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COMMENT

In re Associated Sign & Post, Inc.: The Affirmative Action Obligations of Government Contractors in Indiana

INTRODUCTION

When a government tries to promote a public policy through the award of government contracts, it exercises a classic example of the use of the carrot and the stick in public policymaking. The government in effect rides the private sector mule with a carrot in one hand and a stick in the other; if the government uses the carrot and the stick properly, the mule will eventually arrive at the desired public policy destination.¹ In the procurement process, governments have used the government contract as an incentive to implement its policies of equal employment opportunity.² As a government redefines the scope of a given policy, however, it must also rediscover how and when to use its incentives to promote the new policy goal.

The Reagan Administration has redefined federal equal employment policy. In order to implement this new policy, the Administration has proposed changing Executive Order No. 11,246³ (Executive Order 11,246) and the regulations promulgated pursuant to the Order.⁴ This Order outlines the equal employment obligations of federal government contractors. State and local governments may also have laws regulating the employment of their contractors. This Comment will consider the potential significance of the state and local affirmative action obligations of government contractors in Indiana in light of the Reagan Administration's new policy. The Comment will discuss the scope and coverage of Executive Order 11,246 and the current debate over its continued validity,⁵ outline the affirmative action obligations of businesses having contracts with either the State of Indiana or munic-

1. The carrot and stick analogy applies when the government does not exercise direct control over a private party, but rather tries to influence the party's behavior through the alternative use of incentives and punishments.

2. The procurement process actually involves elements of both the carrot and the stick. While the award of the government contract is certainly a carrot, the withdrawal of the award, or any other penalty for noncompliance, is the stick which punishes the contractor for straying off course. See Morgan, *Achieving National Goals Through Federal Contracts: Giving Form to an Unconstrained Administrative Process*, 1974 Wis. L. Rev. 301, 303-04.

3. 3 C.F.R. 339 (1964-65 Comp.), amended by Exec. Order No. 11,375, 3 C.F.R. 684 (1966-70 Comp.) Exec. Order No. 11,478, 3 C.F.R. 803 (1966-70 Comp.), and Exec. Order 12,086, 3 C.F.R. 230 (1978 Comp.), reprinted in 42 U.S.C. § 2000e (1982).

4. 41 C.F.R. §§ 60-1.1 to -999.2 (1985).

5. See *infra* notes 26-68 and accompanying text.

palties within the state,⁶ and finally, analyze the state and local laws in light of the current debate over the Executive Order.⁷ Specifically, this Comment will consider whether these laws contain the same defects that the Reagan Administration sees in the affirmative action requirements of the Executive Order. But first, this Comment will examine a recent Indiana case which illustrates the potential impact of the state and local laws, *In re Associated Sign & Post, Inc.*⁸

I. AN INDIANA CASE CONSIDERING THE AFFIRMATIVE ACTION OBLIGATIONS OF GOVERNMENT CONTRACTORS

In *In re Associated Sign & Post, Inc.*,⁹ a local agency rejected the low bid for a government contract because the contractor submitted an inadequate affirmative action plan. The City of Bloomington requires each bidder for a government contract to submit an affirmative action proposal prior to the bidding deadline.¹⁰ This affirmative action plan must include, among other things, a racial breakdown of the workforce and a plan for the recruitment of minorities.¹¹ In August of 1984, Associated Sign & Post, Inc., submitted the lowest bid for a contract to provide traffic control signs, signposts, street name sign brackets and related materials.¹² Because Associated's bid failed to contain an adequate affirmative action proposal, the Contract Compliance Officer for the City of Bloomington declared the bid to be unacceptable.¹³ Subsequently, the Board of Public Works awarded the contract to Hall Signs, Inc., the second lowest bidder for the contract.¹⁴ The Monroe Circuit Court denied Associated's petition for judicial review of the decision.¹⁵ On appeal, the Indiana Court of Appeals for the First District held that a municipality could properly determine that a company was not a "responsible" bidder by virtue of its inadequate affirmative action plan and thereby reject its low bid for the contract.¹⁶ The court noted that an awarding body

6. See *infra* notes 69-93 and accompanying text.

7. See *infra* notes 91-109 and accompanying text.

8. 485 N.E.2d 917 (Ind. App. 1985).

9. 485 N.E.2d 917 (Ind. App. 1985).

10. BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070 (1983).

11. *Id.*

12. 485 N.E.2d at 919. Associated's bid of \$169,457.56 was actually the second lowest bid. The Board of Public Works disregarded a bid of \$146,232.55 on the advice of its consulting engineers. *Id.* at 919 n.1.

13. *Id.* at 919.

14. *Id.*

15. *Id.*

16. *Id.* at 924. The court cited decisions in neighboring jurisdictions which held that the government can consider a contractor's ability to ensure compliance with antidiscrimination laws in determining the lowest responsible bidder. See *S.N. Neilson v. Public Bldg. Comm'n*, 81 Ill. 2d 290, 299, 410 N.E.2d 40, 44 (1980); *Weiner v. Cuyahoga Community College Dist.*,

has great discretion in its procurement decisions, and that it would reverse the challenged contract award only where the award was "clearly arbitrary, corrupt, or fraudulent."¹⁷

Many businesses in the State of Indiana have government contracts.¹⁸ These contracts may be with federal, state, or local governments. Moreover, a business may simultaneously have contracts with more than one level of government. As a condition to the award of a government contract, each government may require the contractor to provide equal employment opportunity. Each level of government, however, may have different standards that the contractor must meet to implement its equal employment policy. The federal government, for example, presently requires the contractor to undertake an analysis of its labor pool and establish goals and timetables to remedy the underutilization of women and minorities.¹⁹ Indiana, on the other hand, merely requires the state contractor to include an antidiscrimination clause in the contract.²⁰ As for local governments, the standards are as varied as the number of local ordinances on the subject.²¹ The *Associated Sign & Post* case exemplifies the wide ranging power that a local government can have over its contractors.

Of course, many large businesses are not presently concerned with the state and local laws. A business that has a contract with the federal government is already subject to the comprehensive affirmative action requirements of Executive Order 11,246. If the business complies with the extensive regulations under the Executive Order, the chances are that it will be in compliance with the state and local laws as well. Under the Reagan Administration, however, this Executive Order, and the regulations issued pursuant to the Order, have come under constant attack.²² The Administration considers the regulations which require government contractors to establish goals

19 Ohio St. 2d 35, 39, 249 N.E.2d 907, 910 (1969), *cert. denied*, 396 U.S. 1004 (1970). See also Note, *Affirmative Action Requirements in Illinois Public Contracts*—S.N. Neilsen Company v. Public Building Commission, 30 DE PAUL L. REV. 899 (1981).

The court further stated that had Associated been the lowest responsible bidder, Bloomington could still have rejected the bid for failing to conform to the specifications in the invitation to bid. 485 N.E.2d at 925. The court noted that Associated's variance from the bid invitation not only made it an unresponsive bidder, but also gave Associated "a substantial advantage over both those who were deterred from bidding because of the costs of complying with affirmative action requirements and those who actually expended time and money in an effort to meet the invitation's affirmative action specifications." *Id.*

17. 485 N.E.2d at 923-24.

18. Between 20,000 and 30,000 companies in the United States have contracts with the federal government. See N.Y. Times, Aug. 15, 1985, at A1, col. 6. Thus a large number of businesses in the State of Indiana have federal contracts. Moreover, some businesses which do not have a federal contract, do have a contract with the State of Indiana or with a local government in the state.

19. See 41 C.F.R. § 60-2.12(g) (1985).

20. IND. CODE § 22-9-1-10 (Supp. 1985).

21. See *infra* note 88.

22. See *infra* notes 36-60 and accompanying text.

and timetables for the employment of minorities and women as a subterfuge for quotas.²³ Consequently, the Administration has proposed changing the regulations under the Order,²⁴ or, in the alternative, repealing the Order entirely.²⁵ If either of these proposals become a reality, the state and local laws will take on added significance to state and local contractors previously subject to the requirements of Executive Order 11,246 by virtue of a federal contract.

II. EXECUTIVE ORDER 11,246 AND THE REAGAN ADMINISTRATION'S APPROACH TO AFFIRMATIVE ACTION

Most businesses that have contracts with the federal government must comply with the requirements of Executive Order 11,246.²⁶ A federal contractor must not only refrain from discriminating on the basis of race, color, sex, religion, or national origin,²⁷ but must also take affirmative action to ensure equal employment opportunity.²⁸ The regulations which implement the affirmative action component of the Order are committed to "result-oriented procedures" to which a contractor must commit itself to apply "every good-faith effort."²⁹ These procedures specifically require the government contractor to submit a detailed affirmative action program.³⁰ The affirmative action program must include a breakdown of the contractor's labor pool by race and sex alongside a similar breakdown of the contractor's work force.³¹ When the contractor finds areas in which it is deficient in the utilization of minorities or women,³² the contractor's program must establish goals and timetables to which it must direct its good faith efforts to correct the deficiencies.³³ The use of the goals and timetables, however, is not to

23. See N.Y. Times, Aug. 15, 1985, at A1, col. 6 (the Reagan Administration believes that the regulations are responsible for converting the concept of affirmative action into a "euphemism for quotas"); see also *infra* note 37.

24. 46 Fed. Reg. 42,968 (1981) (to be codified at 41 C.F.R. pts. 60-1, 60-2, 60-4, 60-20, 60-30, 60-50, 60-60, 60-250, and 60-741) (proposed Aug. 25, 1981); 47 Fed. Reg. 17,770 (1982) (to be codified at 41 C.F.R. pts. 60-1, 60-2, 60-4, and 60-30) (proposed Apr. 23, 1982).

25. *Proposed Changes in Affirmative Action Executive Order*, EMPL. PRAC. GUIDE (CCH) ¶ 5010 (Aug. 15, 1985).

26. Most contracts and subcontracts which do not exceed \$10,000 are exempt from the equal opportunity requirements of the Executive Order. 41 C.F.R. § 60-1.5 (1985).

27. Exec. Order No. 11,246 § 202(1), 3 C.F.R. 339, 340 (1964-65 Comp.), *reprinted as amended* in 42 U.S.C. § 2000e (1982).

28. *Id.*

29. 41 C.F.R. § 60-2.10 (1985).

30. *Id.* §§ 60-2.10 to -2.26. Only contractors with 50 or more employees and a contract of \$50,000 or more need to submit a written affirmative action program. *Id.* § 60-2.1.

31. *Id.* § 60-2.11. The availability of minorities and women in the contractor's work force is a function of the factors specifically outlined in the regulations. See *id.* §§ 60-2.11(b)(1) to -2.11(b)(2).

32. The regulations define underutilization as "having fewer minorities or women in a particular job group than would reasonably be expected by their availability." *Id.* § 60-2.11(b).

33. *Id.* § 60-2.12(g).

be "rigid and inflexible"—a contractor can explain its failure to meet a goal.³⁴ In fact, the regulations specifically state that the contractor is not to use the goal to discriminate.³⁵

The Reagan Administration argues that despite the regulations which allow the contractor to show cause why it cannot meet a goal,³⁶ as a practical matter the goals become quotas.³⁷ The Administration contends that federal contractors take the path of least resistance under the result-oriented approach of the Executive Order by treating the goals as quotas.³⁸ This rigid approach to the goals both avoids the expense and inconvenience to the contractor which can accompany the failure to meet a goal³⁹ and also acts to protect the contractor from lawsuits charging discrimination.⁴⁰ The Administration concludes that because of this practical result, the requirements of

34. *Id.* §§ 60-2.12(e), 60-2.2(c)(1). A contractor can also explain its failure to *establish* a goal. *Id.* § 60-2.12(k).

35. *Id.* § 60-2.30.

36. When a contractor fails to meet the goals and timetables of its affirmative action program, it has 30 days to "show cause" why enforcement proceedings should not be instituted. *Id.* § 60-2.2(c)(1). If the contractor fails to negotiate an adjustment in the goal to bring it into compliance, *id.* § 60-2.2(3), the Office of the Federal Contract Compliance Programs can bring enforcement proceedings seeking appropriate sanctions. *Id.* § 60-1.26(2). One possible sanction is the cancellation of the government contract. Exec. Order No. 11,246 § 209(a)(5), 3 C.F.R. 339, 343-44 (1964-65 Comp.), *reprinted as amended in* 42 U.S.C. § 2000e (1982).

37. The press has asked President Reagan: "Why is your Administration so bent on wiping out the flexible hiring goals for blacks, minorities and women?" The President responded: "We have seen in administering these programs . . . that the affirmative action program was becoming a quota system." In response to a follow-up question, the President added: "We find down there at the bureaucracy level and out there actually in personnel offices . . . they chose the easy course, set down a system of numbers and say, we'll go by that." N.Y. Times, Feb. 12, 1986, at 10, col. 1 (national ed.). *See also id.*, at 11, col. 1.

38. N.Y. Times, Feb. 12, 1986, at 10, col. 1 (national ed.). The Justice Department has released documents, consisting of agreements and correspondence between construction companies and the Labor Department, which it claims are evidence that federal contractors "had been required to meet rigid quotas in hiring women and members of minority groups." *See id.*, Mar. 29, 1986, at 1, col. 5 (national ed.).

39. *See* Comment, *Executive Order No. 11,246: Presidential Power to Regulate Employment Discrimination*, 43 Mo. L. REV. 451, 466 (1978). If the contractor fails to meet a goal, it must "show cause" why enforcement proceedings should not be instituted. 41 C.F.R. § 60-2.2(c)(1) (1985). If the contractor fails to establish a goal to remedy underutilization, it must analyze all of the utilization factors in the regulations and detail its reasons for failing to set a goal. *Id.* § 60-2.12(k). *See also* N.Y. Times, Aug. 15, 1986, at A1, col. 6 (White House officials contend that the Executive Order places costly compliance burdens on employers).

40. Contractors that take action pursuant to an affirmative action plan approved under Executive Order 11,246, will not be held liable under Title VII. *Affirmative Action*, EEOC COMPL. MAN. (BNA) No. 43 at §§ 607.6-607.7: 0013-0017 (1982). *But see* *Sisco v. J.S. Alberici Co.*, 655 F.2d 146 (8th Cir. 1981), *cert. denied*, 455 U.S. 976 (1982), where the Eighth Circuit Court of Appeals stated that a contractor can only prevail in a Title VII suit by raising its affirmative action plan as an affirmative defense when the contractor's actions are consistent with the affirmative action guidelines for Title VII outlined by the Supreme Court. *Id.* at 149. *See also infra* notes 48-52 and accompanying text.

A new Executive Order would allow the voluntary use of goals and timetables as long as there was no discrimination against white males. This would leave open the possibility of employment discrimination suits by white males. N.Y. Times, Oct. 23, 1985, at A1, col. 2.

Executive Order 11,246 are inconsistent with Title VII of the Civil Rights Act of 1964⁴¹ and the equal protection clause of the Constitution.⁴² Moreover, this practical result is at odds with the Reagan Administration's view that employment decisions must be color-blind and gender-neutral.⁴³

The Administration believes that the requirements of Executive Order 11,246 are inconsistent with Title VII since they require the contractor to give preferential treatment on the basis of race or sex to correct imbalances that may exist in its workforce.⁴⁴ Title VII of the Civil Rights Act of 1964 makes employment discrimination unlawful,⁴⁵ and most federal contractors are subject to the requirements of both Title VII and Executive Order 11,246.⁴⁶ The extent of affirmative action available under Title VII, however, is limited. Title VII specifically states that the Act does not require an employer to grant preferential treatment to an individual because of race or sex on account of racial or sexual imbalances which may exist in comparing the employer's work force to the available labor pool.⁴⁷

The courts and the Equal Employment Opportunity Commission (EEOC) have outlined three areas in which affirmative action is compatible with Title VII. First, in *Griggs v. Duke Power Co.*,⁴⁸ the Supreme Court held that employment standards, such as written tests or height and weight requirements, that have a discriminatory impact violate Title VII unless the employer demonstrates that the standards bear a relationship to "job performance."⁴⁹

41. 42 U.S.C. §§ 2000e-2000e-17 (1982). See *infra* notes 44-53 and accompanying text.

42. The fifth amendment incorporates the equal protection clause of the fourteenth amendment and applies it to the federal government. See *Bolling v. Sharpe*, 347 U.S. 497 (1954). Technically, the equal protection clause does not apply to private employers, but rather only to state actors. The Supreme Court has held that government contracting is state action. *Reitman v. Mulkey*, 365 U.S. 369 (1967); *Burton v. Wilmington Parking Auth.*, 367 U.S. 715 (1961); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Cf. Comment, *supra* note 39, at 480 n.161 (sufficient state action would not be found in merely doing business with a contractor that discriminates). See *infra* note 54 and accompanying text.

43. See, e.g., N.Y. Times, Oct. 7, 1985, at A20, col. 3 ("Attorney General Edwin Meese 3d says the Constitution is 'color blind,' that 'public policy must be racially neutral,' that 'race-conscious' remedies are illegal and that 'counting by race is a form of racism.'"); N.Y. Times, Sept. 18, 1985, at A16, col. 4 ("Passage of the 13th, 14th and 15th Amendments to the Constitution, which guaranteed certain rights regardless of skin color, made the Constitution 'officially colorblind,' [Attorney General] Meese said in arguing that the Administration merely sought to uphold the Constitution.").

44. The Administration often refers to the remarks of Senator Hubert Humphrey during the debates over the Civil Rights Act of 1964. See N.Y. Times, Feb. 12, 1986, at 10, col. 1 (national ed.); N.Y. Times, Oct. 7, 1985, at A20, col. 3. Senator Humphrey stated: "The proponents of the bill have carefully stated on numerous occasions that Title VII does not require an employer to achieve any sort of racial balance in his work force by giving preferential treatment to any individual or group." 110 CONG. REC. 12,723 (1964).

45. 42 U.S.C. § 2000e-2(a) (1982).

46. Under Title VII, a covered employer is "a person engaged in an industry affecting commerce who has fifteen or more employees . . ." *Id.* § 2000e(b).

47. *Id.* § 2000e-2(j).

48. 401 U.S. 424 (1971).

49. *Id.* at 431.

Under *Griggs*, the employer must take affirmative action to ensure that employment standards that are not job related have no adverse effect on minorities. This is apparently the only mandatory affirmative action under Title VII. The Supreme Court has held, however, that an employer's voluntary affirmative action efforts are permissible under Title VII in limited circumstances. In *United States Steelworkers of America v. Weber*,⁵⁰ the Court stated that a private employer's affirmative action plan to remedy past discrimination does not violate Title VII as long as it does not last longer than necessary, unduly interfere with the interests of non-minorities, require the discharge of white workers and their replacement with new black employees, or absolutely bar the advancement of white individuals.⁵¹ Finally, the EEOC has issued regulations under Title VII which allow voluntary affirmative action through training programs and recruiting activity when discrimination has artificially limited the labor pool.⁵²

Of course, the affirmative action that the federal government requires of its contractors under Executive Order 11,246 goes beyond the affirmative action which the government requires of employers under Title VII.⁵³ This is, in effect, the condition that the business must fulfill to get and keep the government contract. But to the extent the contractor treats the goals of its affirmative action program as quotas—by, for example, discharging a white worker and replacing him with a new black employee, merely to satisfy its affirmative action goal—it violates Title VII as the statute was interpreted by the Supreme Court in *Weber*.

Also, when the contractor treats goals as quotas, the contractor is not only acting inconsistently with Title VII, but is also at odds with the equal

50. 443 U.S. 193 (1979).

51. *Id.* at 208-09.

52. 29 C.F.R. § 1608.3(c) (1985).

53. To comply with the regulations which the government has issued pursuant to Executive Order 11,246, federal government contractors must make substantial affirmative action efforts. See *supra* notes 26-35 and accompanying text. These efforts have resulted in a significant increase in contractor employment of women and minorities. A recent Department of Labor study measured the employment of minorities and women in both contractor and noncontractor establishments. The study shows that federal contractors had from 1974 to 1980 a greater comparable growth rate in the percentage of jobs held by minorities and women than did those firms that did not have a government contract and were therefore only subject to the requirements of Title VII. Though overall employment by federal contractors increased by only 3.0%, minority employment in these firms grew by 20.1%. Over the same period, employers having no federal contract had total employment increase by 8.2% while minority employment rose by only 12.3%. A similar pattern appears in the hiring of women over this period. Federal contractors increased their employment of women by 15.2%, while employment of women by noncontractors grew by only 2.2%. Finally, the study shows that minorities and women employed by federal contractors are well represented in skilled and white collar occupations whereas in noncontractor establishments they are overrepresented in unskilled worker and clerical positions. *Labor Study Details Progress of Minorities and Women in Contractor and Noncontractor Establishments*, OFFICE OF FED. CONT. COMPL., FED. CONT. COMPL. MAN. (CCH) ¶ 21,217 (June 1984).

protection clause of the United States Constitution. In *Regents of the University of California v. Bakke*,⁵⁴ the Supreme Court held that the use of quotas by a university in its admissions program constituted reverse discrimination, a violation of the equal protection clause of the Constitution.

In addition to these two legal arguments, the Reagan Administration advocates the social policy of a color-blind society.⁵⁵ In such a society, employment decisions cannot be race-conscious or sex-conscious.⁵⁶ The Reagan Administration therefore only approves of affirmative action which takes the form of training and recruiting programs.⁵⁷

The Administration has considered a number of measures to implement its view of the proper role for affirmative action. The Administration first offered new regulations for the Executive Order that would narrow its coverage.⁵⁸ More recently the Administration has suggested repealing the Order entirely.⁵⁹

54. 438 U.S. 265 (1978). In *Bakke* the Supreme Court invalidated a university's special admissions program which set a specific number of admissions slots aside for disadvantaged minority applicants. The Court, while setting this system aside as unconstitutional, allowed the university to take race into account as one in a number of relevant factors in an admissions decision.

55. See *supra* note 43.

56. See N.Y. Times, Oct. 7, 1985, at A20, col. 3.

57. See N.Y. Times, Apr. 14, 1985, § 4, at 4, col. 1.

58. 46 Fed. Reg. 42,968 (1981) (to be codified at 41 C.F.R. pts. 60-1, 60-2, 60-4, 60-20, 60-30, 60-50, 60-60, 60-250, and 60-741) (proposed Aug. 25, 1981); 47 Fed. Reg. 17,770 (1982) (to be codified at 41 C.F.R. pts. 60-1, 60-2, 60-4, and 60-30) (proposed Apr. 23, 1982). Among other things, these regulations would exempt many small contractors from the regulations, restrict the contractor's total work force to the geographic area in which the contractor is performing the government work, and change the definition of underutilization to a rate that is less than 80% of the current availability of minorities or women in the relevant labor pool.

59. The Draft Executive Order states in part:

Subpart F—Affirmative Recruitment and Training Programs Required Pursuant to Regulations of the Secretary; Preferential Treatment Neither Required nor Given a Legal Basis by This Executive Order

Sec. 216.—Each Government contractor and subcontractor shall engage in affirmative recruitment and employment-related training programs designed to ensure that minorities and women receive full consideration for hiring and promotion. Such affirmative programs shall be developed pursuant to regulations promulgated by the Secretary of Labor, and shall describe the actions to be taken, including timeframes for taking such actions, to accomplish the objective of expanding the number of qualified minorities and women who receive full consideration for hiring and promotion.

Sec. 217.—Nothing in this Executive Order shall be interpreted to require or to provide a legal basis for a Government contractor or subcontractor to utilize *any numerical quota, goal, or ratio, or otherwise to discriminate against, or grant any preference to, any individual or group on the basis of race, color, religion, sex, or national origin with respect to any aspect of employment* including but not limited to recruitment, hiring, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Nor shall any government contractor or sub-

These proposals have caused a great deal of debate.⁶⁰

In the meantime, the Justice Department has already taken some steps to implement the new approach to affirmative action. The Department has sought modification of consent decrees which give preferential treatment to persons who were not actual victims of discrimination.⁶¹ This action is based on the Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*.⁶² In *Stotts*, black firefighters and the City of Memphis had entered a consent decree which established long term goals to remedy past discriminatory hiring and promotion practices.⁶³ In 1981, however, Memphis had to lay off some firefighters because of budgetary cutbacks.⁶⁴ Since the consent decree had no provisions covering layoffs, a federal district court issued an injunction restraining the city from using a last-hired, first-fired seniority layoff system which would decrease the percentage of black firefighters.⁶⁵ The Supreme Court held that the injunction was improper.⁶⁶

The Justice Department has interpreted language in the *Stotts* opinion as holding that preferential treatment is not a proper remedial measure for

contractor be determined to have violated this Order due to a failure to adopt or attain any statistical measures. . . .

Sec. 2.—(a) The Secretary of Labor shall immediately *revoke all regulations and guidelines promulgated pursuant to Executive Order No. 11246 inconsistent with this Order* in that they require or provide a legal basis for a Government contractor or subcontractor to use numerical quotas, goals, ratios or objectives, or otherwise to discriminate. . . .

Proposed Changes in Affirmative Action Executive Order, EMPL. PRAC. GUIDE (CCH) ¶ 5010 (Aug. 15, 1985) (emphasis added).

Presidential aides have also presented three options to the President for changing the Executive Order: (1) to issue a new Executive Order that would allow the voluntary use of goals and timetables, but would leave open the possibility of job discrimination suits by white males; (2) to revise the regulations under Executive Order 11,246 to prohibit the mandatory use of quotas; and (3) to issue a new Executive Order that would prohibit the use of quotas and make no mention of goals and timetables. N.Y. Times, Oct. 23, 1985, at A1, col. 2.

60. The debate within the Administration is between Attorney General Edwin Meese, with support from his Assistant Attorney General for Civil Rights William Bradford Reynolds, who favors repealing the Order, and Labor Secretary William Brock, who favors keeping the system intact. N.Y. Times, Aug. 20, 1985, at B4, col. 2. Industry is also split on the issue. The National Association of Manufacturers is in favor of retaining the present Order, while the United States Chamber of Commerce and the Associated General Contractors of America are for its repeal. *Id.* See also N.Y. Times, Mar. 3, 1986, at 1, col. 4 (national ed.) (the split in industry is between large businesses which "have the staff and the industrial relations people to fill out all that paperwork," and the small businesses which object to "what they say are burdensome regulations.").

61. N.Y. Times, Apr. 14, 1985, § 4, at 4, col. 1.

62. 104 S. Ct. 2576 (1984).

63. *Id.* at 2581.

64. *Id.*

65. *Id.* at 2582.

66. *Id.* at 2585.

those who are not actual victims of discrimination.⁶⁷ If the Justice Department carries this interpretation to its extreme, any government-sanctioned remedy which required preferential treatment to correct racial imbalances in the work force would be inconsistent with Title VII (including the Executive Order). Most courts, however, have interpreted the *Stotts* decision much more narrowly.⁶⁸

Despite the holdings of these courts, the Reagan Administration is committed to implementing a new policy of affirmative action which emphasizes recruitment and de-emphasizes broad remedial measures. The Executive Order as it now exists is in jeopardy of extinction. A radical change in the Executive Order will decentralize authority over government contractors and subject many businesses to various and conflicting state and local laws.

III. THE AFFIRMATIVE ACTION OBLIGATIONS OF STATE AND LOCAL GOVERNMENT CONTRACTORS IN INDIANA

A business with a government contract in Indiana may be subject to state or local laws regarding the employment of women and minorities. The governmental unit may simply require the contractor to include an antidiscrimination clause in the contract,⁶⁹ or, as under Executive Order 11,246, it may be necessary for the contractor to establish goals and timetables for the utilization of minorities and women.⁷⁰

67. The Justice Department's argument is that:

In *Stotts* 'there was no finding that any of the blacks protected from layoff had been a victim of discrimination' [104 S. Ct. at 2588]. Accordingly, the Supreme Court determined that 'the Court of Appeals [in affirming the District Court injunction] imposed on the parties as an adjunct of settlement something (*i.e.*, a layoff quota) that could not have been ordered had the case gone to trial and the plaintiffs proved that a pattern or practice of discrimination existed' (*Id.* at 2588-89).

Memorandum of the United States in Support of Motion for Prospective Modification of Consent Decrees at 7-8, *United States v. City of Indianapolis*, No. 78-388-C (S.D. Ind. filed Apr. 19, 1985). See also *N.Y. Times*, Oct. 7, 1985, at A20, col. 3 (Assistant Attorney General William Bradford Reynolds interprets the *Stotts* decision as precluding persons who are not actual victims of discrimination from receiving preferential treatment as a part of any remedial measures).

68. See, *e.g.*, *Paradise v. Prescott*, 767 F.2d 1514, 1528 (11th Cir. 1985) (*Stotts* is distinguishable because the order involves "promotion not layoffs pursuant to a bona fide seniority system"); *EEOC v. Local 638 Sheet Metal Workers Int'l Ass'n*, 753 F.2d 1172, 1186 (2d Cir. 1985) (*Stotts* is distinguishable since the remedies at issue were not in direct conflict with a bona fide seniority plan), *cert. granted*, 106 S. Ct. 58 (1985); *Krommick v. School District*, 739 F.2d 894, 911 (3d Cir. 1984) (*Stotts* is distinguishable since there is "no override of a bona fide seniority plan"), *cert. denied*, 105 S. Ct. 782 (1985); *NAACP v. Detroit Police Officers Ass'n*, 591 F. Supp. 1194, 1202 (E.D. Mich. 1984) (*Stotts* is distinguishable since there is intentional discrimination).

69. See, *e.g.*, IND. CODE § 22-9-1-10 (Supp. 1985); COLUMBUS, IND., CITY CODE § 12-4 (1973).

70. See CONTRACT COMPLIANCE REGULATIONS OF THE CITY OF BLOOMINGTON HUMAN RIGHTS COMMISSION, Rule 4 (1985).

In Indiana, every contract to which the state or any of its political or civil subdivisions is a party must contain a provision requiring:

the contractor and his subcontractor not to discriminate against any employee or applicant for employment, to be employed in the performance of such contract, with respect to his hire, tenure, terms, conditions or privileges of employment, because of race, religion, color, sex, handicap, national origin, or ancestry.⁷¹

Breach of this clause may be considered a material breach of the contract.⁷²

This nondiscrimination commitment of Indiana contractors differs from the requirements of the Executive Order in several respects. Most importantly, unlike federal contractors which must comply with the affirmative action component of the Executive Order, businesses with state contracts need not submit any affirmative action plan at all.⁷³ The contractor does not have to analyze the relevant labor market and establish goals and timetables for the utilization of minorities and women. The contractor is not even required to take affirmative action in recruiting and training minorities and women. Furthermore, even the nondiscrimination commitment of Indiana contractors is weaker than the antidiscrimination component of the Executive Order. Contractors who are subject to the regulations promulgated pursuant to the Executive Order must meet the obligations for all of their operations, even those not connected with the government contract work "during the performance of the contract."⁷⁴ In Indiana, however, the contractor must only refrain from discriminating against employees "to be employed in the performance of such contract."⁷⁵

In contrast to the Indiana requirements, a local government may have equal employment laws which are more extensive. The Indiana Civil Rights Act states that its policy is to "provide all of its citizens equal opportunity for . . . employment . . . and to eliminate segregation or separation based solely

71. IND. CODE § 22-9-1-10 (Supp. 1985).

72. *Id.*

73. The use of government contracts to prohibit employment *discrimination* dates back to an Executive Order issued by Franklin Roosevelt in 1941, Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.); the *affirmative action* component was not added for twenty years. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-63 Comp.). Some commentators have argued that since this affirmative action component was first implemented, regulations and subsequent orders have shifted the emphasis of the component from equal opportunity to equal result. See, e.g., N. GLAZER, *AFFIRMATIVE DISCRIMINATION* 45-49 (1975); Murray, *Affirmative Racism*, *New Republic*, Dec. 31, 1984, at 18, 19.

For a detailed history of the Executive Orders see *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159, 168-71 (3d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971), and Comment, *supra* note 39, at 476-77.

74. Exec. Order No. 11,246 § 202, 3 C.F.R. 339, 340 (1964-65 Comp.), *reprinted as amended* in 42 U.S.C. § 2000e (1982). A previous Executive Order had required only that the contractor fulfill the equal employment obligations "in connection with the performance of work under [the] contract." Exec. Order No. 10,925 § 301, 3 C.F.R. 448 (1959-63 Comp.).

75. IND. CODE § 22-9-1-10 (Supp. 1985).

on race, religion, color, sex, handicap, national origin or ancestry, since such segregation is an impediment to equal opportunity."⁷⁶ The Indiana legislature has further provided that a city, town, or county can enact ordinances "to effectuate within its territorial jurisdiction the [civil rights] policy of the state."⁷⁷ Pursuant to this provision, some local governments in Indiana have enacted ordinances covering local government contractors.⁷⁸

Bloomington, Indiana, for example, has established a Human Rights Commission to enforce civil rights within its jurisdiction.⁷⁹ The city has enacted an ordinance which delineates the specific powers and duties of the Commission.⁸⁰ One section of this ordinance requires that:

All contractors doing business with the City . . . shall take affirmative action to insure that applicants are employed and employees are treated during employment in a manner which provides equal employment opportunity and tends to eliminate inequality based on religion, race, color, sex, national ancestry and handicap.⁸¹

The ordinance defines affirmative action as statements of policy regarding equal employment opportunity, recruitment in the minority community, and active efforts to review the qualifications of all applicants regardless of race, religion, color, sex, national origin, ancestry or handicap.⁸² Furthermore, the contractor must submit to the Human Rights Commission a written proposal stating the affirmative action it plans to take.⁸³ The Human Rights Commission has the power to issue regulations to implement the objectives of the ordinance,⁸⁴ and the Commission's Contract Compliance Regulations specifically define the contours of an acceptable affirmative action plan.⁸⁵ Under these regulations, the contractor's affirmative action plan must describe "in detail the good faith efforts they intend to make, as well as the efforts they have already made to comply with the 'Equal Opportunity' provision of the contract, including but not limited to goals and timetables regarding any future affirmative action."⁸⁶ The affirmative action proposal of a contractor must be approved before the contractor can enter into a contract with the city.⁸⁷

76. *Id.* § 22-9-1-2(a).

77. *Id.* § 22-9-1-12.1.

78. See *infra* notes 88-89.

79. BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.010 (1983).

80. *Id.* § 2.21.070.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* § 2.21.060.

85. See CONTRACT COMPLIANCE REGULATIONS OF THE BLOOMINGTON HUMAN RIGHTS COMMISSION, Rule 4 (1985).

86. *Id.* § 4.1(B).

87. *Id.*

Other municipalities, like Bloomington, have ordinances which require the local government contractor to implement the government's equal employment policy.⁸⁸ On the other hand, some local governments have a Human Rights Commission with only the authority to hear complaints of discrimination.⁸⁹ Finally, some local governments have no explicit policy on equal employment opportunity at all.

The *Associated Sign & Post* case illustrated the potential impact of these local frameworks.⁹⁰ The decision revealed that a municipality can reject the low bid for a government contract solely on account of the failure of a bidder to submit an adequate affirmative action plan.⁹¹ Therefore local governments can provide the incentive for affirmative action that the Reagan Administration is trying to take away by changing Executive Order 11,246. As under the Executive Order, a local government may require the contractor to establish goals and timetables for the utilization of minorities. The Bloomington Human Rights Commission has done this;⁹² moreover, it has succeeded in rejecting the bid of a government contractor that failed to submit a plan that conformed to the Commission's ideal of affirmative action.⁹³

IV. STATE AND LOCAL AFFIRMATIVE ACTION IN A "COLOR-BLIND" AND "GENDER-NEUTRAL" SOCIETY

The Reagan Administration is committed to an ideal of affirmative action in which employment decisions are color-blind and gender-neutral.⁹⁴ Consequently, the Administration has sought to substitute recruiting and training efforts for goals and quotas.⁹⁵ The Administration feels that goals and quotas not only lead to reverse discrimination against white males,⁹⁶ but also deny blacks and women the right to compete for jobs equally.⁹⁷

88. See, e.g., COLUMBUS, IND., CITY CODE § 12-4 (1973); FORT WAYNE, IND., CITY CODE § 15-17(b) (1979); INDIANAPOLIS AND MARION COUNTY, IND., CODE § 16-2 (1984); SOUTH BEND, IND., MUNICIPAL CODE § 2-132 (1976) (all require clauses in the contract which state that the contractor will not discriminate in connection with performance of the contract work).

89. See, e.g., LAFAYETTE, IND., CODE OF ORDINANCES § 32.068 (1982); MUNCIE, IND., CODE OF ORDINANCES, § 34.34 (1969); WEST LAFAYETTE, IND., CITY CODE, § 2-35 (1979).

90. *In re Associated Sign & Post, Inc.*, 485 N.E.2d 917 (Ind. App. 1985).

91. *Id.* at 924-25.

92. See CONTRACT COMPLIANCE REGULATIONS OF THE BLOOMINGTON HUMAN RIGHTS COMMISSION, Rule 4 (1985).

93. 485 N.E.2d 917.

94. See *supra* note 43.

95. See, e.g., *Proposed Change in Affirmative Action Executive Order*, EMPL. PRAC. GUIDE (CCH) ¶ 5010 (Aug. 15, 1985); N.Y. Times, Apr. 14, 1985, § 4, at 4, col. 1.

96. See N.Y. Times, Aug. 15, 1985, at 1, col. 6 ("White House officials contend that the existing rules have . . . encouraged employers to discriminate against white men").

97. See N.Y. Times, Sept. 18, 1985, at A16, col. 3 (Attorney General Edwin Meese has stated that "[t]he person preferentially selected by means of race or gender classification suffers

The equal opportunity policies in Indiana for government contractors are inconsistent with the Reagan Administration's policy of affirmative action. The state and some municipalities do not require businesses with government contracts to go far enough in their equal employment efforts, while at the same time some local governments may require its contractors to go too far in trying to achieve equal employment by requiring the contractor to take affirmative action in the form of goals and timetables.

Businesses which have contracts with the State of Indiana are only required to include a clause in the contract which states that it will not discriminate in employment in performance of the particular state contract work.⁹⁸ This clause will not guarantee that the contractor will not make race-conscious or sex-conscious decisions in other aspects of its business. As a condition to the award of the government contract the state could require the employer to refrain from discrimination in all of its operations during performance of the contract work.⁹⁹ The state might also require the government contractor to engage in recruiting and training activity designed to provide equal employment opportunity regardless of race or sex.¹⁰⁰ Finally, the state could provide that the violation of a nondiscrimination clause is not only a material breach of contract,¹⁰¹ but also disqualifies the business from any future state contracts for a certain period of time.¹⁰²

A local affirmative action framework, such as the one enacted in Bloomington, however, may go too far in its affirmative action provisions and contain many of the same problems that the Reagan Administration contends make Executive Order 11,246 bad law. Bloomington's affirmative action scheme on its face calls for "active efforts to review the qualifications of all applicants regardless of race, religion, color, sex, national origin, ancestry, or handicap."¹⁰³ In fact, it contains regulations which require the contractor to submit an affirmative action plan that establishes goals and timetables for the employment of minorities and women.¹⁰⁴ Furthermore, in *Associated*

no less indignity than the person excluded because of those classifications.").

Charles Murray suggests that the preferential treatment of blacks may in fact be detrimental to their interest because it perpetuates an "impression of inferiority." Murray *supra* note 73, at 23. The black academic community is also split on the merits of preferential treatment for blacks. Glenn C. Loury of Harvard argues that in the long run preferential policies do more harm to blacks than good, while Bernard C. Anderson of Princeton contends that the government has a continuing responsibility to use all necessary measures to ensure equal opportunity. N.Y. Times, July 25, 1985, at A16, col. 4.

98. IND. CODE § 22-9-1-10 (Supp. 1985).

99. See Exec. Order No. 11,246 § 202, 3 C.F.R. 339, 340 (1964-65 Comp.), reprinted as amended in 42 U.S.C. § 2000e (1982).

100. See *supra* note 59, § 216 of the Draft Executive Order.

101. IND. CODE § 22-9-1-10 (Supp. 1985).

102. See, e.g., Exec. Order No. 11,246 § 209(a)(6), 3 C.F.R. 339, 343-44 (1964-65 Comp.), reprinted as amended in 42 U.S.C. § 2000e (1982).

103. BLOOMINGTON, IND., MUNICIPAL CODE § 2.21.070 (1983).

104. See CONTRACT COMPLIANCE REGULATIONS OF THE BLOOMINGTON HUMAN RIGHTS COMMISSION, Rule 4 (1985).

Sign & Post, the court held that a local government in Indiana has great discretion to reject a bid because of an inadequate affirmative action plan.¹⁰⁵ Thus, a framework such as that in force in Bloomington cannot help but lead to the sort of race-conscious and sex-conscious decision-making that the Reagan Administration is trying to eliminate from Executive Order 11,246. Like the Executive Order, such a system can be potentially inconsistent with Title VII of the Civil Rights Act of 1964¹⁰⁶ and the United States Constitution,¹⁰⁷ not to mention the Indiana Civil Rights Act¹⁰⁸ and the Indiana Constitution.¹⁰⁹

CONCLUSION

The Reagan Administration is in the process of changing the system of incentives and punishments that influence the federal government contractor in its equal employment efforts. The Indiana state government and local governments in the state should consider changes in their procurement processes which will be consistent with this new system. The government contract can be an effective carrot, and governments should use this incentive to require contractors to make color-blind and gender-neutral employment decisions in all aspects of their businesses. On the other hand, if the government contract instead is used as an incentive to establish race-conscious and sex-conscious goals and timetables, in the final analysis, the carrot may prove rotten and the mule may go astray.*

J. ADAM BAIN

105. *In re Associated Sign & Post, Inc.*, 485 N.E.2d 917, 923-24 (Ind. App. 1985).

106. *See supra* notes 45-53 and accompanying text.

107. *See supra* note 54 and accompanying text.

108. IND. CODE § 22-9-1-2 (Supp. 1985) (prohibiting discriminatory practices).

109. The Indiana Constitution provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art. I, § 23. The Indiana Supreme Court has stated that the rights intended to be protected by this section are identical to the rights protected under the fourteenth amendment to the United States Constitution. *Haas v. South Bend Community School Corp.*, 259 Ind. 515, 526, 289 N.E.2d 495, 501 (1972).

* Since this Comment went to press the Supreme Court has issued rulings in three affirmative action cases which may have an effect on the Reagan Administration's plans to change the affirmative action requirements of Executive Order 11,246. In *Wygant v. Jackson Bd. of Educ.*, 54 U.S.L.W. 4464 (May 19, 1986), the Court held that the Constitution required a showing greater than societal discrimination to justify an affirmative action plan that preferred blacks in layoff decisions. In *Local 28 of the Sheet Metal Workers Int'l Assoc. v. EEOC*, 54 U.S.L.W. 4984 (July 2, 1986), and *Local No. 98, Int'l Assoc. of Firefighters v. Cleveland*, 54 U.S.L.W. 5005 (July 2, 1986), the Court, in upholding two affirmative action hiring plans, rejected the Justice Department's argument that preferential treatment for those who are not actual victims of discrimination is inconsistent with Title VII.

