division, which has a small staff, must review each of the forms returned in order to pre-qualify the applicant. Obviously there will be little time available for enforcement. Much of

65. 442 F.2d 159, 174 (1971).

the program's success will have to depend upon voluntary cooperation by the contractors. However the activities prescribed by the FEPC Rules and Regulations are time-consuming and may in fact create substantial difficulty for the contractor and may therefore inhibit voluntary cooperation.

As previously noted, the contractor is responsible for developing the information necessary to determine the availability of minority workers and women. Collecting and analyzing this type of information takes time and a degree of sophistication and skill. This task will be burdensome for all contractors and most particularly for smaller companies. Secondly, the contractor, by contracting with the State, commits himself to eliminating the vestiges of discrimination from his employee ranks. If the contractor is unable to procure the necessary personnel from union sources, he will not be excused from meeting his commitments under the State contract, and will be forced to seek employees from another source irrespective of any collective bargaining agreements by which he may be bound. Unless there is substantial cooperation on the part of the unions, the contractor may open himself up to crippling labor difficulties.

In addition, the Illinois plan requires that the principal contractor assume responsibility for seeing that his subcontractors are in compliance with the Rules and Regulations. If the subcontractor is found to be in non-compliance, then the contractor will be held in breach of his contract with the contracting agency and sanctions may be taken against him. Although it may be suggested that this is no different than guaranteeing the subcontractors work, hiring practices and preferences are probably more analogous to work habits and methods.

Taking these potential problems together, it is not unreasonable to anticipate foot dragging by State contractors in fully performing their obligations. Should this happen, and in view of the small amount of money the Illinois Legislature has been willing to invest in FEPC activities, the Commission may find it particularly tough to get its new program off the ground.

JILL NICKERSON