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21st July, 1969

COPY NO. 66

CABINET

RACIAL DISCRIMINATION AND GOVERNMENT CONTRACTS

Memorandum by the Attorney-General

It is proposed that there should be included in Government contracts a clause to the following effect:-

- "(1) The contractor shall not unlawfully discriminate within the meaning and scope of the provisions of the Race Relations Act, 1968 or any statutory modification or re-enactment thereof relating to discrimination in employment.
- (2) The contractor shall take all reasonable steps to secure the observance of the provisions of sub-clause (1) hereof by all servants, employees or agents of the contractor and all sub-contractors employed in the execution of the contract."

2. Assuming that such a clause is thought to be necessary (though I myself think it is unnecessary and sets an undesirable precedent), a difference of opinion has arisen as to how breach of the clause on the part of a contractor should be handled and what consequences are to follow from breach of it.

3. If the clause is to have legal or practical significance, it is important to consider the consequences that are to flow from breach of the clause. What has been suggested is that further Government contracts might be withheld from a contractor in breach of the clause and that this should be announced when the new clause is announced.

4. It is open to a Government department to refuse to do business with a particular contractor just as a private individual may refuse. But the Crown is in an exceptionally powerful and often a monopoly position and the sanction of withholding further contracts could have gravely damaging effects both upon the firms themselves and their employees. Indeed it could drive a firm out of business. Where the ground is already covered by legislation providing sanctions for unlawful conduct, for the Executive to withhold further contracts is to impose a penalty in addition to that prescribed by the law - in this case the Race Relations Act. This provides in appropriate circumstances for the grant

of an injunction, with the risk of imprisonment for contempt, if it is not complied with. In my view we ought not to embark upon the imposition of extra statutory sanctions for unlawful conduct without giving careful thought to the implications of what we are doing. Suppose for instance the Industrial Relations Bill had become law. The present proposal would form a precedent for a future administration announcing that no further Government contracts would be awarded to a firm whose employees had been found to be in breach of a conciliation pause Order, or indeed whose employees were thought by the Executive to be in breach.

5. As I see it, the implication of the imposition of an extra statutory sanction, now that time has elapsed since the passing of the Race Relations Act, is that the Act is defective because inadequate, and that accordingly it is the Government's intention to single out for special treatment those employers and employees who carry out Government contracts. The Fair Wages clause which is inserted in Government contracts has been cited as a precedent for what is now proposed. In my view the position there is quite different. That clause imposes no obligation upon the contractor to comply with the law, but provides simply that he shall pay wages and observe hours and conditions of labour not less favourable than the going rate for the district.

6. If the sanction is to be imposed, the question arises whether the decision to withhold further contracts should be taken before there has been a Court finding that the contractor has been guilty of discrimination. Cases could arise where further contracts were withheld because a complaint had been made and later the Board considered that there was no case for Court proceedings or when the case came to Court the court found the complaint unjustified. I understand it is now the intention that the withholding of contracts shall not be in the discretion of contract officers and other officials but that every case shall be referred to Ministers. If what is proposed is to be done, this is clearly a desirable provision. However in my view it would be wrong for Ministers to reach a decision to withhold further contracts unless there had been a finding of discrimination by the Court. The Court might find there had been no discrimination and meantime the withdrawal of contracts could have had most damaging consequences. It is significant that the Fair Wages clause provides that if any question arises as to whether the requirements of the clause are being observed the question if not otherwise disposed of shall be referred by the Minister of Labour to an independent Tribunal. The equivalent Tribunal in the present context is the Court itself.

7. It has been suggested that the sanction should extend not only to the withholding of future contracts but to the cancellation of existing ones. Clearly there would be no justification for cancelling a contract which did not contain the new clause. But a further question arises as respects contracts containing the clause which had already begun to be implemented. The original decision of the Home Affairs Committee was that no provision should be made for the forfeiture of contracts already

in force. If it is now decided that they should be liable to cancellation, careful thought will have to be given to the terms of the clause. Unless it is appropriately drafted a department which cancelled an existing contract on the ground of discrimination might itself be liable in damages for breach of contract.

8. A further matter for consideration is what conditions a contractor must satisfy before he is restored to acceptability and can be offered further contracts. Section 13 of the Race Relations Act, 1968 provides that anything done by a person in the course of his employment shall be treated for the purposes of the Act as done by his employer as well as by him, whether or not it was done with his employer's knowledge or approval. This means that discrimination at a single building site, for instance, could involve a large contractor in liability to Court proceedings and if he were struck off the list of Government contractors there could be a continuing loss both to the firm and its workpeople and also to the Treasury if the firm was the lowest tenderer.

9. I think there is danger in taking the view that the policy can be left to develop with time and that Ministers can do what seems most expedient as cases arise. An objectionable feature of the proposed procedure is that it is envisaged that sanctions may be applied in a capricious fashion. Where for instance contractors are monopoly suppliers or for some other reason the only source of essential Government supplies, I understand it is proposed that they should continue to be offered contracts. It is fundamental that the Government should not act inconsistently or arbitrarily. Cancellation of Government contracts or refusal to do further business can have most damaging consequences for both employers and workpeople and unless the policy is implemented in a way seen to be just, there is serious risk of criticism, not least from the Parliamentary Commissioner.

10. My conclusion is that if the clause is to be introduced into Government contracts it should be on the understanding that failure to comply with it should be dealt with by the ordinary processes of the law (i. e. under the Race Relations Act procedures). At any rate there should in my view be no commitment now to the imposition of sanctions. So far as I know, neither the Race Relations Board nor the Rose Report has advocated the use of sanctions. The Rose Report recommends that if such a clause is added to Government or local authority contracts responsibility for ensuring compliance should be given to the Race Relations Board, to which complaints could be referred and which could make its own investigations. In my view this is all that is needed. If the Government were asked what would be the consequences of failure to comply with the clause the reply would be that the complaint would be referred to the Board.

11. Although the important issue in my view is whether sanctions other than those provided for in the Race Relations Act should be imposed on a contractor guilty of discrimination, I think it is open to question whether a clause should be introduced into Government contracts or whether the matter can be dealt with in some other way. Provisions

are not inserted in formal legal documents like Government contracts unless they have reference to the subject matter of the contract and are intended to have legal effect. Both the Confederation of British Industry and the Trades Union Congress are opposed to the proposal to put the clause in the contracts. It has been suggested that it would be sufficient that when a Government contract is entered into the contractor should be reminded of the provisions of the Race Relations Act relating to employment and be told that he is expected to comply with it. This I think is a preferable way of dealing with the matter, and the letter accompanying the contract could go on to say that any complaint of failure to comply would result in a reference to the Race Relations Board.

F. E. J.

Law Officers' Department, W. C. 2.

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