

5 CFR part 737 may seek judicial review of the determination in an appropriate United States District Court.

[48 FR 38233, Aug. 23, 1984]

PART 906—AFFIRMATIVE ACTION POLICY AND PROCEDURE

Subpart A—Development Program

Sec.

- 906.1 Purpose and policy.
- 906.2 Definitions.
- 906.3 Procedures.
- 906.4 Formulation of affirmative action plan.
- 906.5 Administration of affirmative action plan.
- 906.6 Implementation.
- 906.7 Incentives.
- 906.8 Review and monitoring.
- 906.9 Voluntary compliance.
- 906.10 Confidentiality.

Subpart B [Reserved]

EXHIBIT A TO PART 906—SUGGESTED MINIMUM GUIDELINES AND GOALS

EXHIBIT B TO PART 906—GUIDELINES FOR ESTABLISHING STRATEGY TO IMPLEMENT AFFIRMATIVE ACTION PERSONNEL PLAN

AUTHORITY: Pennsylvania Avenue Development Corporation Act of 1972, as amended, sec. 6(6), Pub. L. 92-578, 86 Stat. 1270 (40 U.S.C. 875(6)); E.O. 11625 (36 FR 19967) Oct. 14, 1971; title VII Civil Rights Act of 1964 (42 U.S.C. 2000e-2); Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, secs. 119, 122(d)(2), Pub. L. 95-602, 92 Stat. 2982, 2987 (29 U.S.C. 794); E.O. 12138 (44 FR 29637) May 22, 1979.

SOURCE: 44 FR 37226, June 26, 1979, unless otherwise noted.

Subpart A—Development Program

§ 906.1 Purpose and policy.

(a) One of the objectives stated in the Congressionally approved Pennsylvania Avenue Plan—1974 is insuring that minority businesses, investors, and workers have an opportunity to share in the benefits that will occur as a result of redevelopment. Accordingly, the Corporation will take affirmative action to assure full minority participation in activities and benefits that result from implementation of The Pennsylvania Avenue Plan—1974.

(b) It is the policy of the Pennsylvania Avenue Development Corpora-

tion to foster a progressive Affirmative Action Program that affords minorities, women, handicapped persons, and Vietnam era veterans a fair and meaningful share in the opportunities generated by the development activities of the Corporation.

(c) It is mandatory for developers who respond to a solicitation for proposals made by the Corporation to comply with the rules stated in subpart A of part 906.

(d) It is mandatory for developers who receive property interests of ten percent (10%) or more of the area of a development parcel from the Corporation to comply with the rules stated in subpart A of part 906.

(e) The Corporation will encourage any entity not described in paragraphs (c) and (d) of this section to comply with the requirements set forth in this subpart A of part 906.

§ 906.2 Definitions.

As used in this part:

(a) *Affirmative Action Plan* means a plan which at a minimum includes:

(1) A statement of the affirmative action policy of the development team and a list of the names of the members of the development team including equity investors, and identification of minority owned businesses and investors;

(2) A contracting and purchasing plan;

(3) A leasing plan;

(4) A personnel plan;

(5) An equity investment plan;

(6) The goals, timetables and strategy for achieving the goals of the developer;

(7) A list of specific, quantifiable committed opportunities; and

(8) Designation of an Affirmative Action Officer.

(b) *Committed Opportunity* means an opportunity set aside and committed for the sole involvement of a woman, minority group member, Vietnam era veteran, handicapped person, or minority owned business, including opportunities for training and equity investment.

(c) *Contracting and purchasing plan* means a plan for the subject project which at a minimum includes the following:

(1) A list of all minority enterprises and minority owned businesses that are involved in the development proposal or its implementation;

(2) An analysis of the types of contracts and purchases that will be required by the development team in order to implement the development through and including operation of the completed development;

(3) A list of goals and timetables by category of purchase or contract for involvement of minority owned businesses in the development process;

(4) Strategy for achieving the goals established; and

(5) A list of committed opportunities for the involvement of minority owned businesses in the development process.

(d) *Developer* means a person partnership, company, corporation, association, or other entity that develops a new structure on a site or substantially renovates a structure on a site within the Corporation's development area where the site either: (1) Has been offered to the public by the Corporation for development, or (2) the Corporation has transferred real property rights that equal or exceed ten percent (10%) of the area of the development parcel.

(e) *Development parcel* is an area of land established by the Corporation to be a minimum developable site under The Pennsylvania Avenue Plan—1974, as amended, and The Planning and Design Objectives, Controls, and Standards of the Corporation (36 CFR part 920 *et seq.*).

(f) *Development team* means the group that submits a proposal to develop a parcel including developers, architects, engineers, lawyers, financial institutions, insurance companies, and others who help formulate, develop, and otherwise make a proposal to the Corporation.

(g) *Equity Investment Plan* means a plan for the subject project which at a minimum includes the following:

(1) A statement as to whether or not equity investment has been or will be solicited to implement the subject project;

(2) A statement as to whether or not a joint venture has been or will be formed to implement the subject project;

(3) If equity investment has been solicited or if a joint venture has been formed, a statement of the efforts made to involve members of minority groups and women when these opportunities were offered;

(4) If equity investment will be solicited, or a joint venture will be formed, a plan to involve members of minority groups and women when these opportunities are offered, including a list of committed opportunities;

(5) A list of goals and a timetable for securing participation of members of minority groups and women in equity investment and joint venture.

(h) *Handicapped person* means any person who: (1) Has a physical or mental impairment that substantially limits one or more of the person's major life activities, (2) has a record of such impairment.

(i) *Leasing plan* means a plan for the subject project which at a minimum includes the following:

(1) A retail plan showing the types of retail businesses to be included in the project and a plan for the types of uses for the balance of the development;

(2) Goals and methods for inclusion of minority enterprises as tenants in the project;

(3) Committed opportunities for leasing to minority enterprises.

(j) *Minority Enterprise* means any enterprise that is either a minority owned business or a not for profit or non-profit organization (as defined in 26 U.S.C. 501(c)(3) or (c)(6)) and also fulfills one or more of the following criteria:

(1) The Board of Directors or equivalent policy making body is comprised of members, a majority of whom are minorities or women and the chief executive officer of the organization is a minority group member or a woman; or

(2) The objectives of the organization as described in its charter are substantially directed toward the betterment of minorities or women.

(k) *Minority group member* means any person residing in the United States who is Negro, Hispanic, Oriental, Native American, Eskimo, or Aleut, as defined below:

(1) Negro—is an individual of the Negro race of African origin;

§ 906.3

36 CFR Ch. IX (7-1-01 Edition)

(2) **Hispanic**—is an individual who is descended from and was raised in or participates in the culture of Spain, Portugal, or Latin America, or who has at least one parent who speaks Spanish or Portuguese as part of their native culture;

(3) **Oriental**—is an individual of a culture, origin, or parentage traceable to the areas south of the Soviet Union, East of Iran, inclusive of the islands adjacent thereto, located in the Pacific including, but limited to, Taiwan, Indonesia, Japan, Hawaii, and the Philippines, together with the islands of Polynesia;

(4) **Native American**—is an individual having origins in any of the original people of North America, who is recognized as an Indian by either a tribe, tribal organization, or suitable authority in the community. For purposes of this section a suitable authority in the community may be an educational institution, a religious organization, or a state or Federal agency.

(5) **Eskimo**—is an individual having origins in any of the original peoples of Alaska;

(6) **Aleut**—is an individual having origins in any of the original peoples of the Aleutian Islands.

(1) *Minority owned business* means a business that is:

(1) A sole proprietorship owned by a minority group member or a woman;

(2) A business entity at least 50 percent of which is owned by minority group members or women;

(3) A publicly owned business at least 51 percent of the stock of which is owned by minority group members or women;

(4) A certified minority owned business as evidenced by a certificate satisfactory to the Corporation's Affirmative Action Officer, and signed by the owner or the executive officer of the minority owned business.

For purposes of this definition, ownership means that the risk of gain or loss and the amount of control exercised must be equivalent to the ownership percentage.

(m) *Personnel plan* means a plan for the subject project which at a minimum includes the following:

(1) An analysis of participation of minority group members, women, Viet-

nam era veterans, and handicapped persons in the development project including an evaluation by category of employment, i.e., professional and managerial, skilled, semi-skilled, trainee, and other, and the number of employees in each category;

(2) An analysis of the salaries of minority group members, women, handicapped persons, and Vietnam era veterans showing the relative position of these employees with those not covered by the Affirmative Action Plan;

(3) Goals and timetables for employment by category and salary level of minorities, women, Vietnam era veterans, and handicapped persons employed for the development parcel;

(4) Strategy for achieving the goals established (see Exhibit B);

(5) A list of committed opportunities for the employment of minority group members, women, Vietnam era veterans, and handicapped persons.

(n) *Vietnam era veteran* means a person who:

(1) Served on active duty for a period of more than 180 days, any part of which occurred during the Vietnam era, and was discharged or released therefrom with other than a dishonorable discharge; or

(2) Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed during the Vietnam era.

§ 906.3 Procedures.

(a) Affirmative Action Plans must be submitted to the Corporation at the following times:

(1) At the time a response is submitted to the Corporation's solicitation for proposals, the response must include an Affirmative Action Plan;

(2) If a property right exceeding 10 percent of the area of the development parcel is made available by the Corporation, but without the Corporation having made a solicitation for proposals, the developer must submit an Affirmative Action Plan within 30 days after the start of negotiations with the Corporation.

(b) Affirmative Action Plans will be reviewed as follows:

(1) Each Affirmative Action Plan submitted to the Corporation will be reviewed by the Corporation's Affirmative Action Officer, or his designee.

(2) In the case of a developer who responds to a solicitation for proposals, the Affirmative Action Plan will be reviewed by the Affirmative Action Officer, and if the Plan is in substantial compliance with the goals set forth in Exhibit A, the Plan and the recommendation of the Affirmative Action Officer will be submitted to the Chairman of the Board for approval prior to the Board's final selection.

(3) In the case of a developer who receives 10 percent or more of the area of a development parcel from the Corporation, the Affirmative Action Plan will be reviewed by the Corporation's Affirmative Action Officer, and if the Plan is in substantial compliance with the goals set forth in Exhibit A, the Plan and the recommendation of the Affirmative Action Officer will be submitted to the Chairman of the Board for approval within 15 days of submission.

(4) The Chairman may approve any Affirmative Action Plan that is not in substantial compliance with the goals set forth in Exhibit A, but for which the developer has documented a genuine effort to meet the goals of the regulations and complied with the spirit of the Corporation's policy.

(5) The Chairman may, in his discretion, submit any Affirmative Action Plan to the Board of Directors for approval, if there is not substantial compliance with the goals set forth in Exhibit A.

(6) The review of the Affirmative Action Plan will determine conformity with The Pennsylvania Avenue Plan—1974, the policy of the Corporation's Board of Directors, and the regulations and guidelines set forth in this subpart A, part 906.

(c) Revisions: (1) The Corporation may require a developer at any time prior to approval of the Affirmative Action Plan to revise the Plan for compliance with the requirements of this subpart.

(2) Each developer required to comply with this subpart must submit for approval an up-dated Affirmative Action Plan at the commencement of

construction, at the commencement of occupancy, and at the commencement of operation or management of any portion of the facility by the developer or a related entity. Each revision of the Affirmative Action Plan must address all the requirements set forth in § 906.4.

(3) The Corporation's Affirmative Action Officer will review all revisions submitted to the Corporation. If the revision is a substantial change from the originally approved Plan, the review procedures set forth in paragraph (b) of this section will be applicable. If the revision submitted is not a substantial change from the originally approved Plan, the Corporation's Affirmative Action Officer may approve the revision.

§ 906.4 Formulation of affirmative action plan.

(a) The developer, in formulating the Affirmative Action Plan, should consider all phases of development from establishment of the development team to operation and management of the development project including each component of the project (e.g., hotel, retail, office, residential). The developer should also consider the personnel profile of project contractors, sub-contractors.

(b) For each phase and each component, the developer should give consideration to creating business and employment opportunities and committed opportunities in the following:

- (1) Equity participation;
- (2) Professional and technical services such as legal, architectural, engineering, and financial;
- (3) Purchasing materials and supplies in connection with construction and operation;
- (4) Contracting for construction, operation, and maintenance; and,
- (5) Financing, including construction and permanent financing, and other financial and banking services.

§ 906.5 Administration of affirmative action plan.

(a) The developer shall appoint an Affirmative Action Officer, and for projects exceeding \$10 million in cost,

§ 906.6

the person appointed must have affirmative action as a primary responsibility.

(b) The developer shall report to the Corporation periodically its progress in meeting the goals and timetables in its Affirmative Action Plan with respect to its contracting and purchasing plan, leasing plan, and committed opportunities. In meeting the reporting requirements the developer shall:

(1) Count an individual only once for reporting purposes;

(2) Count an individual in the first appropriate category as follows:

(i) Minority Group Member;

(ii) Handicapped Person;

(iii) Woman;

(iv) Vietnam Era Veteran;

(3) Report the dollar amount of contracts and purchases from minority owned businesses including sub-contracts;

(4) In the event 10 percent or more of the dollar amount of a contract, sub-contract, or purchase from a minority owned business is performed by other than a minority owned business, the developer shall report only the dollar amount performed by the minority owned business.

§ 906.6 Implementation.

(a) Each developer's Affirmative Action Plan will be incorporated into the real estate agreement between the developer and the Corporation.

(b) Each developer shall include a clause requiring a contracting and purchasing plan and a personnel plan in any contract exceeding \$500,000.

(c) Each developer should consider including a clause requiring a contracting and purchasing plan and a personnel plan in any contract less than \$500,000.

(d) In order that the Corporation may be of assistance, and to the extent practical, the developer shall notify the Corporation's Affirmative Action Officer of any failure to meet the approved Affirmative Action Plan.

(e) The Corporation, at the request of the developer, shall provide the developer with assistance for meeting the goals set forth in the Affirmative Action Plan. Such assistance may be provided in the form of lists of minority enterprises, sources for recruiting and

36 CFR Ch. IX (7-1-01 Edition)

advertising, as well as other available information.

§ 906.7 Incentives.

(a) At the request of the developer, the Corporation may agree to deferral of a portion of rental, not to exceed 50 percent, during construction and during the first year of operation following construction of any phase of the development project. Allowable rent deferral during the construction phase will be two percent of the total base rent for each one percent of the value of all construction contracts which have been awarded to Minority Owned Businesses, not to exceed 50 percent. Rent deferral during the first year of operation following construction of any phase of the development project will be four percent for each one percent of total equity owned by minority group members, minority owned businesses, and women.

(b) Following review of Affirmative Action reports submitted to the Corporation pursuant to § 906.5(b), the Corporation will determine the developer's compliance with the goals set forth in the approved Affirmative Action Plan. Compliance with the goals established in the Plan will be measured by adding the percentages reported including overages in each category and dividing that by the number of categories covered in the Plan.

(c) If 75 percent compliance is not achieved during any rent deferral period, the Corporation will afford the developer 120 days to achieve at least that level of compliance. If, at the end of that 120 day period, 75 percent compliance is not achieved, all rental deferral, together with interest, will be due and payable to the Corporation on the 10th day following receipt of written notice that payment of the deferred rent has been accelerated.

§ 906.8 Review and monitoring.

The Corporation, either by its employees, consultants, or other government agency, shall analyze and monitor compliance with the developer's approved Affirmative Action Plan. The Corporation shall rely on the reports submitted by the developer. However:

(a) Further investigation by the Corporation may be undertaken if problems are brought to the attention of the Corporation through any reliable source, or if any formal complaints are filed against the developer that relate to performance of the Affirmative Action Plan; and

(b) The Corporation reserves the right to audit the records of the developer that pertain to any report submitted to the Corporation.

§906.9 Voluntary compliance.

The Corporation will encourage any individual or entity not described in §906.1(c) or (d) to submit and adopt an Affirmative Action Plan on any development project for which the Corporation's review and approval is required to determine conformity of the development project with the The Pennsylvania Avenue Plan—1974. Any such Affirmative Action Plan should accompany the development plans.

§906.10 Confidentiality.

All information submitted to the Corporation pursuant to this subpart A will be kept confidential, except as availability to the public may be required by the Freedom of Information Act.

Subpart B [Reserved]

EXHIBIT A TO PART 906—SUGGESTED MINIMUM GUIDELINES AND GOALS

The following are suggested for consideration by developers in formulation of minimum affirmative action goals for the development parcel:

(a) Equity participation—10 percent participation by minority group members, women, and minority owned businesses as investors in ownership of the development parcel.

(b) Contracts for professional and technical services—20 percent of the dollar value of the contracts to minority owned businesses.

(c) Persons providing professional or technical services—20 percent should be minority group members, women, handicapped persons, or Vietnam era veterans.

(d) Construction contracting—15 percent of the total dollar value to minority owned businesses. (In order to accomplish this goal, the developer must require that any prime contractor show at least 15 percent minority

subcontractors unless the prime contractor is a minority contractor.)

(e) Construction employment should comply with the Washington Plan as a minimum.

(f) Purchasing—20 percent of the dollar value of all purchases of materials and supplies to minority owned businesses.

(g) Hotel employment—20 percent of all hotel employees, 15 percent of all personnel earning an excess of \$2,000 a month (in 1978 dollars), and 60 percent of trainees for hotel positions should be minority group members, women, handicapped persons, or Vietnam era veterans.

(h) Leasing of space—15 percent of the retail space should be targeted for minority enterprises.

(i) Committed opportunities—should be created for professional, technical, construction, hotel, or other type operations where the representation of minority group members, women, or handicapped persons in a field is inconsistent with the demographic profile of the Washington metropolitan area.

EXHIBIT B TO PART 906—GUIDELINES FOR ESTABLISHING STRATEGY TO IMPLEMENT AFFIRMATIVE ACTION PERSONNEL PLAN

The following are suggested as the types of activities to be considered in the development of strategies for the affirmative action personnel plan:

(1) "Vigorous" searching for qualified minority and women applicants for job openings in professional and managerial positions, often including recruitment visits to educational institutions with large minority or female enrollments.

(2) Wide dissemination of affirmative action policy in advertisements and employment literature.

(3) Utilization of minority media in recruitment advertisements.

(4) Notification of job openings to minority community organizations and associations.

(5) Listing of all employment openings with compensation of under \$20,000 per year at a local office of the State Employment Service (or union hiring hall when union labor is required).

(6) Periodic review of minority, female, Vietnam era veteran, and handicapped employees to identify underutilized and unutilized skills and knowledge as well as opportunities for reassignment.

(7) Utilization of merit promotion and on-the-job training programs to create career ladders or otherwise qualify minority, female, Vietnam era veteran, and handicapped employees for advancement.