

STATE CONTRACT COMPLIANCE EFFORTS IN MISSOURI
March 1983

A report of the Missouri Advisory Committee to the United States Commission on Civil Rights prepared for the information and consideration of the Commission. This report will be considered by the Commission, and the Commission will make public its reaction. In the meantime, the contents of this report should not be attributed to the Commission but only to the Missouri Advisory Committee.

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--A report prepared by the Missouri Advisory
Committee to the U.S. Commission on Civil Rights

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The findings and recommendations contained in this report are those of the Missouri Advisory Committee to the United States Commission on Civil Rights and, as such, are not attributable to the Commission. This report has been prepared by the State Advisory Committee for submission to the Commission and will be considered by the Commission in formulating its recommendations to the President and Congress.

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LETTER OF TRANSMITTAL

Missouri Advisory Committee to the
U.S. Commission on Civil Rights
March 1983

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Dear Commissioners:

The Missouri Advisory Committee submits this report on its study of the contract compliance efforts of Missouri State agencies. The Advisory Committee obtained information for this study from the Office of the Governor, Office of Administration, Department of Highway and Transportation, Department of Higher Education and some State higher education facilities. In addition, information was obtained from minority and women businesspeople. The State agencies and the Governor were given an opportunity to comment on a draft of this report and their comments and corrections have been incorporated.

The Advisory Committee found that the Office of Administration proposed contract compliance procedures will not be effective because they impose an excessive burden on the State affirmative action officer and do not provide adequate resources; there are no guidelines to clearly define what the State expects from contractors; fundamentally discriminatory practices in the contracting process will not be thoroughly explored nor is it clear that if identified they will be corrected; the chain of command minimizes the role of those with knowledge of contract compliance deficiencies; the State affirmative action officer's reviews will be hampered by her dependence on the goodwill of division directors; there are no effective sanctions for substantive noncompliance. The Committee urges the Governor to appoint a blue-ribbon taskforce charged with responsibility for devising a comprehensive contract compliance procedure and estimating the resources necessary.

The Missouri Department of Highway and Transportation does have an extensive contract compliance program. But the Advisory Committee found its implementation was inadequate. The Committee urges the Chief Engineer of the Department of Highway and Transportation review his program and make needed improvements.

The Missouri Department of Higher Education does not coordinate the compliance activities of the various State higher education institutions or facilities. The Advisory Committee found individual facility efforts nonexistent. The Committee urges the Department of Higher Education develop a comprehensive contract compliance system.

We urge you to concur with our recommendations and to assist the Committee in its follow-up activities.

Respectfully,

JOANNE M. COLLINS, Chairperson
Missouri Advisory Committee

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1. INTRODUCTION

The Missouri Advisory Committee to the U.S. Commission on Civil Rights has had a longstanding concern about the affirmative action efforts of Missouri State government. In 1978 and 1982 it reviewed State government affirmative action efforts.¹ It reviewed the contract compliance efforts of the State departments of social services and mental health as part of a study of the implementation of the new Federal block grant regulations.²

In June 1982 Missourians approved a constitutional amendment authorizing the sale of \$600 million in bonds to finance critically needed State construction and maintenance projects and to help local communities fund economic development projects.³ The purpose of this bond issue was to make needed public expenditures that would help put people back to work.⁴ The Governor proposed to concentrate in the first year on maintenance and repair projects both because they were the most necessary and because they were more labor intensive than construction projects and could begin almost immediately.⁵ In addition to a variety of State projects, 15 percent of the first expenditure of \$75 million would go to local projects that would provide infrastructure for future economic development.⁶ In short, a large number of potential jobs, funded by the State, would be created from the expenditure of the first portion of the bond funds.

The Missouri Advisory Committee wondered whether minorities and women would get a fair share of those jobs and whether minority and female-owned businesses would get a reasonable opportunity to participate in the various projects. To prepare this monograph, the Committee obtained data from the Governor's Assistant for Governmental Operations, the State Affirmative Action Officer and knowledgeable persons connected to minority and female-owned businesses.

The latest data on the State's private sector labor force are for the years 1978 and 1980. In that period the black male share was 5.9 percent; the black female share rose from 5.4 to 5.6 percent; the Hispanic male share from 0.6 to 0.7 percent; the Hispanic female share remained constant at 0.4 percent.⁷ But the percentages of those involved in the kinds of occupations likely to benefit from construction and repair projects were larger. In the crafts, operatives, laborers and service workers job categories, 12.5 percent in 1978 and 15.2 percent in 1980 were black; 1 percent were Hispanic in both years; white women were 22.7 percent in 1978 and 25.3 percent in 1980.⁸ In short, if minorities and women benefited from the employment opportunities the State was creating in numbers proportionate to their representation in the private sector work forces, there would be many who would be employed on the various State projects, the exact numbers depending on the total number of jobs that might be created. The Advisory Committee believes that approximate representation would be a reasonable goal, allowing for variation depending on the particular skills needed and their availability.

The most recent data available on the numbers of businesses owned by minorities and women in Missouri was collected in 1977 by the Bureau of the Census. There were substantial numbers of minority and women-owned businesses in the State. There were 5,214 black-owned businesses in the State with gross receipts of \$158,770,000; 924 of these employed 3,260 persons. There were many black-owned businesses in sectors relevant to State procurement needs: 353 in construction, 30 in manufacturing and 28 in wholesaling. Most black-owned businesses were in the St. Louis or Kansas City metropolitan areas. In the Kansas City Standard Metropolitan Statistical Area (that includes some Kansas counties but close enough to Kansas City so that companies could (and probably do) transact business in Missouri), there were 1,967 black-owned businesses including 142 in construction, 14 in

manufacturing and 13 in wholesaling. In the St. Louis Standard Metropolitan Statistical Area (which includes some Illinois counties), there were 3,765 black-owned businesses including 240 in construction, 20 in manufacturing and 23 in wholesaling.⁹ There were 380 Hispanic-owned businesses in Missouri that had gross receipts of \$15,656,000; 74 businesses employed 263 persons. There were some Hispanic-owned businesses in sectors relevant to State procurement needs: 28 in construction, 12 in manufacturing and 5 in wholesaling. Most Hispanic-owned businesses were concentrated in the Kansas City and St. Louis areas. There were 264 Hispanic-owned businesses in the Kansas City SMSA, including 20 in construction and 7 in manufacturing. There were 191 Hispanic-owned businesses in the St. Louis SMSA including 9 in construction, 5 in manufacturing and 3 in wholesaling.¹⁰ There were 408 firms owned by Asian Americans in the State. They had gross receipts of \$21,083,000. These firms included 132 that had a total of 480 employees. There were 46 firms in the State owned by American Indians. They had gross receipts of \$1,136,000. Seven Indian-owned firms had 31 employees. There were 19 construction firms, 8 manufacturing firms and 6 wholesaling firms owned by either Indians, Asians or unspecified minorities in the State. Most such businesses were in the St. Louis or Kansas City SMSAs.¹¹

Women-owned businesses are numerous in Missouri. In 1977 the Bureau of the Census counted 16,249 with gross receipts totaling \$912,077,000. Of these 4,085 had employees and employed 20,877 persons. These women-owned businesses included 501 construction companies, 386 manufacturing companies and 334 wholesalers. Twenty-seven of Missouri's 115 counties (including St. Louis City) had more than 100 woman-owned businesses. Bates had 156, including 3 construction, 1 manufacturing, 2 wholesaling; Boone had 318, including 15 construction, 15 manufacturing, 2 wholesaling; Buchanan had 252, including 12 construction, 3 manufacturing, 7 wholesaling; Butler had 154, including 5

construction, 4 manufacturing, 4 wholesaling; Camden had 101, including 9 construction, 2 manufacturing, 2 wholesaling; Cape Girardeau had 160, including 4 construction, 1 manufacturing, 5 wholesaling; Cass had 130, including 4 construction, 4 manufacturing, 3 wholesaling; Clay had 625, including 15 construction, 7 manufacturing, 4 wholesaling; Cole had 200, including 6 construction, 5 manufacturing, 5 wholesaling; Dunklin had 114, including 4 construction, 2 manufacturing, 2 wholesaling; Franklin had 165, including 9 construction, 1 manufacturing, 1 wholesaling; Greene had 698, including 28 construction, 12 manufacturing, 11 wholesaling; Howell had 114, including 4 construction, 3 manufacturing, 5 wholesaling; Jackson had 2,465, including 73 construction, 75 manufacturing, 56 wholesaling; Jasper had 379, including 10 construction, 10 manufacturing, 14 wholesaling; Jefferson had 245, including 13 construction, 3 manufacturing, 1 wholesaling; Newton had 118, including 4 construction, 4 manufacturing, 4 wholesaling; Pettis had 118, including 4 construction, 2 manufacturing, 4 wholesaling; Platte had 120, including 5 construction, 3 manufacturing, 2 wholesaling; Randolph had 105, including 4 construction, 2 manufacturing, 3 wholesaling; St. Charles had 274, including 14 construction, 3 manufacturing, 4 wholesaling; St. Francois had 132, including 1 construction, 1 manufacturing, 2 wholesaling; St. Louis City had 1,626, including 33 construction, 48 manufacturing, 35 wholesaling; St. Louis County had 3,072, including 103 construction, 84 manufacturing, 69 wholesaling; Scott had 117, including 4 construction and 2 wholesaling; Stoddard had 103, including 5 construction, 1 manufacturing, 4 wholesaling; Taney had 117, including 4 construction and 3 manufacturing.¹² The purpose of this long listing is to indicate that there were a large number of women-owned businesses scattered throughout the State that could do business with State government.

The census does not have figures for the total numbers of businesses in the State. Thus, it is impossible to determine what percentage of firms are minority or woman-owned. But it is clear that there are many such firms and that there is ample scope for a purchaser to find such companies if they are sought. Although data on the availability of minority or female-owned businesses capable of performing the work needed by the State are unobtainable, based on its discussions with minority and women business associations, the Advisory Committee believes that many potential contractors are available that are minority or women-owned. While no precise goal measuring device could be obtained, the Advisory Committee believed that it would be possible to assess the effectiveness of State and local efforts to ensure that minority and women-owned businesses were aware of contracting opportunities and were given every possible assistance in bidding for and obtaining contracts to do the work the new bond issue would provide. The Committee therefore sought to determine whether State efforts to ensure minority and female participation in contracting were sufficient to assure that a maximum effort had been made to obtain minority and female participation as contractors.

In particular, the Advisory Committee wanted to know whether the existing mechanisms for monitoring State contractor compliance with existing contract provisions requiring nondiscrimination and assuring opportunities for minorities and women were effective. Thus, they asked about the quality and quantity of reviews undertaken by the various State agencies with responsibility for monitoring contract performance. The Committee wanted to know whether the agencies were reviewing contractors' activities, whether those reviews were sufficient to determine compliance and what was being done when noncompliance was discovered. Given the relatively large number of new contracts to be issued with the bond money, the Committee wanted to know what

further efforts the State and its agencies were undertaking to ensure an efficient contract compliance system. The Committee sought to determine whether there were measurable objectives for the agencies activities and whether the agencies had set objectives for their contractors.

In Chapter Two of the monograph, the Committee reviews the funding provided through the new bond issue and the civil rights debates regarding their utilization. In Chapter Three, the Committee reviews the compliance activities of the Governor and the State Affirmative Action Officer. In Chapter Four, the compliance activities of the agencies expending bond funds are examined: the Office of Administration, the Department of Highway and Transportation, and the State university campuses. Chapter Five contains the Committee's conclusions, findings and recommendations.

This study was undertaken by the Advisory Committee pursuant to its mandate under the Civil Rights Act of 1957, as amended, that it study civil rights developments within the State and report its findings and recommendations to the Commission for their consideration.

Notes

1. Missouri Advisory Committee, State Government Affirmative Action in Mid-America (1978) and State Government Affirmative Action in Mid-America: An Update (1982).
2. Missouri Advisory Committee, State and Federal Civil Rights Enforcement in Missouri--Nondiscrimination in the New Health and Human Services Block Grant Programs (1982).
3. Message by Governor Kit Bond to a Special Session of the General Assembly, Aug. 16, 1982.
4. Ibid., p. 2.
5. Ibid., p. 3.
6. Ibid., p. 11.
7. Data supplied by EEOC, on file at CSRO; EEOC, 1980 Report: Job Patterns for Minorities and Women in Private Industry, 1980 (April 1982), Table 2.
8. Ibid.
9. Bureau of the Census, 1977 Survey of Minority-Owned Business Enterprises: Black (MB 77-1)(December 1979), tables 1, 2, 3, 4.
10. Bureau of the Census, 1977 Survey of Minority-Owned Business Enterprises: Spanish Origin (MB 77-2)(December 1979), tables 1, 2, 3, 4.
11. Bureau of the Census, 1977 Survey of Minority-Owned Business Enterprises: Asian Americans, American Indians and Others (MB 77-3)(November 1980), tables 1, 2, 3, 4.
12. Bureau of the Census, 1977 Economic Censuses: Women-Owned Businesses (WB 77-1)(May 1980), tables 2, 3, 4.

2. THE BOND ISSUE

In August 1982, the voters of Missouri approved the issuance of \$600 million in State bonds to finance a variety of construction and repair projects for State and local government agencies. The General Assembly allocated the first \$40 million in a Special Session held in the fall. In fact, since the legislature also appropriated funds from the General Revenue Fund, for some projects, the Special session allocated some \$78,151,477 in State funds (of course, some projects would generate Federal matching funds as well).¹

The Department of Agriculture got \$1,408,409; Natural Resources, \$14,483,087; Office of Administration, \$1,321,680; Highway and Transportation, \$4,500,060; Mental Health, \$16,728,650; Public Safety, \$1,611,056; Corrections, \$10,910,593; Social Services, \$2,787,471.² Of the 228 project allocations, 18 (7.9 percent) were for amounts under \$25,000 and 71 (31.1 percent) were for amounts under \$100,000.³ In addition, it should be noted that many larger sums involved projects scattered over several locations that were essentially separate (such as park-site improvements).⁴ Only two departments had none of the smaller projects.⁵ In short, there were many opportunities for minority/female-owned companies which tend to be smaller than those owned by white males to participate in the newly funded projects. Indeed, the kinds of contracts being offered were particularly likely to appeal to smaller contractors. Many were for such items as interior painting, general maintenance and repair of curbs, sidewalks and streets, sealing streets and parking areas, replacing ceiling tiles, routine road repairs.⁶

The only significant controversy surrounding the allocation of funds concerned the geographic distribution. Essentially this pitted Kansas City against St. Louis. By the end, Kansas City appeared to have gained. But in addition, both urban areas gained somewhat at the expense of the rural

areas.⁷ There was no real discussion of the benefits that might accrue to particular ethnic or sex groups. At no point was the quality of contract compliance ever raised.⁸ About 15 percent of the funds allocated went to projects in the St. Louis or Kansas City areas. A further 20 percent went to projects in other cities. The balance went to outstate locations (or to locations whose geographic position could not be determined from the budget.)⁹ This, as a practical matter, might pose a problem for minority and women-owned companies that tend to be concentrated in urban areas, while opportunities were concentrated elsewhere.

Notes

1. Second Extraordinary Session, 81st General Assembly, Missouri, House Bills Nos. 1, 2, 3.
2. Ibid.
3. Ibid.
4. See for example, House Bill 2, Sec. 2.210.
5. House Bills 1, 2, 3.
6. Ibid.
7. Kansas City Star, Aug. 17, 1982; Kansas City Times, Aug. 18, 1982; Kansas City Times, Aug. 19, 1982; Kansas City Star, Aug. 22, 1982; Kansas City Star, Aug. 23, 1982.
8. Ibid.
9. Ibid.

3. STATE CONTRACT COMPLIANCE REGULATIONS

State requirements for nondiscrimination in State contracting were established by former Governor Joseph Teasdale in an amendment to his executive order of March 1978 establishing a State affirmative action policy. That order required that a clause prohibiting discrimination be included in every State contract and that contractors and subcontractors be required to notify unions of their intent to abide by this clause. "Such contractual provision shall be fully and effectively enforced and any breach of such provisions shall be regarded as a material breach of the contract with attendant consequences."¹

In Executive Order 81-17 of August 1981, Governor Christopher Bond considerably expanded the scope of contract prohibitions of discrimination by requiring that contractors with 50 or more employees who did \$50,000 or more in business with the State prepare an affirmative action program plan regarding recruiting, hiring, promoting, training. The plan was to contain a written policy statement, identify a person responsible, establish nondiscriminatory selection standards, objective measures to analyze recruitment, an upward mobility system, a wage and salary structure and standards applicable to layoff, recall, discharge, demotion and discipline. The plan also was to exclude discrimination from all collective bargaining agreements and establish a system of internal auditing of compliance. The contracting State agency was authorized to use "any reasonable procedures available, including, but not limited to requests, reports, site visits and inspections of relevant documents of contractors and subcontractors."² This order was amended by Executive Order 82-27 to require an affirmative action program of employers of 50 or more workers, regardless of the value of the contracts.³ Neither of these orders provided for any sanctions for noncompliance, such as that provided by the Teasdale order.

To complement the Executive Order, the State Office of Administration made modifications in the documentation and standards required for all bid contracts.⁴ Under Article 5, bidders are required to agree to provide required copies of affirmative action plans within 14 days of a tender.⁵ Under Article 11(B) the State requires that in addition to returning a properly executed copy of a contract, the bidder provide the required copies of the affirmative action plan within 14 days of receipt of the draft contract. Article VI of the General Conditions of the Contract restates the requirements of the Executive Order. It also states that the contractor and subcontractor must state in all advertisements for employees that all qualified applicants will be considered. The terms state that "In the event of the Contractor's or a Subcontractor's noncompliance with the anti-discrimination clause of the Contract, the Owner may cancel this contract in whole or in part or require the Contractor to terminate his contract with the Subcontractor."⁶ In addition, the contractor and his subcontractors are required to provide quarterly reports on the number and percentage of minority workmen, classified by trade, and a list of all minority subcontractors involved on the project. The report is to include: "The total number of minority workmen on the construction project, classified by trade, on the last regular working day of the month of February, May, August, November;" the percentage of minority workmen in each trade; a list of minority subcontractors, their trade and mailing address, the dollar value of work completed by each minority subcontractor during each reporting period.⁷ Article 27(B) of the General Conditions provides that payment can be withheld from contractors that fail to submit the required quarterly reports on minority employment.

The General Conditions provide that bids must be followed by copies of affirmative action plans and similarly that when a contract is signed an

affirmative action plan (or waiver affidavit) must be delivered promptly. But no enforcing mechanism is established to determine whether these conditions have been met or what level of penalty should be imposed for noncompliance.⁸ There are no standards established to determine when the provisions governing affirmative action have been violated (other than the reporting requirement). Consequently, the Office of Administration was unable to tell the Advisory Committee what levels of noncompliance would be required for any given sanction to be imposed. Similarly, there are no standards established to show what would constitute effective affirmative action and therefore no way for either contractors or State officials to determine what would constitute good faith compliance with the affirmative action clauses. Indeed, it could be argued that so long as a plan is presented, irrespective of what the plan specifies, it will have to be accepted and that noncompliance with a contractor's own plan is not a basis for termination, since no standards exist.⁹

According to the Governor's Executive Assistant for Governmental Operations, Alden Shields, the State affirmative action officer "will implement a new process of systematic contract review in conjunction with the State minority contracts coordinator and the State minority business coordinator."¹⁰ But specific formal delegation of this responsibility from the Commissioner of Administration to the affirmative action officer has yet to occur.¹¹ The State Affirmative Action Officer stated that there were plans for implementation, but these had not been put in writing.¹² The coordinating responsibility with other agencies and even within her own department would depend largely on good will. The department believed that successful implementation would require cooperation and support from its division directors (especially those in construction and design and purchasing). Consequently, the affirmative action officer could only request,

not require their assistance or that of their staffs in collecting data she would need regarding contracts let by the department.¹³ Similarly, she could only request information from the other contracting agencies. She would have to request help from her commissioner to require data from her own department or to strongly request data from other departments.¹⁴

Three forms are available for the compliance program: the quarterly report, a contractor questionnaire and a checklist for evaluating affirmative action plans. An early draft of the employer quarterly report was based on EEOC's Form 4 for State and local governments and divides workers by categories appropriate to State government. It was not an appropriate form for monitoring State contractors, especially in construction. It was unclear to the Advisory Committee why the State chose to use this in preference to EEO-1 forms used in the private sector or the even more appropriate forms used by the Federal Highway Administration or the Office of Federal Contract Compliance Programs for monitoring Federal construction and supplies and services contractors. It was clear that the form would not provide the data needed to determine representation by trade. Nor would it provide data on age or handicapped worker utilization. Similarly, it required data by categories such as public welfare that are appropriate to local or State governments but inappropriate for construction or supplies and services contractors. These deficiencies were discussed with the State Affirmative Action Officer who agreed to propose a new form based on the Advisory Committee staff's suggestions.

The "Contractors' Affirmative Action Questionnaire" is to be completed by contractors. It asks a number of questions about the company, its parent organization and the size of the State project staff. It also asks whether it is the policy of the company "to recruit, hire, train, upgrade, promote and discipline persons without regard to race, color, religion, sex, national

origin or ancestry," whether a company official has been assigned to ensure this, for a copy of any company affirmative action plan, whether recruitment sources have been notified of the company's intent not to discriminate, whether there are specific goals and timetables, whether subcontractors have been notified they must comply with nondiscrimination regulations, whether the company has conducted an underutilization analysis, whether collective bargaining agreements prohibit discrimination.¹⁵ It is not clear at this stage whether the statements contained in this questionnaire will be verified by the Office of Administration or whether this form will be used by other State agencies with procurement authority. The form does not ask for information about policies regarding the handicapped or older persons. The document does not provide standards for answering the questions and does not suggest that failure to do any of the activities might constitute a basis for alleging a violation of a contract.

The "Suggested Items for Evaluation of Affirmative Action Plans and Programs" has two significant omissions. At no point does it require the employer to conduct a utilization analysis in comparison to the available laborforce. Nor does it require development of objectives and timeframes for implementing those. Consequently, an employer would have no basis for knowing how its workforce compared to what was available and is not encouraged to set either quantitative or action objectives to be met in a reasonable timeframe. The guidelines do not include explicit reference to EEOC's guidelines on employment selection procedures and consequently might be construed sufficiently broadly to allow improper assertions of the validity of selection procedures. There are limited explicit references to discrimination based on age or handicap. These raise issues different from those involving other forms of discrimination that should be called to the attention of employers and should be addressed by them. The handicapped should be eligible for most

positions, not only a few. While the questions in the suggested items are appropriate, the standards for an acceptable response are often only implicit or not apparent. This could make for inconsistent interpretation by employers and reviewers. The guidelines do not suggest the complete range of recordkeeping and internal evaluation that ought to be an essential element of all affirmative action plans and programs. In some cases, the suggested format merely requires that there be documentation rather than action. For example, the guideline suggests there be "documentation to demonstrate that...services are equally accessible to and of equal quality for members of both sexes, all ethnic groups, and the handicapped." What is required is the development of plans to ensure that the necessary changes are carried out. At minimum, the notion of what is needed to ensure equality should be spelled out.¹⁶

The problem with the proposed review process is that the reviewers cannot compel the production of records necessary to determine compliance. They can only request that the records be provided.¹⁷ Thus, it is not clear that it will be possible for reviewers to determine compliance if a contractor chooses to be uncooperative.

How much can be done to determine statewide compliance is open to question. State agencies other than the Office of Administration have not been ordered to use the reporting forms developed by the State Affirmative Action Officer that would allow her to track whether or not their contracting patterns are discriminatory. Mandatory use of this form is currently under discussion in the Office of Administration. But the final decision would rest with the Governor. Only he could order the other agencies to comply.¹⁸

Notes

1. Joseph Teasdale, Executive Order, Mar. 23, 1978.
2. Executive Order 81-17, Article XIII.
3. Executive Order 82-27, Dec. 16, 1982, Article XIII.
4. Information Pertaining to the State of Missouri's Standard Specification Format, Aug. 30, 1982.
5. Ibid., p. 2 of 7.
6. Ibid., General Conditions, Article VI, para. C.
7. Ibid., para. D.
8. Jacqueline Lester, State Affirmative Action Officer and Jonn Boehm, Deputy Commissioner, Office of Administration, telephone interview, Dec. 22, 1982 (hereafter cited as DoA interview).
9. Ibid.
10. Alden Shields, letter to staff, Dec. 9, 1982.
11. DoA interview.
12. Ibid.
13. Ibid.
14. Ibid.
15. Jacqueline Lester, memorandum to staff, Feb. 22, 1983.
16. Jacqueline Lester, letter to chairperson, Missouri Advisory Committee, Feb. 22, 1983, Attachment.
17. Jacqueline Lester, telephone interview, Jan. 14, 1983.
18. Ibid.

4. STATE CONTRACT COMPLIANCE IMPLEMENTATION ACTIVITIES

The Governor's office told the Advisory Committee that contract compliance efforts would be the duty of the Office of Administration, the Department of Highway and Transportation, and the various State college and university facilities,¹ although many other agencies fund contracts.² The reason for this is that the Office of Administration serves as the contracting agency for most other State agencies.³

A. Office of Administration

In addition to its own monitoring role, the Office of Administration is responsible, through the State Affirmative Action Officer, for ensuring the adequacy of its own and other State agencies' monitoring efforts. One vehicle for this is review of the agencies' affirmative action plans. The State Affirmative Action Officer reported that the Office of Administration, the Departments of Social Services and Mental Health, had extensive contract compliance procedures. Other departments that reported at least something about contract compliance in their affirmative action plans were the Departments of Labor and Industrial Relations and Consumer Affairs, Regulations and Licensing.⁴ The State Affirmative Action Officer reported no activities to ensure the adequacy of the efforts of those agencies.⁵ Indeed, although she knew about the work of some of the agencies, it would be impossible from the limited data provided on any of the affirmative action plans other than that of her own department to determine the adequacy of the contract compliance effort.

The State Affirmative Action Officer and the Deputy Commissioner of Administration stated they did have plans for further monitoring activities. Their department has requested \$175,000 to fund a seminar for minority contractors to be held, if funding is granted by the General Assembly, after July 1, 1983. They hope to use this seminar not only to educate the minority

companies about opportunities in State government but also to hear complaints about the failings of the existing contracting system--especially whether minority businesspeople believe any aspects of the system are discriminatory.⁶ They did not explain what benefit this would be to potential bidders on contracts under the new bond issue that will be let long before this possible seminar would be held. Nor was there any commitment to do more than consider the complaints that might be generated.⁷

Indeed, the Office of Administration stated that it did not know the universe of potential disadvantaged contractors or the numbers actually utilized by State agencies.⁸ Until they do this, they state it would be impossible to frame meaningful objectives to be used as benchmarks in evaluating agency compliance efforts.⁹ They plan to rely on their new quarterly reports to determine whether agencies or contractors are failing to utilize disadvantaged persons or companies.¹⁰

The Affirmative Action Plan for FY 1982 of the Office of Administration contained specific commitments regarding contracting efforts. It required the Division of Purchasing to maintain, publish and distribute a list of all minority businesses on the bidder's list; record the number of Request for Proposals sent to minorities, the number returned, a record of awards and amounts and other unspecified recordkeeping. In addition, the division was to encourage agencies with authority for purchases under \$500 to contact minority businesses and advise the division as to what they had done. The division agreed to advertise its Requests for Proposals in at least two urban newspapers, to identify minority businesses and provide vendor applications to those businesses. The division also agreed to participate in minority sponsored meetings and other opportunities to explain State procurement procedures. The Division of Design and Construction agreed to ensure that contractors and subcontractors on construction projects that contained at

least three potential subcontractors and were valued at more than \$100,000 in Jackson, Clay, Platte, Lafayette, Buchanan, St. Louis, St. Charles, Jefferson, Lincoln and Franklin Counties publish affirmative action plans. The same would be required for contracts in excess of \$250,000 in Springfield, Sedalia, Jefferson City, Columbia or Joplin and for contracts in excess of \$500,000 elsewhere. This apparently is a significantly lesser requirement than imposed by the then Executive Order that required such plans of contractors with at least 50 employees and \$50,000 in contracts.¹¹ Finally, the Division of Design and Construction agreed to establish policies and procedures to attract more participation in State work by minority contractors and subcontractors. It proposed to achieve the latter by utilizing a minority contracts coordinator and advertising in minority oriented newspapers in St. Louis and Kansas City.¹² It was also to encourage meetings with minority-owned contracting businesses and minority contracting associations, publish a directory, conducting seminars, visit projects being constructed by minority-owned contractors at least weekly, establish a directory of minority-owned consulting firms, make project managers aware of the capabilities of minority-owned consulting firms prior to the pre-selection process.¹³

While all of this would assist contract compliance, it hardly constituted an effective system for monitoring compliance with State regulations requiring nondiscrimination by contractors nor did it ensure that contractors and subcontractors complied with contract requirements regarding affirmative action program plans. It certainly did not indicate any intent to conduct effective field reviews or initiate compliance proceedings where contractors were found not to have complied with their contractual obligations for promoting affirmative action. There is no indication of any review that would disclose instances where contractors violated the provisions of their contract with the State by discriminating on a prohibited basis.

In fact, the resources available for the tasks planned and the activities accomplished were less than promised. In the Purchasing Division, which handles contracts for all nonconstruction activities for most agencies, the affirmative action effort was the work of one staff person, Marvin Eason, assisted by a secretary he shared.¹⁴ His primary function is to encourage minorities to bid for contracts. He meets with agency purchasing committees (since agencies have authority to purchase items under \$500) to encourage them to use minority vendors. Although the Purchasing Division does advertise in Kansas City and St. Louis newspapers, it does not do so in the papers of general circulation but rather in the legal publications. At one time it advertised in minority papers, but stopped doing so during 1982 because of budget restrictions. Minority vendors have been identified and are sent copies of bid requests. The division does publish a directory of minority vendors, but this includes only companies that have submitted an application to do business with the State. The directory is updated quarterly. Since only one copy of the list is sent to each agency, many with purchasing authority do not have copies.¹⁵

In fact, the minority business coordinator in purchasing acknowledged that his was not a contract compliance program at all. His only contract compliance activity is to ensure that companies claiming to be minority are, in fact, minority-owned and operated.¹⁶ He does this by calling to make sure companies claiming this understand the definitions. As resources permit, he visits companies making this claim he does not know.¹⁷ He has no involvement with other types of businesses such as those run by women, the handicapped or older persons although he will help any business that asks.¹⁸ Basically, he asserted, his program is directed toward black businesspeople. Efforts to reach Hispanics have been unsuccessful.¹⁹ The coordinator has repeatedly contacted the Hispanic Chamber of Commerce but its members have not returned this applications.²⁰ His contractor list does

include a few Hispanic and Asian firms.²¹ Neither he nor anyone else in the division investigates to determine whether there is compliance with the nondiscrimination clause in all State contracts, nor has any contractor been terminated for failure to comply with that clause.²²

What the minority business coordinator can do is see the bid list on all contracts and add minority companies when there are any he is aware of that are not on the list of companies being sent requests for proposals. Although the coordinator provides outreach assistance, the primary obligation to ensure minority participation rests with the buyer.²³ In addition, the coordinator sees the bid abstracts and tells the minority bidders what element(s) of their proposal resulted in rejection of their bid. The coordinator has no influence in the process of bid consideration except to the extent that he can persuade a buyer to accept a minority bid where the issue is one of capacity to perform the contract. The coordinator did note that there is a greater tendency to question minority bidders' capacities than to question white bidders'.²⁴

The division is aware that the size of the contracts might pose a problem for minority bidders. But its view is that most purchasing contracts are too small to be divisible. Those that could be divided are generally for items or services that minorities cannot provide such as copy machines, drugs, medical supplies, foodstuffs or do not wish to supply such as insurance.²⁵ Although the division does not think there are other ways by which the process discriminates against minorities, minority vendors do think the process discriminates.²⁶ In the purchase of commodities the division believes it is hard to discriminate but that there is more scope for discrimination on subjective items such as service contracts where proposals are needed and where experience and similar considerations become relevant factors in selection. For example, the qualifications required might well exceed what a minority vendor could offer but his or hers would still be sufficient to do the job well.²⁷ Final decisions on such matters are the responsibility of

the purchasing agency, although the purchasing division does evaluate the bidder it merely checks to ensure that the specifications have been met in the bid.

The minority business coordinator stated he has had support from his division director and the Commissioner of the Office of Administration, although travel has been cut somewhat and ads are no longer placed in the minority papers. Primarily, the coordinator noted that despite cutbacks he had been allowed to continue to function and to do what he thought necessary. He also noted that the Director of Purchasing had proposed a "Model Procurement Code" that includes specific reference to "disadvantaged" owners of small businesses (including minority-owned businesses) and would allow some modification in the State's bonding requirements and "progress payments." This would require approval by both the Commissioner of Administration and the General Assembly. This proposal is awaiting action by the Commissioner and has not yet been submitted to the General Assembly.²⁸ But there had not been sensitivity training for the buyers in the purchasing department to ensure they did not unconsciously discriminate and the agency did not check to ensure that bid criteria are the minimum necessary to do the job properly.²⁹

The State Affirmative Action Officer has told him they will be doing spot checks on contractors but he has not yet been officially informed and does not know when the new process will begin. He anticipated there might be some resistance from employers but he anticipated the new system would help. It would be especially helpful in dealing with out-of-State contractors to whom he could provide names of in-State minority contractors who could serve as their subcontractors on large projects. He thought the system would be effective but he would be limited to checking paper to ensure the reports were accurate. He noted that bills that had been introduced to provide set-asides for disadvantaged businesses had never gotten out of committee in the past four years. But the proposed model procurement code would include a section

on assisting disadvantaged businessmen. While not a solution, it was a start at providing some aid for the disadvantaged.³⁰

The Division of Design and Construction also has a minority contracts coordinator. He has no clerical support. He has no responsibilities for companies owned and operated by women, the handicapped, older persons or veterans. In the past up to half his time was devoted to matters unconnected with minority affairs but he has been told he will be assigned to minority matters full time. In the past the coordinator reported directly to the division director on minority contracting issues. That is no longer the case; he now reports to the deputy director. The logic of this change is that the division director cannot deal with everyone and is seeking a more vertical staffing pattern.³¹ But on a matter as important as opportunities for minorities and others to participate, the lack of access could frustrate quests for remedy. Traditional channels of command are likely to be slow and unproductive. The logic of an intermediary is especially unclear in view of the direct relationship between the minority coordinator and his director in the purchasing division.

The coordinator's job is to aid minority contractors in getting jobs by notifying them about potential contracts, helping them prepare bid packages, helping them with paperwork when they get an award and making sure they don't have any problems implementing the terms of their agreements. He has never been assigned to police utilization of minorities (either as employees or subcontractors) by nonminority contractors.³²

The division does advertise bids in the principal minority papers in the State: Sentinel, Argus, American and Call. The contract with the latter has recently been terminated because of timing and billing problems. Although the coordinator was not told about the problem until the contract was terminated, he is working with the Call and his division to remedy the problems and get the Call reinstated.³³

The purpose of visits by the coordinator to minority company projects is to ensure that they do not have difficulties in implementing the terms of their contracts. Since the State currently has no such projects, the coordinator is not making these visits.³⁴

Advertisement for competitive bidding is not required for projects valued at less than \$10,000. If minorities are available to bid and perform the work to be done, then the invitation for bids can be restricted to them exclusively. Although initially there was resistance from project managers to use of minority contractors, the minority contracts coordinator reported this had been resolved.³⁵ Minorities cannot participate in the larger contracts in the main because they are not large enough and cannot obtain the necessary bonding for a large project. This system, the coordinator felt, insulated against largescale participation by minorities. Because it is more economical and less problematic for the State to administer larger contracts, the division prefers not to separate or break out pieces that minorities might do--such as concrete work, ceiling-tile installation or carpeting for which good minority vendors could be obtained at competitive prices.³⁶

The division director has not conducted sensitivity training for his staff to alert them to the special problems of minority bidders. But the assistant director has sent the appropriate memoranda on minority contractors. The division director has tried to get the bonding requirement that hampers minority bidders lifted for lower priced contracts. He supported the coordinator in seminars on how to reach and assist minority contractors. The division does require that subcontractors be listed at time of bid submission. This prevents contractors' bidshopping after the contract has been awarded and makes clear whether or not minorities will get a piece of the work. Without this, a minority might be in the initial plans but be pushed out when the final contract was awarded.³⁷

The existing system excludes the minority contracts coordinator from participation in many key decisions because he does not regularly attend staff meetings at which decisions on individual contracts are made. He thus does not have the opportunity to ensure that minorities are given full consideration for contracts or that the potential of minorities as subcontractors is fully explored.³⁸ Since the minority contracts coordinator is the only person with division expertise on the availability of minorities as contractors or subcontractors, this exclusion would appear to constitute agency disregard of this significant issue in its evaluations of proposals.

The coordinator understands that under the contract compliance system to be implemented he will have a compliance role. He will be monitoring projects where there are 50 or more workers (whether for the prime contractor or his subcontractors). But the coordinator notes that no actual obligations are placed on the contractor, other than to report utilization and prepare a plan. There is no requirement that the plan provide for full utilization of available people or companies.³⁹ Moreover, to be effective, such a program will require commitment up and down the organizational structure of the Office of Administration and his division.⁴⁰

The State Affirmative Action Officer reported that "because of limited staff, 'spot reviews' will be conducted, as opposed to reviewing each contractor."⁴¹ She states that:

In the event a contractor is found out of compliance by the affirmative action officer, minority contracts coordinator or minority business coordinator, the contractor is reported to the Director of the Division. Once the director is made aware of noncompliance, he then writes a letter to the contractor giving him twenty calendar days in construction to comply and ten days to comply in the Division of Purchasing. If compliance is not achieved after said time has expired, the contract may be cancelled.⁴²

These reviews will be limited to contractors whose contracts have been administered by the Office of Administration. The State affirmative action officer stated there will not be sufficient staff to review the contracts

administered by other departments. The division directors in the Office of Administration will not be authorized to overrule a finding by their reviewers. A violation of any element of the required reporting or failure to implement an approved affirmative action plan will constitute noncompliance. The reviewers will re-investigate to ensure that any agreements to correct noncompliance are honored. They do have a set of criteria for an appropriate affirmative action plan.⁴³

The guidelines for giving effect to the Executive Order on contract compliance are clearly deficient. An early draft of the guidelines specified that if contract compliance could not be achieved by negotiation "the contract is then cancelled." The new guidelines merely permit cancellation. Absent clear guidelines for determining the circumstances under which contracts must be cancelled, it is clearly possible, perhaps even likely, that this sanction will never be utilized despite ample justification. At one point, the Office of Administration was concerned about the problem of sole source availability and thought this might be a necessary basis for exemption from mandatory cancellation requirements.⁴⁴ Minority contractors have noted that frequently alternate products are available for particular needs but the State, especially the Division of Design and Construction, is slow to accept equivalence. Consequently, contracts are often let to ostensibly sole source majority vendors when minority or women vendors could furnish a suitable alternative.⁴⁵ If this is the only basis for noncancellation, the guidelines should be revised to say so and should clarify the question of suitable alternatives.

In some cases a contract will have been completed and final payment made before a determination of noncompliance. In these instances the Office of Administration will maintain a list of noncompliant contractors. But it is not clear whether that list would be used as a basis for debarring the contractor from further State work.⁴⁶

B. Department of Highway and Transportation

The compliance efforts of the Department of Highway and Transportation are administered by several of its operating components. The Minority Business Enterprise/Women Business Enterprise (MBE/WBE) program is the responsibility of the Division of Surveys and Plans. The Title VI compliance efforts are administered by the director of employee relations. The Division of Construction administers another element, compliance with equal opportunity.

A general description of the MBE/WBE program is provided in Table 1. The Surveys and Plans Division uses about 10 people, each spending between 15-25 percent of their time on this program. The division sets goals for good faith efforts, determines the availability of MBE or WBE contractors, determines the eligibility of contractors seeking to be declared MBE or WBE and checks to make sure that good faith efforts are evident in bids. In addition, the staff will meet with people who want information about the program and attend meetings around the State concerning the program.⁴⁷ Although this is essentially a Federal funds oriented program, it covers most projects. Even the new State bond issue contains only one \$20,000 project that does not include Federal funding⁴⁸ and therefore escape Federal "good faith" regulations.

The overall goal for projects is about 0.25 percent for women and about 1.5 percent for minorities. But the goal set for projects in urban areas is about 5 percent and even in other areas, they set a goal of about 1 percent (for each). These are based on the division's estimate of the availability of minority or women-owned businesses that could do a part of the subcontracting. Bidders are required to show in their proposals that they have made a good faith effort to reach the goals. To do so they must either reach their goals or show what they have done and still not reached them. Thus, they must show who they have contacted, how they contacted the

prospective subcontractors, whether they advertised and other illustrations of effort.⁴⁹

By and large, the division staff believe contractors have met the good faith test. But approximately 2-3 of the about 150 biddings each year must be rejected because the low bidder did not meet the test. When this happens the contract is rebid because State law requires the bid go to the lowest bidder.⁵⁰ Even if a contractor was not low bidder, if the bid proposal does not contain adequate documentation of good faith efforts, the division will notify the bidder of a deficiency and note that this must be corrected in subsequent submissions.⁵¹

To help contractors make good faith efforts, the division publishes an annual booklet listing all minority and women-owned contractors who might serve as subcontractors.⁵² It is updated every two months and the update sent with all bid information packets.⁵³ The 1981 list included 187 MBE/WBES in all parts of the State.⁵⁴ This is sent to about 2,000 contractors.⁵⁵

The division reports it has not encountered any particular problems with sham companies. Nor has meeting the goal for utilization of WBES been a problem.⁵⁶

Once the contract is let, the requirements of the Division of Construction "E.E.O. Contract Compliance Manual" take effect. This was last revised and published on March 1, 1976. Under these regulations governing highway construction contracts, the contractor is required to

- give the State the name of a person, an address and phone number, who will serve as the contractor's EEO officer;
- require all subcontractors make known to the State the name, address and telephone number of their EEO officers;
- incorporate a copy of Form PR-1273 in each subcontractor's contract where there is a Federal-Aid Construction Contract;
- not to discriminate and take affirmative action;
- notify all labor unions of its affirmative actions;
- post a notice of its affirmative action efforts.

Contracts are subject to Executive Order 11246 procedures, including possible debarment and contractors are required not to discriminate in selecting subcontractors. The State is authorized to withhold payments to the contractor until the contractor complies with these obligations, and may cancel, terminate or suspend the contract in whole or in part.⁵⁷ In addition to including these clauses, State personnel are required to remind the contractor that it must maintain the documentation necessary to indicate compliance with the EEO obligation assumed.⁵⁸ In addition, the contractor or subcontractor must submit a certificate stating whether or not it has filed the required reports with the Joint Reporting Committee, OFCCP, another Federal agency or the former President's Committee on Equal Employment Opportunity.⁵⁹ Failure to file these would be grounds for automatic debarment until forms covering the delinquent period are filed.⁶⁰ The Resident Engineer is ordered not to allow any contract if the proposed contractor indicates the required forms have not been completed.⁶¹ Contractors regardless of the size of contracts and all subcontractors with contracts for \$10,000 or more are required to complete Form PR-1391 at various intervals to show their employment patterns.⁶² In addition, reports are required on training and on details of utilization of minorities and women under the provisions of the Kansas City and St. Louis Plans.⁶³

The State regulations note that they have modified their E.E.O. Project Questionnaire so that they can complete the 40 reviews per year mandated by Federal Highway Administration. But in some cases, project engineers were to review E.E.O. efforts and in that case, contractors would be exempted from completing the questionnaire.⁶⁴ In general, all such reviews are completed by the project engineer when about 30 percent of the work has been completed.⁶⁵ The project engineer, in turn, completes a project report showing what the contractor has done to comply with the Federal affirmative action and equal opportunity requirements.⁶⁶ Collectively, the information

should be sufficient for a comprehensive assessment of the performance of the contractor and a determination of compliance.

Administration of the construction contracts review process is the duty of the Engineer of Contract Controls. He stated that they had conducted eight or nine reviews in 1981 but fewer in 1982 because there had been less activity. In the past he had a full-time staff person assigned to review the reports of the resident engineers and conduct on-site review follow-ups. That position was abolished in 1982 because there was too little work, but will be restored during 1983 as the workload increases. Although the primary concern is with reviews of contracts involving Federal aid funds, there are many contracts that do not have Federal funding. These are also reviewed in the same manner as Federal reviews, except that inclusion of the Federal contract clauses is not monitored and such reviews have a lower priority than the federally-mandated reviews.⁶⁷ It would appear that not all large contractors were reviewed. Some State contractors reviewed by OFCCP were not reviewed; on out-State projects by the Missouri department for FHWA.⁶⁸

Mr. Wilson acknowledged that the resident engineers are very close to the projects they review.⁶⁹ But he pointed out they have responsibility for all phases of administering the projects including quality control and payment. The department expects them to exercise the same care regarding equal opportunity that they take regarding other elements of contract administration for which they are responsible. The resident engineers do get in-service training regarding what is expected of them in E.E.O. matters and what to look for when doing their reviews.⁷⁰

The primary kinds of findings they have made in the past were of paperwork deficiencies. They were usually resolved by requiring the contractor to agree to correct the deficiencies in the future. In the past three years there have not been any findings of substantive deficiencies that would require noncompliance action. However, in the past there were occasions when funds

were withheld for failure to submit required reports. Should a contractor allege he cannot get minority or female workers because a union has failed to supply them and he can prove he has asked the union to try, the department does not feel that anything more can be done until the rules regarding use of unions are changed.⁷¹ However, it should be noted that the Federal Highway Administration takes a different view, and in its regulations indicates that union inability to provide minorities and women is not a defense.⁷²

The administrator did express concern about the lack of clarity regarding responsibility for reviews of hometown plan contractors. Many of the major contractors are, in fact, reviewed when they do out-State work. However, although the department is supposed to ensure that hometown plan contractors file monthly reports with the U.S. Department of Labor there is no way for the department to know whether these are filed since they do not pass through the department. Furthermore, the department does not get the results of U.S. Department of Labor compliance reviews until long after a contract is completed and therefore the department has no recourse against the contractor for any noncompliance that may have been found.⁷³

In addition to its program regarding construction, the department has a separate program, covering all aspects of department activities, to ensure compliance with Title VI of the 1964 Civil Rights Act, requiring nondiscrimination in programs that are funded by the Federal Government. This is administered by the director of employee relations who coordinates the work of Title VI liaison officers that have been given responsibility for Title VI matters in each division. These are usually middle-managers, for the most part engineers, who report to their division directors on Title VI issues. They spend about 2 percent of their time on Title VI issues, they spent more when there were more Federal programs.⁷⁴ The director of employee relations reports directly to the chief engineer of the department on Title VI

matters.⁷⁵ The chief engineer is the chief executive officer of the department and has ultimate responsibility for Title VI matters.

Under the program for 1982-1983, division heads are responsible for:

- encouraging, developing and implementing minority enterprise programs that will increase the utilization of minority and women-owned businesses as vendors, negotiators, property managers and providers of services;
- developing procedures for the collection of racial and ethnic data on participants and beneficiaries of the highways programs and ensuring that these show compliance with Title VI;
- developing procedures to ensure beneficiaries are aware of the nature of prohibited and discriminatory actions;
- maintaining current and continuous records to adequately document implementation of Title VI activities;
- ensuring that the manpower and budget appropriate to the level of Title VI activity is available.⁷⁶

Among the specific actions required of particular divisions are:

- the division of engineer planning is to ensure utilization of minorities and women on consultant contracts to the maximum extent practical; to ensure that studies conducted provide data regarding all persons, neighborhoods, income levels, physical environment and travel habits and specifically that data regarding minority persons is collected; that minorities are invited to attend all hearings on rights-of-way and corridor selection;
- the division engineer of Surveys and Plans is required to prepare plans showing the effect on minorities and women of proposed corridors;
- the division chief, right-of-way, is required to ensure that right-of-way decisions take account of Title VI issues; that minority and female appraisers are given an equal opportunity to appraise all kinds of property; that appraisal standards are uniformly applied in all neighborhoods; that negotiations be conducted in a nondiscriminatory manner and that minorities and women be informed of their rights; that minorities and women be given equal consideration for hardship advance acquisitions; that relocation services be provided equally;
- the division engineer, construction, and division engineer, surveys and plans, are to ensure that Title VI clauses are included in all Federal-aid contracts, notices, etc.; maintain a listing of minority and female-owned firms who could bid on projects; maintain records of contract awards; maintain contacts with minority organization and others.⁷⁷

To monitor compliance by contractors, a Title VI questionnaire is sent to all recipients of contracts for \$10,000 or more. The responses are reviewed by the Title VI Liaison Officer. When deficiencies are found, they conduct an on-site review. If deficiencies remain evident, the recipient is notified and requested to take remedial action within 90 days. If deficiencies are not resolved, the department reserves the right to implement the compliance

procedures of the Civil Rights Act.⁷⁸ The district engineers are responsible for processing complaints of discrimination and the division head must assure that if the claim is valid, corrective action is taken.⁷⁹

The utility of the Title VI questionnaire is open to question. It asks questions such as "Would an 'on site' review or investigation reveal that your organization has taken steps to ensure that work areas, department, and facilities or programs are racially integrated, and accessible to the handicapped, such as: recreation facilities, cafeterias, rest rooms, drinking fountains, locker rooms, dormitories," and "Are promotions, demotions, transfers, layoffs, recalls or discharges made without regard to race, color, sex, national origin or handicap?"⁸⁰

The director of employee relations reported that they have sometimes found minor deficiencies such as improper application forms. When this happens they send a letter asking for corrective action and accept a commitment from the contractor to make the correction. They have never had to proceed to formal enforcement action under Title VI.⁸¹ The department has not conducted many Title VI reviews recently because they have not had any Federal money contracts recently.⁸²

The department has tried to encourage the use of minority and women contractors by reducing the size of some contracts. They have established a list of minority groups to contact on Title VI matters.⁸³

The latest available Title VI summary report by the department was for 1981. This shows:

- \$3,912,856.43 was awarded to minority businesses for construction and related work and \$9,340,512.47 was awarded to women businesses for similar work;
- a company in Hannibal and one in Kansas City, Kansas, were awarded hauling contracts;
- three minority companies received a total of \$33,778.26 in procurement contracts;
- twelve compliance reviews were conducted either by the department's EEO Coordinator or by staff from FHWA;
- legal notices of lettings were published in the St. Louis Argus, Kansas City Call, and St. Louis American.⁸⁴

In addition to the statewide activities, there are also district activities. The summary of district efforts for 1981 suggests that affirmative action was not a very high priority. For example, there are no reports of minority or female-owned firms being awarded contracts in St. Louis and only a small contract was awarded in Kansas City. No activity at all is reported in the northeast area comprising Macon, Kirksville and Moberly.⁸⁵

To see what the department had actually done to ensure compliance, the Advisory Committee's staff examined 12 review reports submitted by the Missouri Department of Highway and Transportation to the U.S. Federal Highway Administration regional office in Kansas City. It also reviewed two files submitted by the State on its review of hometown plan activities. Particularly noteworthy was a letter sent to the FHWA division administrator in Jefferson City by Robert Hunter, the chief engineer of the Missouri department. In it he stated: "We are not completely satisfied with the efforts made by this subcontractor to comply with the EEO provisions of the contract. It is too late for corrective action now as the subcontractor's work is almost complete. The prime contractor's EEO posture is very good, therefore we find the...[subcontractor] in compliance at this time."⁸⁶ It should be noted that the prime contractor had no workers on the site. The review of the prime contractor, however, was conducted on-site in Missouri to cover a plant in Chicago Heights, Illinois where over half of the workers of a fabrication plant were minorities.⁸⁷ The prime contract was for \$9.9 million; the subcontract was for \$2 million. More typical was a report on a \$1.1 million contract in Greene County conducted in 1981 in which the State noted that:

- there was no documentation of contact with a minority referral organization;
- no documentation of regular EEO job site meetings;
- no documentation of annual EEO meetings for supervisors;
- a copy of the required notice to employees asking them to refer minority or women applicants was not available;
- a copy of the notice to employees about access to union apprenticeship programs was not available;

--the contractor was found not to have included the mandatory affirmative action contract clauses, PR-1273, in subcontracts.

But the reviewer concluded: "In correspondence received July 22, 1981, the contractor addressed all the deficient areas mentioned above. He also pledged to continue efforts to meet minority and female goals."⁸⁸ Many contractors had similar paper deficiencies that were, as this one, accepted as corrected merely by obtaining a further assurance from the contractor.⁸⁹ This was true even when it was clear that not only were no minority or women-owned companies employed as subcontractors but there was no active solicitation of potential minority or women subcontractors.⁹⁰

The State's review of compliance with both the Kansas City and St. Louis plans disclosed numerous instances in which contractors had failed to reach the plan goals for utilization of minorities or women. In some cases letters were sent asking "what steps you propose to try to achieve the goal."⁹¹ But in many other cases where deficiencies were noted in many contractors' utilization efforts, a letter was not sent and the State merely noted its intent to further monitor the contractor.⁹²

The problems noted here with the Highway and Transportation department's contract compliance efforts are not new discoveries. As long ago as 1970 in a review of policies and procedures of the department, the civil rights office of the Federal Highway Administration noted similar deficiencies.⁹³ Indeed, then as now, the State had failed to utilize the sanctions available to it to obtain compliance.⁹⁴

C. Department of Higher Education

A considerable portion of the new bond money will provide repairs and construction at campuses administered by the Department of Higher Education. But the Department does not maintain a centralized contract compliance unit. Instead, responsibility for this is assigned to each of the facilities of the university/college system. The Department denied it had any authority over

the colleges and university campuses in this matter "or any other matter."⁹⁵ Most of the facilities failed to provide information on their contract compliance efforts, including the major campuses where most construction or repair work will occur.

Central Missouri State University stated that it requires each contract to submit with the bid a certification of nondiscrimination. It stated:

All bidding for capital development is done in compliance with the applicable statutes of the State of Missouri. Advertisements are placed in the major newspapers in Kansas City and St. Louis and all interested contractors have equal opportunity to submit proposals and bids.⁹⁶

The university noted that its contract compliance efforts have been "reactive" and that it has had few complaints. These have been resolved by the contractors.⁹⁷ Their director of affirmative action thought contract compliance should be the responsibility of the Office of Administration.⁹⁸

Missouri Western State College reported that it has four persons in its purchasing department. It stated all purchases are made in accordance with State law. It stated that its purchasing agent "utilizes the State's minority business directory whenever applicable." It provided no information about any contract compliance efforts.⁹⁹

Northwestern Missouri State University at Maryville stated that its purchasing agent and purchasing staff act as contract compliance staff. They stated that "The University adheres to a policy of equal rights in all transactions." They stated that "the university, on an ongoing basis, monitors compliance by requiring affidavits from all vendors." The affidavits do not include one covering affirmative action or equal opportunity. They believe that they ensure "a fair opportunity for all protected classes" by public advertisement for 10 days in the Maryville, St. Joseph and Kansas City newspapers.¹⁰⁰

If these responses are typical, and we have no reason to believe they are not, then the State universities have virtually no contract compliance system

that would protect the rights of minorities or women either as contractors or as workers on university related projects.

Notes

1. Alden Shields, letter to staff, Dec. 9, 1982.
2. DoA interview.
3. Ibid.
4. Jacqueline Lester, memo to staff, Dec. 21, 1982, attachments.
5. DoA interview.
6. Ibid.
7. Ibid.
8. Ibid.
9. Ibid.
10. Ibid.
11. See the rules on this in Chapter 3.
12. Office of Administration, Affirmative Action Plan for Equal Opportunity, Jan. 1, 1982.
13. Ibid.
14. Marvin Eason, interview in Jefferson City, Dec. 29, 1982.
15. Ibid.
16. Ibid.
17. Marvin Eason, telephone interview, Feb. 22, 1983.
18. Marvin Eason, interview in Jefferson City, Dec. 29, 1982.
19. Ibid.
20. Marvin Eason, telephone interview, Feb. 22, 1983.
21. Marvin Eason, interview in Jefferson City, Dec. 29, 1982.
22. Ibid.
23. Ibid.
24. Ibid.
25. Ibid. and telephone interview, Feb. 22, 1983.
26. Marvin Eason, interview in Jefferson City, Dec. 29, 1982.

27. Ibid.

28. Ibid., and telephone interview, Feb. 24, 1983.

29. Marvin Eason, interview in Jefferson City, Dec. 29, 1982.

30. Ibid.

31. Elijah Bolton, interview in Jefferson City, Dec. 29, 1982.

32. Elijah Bolton, interview in Jefferson City, Dec. 29, 1982.

33. Ibid.

34. Ibid.

35. Ibid.

36. Ibid.

37. Ibid.

38. Ibid.

39. Ibid.

40. Ibid.

41. Jacqueline Lester, letter to staff, Jan. 7, 1983, attachment.

42. Jacqueline Lester, letter to chairperson, Missouri Advisory Committee, Feb. 22, 1983, attachment.

43. Jacqueline Lester, telephone interview, Jan. 14, 1983.

44. Jacqueline Lester, telephone interview, Jan. 26, 1983.

45. Members and staff of Mo-Kan, Inc., interview in Kansas City, Mo., Nov. 22, 1982.

46. Jacqueline Lester, telephone interview, Jan. 14, 1983.

47. Humbert Sfreddo, Assistant MBE Liaison Officer, telephone interview, Jan. 25, 1983.

48. Ibid.

49. Ibid.

50. Ibid.

51. Ibid.

52. Ibid.
53. Ibid.
54. Missouri Highway and Transportation Department, MBE/WBE Directory (Oct. 1981).
55. Humbert Sfreddo, telephone interview, Jan. 25, 1983.
56. Ibid.
57. Missouri State Highway Commission, Division of Construction, E.E.O. Contract Compliance Manual, 1976 Edition (March 1, 1976), appendix XI.
58. Ibid., sec. 200.1(f).
59. Ibid., Appendix XV.
60. Ibid.
61. Ibid., Sec. 200.3.
62. Ibid., Sec. 200.4.
63. Ibid., Secs. 300.1-300.13.
64. Ibid., Sec. 600.
65. Ibid.
66. Ibid., Appendices, XXV, XXVI, XXVII.
67. Raymond Wilson, Engineer of Contract Controls, telephone interview, Jan. 13, 1983. In fact, the chief engineer stated there had been nine construction reviews in 1980; seven in 1981 and six in 1982. (Robert Hunter, letter to Jacqueline Lester, State Affirmative Action Officer, Jan. 7, 1983.)
68. Data on file, Kansas City Area Office, OFCCP.
69. Raymond Wilson, telephone interview, Jan. 13, 1983.
70. Ibid.
71. Ibid.
72. 23 CFR Subpart A, Appendix A(5)(b).
73. Raymond Wilson, telephone interview, Jan. 13, 1983.
74. Missouri Department of Highway and Transportation, Missouri Highway and Transportation Department's Program for Compliance to the Requirements of

Title VI of the 1964 Civil Rights Act: 1982-1983 (n.d.)(hereafter cited as Title VI Program); Russell Keith, Director of Employee Relations, Missouri Department of Highway and Transportation, telephone interview, Jan. 12, 1983.

75. Title VI Program, p. 3.

76. Ibid., p. 4.

77. Ibid., pp. 6-14.

78. Ibid., p. 14 and Russell Keith, telephone interview, Jan. 12, 1983.

79. Title VI Program, p. 15.

80. Missouri Highway and Transportation Department, Title VI Questionnaire.

81. Russell Keith, telephone interview, Jan. 12, 1983.

82. Ibid.

83. Ibid.

84. Robert N. Hunter, Chief Engineer, Missouri Department of Highway and Transportation, letter to staff, including attachments, Jan. 17, 1983.

85. Ibid.

86. Robert Hunter, letter to Gerald Reihsen, Division Administrator, FHWA, Jefferson City, Oct. 15, 1982.

87. Robert Hunter, letter to FHWA, Oct. 20, 1982.

88. Ken Luetkemeyer, State EEO Coordinator, report, Sept. 28, 1981.

89. Data on file, FHWA, Kansas City Regional Office.

90. Ibid.

91. W.H. Shaw, Construction Division Engineer, letter to J.A. Tobin Co., Oct. 18, 1982.

92. St. Louis and Kansas City plan reports, on file at FHWA, Kansas City regional office.

93. Federal Highway Administration, Review of Policies and Procedures; Missouri State Highway Department, n.d. but based on a meeting held Dec. 7-11, 1970.

94. Ibid.

95. Robert W. Jacob, Assistant to the Commissioner, Missouri Department of Higher Education, letter to the chairperson, Missouri Advisory Committee, Feb. 21, 1983.

96. Carrie L. Dunson, Director of Equal Employment Opportunity, letter to State Affirmative Action Officer, Dec. 17, 1982.

97. Ibid.

98. Carrie L. Dunson, letter to staff, Feb. 22, 1983.

99. Kenneth L. Hawk, Vice President for Administrative Affairs, letter to State Affirmative Action Officer, Jan. 7, 1983.

100. Warren L. Gose, Vice President for Finance, Northwestern Missouri State University, letter to State Affirmative Action Officer, Dec. 23, 1982.

Table 1

Minority Business Enterprise Program

I. Policy Statement.

It is the intent of the Missouri Highway and Transportation Department to comply with the requirement of the Minority Business Enterprise Regulations to assure that minority business enterprises have the maximum opportunity to participate in the performance of contracts financed in whole or in part with Federal funds.

A minority business enterprise liaison officer will be designated and provided with adequate staff to administer the Minority Business Enterprise Program. The MBE liaison officer will be responsible for developing, managing and implementing the MBE program for the Missouri Highway and Transportation Department on a day to day basis.

II. Affirmative Action Techniques.

An equitable opportunity for minority business enterprises to compete for contracts and subcontracts will be provided. Appropriate affirmative action techniques such as arranging solicitations, time for the presentation of bids, quantities, specifications and delivery schedules will be used to facilitate the participation of MBEs. Information will be available for MBEs concerning bonding, financing, bidding and contract requirements.

III. The Missouri Highway and Transportation Department will secure and make available to all contractors and minority business enterprises a list of minority banks owned and controlled by minorities or women.

IV. The Missouri Highway and Transportation Department will secure and/or develop a Minority Business Enterprise Directory that will be made available to all bidders.

V. The Missouri Highway and Transportation Department will verify that contracting firms that call themselves Minority Business Enterprises are in fact eligible minority business enterprises.

VI. The Missouri Highway and Transportation Department will require its prime contractors to make good faith efforts to replace a Minority Business Enterprise subcontractor that is unable to perform successfully with another Minority Business Enterprise subcontractor.

VII. The Missouri Highway and Transportation Department will establish goals for the amount of work to be awarded to Minority Business Enterprises. Separate goals will be set for firms owned and controlled by minorities and for firms owned and controlled by women.

VIII. Contract goals for specific contracts will be based on the known availability of qualified MBEs.

IX. As a minimum the Missouri Highway and Transportation Department will require that Minority Business Enterprises be sought in the same geographic area in which the solicitation for subcontracts and materials is made.

X. The Missouri Highway and Transportation Department will require that all bidders submit, with the bid proposal, a written list of Minority Business Enterprises proposed to be used in accomplishing the work of the contract and the amount of work that the Minority Business Enterprises will perform.

XI. Contracts will be awarded to the bidder that (1) submits the lowest reasonable bid and (2) meets the MBE goals established in the contract or satisfies the MHTD that it has made good faith efforts to meet the goals.

XII. The Missouri Highway and Transportation Department will require contractors to document the steps they have taken to obtain Minority Business Enterprise participation.

XIII. The Missouri Highway and Transportation Department will review the successful bidder's Minority Business Enterprise involvement efforts during the performance of the contract.

XIV. The Missouri Highway and Transportation Department will require that subrecipients develop an acceptable Minority Business Enterprise Program or comply with the approved MBE program of the Missouri Highway and Transportation Department.

XV. Minority Business Enterprise participation shall be counted toward meeting MBE goals in accordance with 49 CFR, Part 23 Section 23.47.

XVI. The Missouri Highway and Transportation Department will develop and maintain a record keeping system to monitor the Minority Business Enterprise Program.

Source: Missouri Highway and Transportation Department, May 1981.

5. CONCLUSIONS

The State of Missouri's contract compliance activities range from nonexistent to adequate on paper. The Office of Administration which handles procurement for most State agencies has no viable contract compliance procedure. Parts of the efforts of the Missouri Department of Highway and Transportation are, on paper, adequate. But it is not clear from a review of its accomplishments that there is practical contract compliance. The State university and college campuses and the Department of Higher Education have no viable contract compliance program. Given that all these agencies handle substantial Federal funds that carry with them clear and precise contract compliance requirements, none of the State agencies can claim they had no reason to develop effective contract compliance procedures and enforcement measures. The Missouri Advisory Committee has not reviewed in this study the role of the Federal monitoring agencies. Why they have allowed such clear violation of the spirit and probably the letter of their own antidiscrimination regulations is unclear. In our October 1982 report on Federal block grants we noted that the Missouri Commission on Human Rights does not believe it has jurisdiction in contract compliance matters and cannot even process complaints about them.¹

It is clear that there are many minority and female-owned businesses that could serve as State contractors. It is also clear that few do. For many reasons they may simply be uninterested in State (or for that matter Federal) contracts. But in review of the State's track record, they might also take the position that they were not wanted and that the effort required to obtain a State contract would not be rewarded.

Most State agencies' procurement activities are handled by the Office of Administration. In the past this office had no contract compliance activities. Under instruction from the Governor, some efforts are now beginning. But these efforts will not be effective. The review process seems

unlikely to generate significant findings. There are no guidelines whereby State officials can determine noncompliance with other than paperwork obligations. The "good faith" test is undefined. Sanctions for significant noncompliance are nonexistent. Proposals to review the contracting system to ensure that it does not, per se, discriminate are tentative, at best. The program, as presently designed, is a charade.

The State Affirmative Action Officer has been assigned to monitor the Office of Administration's contract compliance efforts. But it is clear that she lacks either the authority or the staff to do so. To even suggest that one professional and a secretary can effectively monitor contract compliance in addition to administering the State's affirmative employment activities is ludicrous. What apparently will be available is the assistance of two contract compliance officers whose primary loyalties must be to their own employers, the very units she is being asked to review.

In addition, the State Affirmative Action Officer is supposed to review the contract compliance activities of other State agencies. But she has neither the status nor staff to do so. An affirmative action officer who does not even report directly to her own commissioner can hardly be taken seriously by other agency chief executive officers. She cannot require other agencies to use standardized reporting forms. If the affirmative action officer has insufficient staff for her internal contract compliance effort, she certainly has insufficient staff for any external reviews.

In a previous study, the Missouri Advisory Committee found that the State Departments of Social Services and Mental Health do have adequate civil rights compliance procedures, on paper. But it was evident in those reports that they lacked funding to adequately administer their own programs.

The Department of Highway and Transportation has an extensive formal contract compliance program. It has some good elements. But it is split among three different units and has many substantive deficiencies such as meaningless paper reviews. More important, examination of some reviews the

department has conducted indicate either procedural deficiencies or reluctance to enforce contractual agreements to ensure nondiscrimination.

The State colleges and universities each have independent contract compliance responsibilities. There is no indication that these have been adequately fulfilled. Clearly the State Department of Higher Education has equally failed to fill the void.

The Governor, as chief executive officer of the State, has indicated his interest in contract compliance in two executive orders. But like many chief executives he has failed to ensure that the spirit of his orders is given effect. It would appear that until the Governor issues clear and precise instructions for contract compliance activities and ensures that the resources necessary are available there will be no effective contract compliance program in Missouri.

Notes

1. Missouri Advisory Committee, State and Federal Civil Rights Enforcement in Missouri--Nondiscrimination in the New Health and Human Services Block Grant Programs (October 1982), p. 14.

FINDINGS AND RECOMMENDATIONS

The following findings and recommendations are submitted under the provisions of Sec. 703.2(e) of the Commission's regulations, empowering and Advisory Committee to "Initiate and forward advice and recommendations to the Commission upon matters which the State Committee has studied."

The Advisory Committee presents the findings and recommendations for consideration by the Commission in its national program planning and for its consideration in advising the President and Congress on matters within its jurisdiction.

Finding 1: The proposed contract compliance procedures to be implemented by the Missouri Office of Administration will not be effective without major change.

A. Contract compliance responsibilities when added to the other duties of the affirmative action officer will impose an excessive burden and result in lack of adequate attention to this important program.

B. Guidelines that clearly define what the State wants from its contractors to ensure adequate opportunity for minority or women-owned businesses are lacking. Consequently neither they nor the affirmative action officer have clear standards to use when evaluating performance of other than paperwork requirements.

C. Fundamentally discriminatory practices that might exist in the contracting process will not be thoroughly explored nor is it clear that if identified they will be corrected.

D. The chain of command for contract compliance in the Division of Design and Construction and the exclusion of the minority contracts coordinator from key meetings on bid selection make an effective program within that division difficult, at best.

E. The dependence of the State Affirmative Action Officer on the goodwill of division directors and the work of staff not directly assigned to her will make effective reviews problematic.

F. The lack of effective sanctions for substantive noncompliance will render the entire program a nullity.

Recommendation 1: The Advisory Committee urges the Governor to undertake a comprehensive examination of the State's contract compliance activities. He should ensure that such efforts match those of the existing Federal requirements and that resources are sufficient to result in real reviews, substantive findings and appropriate remedial action. To implement this recommendation, the Governor should appoint a blue-ribbon taskforce composed of private sector corporate leaders with a track record of successful utilization of minority and women-owned businesses as subcontractors and representatives of minority and women-owned businesses. This taskforce should be directed to devise a comprehensive contract compliance system for the State and provide an estimate of the resources needed to make it effective. The Governor should commit himself to implement the suggestions made by the taskforce, despite existing fiscal constraints.

Finding 2: The Advisory Committee notes that the Office of Administration and the Governor have requested that the legislature appropriate funds to conduct seminars so that minority and women contractors know what needs to be done. While they regard this effort as insufficient to the needs of an effective program to increase utilization of minority and women-owned businesses as contractors, they applaud the effort.

Recommendation 2: The Advisory Committee urges the members of the General Assembly give serious consideration to the proposed seminars in light of the inadequate past efforts to promote opportunities for minorities and women.

Finding 3: The Missouri Department of Highway and Transportation has an extensive contract compliance program, for the most part the result of its use

of Federal funds. The Advisory Committee notes that the statewide goals for utilization of minority and female contractors is relatively low. Even for urban areas, the goal is lower than what would appear possible. But on paper the review of bids appears adequate. The contract compliance efforts following bid awards do not. There is evidence that willful violations have been excused or ignored. The Title VI program appears worthless because it is unlikely to reveal any noncompliance.

Recommendation 3: The Advisory Committee urges the Chief Engineer of the Department of Highway and Transportation to conduct a comprehensive review of his department's contract compliance program. He may wish to consider centralizing responsibility for the various civil rights and contract compliance duties and revising procedures to make the program appear effective.

Finding 4: The Missouri Department of Higher Education does not review the contract compliance of contractors performing work for the State's colleges and universities nor does it review the compliance efforts of those bodies. The colleges and universities own efforts are nonexistent.

Recommendation 4: The Missouri Department of Higher Education should develop a centralized contract compliance system and procedures likely to result in a meaningful compliance program including reviews and remedies.