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Harvey D. Fort
Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room C-3325
Washington, DC 20210

Re: Docket ID: OFCCP-2018-0002-0001
Comments of the Center for Workplace Compliance in Response to the Office of Federal
Contract Compliance Programs' Contractor Recognition Program – Excellence in Disability
Inclusion Award

Dear Mr. Fort:

The Center for Workplace Compliance (CWC), welcomes the opportunity to submit these written comments on the Office of Federal Contract Compliance Programs' (OFCCP) *Contractor Recognition Program – Excellence in Disability Inclusion Award*, notice of which was published in the *Federal Register* on October 5, 2018. 83 Fed. Reg. 50411. OFCCP's proposed Excellence in Disability Inclusion Award aims to recognize small and large contractors with exemplary programs for advancing the opportunities of individuals with disabilities in the workplace.

CWC fully supports OFCCP's efforts to distinguish and recognize contractors for their creative, good-faith efforts to ensure compliance with their equal employment opportunity and affirmative action obligations. Indeed, we believe that awards such as this can be an effective way to encourage voluntary compliance not only for nominees and awardees, but also for other contractors by providing real-world examples of truly effective compliance programs.

That said, laudable as the agency's proposal is, we believe OFCCP can do even more to fully achieve its stated goal of identifying "exemplary practices of successful contractor establishments" by providing itself the opportunity to consider and select *from an even greater variety* of exemplary disability inclusion programs. To that end, we recommend several simple and practical modifications that would, if adopted, increase both the number of contractors that apply for the award and the number of contractors eligible to receive it.

Statement of Interest

CWC is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment, affirmative action, and other workplace requirements. Formed in 1976 as the Equal Employment Advisory Council (EEAC), CWC's membership now includes nearly 250 of the nation's largest employers, all of which are firmly committed to the principles and practice of equal employment opportunity.

In addition, nearly all CWC member employers are subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and information collection requirements effectively accomplish their underlying policy objectives while minimizing unnecessary burdens and costs.

Summary of Comments

OFCCP's proposed Excellence in Disability Inclusion (EDI) Award is intended to recognize federal contractors that have exemplary programs for advancing the recruitment, hiring, retention, and promotion of individuals with disabilities. Under OFCCP's proposal, contractor establishments that receive an award would receive a two-year moratorium during which the establishment(s) would be exempt from agency compliance evaluations. During this two-year period, awardees and runners-up would be required to develop and provide input into the development of technical assistance, outreach, and model practices for use by other employers.

CWC strongly supports OFCCP's objective of recognizing contractors with successful disability inclusion programs. At the same time, we respectfully submit that the proposed EDI award can be modified to encourage even greater contractor participation, which would yield a greater number and variety of creative and exemplary programs for OFCCP's and the contractor community's consideration. In particular, we encourage OFCCP to revisit the extent to which the following provisions might unnecessarily limit contractor participation in the EDI nomination process:

- Excluding contractors with functional affirmative action programs;
- Limiting award eligibility to contractors not already covered by an audit moratorium;
- Requiring contractors to certify that nominated establishments are "in compliance" with OFCCP's regulations, the statutes and executive orders on which they are based, and the Americans with Disabilities Act (ADA);
- Limiting the award's compliance evaluation moratorium to single establishments; and
- Imposing post-award requirements on "honorable mention" awardees.

CWC respectfully submits that OFCCP could significantly increase the likelihood of success in achieving the agency's desired goals by:

- Explicitly conferring eligibility on contractors with functional affirmative action programs;
- Allowing contractors covered by other OFCCP moratoriums to be considered for the award;
- Eliminating the certification requirement;
- Expanding the scope of the award to include all contractor establishments (and functions) where selected disability inclusion programs are implemented; and
- Recognizing "honorable mention" awardees without imposing additional recordkeeping and reporting obligations.

CWC also recommends that OFCCP clarify the scope of compliance evaluations covered by the awardee moratorium. As drafted, it is unclear whether the moratorium exempts awardees from agency reviews of only their Section 503 AAPs or all of their AAPs implemented pursuant to the authorities OFCCP enforces.

Comments on Proposed Changes

OFCCP Should Permit Contractors with Functional Affirmative Action Programs to Apply for the EDI Award

OFCCP's proposal appears to confer EDI award eligibility only to those contractors with establishment-based AAPs. This implies that contractors who prepare their AAPs by function or business unit pursuant to an OFCCP-approved functional affirmative action program (FAAP) agreement are not eligible for the award and therefore may not apply. We are unaware of any regulatory or practical rationale for drawing such a distinction.¹

Indeed, contractors with FAAP agreements are just as committed to their equal employment opportunity (EEO) and affirmative action (AA) obligations as contractors without such agreements, and perhaps even more so. We submit that they are just as deserving of recognition for their efforts in developing and implementing exemplary disability inclusion programs as those contractors that develop and implement their AAPs by establishment. Importantly, a critical purpose of the EDI award is to encourage other contractors to "adopt these or similar practice[s] to support their compliance with mandatory obligations under Section 503." Excluding contractors with FAAPs arguably undermines the purpose of the award and unnecessarily limits information about model programs for consideration by others. Accordingly, we recommend that OFCCP explicitly permit contractors with functional affirmative action programs to apply for this and other planned contractor recognition awards.

¹ We recognize that, unlike OFCCP's regulations implementing E.O. 11246, the agency's Section 503 regulations neither explicitly permit nor explicitly prohibit contractors from developing FAAPs. Nonetheless, since the FAAP program's inception, OFCCP as a matter of practice has accepted federal contractor's "functional" Section 503 and VEVRAA AAPs covering the employee population in question. The same should apply here.

OFCCP Should Not Exclude a Contractor Covered by Another Moratorium From Applying for the EDI Award

OFCCP's proposal states that "contractor establishments that received, or are otherwise covered by, a moratorium through another OFCCP incentive or recognition program within the last two calendar years" will not be eligible to apply for this award. We submit that excluding these contractors will limit OFCCP's opportunity to consider and reward the widest possible range of successful disability inclusion programs, with no apparent corresponding public policy benefit.

For example, if a contractor is covered by another moratorium—such as one under OFCCP's proposed Leadership in Equal Access and Diversity (LEAD) Award—and also has an exemplary disability inclusion program in place, the current proposal would disqualify the contractor from applying for the EDI award. This deprives OFCCP of the opportunity to consider the exemplary disability inclusion program, and it deprives the broader federal contractor community from potentially learning about and implementing their own versions of it. Furthermore, a contractor that applies for more than one award program has no way of knowing at the outset whether it will be selected for any award, much less more than one. Accordingly, we recommend that OFCCP eliminate this restriction.

OFCCP Should Eliminate the Requirement that a Contractor Certify It Is "in Compliance" with the Laws OFCCP Enforces

OFCCP's proposal requires contractors to certify that they are "in compliance" with and have no "unresolved violations" of E.O. 11246, Section 503, or VEVRAA when applying for the EDI Award and, if selected, also during its attendant moratorium period. In addition, contractors applying for the award must certify that they have "no adverse decisions" by a court, DOL's Administrative Review Board, or an Administrative Law Judge related to E.O. 11246, Section 503, VEVRAA, or the ADA in the three years preceding their award application. This certification would be included in a Statement of Support signed by the contractor's Chief Executive Officer (CEO) or President and the highest-ranking executive responsible for overseeing the nominated disability inclusion program.

CWC respectfully submits that this proposed certification requirement is unnecessary, problematically vague, and will discourage larger organizations, which often dedicate significant resources to their disability inclusion programs, from participating. We believe that if implemented as proposed, the certification requirement will deter contractor participation and likely result in many exemplary programs going unrecognized.

To be clear, we completely agree that contractors lacking a full commitment to meaningful compliance should *not* be eligible for the EDI Award. However, the proposed compliance certification requirement is unnecessary to ensure contractor compliance. Contractors don't determine their own compliance; OFCCP and other enforcement agencies do. In its proposal, however, OFCCP is essentially asking contractors to certify that OFCCP would find no violations of any kind were it to conduct a full compliance review. This is obviously something no contractor could do in good faith. As an alternative, if OFCCP insists that some attestation is necessary, it should ask the contractor to acknowledge that the company is *committed* to complying with Section 503 and its implementing regulations, and to ensuring equal employment opportunity for persons with disabilities.

Indeed, contractors applying for award consideration would *already* be required to produce the information needed for OFCCP to evaluate the contractor's compliance status, including the current year's Section 503 AAP and supporting data for the past three years. OFCCP also may review its own enforcement database and files to identify any record of meaningful noncompliance or ongoing reviews. In other words, OFCCP already has access to sufficient information to reasonably determine a contractor's overall compliance posture. It may be that OFCCP identifies information that renders a contractor ineligible for recognition, but CWC sees no reason for contractors to certify what they think OFCCP might find.²

Moreover, Chief Executives will be reluctant to certify, in writing, that any portion of the enterprise is completely free of violations of the laws and regulations OFCCP cites, and rightly so.

First, the proposal fails to define what it means to be "in compliance." For instance, if a contractor applies to be considered for the EDI Award and an employee files a complaint with OFCCP, is the contractor automatically barred from consideration? As another example, if an employee has filed an internal complaint that the contractor is currently investigating, should the contractor refrain from applying for the EDI Award? Can the contractor certify that it is "in compliance?"

Second, the proposal makes no distinction between EEO/AA violations that are relevant to consideration for the EDI Award and those that are not. CWC encourages OFCCP to question whether and to what extent the myriad possible violations under E.O. 11246 or VEVRAA bear on the quality of a contractor's efforts to meaningfully include individuals with disabilities in the workplace. For example, does a technical violation for failing to properly display a required poster necessarily mean that a contractor's disability inclusion efforts are unworthy of consideration?

CWC encourages OFCCP to reconsider the proposed certification requirement because it likely will deter good-faith contractors from applying while also denying the broader federal contracting community the opportunity to hear and learn from compelling disability inclusion success stories. Compliance is a process, often assisted by OFCCP either in the form of guidance materials and technical assistance or one-on-one interactions with contractors during the course of a compliance evaluation. When OFCCP finds potential violations in an audit, the agency works with contractors to implement better solutions. OFCCP should maintain the flexibility to consider the disability inclusion programs of even those contractors that have made past mistakes, perhaps even in highly relevant areas such as disability outreach, where highlighting such programs that resulted from meaningful collaboration between OFCCP and the contractor makes good public policy sense.

For these reasons, CWC respectfully urges the agency to eliminate the requirement for contractors to certify their compliance with the laws OFCCP enforces as a condition of EDI Award eligibility.

² The only information sought in this provision of the proposed certification that OFCCP does not currently possess is adverse court decisions related to the ADA issued in the three years prior to submission. As an alternative to the proposed certification provision, OFCCP could simply require that contractors report and explain any adverse decisions. Unlike the proposed certification provision, which would act to screen out many contractors that may have exemplary programs, this alternative would allow OFCCP to consider the contractor's program in proper context.

OFCCP Should Extend the Proposed Compliance Evaluation Moratorium to All Establishments Where the Selected Programs Are Implemented

As proposed, OFCCP will award a selected contractor a two-year audit moratorium to a specific *establishment* (or functional unit, if OFCCP implements CWC's recommendation above). Many contractors of all sizes, however, have centralized compliance functions that coordinate and direct certain EEO/AA efforts and programs across the enterprise. These contractors would have to choose a single establishment to nominate for the award, passing over other, equally deserving establishments. If the contractor's establishment is then selected, that establishment alone is rewarded for the efforts of the organization as a whole.

If the purpose of the award is to recognize a contractor's exemplary disability inclusion *programs*, then OFCCP should consider rewarding all establishments or functions where such programs have been implemented. Accordingly, we recommend that OFCCP allow contractors to nominate multiple establishments or functions for recognition, and that OFCCP extend the benefits of the award to all areas of the company where the exemplary program is implemented.

OFCCP Should Sufficiently Reward Honorable Mention Awardees

As proposed, the EDI award would allow OFCCP to recognize up to two "honorable mentions" per contractor category. While honorable mention recipients would not be granted a moratorium, they would be obligated to participate in all the same post-award requirements as full awardees, including mentoring other contractors, developing technical assistance tools, and conducting outreach events.

In plain terms, honorable mentions are "awarded" with the same obligations as the EDI Award winners, but with almost no incentive. CWC is concerned that contractors will be discouraged from applying for the award if the potential cost of coming in second so outweighs the potential benefits. To avoid inadvertently discouraging participation, OFCCP should consider granting the two-year moratorium to honorable mention awardees or, in the alternative, extend a one-year moratorium to honorable mention recipients with corresponding one-year post award obligations.

Additional Recommendations

OFCCP Should Clarify the Scope of the Compliance Evaluations Covered by the Moratorium Period

The proposal is ambiguous regarding the scope of the compliance evaluation moratorium for awardees. Specifically, it is unclear whether the moratorium exempts awardees from review of only Section 503 AAPs, or AAPs implemented pursuant to E.O. 11246 and VEVRAA as well. The proposal does provide that contractors will be required to have implemented an affirmative action program and have no unresolved issues involving E.O. 11246, Section 503, and VEVRAA before applying for the award. It also requires them to further certify their compliance with these laws during the moratorium period if they are selected for the EDI Award.

CWC believes that because OFCCP is able to take into account a contractor's compliance with E.O. 11246, Section 503, and VEVRAA before it applies for the award and during the moratorium period, OFCCP

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should explicitly extend any moratorium to compliance reviews of EEO/AA obligations pursuant to E.O. 11246 and VEVRAA (if applicable).

Conclusion

CWC appreciates the opportunity to comment on OFCCP's proposed Excellence in Disability Inclusion Award and appreciates the agency's consideration of our recommendations. If we can be of any further assistance in the development of OFCCP's final EDI Award program, please do not hesitate to contact me by phone or email.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt A. D. Nusbaum", with a long horizontal flourish extending to the right.

Matt A. D. Nusbaum
Senior Counsel