

DOCUMENT RESUME

07985 - [C3348452]

Released 9-24-78

Evaluation of Efforts by the City of Denver and Five Federal Agencies To Comply with Certain Federal Affirmative Action Requirements. CED-78-172; B-149685. September 21, 1978. Released September 29, 1978. 3 pp. + appendix (17 pp.).

Report to Rep. Patricia Schroeder; by Henry Eschwege, Director, Community and Economic Development Div.

Issue Area: Non-Discrimination and Equal Opportunity Programs: Discrimination in Federal Financial Assistance Programs (1005).

Contact: Community and Economic Development Div.

Budget Function: General Government: Other General Government (806).

Organization Concerned: Office of Management and Budget; Department of Commerce; Environmental Protection Agency; Department of Health, Education, and Welfare; Department of Housing and Urban Development; Department of Transportation; Federal Aviation Administration; Economic Development Administration; Denver: Dept. of Public Works.

Congressional Relevance: House Committee on Small Business: SBA Oversight and Minority Enterprise Subcommittee; Senate Committee on Commerce, Science, and Transportation. Rep. Patricia Schroeder.

Authority: Housing and Urban Development Act of 1968 (42 U.S.C. 17010). Public Works Employment Act of 1977 (42 U.S.C. 6705). Executive Order 11625. OMB Circular A-102.

Denver's Department of Public Works awarded approximately \$55.5 million in construction contracts during the period July 1, 1975, to December 31, 1977, under Federal grants from the following agencies: the Department of Health, Education, and Welfare; the Department of Housing and Urban Development (HUD); the Environmental Protection Agency (EPA); the Federal Aviation Administration; and the Economic Development Administration. A number of Federal affirmative action laws, rules, and regulations require Federal agencies and grant recipients to assist certain business concerns to compete for contracts financed by Federal funds. Findings/Conclusions: Minority and other groups of contractors targeted for special assistance may not have been provided with the full range of opportunities required or implied by Federal affirmative action mandates. This appeared to have been caused by the low priority placed on compliance with requirements by the Federal agencies and the lack of strong commitment to affirmative action goals by Denver and its Department of Public Works. The lack of specificity in affirmative action requirements, a possible lack of Federal enforcement authority, and implementation deficiencies could also have contributed to the problem of promoting affirmative action objectives. Policy questions which require resolution are: What price concessions are necessary to

obtain representation from the contractors to be assisted? How much risk is to be accepted in relaxing requirements on contractor prequalification? How are goals and timetables to be formulated? and What is the proper balance between Federal and local laws? Recommendations: The Secretary of HUD should review and correct weaknesses in regulations implementing the Housing and Urban Development Act of 1968. The Office of Management and Budget should determine if appropriate authority exists to enforce affirmative action other than what is found in legislation, and take actions to better organize, coordinate, and direct the activities of Federal agencies in affirmative action matters. (HTW)

REPORT BY THE U.S.

General Accounting Office

Released

9-25-78

Evaluation Of Efforts By The City Of Denver And Five Federal Agencies To Comply With Certain Federal Affirmative Action Requirements

In response to a request for an evaluation from Congresswoman Patricia Schroeder, GAO found that

- some of the affirmative action requirements were vague,
- there was a lack of definitive implementing regulations, and
- enforcement authority was uncertain.

In addition, some city contracting practices tended to limit small contractors from competing for city contracts supported by Federal funds.

The Department of Housing and Urban Development and the Office of Management and Budget should act to remedy the problems identified and improve compliance with affirmative action requirements.





UNITED STATES GENERAL ACCOUNTING OFFICE
WASHINGTON, D.C. 20548

COMMUNITY AND ECONOMIC
DEVELOPMENT DIVISION

B-149685

The Honorable Patricia Schroeder
House of Representatives

Dear Ms. Schroeder:

As requested in your September 13, 1977, letter, as supplemented by two subsequent letters (November 11 and December 15, 1977) and discussions with you and your staff, we have reviewed compliance by the city of Denver's Department of Public Works with Federal affirmative action requirements for minority and certain other categorical groups of construction contractors. We also reviewed the efforts of five Federal agencies to administer Federal affirmative action requirements under the terms of grants from which Denver awarded contracts during the periods of July 1, 1975, through December 31, 1977. The Federal agencies included in our review were the Department of Health, Education, and Welfare; the Department of Housing and Urban Development; the Environmental Protection Agency; the Federal Aviation Administration; and the Economic Development Administration.

In summary, we found that minority and other categorical groups of contractors targeted for special assistance may not have been provided with the full range of opportunities required or implied by Federal affirmative action mandates. The basic cause for this appeared to be the low priority placed on obtaining compliance with affirmative action requirements by the responsible Federal agencies and a corresponding lack of a strong commitment to affirmative action objectives by Denver and its Department of Public Works. The conditions noted also could be attributed to the lack of specificity in affirmative action requirements, a possible lack of Federal authority to enforce them, and the lack of definitive implementing regulations, procedures, goals, timetables, funding, and staffing.

Many difficult policy decisions are required and questions must be resolved to implement the Government's broad policies regarding affirmative action. These include: (1) how much is to be conceded in price to obtain representation from the contractors to be assisted, (2) how much risk is to be accepted in relaxing the requirements on contractor prequalification, (3) how are goals and timetables to be formulated, and (4) what is the proper balance between Federal and local laws?

Notwithstanding the various problems noted, there were certain indicators of recent progress in extending contracting opportunities to the target groups of contractors. Subsequent to a grievance filed by a minority association of contractors against the city of Denver alleging violation of certain Federal requirements on the basis of the Housing and Urban Development Act of 1968, Denver is considering several changes. Most notable, the Department of Public Works has agreed to eliminate prequalification requirements on all construction contracts of less than \$500,000 and indicated that it was trying to develop goals and timetables for affirmative action for contractors who qualified for preferential consideration under section 3 of the Housing and Urban Development Act of 1968.

Also, in April 1978 the local regional office of the Environmental Protection Agency had established a 15-percent minority participation goal for construction contract awards and was rewriting guidelines to implement the requirement for utilization of minority contractors. In addition, a recent Department of Transportation regulation (March 1978) has been issued requiring each grantee to prepare an affirmative action program, which must include goals with supporting justification, to promote minority business enterprise. While certain of these efforts have been difficult and tenuous, with lengthy delays, some progress, nevertheless, is being made.

We are recommending that the Secretary of Housing and Urban Development review and correct weaknesses in regulations implementing the Housing and Urban Development Act of 1968 and that the Office of Management and Budget determine if appropriate authority exists to enforce affirmative action other than what is found in legislation, and take certain actions to better organize, coordinate, and direct the activities of all Federal agencies in affirmative action matters.

The details of our findings, conclusions, recommendations, and agency comments are set forth in appendix I. We discussed a draft of this report with each of five Federal agencies visited, the Office of Management and Budget, and the city of Denver. Their comments have been considered.

As arranged with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 7 days from the date of the report. At that time, we will send copies to the Director, Office of Management and Budget; the heads of departments and agencies directly involved; the city of Denver, Colorado; and other interested parties.

Sincerely yours,

A handwritten signature in cursive script that reads "Henry Eschwege". The signature is written in dark ink and is positioned above the typed name and title.

Henry Eschwege
Director

C o n t e n t s

	<u>Page</u>
APPENDIX	
I	
EVALUATION OF EFFORTS BY THE CITY OF DENVER AND FIVE FEDERAL AGENCIES TO COMPLY WITH CERTAIN FEDERAL AFFIRMATIVE ACTION REQUIREMENTS	4
Background	4
City of Denver efforts to comply with affirmative action requirements	6
Contracting practices of Denver's Department of Public Works	7
Federal agency efforts to comply with affirmative action require- ments	10
Conclusions	16
Recommendations	17
Denver and agency comments	18
II	
MINORITY PARTICIPATION IN FEDERALLY FUNDED CONSTRUCTION CONTRACTS AWARDED BY DENVER'S DEPARTMENT OF PUBLIC WORKS	20

ABBREVIATIONS

EDA	Economic Development Administration
EPA	Environmental Protection Agency
FAA	Federal Aviation Administration
GAO	General Accounting Office
HEW	Department of Health, Education, and Welfare
HUD	Department of Housing and Urban Devel- opment
OMB	Office of Management and Budget

EVALUATION OF EFFORTS BY THE CITY OF DENVER AND
FIVE FEDERAL AGENCIES TO COMPLY WITH CERTAIN
FEDERAL AFFIRMATIVE ACTION REQUIREMENTS

BACKGROUND

The following Federal affirmative action laws, rules, and regulations require Federal agencies and Federal grant recipients to assist certain business concerns in their efforts to compete for contracts financed, in whole or in part, by Federal funds.

1. Section 3(2) of the Housing and Urban Development Act of 1968 (12 U.S.C. 1701U) requires the Secretary of Housing and Urban Development (HUD) to assure that, to the greatest extent feasible, contracts for work to be performed in connection with certain Federal funds, including Community Development Block Grant funds, be awarded to business concerns which are located in or owned in substantial part by persons residing in the area of such projects. HUD interpreted the targeted businesses as those considered as small and owned by persons living in the project area who are considered to be socially or economically disadvantaged as well as businesses considered small and located in the project area. Its regulations became effective in November 1973 to implement the provisions of the act.

2. Section 103 of the Public Works Employment Act of 1977 (42 U.S.C. 6705) requires that, except to the extent the Secretary of Commerce determines otherwise, no grant shall be made under the act for any local public works project unless the applicant gives satisfactory assurance that at least 10 percent of the amount of each grant will be expended for minority enterprises.

The act defines minority group members as Negro, Spanish-speaking, Oriental, Indian, Eskimo, and Aleut citizens of the United States. The Economic Development Administration (EDA), an agency of the Department of Commerce, is responsible for implementing this provision of the law. EDA regulations became effective in May 1977 to implement the provisions of the act.

3. Office of Management and Budget (OMB) Circular A-102, which in essence has been in existence since October 1, 1971, establishes consistent and uniform standards for the

administration of Federal grants made to State and local governments. Attachment 0 of the Circular states the grantee shall make positive efforts to use small and minority-owned business sources of supplies and services. We did not find implementing regulations by the agencies we visited to further expand the language of this requirement.

4. Section 3 of Executive Order 11625, dated October 13, 1971, requires each Federal department or agency to continue all efforts to foster and promote minority business enterprises. Minority business enterprise is defined as a business owned or controlled by socially or economically disadvantaged persons arising from such conditions as cultural, racial, and chronic economic circumstances or background. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts. Federal regulations issue pursuant to this order had been interpreted by most of the agencies we visited as applying to Federal procurement other than grant programs.

Use of minority construction contractors by
Denver's Department of Public Works

Denver's Department of Public Works awarded approximately \$55.5 million in construction contracts during the period July 1, 1975, to December 31, 1977, which were financed in whole or in part by Federal grants from the five Federal agencies included in our review. About \$2.5 million, less than 5 percent of the total amount, was awarded to minority contractors.

Since Denver had not established specific goals for minority contractor participation in federally assisted construction contracts, no measure was available to determine whether the current 5-percent level of participation was reasonable. However, Denver identified about 11 percent of the construction contracting firms in the Denver metropolitan area as being owned by minorities.

Federal affirmative action requirements included in implementing regulations of the HUD Act of 1968 and Executive Order 11625 are directed toward socially or economically disadvantaged business concerns while the 1977 Public Works Employment Act and OMB Circular A-102 Attachment 0, in part, are directed toward minority businesses. No information was readily available to determine the extent to which socially or economically disadvantaged contractors other than minorities were used by the Department of Public Works. It

should be emphasized that we did not review Denver's total effort to use minority contractors. The statistics represent only minority contractors awarded contracts by Denver's Department of Public Works.

Scope of review

We reviewed city records and interviewed city officials to determine what Denver had done to carry out affirmative action requirements. We also interviewed local construction contractors and construction contractor association representatives to obtain their views about the city and Federal agency efforts.

We reviewed records and interviewed officials of the Department of Health, Education, and Welfare (HEW), HUD, the Environmental Protection Agency (EPA), the Federal Aviation Administration (FAA), EDA, the Small Business Administration, and the Office of Minority Business Enterprises. We also reviewed reports prepared by several local agencies and other sources on the general subject of affirmative action activities.

CITY OF DENVER EFFORTS TO COMPLY WITH AFFIRMATIVE ACTION REQUIREMENTS

Although our review was directed primarily to Denver's Department of Public Works, we believe the Department's authority to respond to affirmative action requirements was limited by the city's lack of developed policies in this area. The city had no central office with responsibility for affirmative action matters, no overall formal written affirmative action policies or procedures to assist minority and other disadvantaged businesses, and no specific results-oriented goals and timetables to direct and measure its affirmative action efforts. The only affirmative action commitments specifically set forth as city policy were directed toward the hiring and promotion of individuals.

With regard to the Housing and Urban Development Act of 1968, Denver's Department of Public Works was not complying fully with various requirements in HUD's regulations or other instructions which implement section 3 of that act. Specifically, the Department

--had not established guidelines indicating the numbers and dollar amounts of construction contracts to be awarded to "Section 3" business concerns,

- had not provided preferential consideration to small business concerns which were owned by socially or economically disadvantaged persons who might qualify for the special consideration (although special consideration is provided to small businesses located in Denver), and
- did not require contractors, on a consistent basis, to furnish evidence of their efforts to notify eligible section 3 subcontractors of available opportunities.

These inactions may have resulted in the Department's not using section 3 business concerns to the greatest extent feasible as required by the act.

Notwithstanding the various problems noted, there were certain indicators of recent progress in extending contracting opportunities to the target groups of contractors. Subsequent to a grievance filed by a minority association of contractors against the city of Denver alleging violation of certain HUD requirements, Denver is considering several changes. Denver has indicated that it was attempting to develop goals and timetables for affirmative action for contractors that qualified for preferential consideration under section 3 of the Housing and Urban Development Act of 1968.

CONTRACTING PRACTICES OF DENVER'S DEPARTMENT OF PUBLIC WORKS

Certain contracting practices of the city's Department of Public Works appeared to have a significant negative effect on minority and other categorical groups of contractors covered by affirmative action requirements. In particular, we noted problems involving contractor prequalification, advertising for bid proposals, and bidding response time.

Contractor prequalification

Prequalification is the practice of judging whether, or to what degree, a contractor is financially capable and sufficiently experienced to satisfactorily perform on contracts. This practice is in addition to normal bonding requirements, which are supposed to assure satisfactory performance. Until recently, all contractors that desire to bid on Department of Public Works contracts must have prequalified before having their bids considered.

We found that although all contractors must prequalify, the costs for certified financial statements, the practice of not considering working capital and equipment available to the contractor through bank credit, and delays in processing some prequalification applications appeared to have a greater adverse effect on small and minority contractors than on large, well-established firms.

The Department's prequalification practices were recently reviewed by a certified public accounting firm at Denver's request and the FAA based on a complaint. Information in the public accounting firm study showed that 25 out of 32 cities which they contacted had no prequalification system, and the difference in their contractor default rate as compared to the seven cities with such a screening system was minimal. The FAA report concluded that most minority contractors could not meet the stringent prequalification requirements and were kept out of the bidding process.

We question the value of the Department of Public Works' prequalification system. We found that it has been applied in an inconsistent and subjective manner because the Department of Public Works has failed to establish formal written criteria. For example, in our review of 74 application files and interviews with several minority contractors, we found that

- eight contractors were prequalified to bid on contracts at a monetary level inconsistent with informal criteria provided,
- five contractors were prequalified on the basis of parent company financial statements only and without documented assurance of parent company support,
- four contractors were prequalified to bid on contracts of a greater amount than was supported by the information submitted because Department of Public Works personnel changed the data on the certified financial statements, and
- two minority contractors wishing to bid on certain projects were prevented from doing so because notification of the approval of their prequalification applications occurred too late to allow time to prepare bids.

Subsequent to the public accounting firm's study and the resultant recommendations, the Department of Public Works

recently eliminated the prequalification requirement for contracts of \$500,000 or less. Denver also commented that other changes are currently being made to the prequalification system.

Advertising for bid proposals

Department procedures for advertising invitations to bid on construction contracts appeared to have a detrimental effect on small and minority contractors, primarily because of the high cost and lack of availability of the publication currently used. Most invitations to bid are published in a privately owned journal published daily, which costs about \$400 for a year's subscription. Although the journal is made available by a local minority association of contractors, we were told by contractors that it is difficult to use these sources on a daily basis.

A few invitations to bid are published by the Department in a local general circulation newspaper. Denver believed the cost of the journal is a normal cost of doing business and the journal is an accepted central point for contractors to find bid proposals.

It appeared to us that the Department could easily expand its method of advertising bid solicitations by placing them in local general circulation newspapers to assure that a greater range of contractors were made aware of opportunities to bid on city contracts.

Bid response time

Currently the Department has no policy or procedures to assure that contractors have adequate time to prepare bids in response to bid solicitations. Some small contractors advised us that they require as much as 3 to 4 weeks to prepare their bids, and one bonding company official said it can take as much as 4 weeks to process a new application for bonding. In our review of 39 selected contracts which were funded, at least in part, by Federal funds, the number of days from the time the bid solicitation was first advertised to the advertised bid opening date ranged from 3 to 33 days. About one-half of the contracts allowed 3 weeks or less. It appeared to us that the Department could assure that a greater number of contractors could compete if more time were allowed for the preparation of bids, taking into consideration the special needs of the smaller contractors.

FEDERAL AGENCY EFFORTS TO COMPLY WITH
AFFIRMATIVE ACTION REQUIREMENTS

We found that minority and other categorical groups of contractors targeted for special assistance may not have been provided with the full range of opportunities required by Federal affirmative action mandates. The basic cause for this appeared to be the low priority placed on obtaining compliance with affirmative action requirements by the responsible Federal agencies and a corresponding lack of a strong commitment to affirmative action objectives by Denver and its Department of Public Works. Also, the conditions noted seemed attributable, in substantial part, to the lack of specificity in affirmative action requirements and the lack of definitive implementing regulations, procedures, goals, timetables, funding, and staffing.

Housing and Urban Development Act of 1968

Although the Housing and Urban Development Act of 1968 was enacted on August 1, 1968, it was not until November 23, 1973, that HUD finally implemented regulations regarding the affirmative action requirements of the act. These regulations were developed and issued during a court action to compel the Secretary to promulgate and enforce appropriate regulations implementing section 3 of the act.

One major requirement in the regulations regarding affirmative action was that the grantee develop and implement an affirmative action plan. This requirement stipulated that the grantee should include in such a plan numbers and dollar amounts of contracts proposed to be awarded to business concerns that qualified for special consideration. Although Denver was awarded Community Development block grants beginning in May 1975, it did not complete the required affirmative action plan until June 1977. Even then, HUD accepted the plan which contained no required number or dollar amounts of contracts proposed to be awarded to business concerns that qualified for special consideration. As a result, HUD had no method to effectively measure Denver's efforts to comply with the requirement. Denver is currently attempting to establish goals in compliance with the regulations.

Also, HUD's formal regional operating plan does not provide adequate time for monitoring compliance with the regulations. The only formal monitoring effort by the region's Fair Housing and Equal Opportunity Office was performed in April 1976. Regional monitoring visits have been made by

personnel responsible for the overall community development program, but little emphasis was placed on affirmative action efforts of Denver. Regional compliance reviews, a more detailed review of the city's efforts to carry out Federal requirements under section 3, have never been performed.

HUD officials in Denver advised us that no specific funding or staffing was allocated to HUD's field offices to administer affirmative action activities. Officials at HUD headquarters stated that resources for all civil rights activities are limited, but reasonably allocated.

Certain provisions in the HUD regulations issued pursuant to the HUD Act of 1968 appeared to need further review and possible revision as follows:

1. HUD regulations allow project areas to be defined several ways for purposes of qualifying local contractors for special consideration, one being the smallest political jurisdiction in which a grant project is located. Denver selected this alternative which resulted in open competition for certain contractors within the boundaries of the entire city of Denver, Colorado, approximately 100 square miles. Following complaints by a local minority contractor association, Denver is currently considering reducing the size of the project area for future projects on a test basis, and HUD has agreed with the size reduction. The reduced size of the project area should provide greater opportunities for qualified groups of business concerns.
2. According to HUD definitions, if the owner of the business lives in the project area and the business is located outside the project area, the business will be given special consideration if determined to be "small" under the guidelines of the Small Business Administration and the owner is considered socially or economically disadvantaged. However, businesses located in the project area need only meet the Small Business Administration's guidelines to qualify under the regulations. The existence of two definitions has resulted in some confusion and misunderstanding as to the application of section 3, and we believe HUD should revise the regulations to reflect a single definition for eligible business concerns.

3. HUD officials said the department had not established a register of eligible business concerns that qualify for special consideration under the HUD act of 1968 because of (1) problems in accurately identifying businesses owned by socially or economically disadvantaged persons caused by rapid changes in their status as operating businesses, (2) the lack of staff to develop, maintain, and disseminate the registry information, and (3) the inadequate guidance from HUD headquarters.

We believe the preparation of such a register, which, under the present regulations, must include all small businesses located in each designated project area and all small businesses owned by socially or economically disadvantaged persons living in each designated project area, would be a difficult and time-consuming process. We believe that if the intended group of business concerns were more clearly defined, a registry would be much easier to establish, maintain, and use and the appropriate business concerns would be more likely to receive the intended assistance.

4. HUD regulations, as stated previously, define one group of qualified business concerns as those owned by persons considered to be socially or economically disadvantaged. Denver has not focused its attention on this group of business concerns nor has HUD required Denver to do so. On the basis of discussions with both HUD and Denver officials, the identification of this group of business concerns would be very difficult. Also, the Congress has not precisely defined businesses targeted for assistance under the act. The intent may have been to assist any business or person in the project area, or to assist primarily minority business concerns of persons in the project area. We believe that the use of the term "socially or economically disadvantaged," even though defined by the Small Business Administration, has contributed to both HUD's and Denver's difficulty in identifying a definitive group of contractors for special consideration.

In a HUD section 3 task force report dated September 1976, several problems were identified, including some of those discussed above. The Secretary of HUD directed that existing section 3 regulations be amended consistent with some of the task force recommendations. Although revised regulations

were drafted and cleared under the directive, final approval by the Secretary was not obtained. Currently, nearly 2 years later, the regulations remain unchanged. Officials of HUD headquarters told us they are considering making another attempt to rewrite the section 3 regulations.

Public Works Employment Act of 1977

Section 103 of the Public Works Employment Act of 1977 requires that, except to the extent the Secretary of Commerce determines otherwise, at least 10 percent of grant funds under the act must be spent for contracts to minority business enterprises. EDA is responsible for assuring that the 10-percent provision is carried out.

We note, however, that the case of the University of California Regents versus Bakke, determined on June 28, 1978, while approving the principle of affirmative action, stated that rigid quotas based solely on race were forbidden in judging students for admission to universities. The extent to which the Bakke decision can determine the constitutionality of the requirement that 10-percent of Federal grants disbursed under the Public Works Employment Act of 1977 be set aside for minority business is unclear.

EDA requires Denver to indicate the number and dollar amounts of contracts awarded or planned to be awarded to minority firms. EDA requires some evidence that firms are bona fide minority firms and also verifies the names by comparing them with available listings of minority businesses. As of December 31, 1977, on the basis of EDA records, it appears Denver will far exceed the 10-percent requirement. (See app. II.)

However, several problems are inherent in the program, such as deciding which businesses qualify as minority businesses or when a minority business is considered the provider of supplies or only a broker. We currently are conducting a nationwide assessment of EDA's implementation of the 10-percent provision.

OMB Circular A-102

OMB Circular A-102 is designed to establish consistent and uniform standards for the administration of Federal grants made to State and local governments. One section of the Circular states that grantees shall make positive efforts to use small- and minority-owned business sources of supplies and services. The five agencies we reviewed generally did not have

adequate procedures or make concerted efforts to assure Denver's compliance with the provision. We found no agency regulations or guidelines to assist them in assuring Denver's compliance, or to assist Denver in complying with the requirement. Some agency officials told us that they encourage Denver to use minority businesses, but lacked enforcement authority, legislative sanctions, and staff to better assure compliance with the Circular provision. Other agency officials said they believe the intent of the provision is merely to encourage grantees to use minority businesses and that the burden of compliance was on the grantee. Currently, OMB is attempting to clarify this provision of the Circular by providing some examples of positive efforts. The clarification, if implemented, should provide some help to the agencies.

Office of Management and Budget (OMB) officials told us they cannot require Federal agencies to set specific affirmative action goals because they lack legislative authority to do so. They believed it presumptuous to require such affirmative action goals in programs where the Congress has not specified such a requirement.

If the Circular provision is intended merely to encourage grantees to make positive efforts to use small and minority businesses, little can be expected in addition to the grantees' planned efforts regardless of Federal requirements. We believe that if the Federal Government intends to promote affirmative action consistently through Federal grants, the Circular provision must be based on sound authority to enforce it and must be clarified so that Federal agencies and grantees fully understand what is expected of them.

Executive Order 11625

None of the five Federal agencies we reviewed was adequately implementing Executive Order 11625 relative to grant programs. Executive Order 11625 requires, in part, that each Federal agency foster and promote minority businesses. This requirement is similar to the provision in OMB Circular A-102 which states that recipients of Federal grants shall make positive efforts to use small and minority business sources of supplies and services. Although the Executive order makes the Department of Commerce responsible for developing and coordinating a national program to promote minority businesses, it also places some responsibility on each agency. Generally, the agencies we visited were directing their efforts toward Federal procurement rather than the grant programs because they believed the regulations implementing the

Executive order applied primarily to Federal procurement. An official of the Office of Minority Business Enterprise, an agency of the Department of Commerce, responsible for a National Minority Business Enterprise program, said the Office believed the order applies to grants, and regional agency officials agreed. However, OMB officials believed the order does not apply to grants.

The President recently directed all agencies to develop goals and timetables for increased minority participation and to include them in their contracts and grants programs. Subsequently, OMB proposed that construction contracts estimated to exceed \$500,000 contain a percentage goal for subcontracts with minority firms. The percentages established were to be sufficiently high to contribute to the program of increasing the share of subcontracting awards to minority businesses.

Officials of the local regional offices of HUD, EPA, FAA, and EDA told us that generally they have not adequately implemented the requirement relative to the grant programs because they have not received guidance or implementing instructions from either their own headquarters or from the Department of Commerce. The local regional offices of the Federal agencies said they had generally used a technique of persuasion and encouragement to motivate Denver to use minority businesses, but the results have not been adequate. A recent EPA study concluded that the present minority business enterprise program through Federal grants is being inadequately enforced by most EPA regions, including Denver.

We were told by various Federal regional officials that, in addition to the lack of guidance to implement the Executive order, several other problems exist, including

- a lack of enforcement authority to require the grantees to use minority businesses;
- a lack of practical sanctions which can be applied if a grantee does not adequately promote minority business participation in grant-assisted contracts; and
- a lack of staff to implement, monitor, and enforce grantee efforts.

However, some efforts are being made to implement the Executive order relative to grants. In April 1978 the local EPA region established a minority participation goal of 15 percent for construction contract awards and was rewriting guidelines to implement the requirement for utilization of

minority contractors. In addition, a March 1978 Department of Transportation regulation was issued requiring each grantee to prepare an affirmative action program to promote minority business enterprise which must include goals with supporting justification.

Since Federal agencies have considerable control over funds through the grant program, we believe a clear determination must be made as to whether or not Executive Order 11625 applies to the grant program and the responsibility of each Federal agency to implement it.

CONCLUSIONS

Although the scope of our review was relatively narrow, in that it focused only on Denver and five Federal agencies which awarded grants to that city, we believe lessons can be learned from Denver's problems which have nationwide significance. In particular, it seems clear that frustrations, disillusionment, and serious problems of Government credibility are created when legislation and directives from top levels of Government are not followed up with specific administrative regulations, instructions, and procedures, together with the necessary funding and staffing to implement such requirements at the field level. A notable example of this was the affirmative action requirements in the Housing and Urban Development Act of 1968. It took 5 years and a court action before HUD finally issued implementing regulations. Three years later, a HUD task force reported weaknesses in the regulations, but no action was taken. Currently, a total of 10 years from the date of the act, key provisions of the implementing regulations had still not been carried out.

The essence of the problem of promoting affirmative action objectives in Denver appeared to be the clash between longstanding traditional and proven methods of contracting through local laws and the more socially oriented policy of promoting the growth and development of minority and other categorical groups of contractors. It is argued that traditional practices of using contractors with the greatest resources and proven experience will bring the greatest assurance that a maximum return will be obtained for money expended. However, it can also be argued that providing opportunities to less equipped and experienced contractors will result in a variety of social benefits not easily calculable.

Many difficult policy decisions are required and questions must be resolved to implement the Government's broad

policies regarding affirmative action. These include: (1) how much is to be conceded in price to obtain representation from the contractors to be assisted, (2) how much risk is to be accepted in relaxing the requirements on contractor pre-qualification, (3) how are goals and timetables to be formulated, and (4) what is the proper balance between Federal and local laws?

We believe the level of effort desired and beneficiaries to be served by Federal policies for assisting minority and other categorical groups of contractors should be more clearly stated in both the applicable laws and Federal directives. Terms such as "positive efforts," "foster and promote," and "socially or economically disadvantaged" are susceptible to widely varying interpretations, and consequently, widely varying efforts to implement them. For example, when requirements are reasonably clear, as in the 1977 Public Works Employment Act, which requires that at least 10 percent of the grant funds be expended for minority businesses, implementation by Denver appeared effective. Conversely, under OMB Circular A-102, which requires grantees to make positive efforts to use minority sources of supplies and services, we found very little documented efforts of compliance by either Denver or the Federal agencies. There is also a serious question as to whether the Federal Government has the authority to enforce the provision.

Conditions found in Denver suggest a need for the several Federal agencies with similar mandates to enter into cooperative agreements for greater efficiency, economy, and effectiveness in administering special contracting policies relative to minority and other categorical groups of contractors. There is a similar need for greater consistency in approach and in regulations. Better and closer relationships are needed between Federal and local agencies to lessen the likelihood of burdensome and duplicative monitoring of grantees. The President recently established a Reorganization Project which includes a task force considering the problems involved in implementing affirmative action provisions. An official of the task force on civil rights informed us that the task force recognized the problems identified in our report and is considering recommendations to address some of them. However, no recommendation had been published at the conclusion of our review.

RECOMMENDATIONS

Certain fundamental actions are needed to achieve a reasonable measure of credibility, efficiency, and effectiveness

in Federal efforts to assure that Federal affirmative action requirements relative to business concerns are wanted and are being met.

We recommend that the Secretary of Housing and Urban Development, relative to section 3 of the HUD Act of 1968,

- review the weaknesses in the existing Federal regulations identified in this report and the 1976 HUD task force report (see p. 12) and take action to correct them and
- provide the necessary direction and, if possible, resources to Region VIII to adequately assure Denver's compliance.

We recommend that the Director of the Office of Management and Budget:

- Review the affirmative action provisions of OMB Circular A-102 and Executive Order 11625 and determine if adequate authority exists to enforce them through Federal grants. If such authority is found, we recommend that the provisions be more specifically stated so that agencies and grantees know what is expected. If there is inadequate authority to enforce the provisions, proposed legislation should be prepared and forwarded to the Congress for its consideration.
- Provide adequate funding and staff to agencies for proper implementation of affirmative action provisions after they have been clearly identified.
- Take a leadership role in developing a coordinated governmentwide program for obtaining compliance with affirmative action requirements and assigning lead agencies to monitor affirmative action efforts of grantees.
- Work with the agencies to provide regulations or, when necessary, proposed legislation to define the vague and troublesome terms in existing legislation and regulations which attempt to identify certain groups of business concerns for special assistance.

DENVER AND AGENCY COMMENTS

Denver's major concern with our report was that we did not consider total city efforts to assist minority contractors. It believes that activities contracted through its

Department of Public Works are, by the complexity of their nature and size of the projects, necessarily subject to a formal bid procedure. It was the City's view that a less restricted study would demonstrate that, wherever discretion was available in the contracting process, city and Federal affirmative action objectives played a significant role.

Officials of HEW, HUD, EPA, FAA, and EDA generally agreed with a draft of this report. OMB officials believed our recommendations should be directed at specific agencies rather than OMB. However, we believe that OMB is the appropriate office to address the problem of determining if proper authority exists to enforce affirmative action other than what is included in specific legislative acts, such as the Public Works Employment Act of 1977 and the Housing and Urban Development Act of 1968. Also, we believe OMB is the appropriate agency to address the problem as a whole and to provide consistent and uniform guidance to the Federal agencies consistent with specific program requirements.

MINORITY UTILIZATION OF FEDERALLY FUNDED
CONSTRUCTION CONTRACTS AWARDED BY
DENVER'S DEPARTMENT OF PUBLIC WORKS (note a)

<u>Source of Federal funds</u>	<u>Total contract amounts (note b)</u>	<u>Amounts awarded to minority firms</u>	<u>Percent awarded to minority firms</u>
Economic Development Adminis- tration:			
1977 Public Works Employment Act	\$ 4,955,000	c/\$1,579,000	31.9
1976 Public Works Employment Act	3,132,000	108,000	3.4
Environmental Protection Agency	13,526,000	140,000	1.0
Federal Aviation Administration	24,659,000	164,000	.7
Department of Health, Education, and Welfare	100,000	-	-
Department of Housing and Urban Development	<u>9,105,000</u>	476,000	5.2
Total	<u>\$55,477,000</u>	<u>\$2,476,000</u>	4.4
Net of EDA's 1977 Public Works Employment Act Funds	<u>\$50,522,000</u>	d/\$ 888,000	d/1.8

a/Contracts awarded between July 1, 1975, and December 31, 1977.

b/Amounts shown include both Federal and other funds if used.

c/The \$1,579,000 awarded to minority firms funded through the 1977 Public Works Employment Act represents 64 percent of the total funds awarded to minority firms by the five Federal agencies.

d/Subtracting funds awarded to minority firms funded through the 1977 Public Works Employment Act would substantially reduce the amount minority firms received--from \$2,467,000 to \$888,000. Participation would drop from 4.4 percent overall to 1.8 percent overall.

(38107)