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State and Local Contracts and Subcontracts

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PART III: SUPPLEMENTS TO DIRECT ENFORCEMENT

STATE AND LOCAL CONTRACTS AND SUBCONTRACTS

J. EDWARD CONWAY*

Background and Estimate

The initial question presented for consideration at this session of the Symposium is whether state and local contract powers can be used to further equal employment opportunities. It is my own estimate that such powers can be so used. I reach this estimate on the basis of my experience as a member of the New York State Commission for Human Rights¹ since 1954, and particularly on my experience as the liaison commissioner in charge of the most recent and still developing phase of New York state's contract compliance program.

I should add at least one caveat to my estimate and one note of limitation on the statement of experience to support it. The conception of using state and local contract powers has been proposed and recommended in some instances to fill a need deemed to exist because of the absence of a detailed equal employment opportunity statute under the administration of an adequately staffed and financed operating agency.² I have no experience in the use of state and local contract powers standing apart from the kind of statutory and administrative foundation which does exist in the state of New York; nor does it appear from the literature that any clear evaluation can yet be made as to the effectiveness of such contract powers when they stand alone.³ Thus, my estimate and comments are confined to the situation where the use of state and local contract powers is not an alternative to direct enforcement in the sense of a substitute for it, but to a situation where such a power is supplementary to or coordinate with those possessed by a commission such as my own.

Exercise of Contract Powers as an Expression of Public Policy

Responsible and experienced public officials are not unaware of the administrative and legal questions which may come into being upon the institution of any program based upon the use of government contract powers. It is also clear, however, that the correlation of government contract powers with equal employment opportunities constitutes an underlining of public policy, which is of extreme importance because it is so readily understandable. The

* Commissioner, State Commission for Human Rights.

1. Known as the State Commission Against Discrimination from July 1, 1945 to March 20, 1962.

2. The Potomac Institute, State Executive Authority to Promote Civil Rights (1963).

3. See, e.g., Corwin, *The President: Office and Powers—1787-1957* (rev. ed. 1957), ch. IV; Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 Colum. L. Rev. 243 (1963).

fact that the government is prepared to give notice of its policy to all affected groups and persons and to the general public by presenting the possibility of such action as contract cancellation, termination or suspension and a declaration of ineligibility for future contracts, makes pointed and real, to at least a certain number of individuals and groups, a set of rights and duties which were formerly largely diffuse and academic.

The Statutory and Contractual Framework

There are advantages and disadvantages to a Symposium in the selection of a person such as myself to lead a discussion of a program with which he is associated. I have no reluctance, as I have already demonstrated, to stating a personal estimate of general values. On the other hand, I would not myself raise nor suggest the answer to any of the particular legal questions which may eventuate as the program develops. I will presumably be involved in the disposition of such questions, and I would certainly await a framework of actual fact and the benefit of argument under it before venturing a conclusion. Perhaps more important, many, if not most, of the questions I would propound may prove to be speculative and largely rhetorical. In this area, I will therefore simply call attention to the fact that there has developed, particularly on the basis of federal experience, a fairly substantial literature which raises and discusses a variety of problems and calls attention to the direction for further inquiry.⁴

It would, at the same time, seem useful to provide some analysis and history of the principal statutory provisions and standard contract clauses which come into play in the state of New York in connection with the exercise of state and local contract powers to further equal employment opportunities.

Section 220-e of the New York Labor Law

Article 8 of the New York Labor Law deals with the general subject of public work. Among its provisions are a number which go back as far as the Laws of 1909; and some appear to have even earlier antecedents.⁵ Certainly, the idea that public work contracts may be the subject of special

4. Speck, *Enforcement of Nondiscrimination Requirements for Government Contract Work*, 63 Colum. L. Rev. 243 (1963); Birnbaum, *Equal Employment Opportunity and Executive Order 10925*, 11 Kan. Law Rev. 17 (1962); Birnbaum and Burch, *Executive Order 10925 on Equal Employment Opportunity*, 8 Fed. Bar News 159 (1961), and *President Issues New Executive Order Extending Non-Discrimination Principles*, 10 Fed. Bar News 299 (1963); Pollitt, *Racial Discrimination in Employment: Proposals for Corrective Action*, 13 Buffalo L. Rev. 59, 66 (1963); Hannah, *Government by Procurement*, 18 Bus. Law 997 (1963); Note, 74 Harv. L. Rev. 526, 575 (1961); Van Cleve, *Use of Federal Procurement to Achieve National Goals*, 1961 Wis. L. Rev. 566; Miller, *Administration by Contract: A New Concern for the Administrative Lawyer*, 36 N.Y.U.L. Rev. 957 (1961); Heyman, *Government by Contract: Boon or Boner?* 21 Pub. Admin. Rev. 59 (1961); *Employment Discrimination*, 5 Race Rel. L. Rep. 569, 578 (1960); Pasley, *The Nondiscrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957).

5. E.g., the provisions covering hours and wages such as the so-called eight hour law. Cf. *State v. Metz*, 193 N.Y. 148 (1908); *Yerry v. Goodsell*, 4 A.D.2d 395, 166 N.Y.S.2d 224 (3rd Dep't 1957), *aff'd*, 4 N.Y.2d 999, 152 N.E.2d 535, 177 N.Y.S.2d 514 (1958).

treatment, under the legislative and the executive power, is not novel nor is it peculiar to the state of New York.⁶ The legislative conclusion that there is a particular antithesis between public work and discrimination because of race, creed, or color was brought into Article 8 of the New York Labor Law by the addition of section 220-e in 1935.⁷

Section 220-e, as originally enacted, applied to contracts for the state or municipalities for the construction, alteration or repair of any public building or public work. The bill was introduced by Assemblyman J. E. Stephens⁸ and became Chapter 158 of the Laws of 1935. So far as appears from a study of the official papers of that period, the 1935 bill was not a formal part of any executive program for that year, and no public document has been found which indicates that it was the bill of any particular state department.⁹

There were no changes in section 220-e until 1945 when the Temporary Commission Against Discrimination, as part of its report concerning the proposed Law Against Discrimination, suggested a number of amendments to existing statutes for the purpose of achieving "uniform phraseology." Section 220-e prior to the enactment of this bill for uniform phraseology used only the terms *race*, *creed* or *color*. The amending law in 1945 (Chapter 292) added the term *national origin*.

The second amendment to section 220-e of the Labor Law was adopted in 1950.¹⁰ The change made by this amendment was to expand the scope of the section to include contracts for the manufacture, sale or distribution of materials, equipment or supplies.¹¹ This additional coverage applied to operations performed within the territorial limits of the state of New York.

Thus, in its present form Section 220-e of the Labor Law provides that every contract on behalf of the state or a municipality for the construction, operation or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies shall contain pro-

6. See Cohen, *Public Construction Contracts and the Law* (1961); *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127-8, (1940).

7. L. 1935, ch. 138, amended by L. 1945, ch. 292. Library of Congress, Legislative Reference Service, has compiled a list of states having laws particularly providing for nondiscrimination by public contractors. See its *State Laws Dealing with Non-Discrimination in Employment* (1962) 48-9. As amplified by information from the U.S. Civil Rights Commission and data in the *Race Relations Law Reporter*, the following states would seem to warrant inclusion, although they present varying degrees of coverage:

Arizona, California, Colorado, Illinois, Indiana, Kansas, Maryland, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Vermont, Wisconsin.

8. Assembly Intro. No. 1223, PR 1308.

9. In the same year (1935) an amendment was made to section 4 of the Tax Law with reference to nondiscriminatory use of the facilities of non-profit educational organizations exempt from the real property tax, L. 1935, ch. 852. This provision was transferred to the Law Against Discrimination in 1958 to form, with adapted language, subdivision 4 of section 296. This amendment to the Tax Law, however, was introduced by a different Assemblyman (Mr. Heffand) and there is nothing to indicate that this provision and section 220-e of the Labor Law were associated or formed part of any special program.

10. L. 1950, ch. 424.

11. The 1950 amendment was suggested by the State Commission Against Discrimination (Assembly Intro. No. 1396, PR 1427).

CONTRACTS AND SUBCONTRACTS

visions by which the contractor agrees (1) that in the hiring of employees for the performance of work under the contract or subcontract, no contractor or subcontractor shall, by reason of race, creed, color or national origin, discriminate against any citizen of the state of New York who is qualified and available to perform the work to which the employment relates; (2) that no contractor or subcontractor shall discriminate against or intimidate any such employee on account of race, creed, color or national origin; (3) that there may be deducted from the amounts payable to the contractor by the state or municipality a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated; and (4) that the contract may be cancelled by the state or municipality and all money due or to become due may be forfeited for a second or any subsequent violation.

The exact language of the existing provisions is as follows.¹²

220-e. Provisions in contracts prohibiting discrimination on account of race, creed, color or national origin in employment of citizens upon public works

Every contract for or on behalf of the state or a municipality for the construction, alteration or repair of any public building or public work or for the manufacture, sale or distribution of materials, equipment or supplies shall contain provisions by which the contractor with the state or municipality agrees:

(a) That in the hiring of employees for the performance of work under this contract or any subcontract hereunder, no contractor, subcontractor, nor any person acting on behalf of such contractor or subcontractor, shall by reason of race, creed, color or national origin discriminate against any citizen of the state of New York who is qualified and available to perform the work to which the employment relates;

(b) That no contractor, subcontractor, nor any person on his behalf shall, in any manner, discriminate against or intimidate any employee hired for the performance of work under this contract on account of race, creed, color or national origin;

(c) That there may be deducted from the amount payable to the contractor by the state or municipality under this contract a penalty of five dollars for each person for each calendar day during which such person was discriminated against or intimidated in violation of the provisions of the contract;

(d) That this contract may be cancelled or terminated by the state or municipality, and all moneys due or to become due hereunder may be forfeited, for a second or any subsequent violation of the terms or conditions of this section of the contract; and

(e) The aforesaid provisions of this section covering every contract for or on behalf of the state or a municipality for the manufac-

12. During the 1964 Legislative Session a number of amendments to section 220-e were proposed, and one such bill was sent to the Governor. Its principal effect would be in connection with contracts for the manufacture, sale or distribution of materials, equipment or supplies in that it would delete from section 220-e the limitation of coverage to operations performed within the territorial limits of the state of New York.

ture, sale or distribution of materials,⁶ equipment or supplies shall be limited to operations performed within the territorial limits of the state of New York.

Section 343-8.0 of the New York City Administrative Code

The instant discussion, as defined by the title of the topic, includes local contracts as well as state contracts. It is accordingly appropriate to note that there is an increasing body of local legislation and to present for consideration by the Symposium the effect of such legislation.¹³ Perhaps the best known of such local legislative enactments in New York is section 343-8.0 of the New York City Administrative Code. This section, relating to discrimination in public contracts of the City of New York, was added to the City Administrative Code in 1942.¹⁴ The provision prohibits discrimination because of race, color or creed. (Like the first version of section 220-e of the New York State Labor Law, it does not include national origin.) It covers "any person engaged in the construction, alteration or repair of buildings or engaged in the construction or repair of streets or highways pursuant to a contract with the City, or engaged in the manufacture, sale or distribution of materials, equipment or supplies pursuant to a contract with the City." The wording in section 343-8.0 has not been altered since its enactment in 1942, and declares as follows:

343-8.0 Discrimination in employment. —a. It shall be unlawful for any person engaged in the construction, alteration or repair of buildings or engaged in the construction or repair of streets or highways pursuant to a contract with the city, or engaged in the manufacture, sale or distribution of materials, equipment or supplies pursuant to a contract with the city to refuse to employ or to refuse to continue in any employment any person on account of race, color or creed of such person.

b. It shall be unlawful for any person or any servant, agent or employee of any person, described in subdivision a to ask, indicate

13. The existence of local laws in addition to state laws extends to jurisdictions other than New York. For example, instances of each coverage as reported by various sources (see note 7, *supra*) are found in the following jurisdictions:

Arizona—Phoenix.

California—Bakersfield, San Francisco.

Illinois—Chicago.

Indiana—East Chicago, Gary.

Maryland—Baltimore.

Michigan—Ecorse, Hamtramck, Jackson, Lansing, Pontiac, River Rouge.

Minnesota—Duluth, Minneapolis, St. Paul.

Ohio—Cleveland, Toledo, Youngstown.

Pennsylvania—Braddock, Pittsburgh.

Wisconsin—Beloit, Milwaukee.

There are also instances where a local law exists in a state in which there is no comparable state law, e.g., Des Moines, Iowa.

14. L.L. 1942, No. 44. The bill was introduced in the City Council in 1942 as Intro. No. 13, PR 13, and after committee amendment was PR 78. It represented a number of changes in language from a bill introduced by the same sponsor (Councilman Diogiovanna) in 1941.

CONTRACTS AND SUBCONTRACTS

or transmit, orally or in writing, directly or indirectly, the race, color or creed or religious affiliation of any person employed or seeking employment from such person, firm or corporation.

c. The wording of section 343-8.0, subdivisions a and b, shall appear on all contracts entered into by the city, and disobedience thereto shall be deemed a violation of a material provision of the contract.

d. Any person, or the employee, manager or owner of or officer of such firm or corporation who shall violate any of the provisions of this section shall, upon conviction thereof, be punished by a fine of not more than one hundred dollars or by imprisonment for not more than thirty days, or both.

Although, as noted, there has been no change in the wording of section 343-8.0 of the Administrative Code, it has been implemented by an executive order dated February 7, 1962, issued to all city departments and agencies, by Mayor Wagner. This order includes use of the term "national origin." With a supplement, entitled "Supplement 1," the order sets forth the jurisdiction and supervision of the City Commission on Intergroup Relations (now the City Commission on Human Rights) with respect to the Code provision, and provides a compliance hearing and complaint procedure.¹⁵

Action by Local Subdivisions of Government

In 1963 the New York Legislature added Article 12-D to the General Municipal Law to provide for the creation of local human relations commissions. More than a score of such commissions have already come into existence and it appears that there will be a substantially greater number. Action in connection with contract compliance by the state and federal government has obviously engaged the interest of these commissions and it appears that their programs have begun to include recommendations to local units of government to adopt resolutions or local laws dealing with equal employment opportunities in public contracts. For example, the Rockland County Human Relations Commission has proposed the following resolution for the County of Rockland:

15. The "Purpose" and "Policy" paragraphs of the Mayor's executive order (Executive Order No. 4, February 7, 1962) declare:

"I. *Purpose.* This order and its supplement implement section 343-8.0 of the Administrative Code of the City of New York which provides for equal employment opportunity in the policies and practices of contractors for goods and services paid for by the City, and set forth the jurisdiction and supervision of the Commission on Intergroup Relations with respect thereto.

"II. *Policy.*—A. Qualified persons employed by or seeking employment with contractors of departments or agencies of the City of New York shall have equal employment, promotion and training opportunities regardless of race, creed, color or national origin.

"B. Positive and affirmative steps shall be taken by officials of city departments and by contractors to promote and assure equal employment opportunities.

"C. Compliance, hearing and complaint procedures are set forth in Supplement 1.

PROPOSED RESOLUTION COVERING DISCRIMINATION ON THE PART
OF SUPPLIERS OF THE COUNTY OF ROCKLAND

WHEREAS, Article 15 of the Executive Law of the State of New York finds and declares that practices of discrimination because of race, creed, color or national origin are not in the best interest of the public welfare, and

WHEREAS, the United States and the State of New York and other government agencies decreed that all contracts shall contain a clause prohibiting discrimination because of race, creed, color or national origin in matters of employment, now therefore be it,

RESOLVED, the County of Rockland restate and reiterate the principles set forth in Article 15 of Executive Law of the State of New York, and be it further

RESOLVED, that all contracts with the County of Rockland contain an appropriate clause against discrimination as set forth in Article 15 of Executive Law of the State of New York.

Standard Contract Form for Use by New York State Contracting Agencies

On September 12, 1963, Governor Rockefeller announced the promulgation of a new standard contract form for use by state contracting agencies, including public authorities. The form describes its seven clauses, lettered (a) through (g) as "non-discrimination clauses."

The contractor's fundamental agreement is that set forth in clause (a), namely: "The contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and will take affirmative action to insure that they are afforded equal employment opportunities without discrimination because of race, creed, color or national origin. Such action shall be taken with reference, but not be limited, to: recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training."

Clause (b) is directed to the giving of notice to labor unions or representatives of workers with whom the contractor has agreements or understandings and it provides for a number of contingencies.

Clauses (c) and (d) are directed to the giving of general public notice of the contractor's agreement. Clause (c) covers the posting of notices by the contractor; and clause (d) covers the inclusion of an equal employment opportunity statement in solicitations or advertisements for employees by the contractor.

Under clause (e) there is a reiteration of the contractor's existing duty to comply with the Law Against Discrimination and the Civil Rights Law and an agreement to furnish all information and reports necessary to ascertain compliance with the nondiscrimination clauses and with the Law Against Discrimination and the Civil Rights Law.

CONTRACTS AND SUBCONTRACTS

Clause (f) is the heart of the enforcement procedure and clause (g) provides for inclusion by the contractor of the nondiscrimination clauses and requirements in subcontracts and purchase orders.

The full text of the standard contract form is attached as an appendix.

The Enforcement Clause of the New York Standard Contract Form

It would appear useful to draw particular attention to some of the features of clause (f) of the New York nondiscrimination contract clauses. The powers stated in clause (f) are the powers to cancel, to terminate or to suspend, in whole or in part. The authority to take such action is given to the contracting agency. The clause also states that the contractor may be declared ineligible for future contracts made by or on behalf of the state or a public authority or agency of the state.¹⁶ Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

Action by the contracting agency is authorized "upon the basis of a finding made by the State Commission for Human Rights that the contractor has not complied with [the] non-discrimination clauses."

A number of steps are required before any such finding is made by the Commission. Thus, clause (f) contains the statement that, "Such finding shall be made by the State Commission for Human Rights after conciliation efforts by the Commission have failed to achieve compliance with these non-discrimination clauses and after a verified complaint has been filed with the Commission, notice thereof has been given to the contractor and an opportunity has been afforded him to be heard publicly before three members of the Commission."

In summary, then, the authority to exercise the sanction is the authority of the contracting agency; and the responsibility for making the finding upon which such authority may be based is the responsibility of the State Commission for Human Rights.

The On-Going Question

It has been my intention in presenting for discussion the topic assigned to me at this Symposium, to give some detail concerning the complex of legislative and executive directives which bear upon the general question of how state and local contracting power can be used to further equal employment opportunity. It is submitted that it is not particularly profitable to deal with the subject in terms of isolating contract compliance clauses and viewing them as if there were no correlative or coordinate legislation in existence. It would appear to be more helpful to the public which is directly affected, to the

16. The ineligibility, once declared, continues until the contractor "satisfies the State Commission for Human Rights that he has established and is carrying out a program in conformity with the provisions of [the] non-discrimination clauses."

segments of industry and labor involved and to the public administrators who are charged with enforcement, if an effort were made, by the kind of expert commentators and analysts gathered here today, to explore and define the most viable framework for action in jurisdictions such as New York where contract compliance powers do not stand alone.¹⁷

Accordingly, it is to be hoped that this kind of discussion will eventuate under the impact of the ever-increasing importance of public contracts upon the general economy and with specific relationship to the type of question which has brought this Symposium into being. Such analysis, discussion and recommendation, I assure you, is vital to give direction and cohesion to the efforts of those who, like myself, must assume the responsibilities of day-to-day administration.

APPENDIX

EQUAL EMPLOYMENT OPPORTUNITY

NON-DISCRIMINATION CLAUSES IN NEW YORK PUBLIC CONTRACTS

During the performance of this contract, the contractor agrees as follows:

(a) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin, and will take affirmative action to insure that they are afforded equal employment opportunities without discrimination because of race, creed, color or national origin. Such action shall be taken with reference, but not be limited, to: recruitment, employment, job assignment, promotion, upgrading, demotion, transfer, layoff or termination, rates of pay or other forms of compensation, and selection for training or retraining, including apprenticeship and on-the-job training.

(b) The contractor will send to each labor union or representative of workers with which he has or is bound by a collective bargaining or other agreement or understanding, a notice, to be provided by the State Commission for Human Rights, advising such labor union or representative of the contractor's agreement under clauses (a) through (g) (hereinafter called "non-discrimination clauses"). If the contractor was directed to do so by the contracting agency as part of the bid or negotiation of this contract, the contractor shall request such labor union or representative to furnish him with a written statement that such labor union or representative will not discriminate because of race, creed, color or national origin and that such labor union or representative either will affirmatively cooperate, within the limits of its legal and contractual authority, in the implementation of the policy and provisions of these non-discrimination clauses or that it consents and agrees that recruitment, employment and the terms and conditions of employment under this contract shall be in accordance with the purposes and provisions of these non-discrimination clauses. If such labor union or representative fails or refuses to comply with such a request that it furnish such a statement, the contractor shall promptly notify the State Commission for Human Rights of such failure or refusal.

(c) The contractor will post and keep posted in conspicuous places, available to employees and applicants for employment, notices to be provided by the State Commission for Human Rights setting forth the substance of the provisions of clauses

17. See also, *e.g.*, California, Illinois, Indiana, Minnesota, Ohio, and notes 7 and 13 *supra*.

CONTRACTS AND SUBCONTRACTS

(a) and (b) and such provisions of the State's laws against discrimination as the State Commission for Human Rights shall determine.

(d) The contractor will state, in all solicitations or advertisements for employees placed by or on behalf of the contractor, that all qualified applicants will be afforded equal employment opportunities without discrimination because of race, creed, color or national origin.

(e) The contractor will comply with the provisions of Sections 291-299 of the Executive Law and the Civil Rights Law, will furnish all information and reports deemed necessary by the State Commission for Human Rights under these non-discrimination clauses and such sections of the Executive Law, and will permit access to his books, records and accounts by the State Commission for Human Rights, the Attorney General and the Industrial Commissioner for the purposes of investigation to ascertain compliance with these non-discrimination clauses and such sections of the Executive Law and Civil Rights Law.

(f) This contract may be forthwith canceled, terminated or suspended, in whole or in part, by the contracting agency upon the basis of a finding made by the State Commission for Human Rights that the contractor has not complied with these non-discrimination clauses, and the contractor may be declared ineligible for future contracts made by or on behalf of the State or a public authority or agency of the State, until he satisfies the State Commission for Human Rights that he has established and is carrying out a program in conformity with the provisions of these non-discrimination clauses. Such finding shall be made by the State Commission for Human Rights after conciliation efforts by the Commission have failed to achieve compliance with these non-discrimination clauses and after a verified complaint has been filed with the Commission, notice thereof has been given to the contractor and an opportunity has been afforded him to be heard publicly before three members of the Commission. Such sanctions may be imposed and remedies invoked independently of or in addition to sanctions and remedies otherwise provided by law.

(g) The contractor will include the provisions of clauses (a) through (f) in every subcontract or purchase order in such a manner that such provisions will be binding upon each subcontractor or vendor as to operations to be performed within the State of New York. The contractor will take such action in enforcing such provisions of such subcontract or purchase order as the contracting agency may direct, including sanctions or remedies for non-compliance. If 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 shall promptly so notify the Attorney General, requesting him to intervene and protect the interests of the State of New York.