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TESTIMONY OF JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, BEFORE
THE SUBCOMMITTEE ON ADMINISTRATIVE PROCEDURE AND PRACTICE OF
THE SENATE COMMITTEE ON THE JUDICIARY, MARCH 28, 1969

I am pleased to appear before the Subcommittee this morning. I understand that the committee is examining the Department's broadened equal employment opportunity program for Federally assisted highway construction contracts. I welcome this opportunity to clarify any misunderstandings which may have arisen in regard to the program. I hope to make it unmistakably clear that the Department intends to take all necessary steps to assure that people will be employed and upgraded in Federal highway programs without regard to their race, religion, sex, color, or national origin.

Our new program, which was established by the issuance of Federal Highway Administration Order 7-2(1) on March 17, 1969, is designed to get results in equal employment opportunity in the highway construction field. It has these important features:

1. It extends equal opportunity requirements from 30% to virtually 100% of Federally assisted highway construction contracts and subcontracts.
2. It places specific and understandable--and for that reason enforceable--responsibilities on the contractors who must bring about the equality in job opportunities this program demands.
3. It responds affirmatively to the concerns of the Chairmen and ranking minority members of the Public Works

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Committees of the House and Senate, who have legislative oversight over the Federal-aid Highway Program and who seven months ago drafted the equal opportunity provision we are carrying out.

4. It is flexible and will meet specific problems in cases as they arise and tie in with special Government-wide programs of the Office of Federal Contract Compliance.

I believe very firmly that this is an effective program to achieve the result we all seek--significantly increased equal employment opportunity in highway construction. My conviction is that equal employment opportunity must be achieved here and now--a conviction well known, of long standing, and proven in my actions as Governor of Massachusetts. I am convinced that our new program strengthens my Department's capability to achieve results. I say this based on my knowledge of how to get things done in the construction field as well as in Government. I have never built a highway and have never been a highway contractor. But I do know construction, and I do know the problems of achieving equal opportunity, and I do believe we are now on the right road to solving them in the highway field.

Equal employment opportunity obligations for all Federally assisted construction are established in a contract clause required by Executive Order 11246. This clause requires that contractors and subcontractors take "affirmative action" to assure nondiscrimination in employment. To implement the affirmative action requirement has been and is the goal of all our endeavors.

At the request of the Office of Federal Contract Compliance, the Department of Transportation last year endeavored to negotiate a definitive affirmative action plan with each low bidder for highway contracts in Cleveland and Philadelphia. The thought was to tailor equal employment opportunity requirements to fit each low bidder and thereby give content to the words "affirmative action."

This procedure had two unfortunate side effects. First, bidders were required to establish their price before they knew the extent of their contract EEO obligations. Second, they could walk out of any improvident bid merely by refusing to agree to an affirmative action plan satisfactory to the Government. Thus, pre-award negotiation undermined the competitive bidding system. Attempting to carry it out held up highway construction in Ohio and in Pennsylvania. The Comptroller General ruled in response to an inquiry from Congressman Cramer that such pre-award negotiation was inconsistent with competitive bidding requirements in Federal-aid highway legislation. Congress emphasized the need for following sound competitive bidding principles while at the same time establishing a statutory requirement for equal employment opportunity obligations in Federal highway construction by enactment of section 22 of the Federal-aid Highway Act of 1968.

To implement this statutory mandate and to avoid the procurement problems coming from negotiation with the low bidder, the Federal Highway Administration, in its Interim Order 7-2, required "prequalification" of bidders for Federally assisted construction contracts and subcontracts of \$500,000 or more. Prequalification was to be obtained by the annual submission of a satisfactory prequalification statement setting forth the company's affirmative action program in response to certain designated requirements and criteria. The prequalification statement was to be incorporated into each Federal-aid highway construction contract and subcontract expected to be \$500,000 or more which the contractor obtained in the State for which he was being prequalified. The Order thus provided for the particularization of the affirmative action obligations of the individual contractor before bids were opened. This, in theory, avoided the problems with the competitive bidding system.

The great advantage expected from prequalification was that the contractor himself would tailor his equal employment opportunity program to his individual circumstances. Unfortunately, there were many difficulties in administering the system. Fairness in competitive bidding could be defeated by the failure to treat similarly situated contractors alike.

It quickly became evident that evenhanded application of the necessarily indefinite standards in the Order to a specific

affirmative action plan was exceedingly difficult. Different equal employment opportunity standards were imposed by the various States and by Federal reviewing officials. Individuals differed in their reading of the Order. Consequently, they attempted to impose differing requirements. In some cases, the identical program would be accepted in one instance and rejected in another. Though unintended, severe administrative burdens were in fact imposed upon the States, the contractors, and on the Department.

Protests from State officials, contractors and others prompted the Subcommittee on Roads to call hearings in January 1969. These hearings convincingly demonstrated to us that these problems were real and had to be solved. On the basis of these hearings, the Chairman and the Ranking Minority Member of the Senate Committee on Public Works concluded on behalf of the Committee that "Interim Order 7-2 runs contrary to the statutory requirements of section 22 of the Federal-Aid Highway Act of 1968." The Chairman and the Ranking Minority Member of the House Committee on Public Works similarly indicated in correspondence to me:

"It is obvious that if both the highway program and the equal employment opportunity program are to proceed in a smooth and orderly fashion, more specific and reasonable Federal requirements must be substituted for those presently in effect. We urge you to look into this matter at the earliest possible time. We hope you will consider withdrawing Federal Administration Order Interim 7-2 and substituting clear and specific requirements to be set forth in the advertised specifications as required by section 22 of the Federal-Aid Highway Act of 1968."

In the light of this criticism and because of my own commitment to equal employment opportunity, we decided to act quickly to develop equal employment opportunity coverage which would achieve greater results than could be obtained under the prior Order and would at the same time eliminate many of the administrative problems and misunderstandings that the prior Order had generated.

I believe that we have accomplished this.

1. We have made the program applicable to all construction contracts and to all subcontracts of \$10,000 or more instead of the \$500,000 level which the prior Order called for. This has broadened the coverage from some 30% of Federally-aided highway construction contracts to almost 100% of Federally-aided highway construction contracts. To me, this significantly broadened coverage makes much more meaningful the Department's commitment to assure nondiscrimination in all highway construction.

2. We have substituted standard equal employment opportunity requirements for what had been differing requirements to be submitted by each contractor. The standard provisions permit timely appraisal to every bidder as to what is expected of him and will result in fair and uniform treatment of all contractors. There can be no complaints by a contractor that he is being asked to do more

than another or that he does not know what he is being required to do.

3. We have made the contract requirements explicit and definite so that they can be enforced. Where matters are not within the contractor's control, we require him to work toward goals; where they are within his control, we require him to accomplish the task.

To make these regulations effective for the current construction season, we had to move quickly. We did not have time for extended debate over all of the provisions of the Order because bids must be invited soon for the 1969 construction season. At the same time, we felt it necessary to consider all views on the subject and on the necessity for change. We were very fortunate in being able to draw upon the recent hearings of the Senate Subcommittee on Roads which heard representatives of the States, of contractors, and of Civil Rights groups on this subject. We obviously could not adopt the suggestions of all. But we did adopt a number of suggestions made by witnesses before the Senate Subcommittee. We adopted contractors' suggestions that the requirements be made specific. We also adopted the suggestion put forward by, among others, Mr. Clarence Mitchell, Director of the Washington Branch of the NAACP, and Legislative Director of the Leadership Conference on Civil Rights, that coverage be extended to all contracts and sub-contracts of \$10,000 or more.

I want to clarify one point about which there has been some misunderstanding. The special provisions provide a method upon which the contractor or subcontractor may meet the affirmative action requirements for the particular project concerned. They do not constitute the totality of his equal employment obligations. The contractor still must abide by the equal employment clause required by Executive Order and must take affirmative action on all his work regardless of whether it involves the particular contract or not. By defining what the contractor must do in construction work under the particular contract, we have taken a step toward enforcement of equal employment opportunity requirements without relieving the contractor from any requirements that he would otherwise have.

The procedures we followed in developing the Order were substantially the same as those used in developing the original Order 7-2. Both were the product of internal decision making involving the Federal Highway Administration and the Office of the Secretary of Transportation. Engineers, equal employment officials, lawyers and administrators were involved in the development of both Orders.

In the case of 7-2, the Highway Administration consulted with several State highway officials and representatives of the construction industry. In the case of Order 7-2(1), we consulted with the American Association of State Highway Officials,

the American Road Builders Association, and the Associated General Contractors of America. We benefited as I have indicated from the testimony before the Senate Road Subcommittee, including that from the minority group representative. Finally, in the case of Order 7-2(1), to assure that we had an effective and meaningful equal opportunity program, we sought OFCC counsel and approval.

Such procedures have been traditionally followed by the FHWA in issuing orders affecting the highway program. The procedure is fully consistent with the Administrative Procedure Act which exempts from the requirements of formal rulemaking "a matter relating . . . to public property, loans, grants, benefits or contracts."

I believe that the procedures we used in preparing 7-2(1) were appropriate in view of the subject matter of the changes made to 7-2. These changes were basically changes in the procurement procedure for obtaining equal employment opportunity and not changes in the substance of those obligations. We did broaden the coverage of the regulation substantially but I felt that this was so important and so unquestionably needed that I did not believe any formal rulemaking procedure would be appropriate.

I recognize that FHWA Order 7-2(1) is not necessarily perfect. It is obviously subject to improvement. Anything can be improved. However, while we consider possible improvement,

and I invite your suggestions on this, I feel most strongly that we should have a basically sound interim policy. It is important that we act now and not delay a good policy in the hopes that we may be able to develop a better one later. If and when a better policy emerges, we will substitute it.

Before I conclude, I would like to call your attention to some of the other actions which I have taken during my brief tenure to assure equal opportunity not only in the area of highway construction but in all activities of the Department of Transportation and, indeed, in other activities of the Executive Branch. I can assure you that the time and attention which I and the top staff of the DOT have devoted to equal opportunity has been as great as the time devoted to any other single matter including the SST, urban mass transportation, and airways congestion.

On February 13, less than a month after I took office I was given, at my request, an in-depth briefing on all aspects of the DOT equal opportunity program. I have had staff meetings and individual meetings on equal opportunity and have established a special ad hoc recruiting team in my immediate office to conduct a talent search for qualified minority candidates for policy level positions throughout DOT. Next Wednesday, April 2, I will preside over a meeting of top Washington and field officials of DOT. Included will be the heads of each of the six operating

Administrations of DOT as well as our top field officials such as the Regional Directors of the FRA, the FHWA, and the FAA and the District Commanders of the U. S. Coast Guard. This conference will deal solely with the need for increased action to achieve positive equal opportunity results in all our programs, whether they involve aviation, railroads, urban transportation, waterways or highway activities. Each Administrator will give me a report on the specific equal opportunity activities of his Administration and the results achieved since former Secretary Boyd's first conference on this topic last October.

I have taken organizational steps to achieve equal opportunity results. High level positions are being established within each Administration to carry out equal opportunity programs. In the Highway Administration, this position has been given to a highly knowledgeable civil rights specialist, Alexander D. Gaither. In addition, an equal opportunity officer is being designated in every one of FHWA's fifty division offices, located in every State in the Union. These equal opportunity officers will be responsible for enforcement of the special provisions which I have discussed today. Working with them will be FHWA's 400 Area Engineers throughout the country. These Area Engineers, during their monthly inspections of Federal-aid highway construction projects will pay special attention to the equal opportunity performance of contractors and subcontractors.

I believe that this will assure enforcement of our new equal opportunity provisions.

The commitment to equal employment opportunity that we have in DOT is truly a Government-wide commitment. With the President's permission, on February 25, I addressed the Urban Affairs Council on the subject of equal opportunity in DOT using our experience as an example of how an agency can meet the equal employment opportunity problems which face our Government.

On March 11, I recommended the establishment of a special subcommittee on equal opportunity to the President's Urban Affairs Council. I am informed that this recommendation has received tentative approval.

I can assure you that this Administration and the Department of Transportation, in particular, will work vigilantly toward the goal of equal employment opportunity for all.

Now, Mr. Chairman, I would be happy to answer any questions which you or the members of the Subcommittee may have.