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VIA FEDERAL eRULEMKAING PORTAL: <http://www.regulations.gov>

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

Re: Comment on the Office of Federal Contract Compliance Programs Proposed Revisions to the Recordkeeping and Reporting Obligations of Supply and Service Federal Contractors and Subcontractors by Berkshire Associates Inc.; OMB Control No. 1250-0003

Dear Mr. Fort:

Berkshire Associates Inc. (“Berkshire”) submits the following comment in response to the proposal by the Office of Federal Contract Compliance Programs (“OFCCP”) to seek a three-year approval under the Paperwork Reduction Act (“PRA”) for the agency’s Supply and Service program. The OFCCP’s Information Collection Request (“ICR”) includes proposed revisions to the reporting requirements under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (“Section 503”) and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”), all as amended. More specifically, the ICR seeks to make significant revisions to the Scheduling Letters and Itemized Listings used by the agency to initiate Supply and Service compliance checks, Supply and Service compliance reviews, and focused reviews under Section 503 and VEVRAA.

BACKGROUND ON BERKSHIRE AND ITS CLIENTS

Berkshire is a human resources consulting and technology firm specializing in affirmative action compliance and applicant data management. Berkshire’s clients vary in size from small establishments with one affirmative action plan (“AAP”) to nation-wide employers with thousands of employees covered by multiple AAPs. Berkshire’s services are utilized by employers in a wide range of industries, including hospitality, food services, retail, information technology, manufacturing, professional services, health care, colleges, universities and not-for-profit organizations.

In business since 1983, Berkshire was one of the first companies to provide an automated way of preparing AAPs for employers. Hundreds of Federal contractors and subcontractors, as well as other independent consultants, use Berkshire’s proprietary software to prepare compliant AAPs on



an annual basis. A certified small business enterprise, Berkshire also provides outsourcing and consulting services to employers, including Federal contractors and subcontractors. Berkshire consultants help employers prepare approximately 6000 AAPs every year and regularly assist employers during compliance reviews by the OFCCP. Over the past several years alone, Berkshire has assisted clients with preparing hundreds of responses to supply and service compliance reviews in every OFCCP region.

In preparing these comments, Berkshire relied on its own experiences in assisting clients with affirmative action compliance for more than 35 years. Berkshire and its clients strongly support equal employment opportunity. To that end, we recognize the important role the OFCCP plays in ensuring that employment decisions are made in a non-discriminatory manner, without regard to an individual's sex, race, ethnicity, disability, veteran, or other protected basis. While we support the OFCCP's commitment to voluntary compliance, strong enforcement, and a desire to streamline the compliance review process by limiting the number of items that are requested after a contractor's initial response to a Scheduling Letter and Itemized Listing, we are concerned that significant portions of the proposed data collections go well beyond the current regulatory requirements and therefore are not appropriately promulgated through the PRA process. We also believe that many of the new reporting requirements are unnecessary to achieve the agency's stated purpose, particularly since these new requirements will impose significant costs and burdens on employers.

COMMENTS ON THE PROPOSAL

I. OFCCP'S PROPOSED REQUESTS FOR MONTHLY DATA UPDATES

Throughout the OFCCP's proposed ICR, there are a number of reporting changes that would fundamentally alter a contractor's annual affirmative action plan process. For example, Item 4 of the proposed Section 503 and VEVRAA Focused Review Scheduling Letters and Itemized Listings would require that contractors produce data metric information for the annual AAP, as well as for "every completed month of the current AAP year" when a contractor is more than six months into its current AAP year. Similarly, Item 11 of these proposed ICRs seeks employment activity data for the period of time covered by the annual AAP and "for every completed month of the current AAP year" if a contractor is more than six months into its current plan year. Items 9, 12, and 17 of the proposed Supply and Service Scheduling Letter and Itemized Listing also seek monthly data when a contractor is more than six months into its current AAP year.

These proposed reporting requirements go well beyond what is required by the current regulatory scheme under EO 11246, Section 503 and VEVRAA. Berkshire respectfully submits that these types of revisions are not mere revisions to an information collection request. Instead, these proposed revisions turn a contractor's annual affirmative action plan obligation into a monthly one. While contractors are required to maintain records throughout the AAP year, there is currently no obligation to compile or analyze that information more frequently than annually.¹

¹ Indeed, the current ICR for establishment-based supply and service reviews already requests that this information be provided more frequently than is required by the regulations. Items 9 and 12 of the current ICR requests a contractor provide the Section 503 and VEVRAA data metric information for the first six months of the current AAP year when a contractor is more than six months into its AAP year on the date it receives the Scheduling Letter and Itemized Listing.



What OFCCP fails to appreciate is the significant amount of time and effort it takes for a contractor to compile and reconcile the employment activity data used to prepare an annual AAP, or even a single six-month update. While employment records may be created throughout the year, the process of gathering and reconciling that data for use in an AAP takes a significant amount of time. To suggest that contractors can easily do so on a monthly basis, with no additional burden, reflects a lack of understanding about the steps necessary to prepare the quantitative data analyses in an annual AAP. Importantly, a contractor's personnel activity is not neatly completed on a monthly basis. Hiring decisions can take months from the listing of the position to the actual selection of a candidate. While records regarding the process are being created throughout the process, requiring that a contractor fully reconcile that data on a monthly basis so that it can accurately and correctly be presented to OFCCP during a compliance review is simply unreasonable.

Furthermore, the requirement to provide monthly updates in a number of areas is not accounted for in the burden estimates for the Section 503 or VEVRAA regulations, or the proposed ICR for the Supply and Service program and proposed Scheduling Letters and Itemized Listings. While the Supporting Statement for the proposed ICR reflects a slight increase in the total burden hours for creating an initial AAP, preparing an annual update, and maintaining an AAP, the increase is solely "attributable to the higher number of contractor establishments used in the current ICR compared to the previous ICR." The agency's burden estimates, therefore, do not include an increase in the number of hours to collect, reconcile, and analyze monthly employment activity updates, which is what contractors would need to do if they wanted to be fully prepared for a compliance review.

These proposals also significantly undermine, rather than enhance, many of the OFCCP's stated compliance and enforcement priorities. For example, the agency has consistently complained that contractors do not respond to the current Scheduling Letter and Itemized Listing within the required 30-day period. Indeed a 2016 report by the Government Accounting Office found that "close to 85 percent of contractor establishments did not submit a written AAP within 30 days of receiving a scheduling letter." *See Government Accounting Office's September 2016 Report: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance.* Adding a requirement that contractors produce monthly data to the agency only adds to a contractor's inability to provide all requested data within the 30-day period after receipt of a scheduling letter. In essence, no matter how proactive contractors are, they will never have a complete AAP nor will they be "ready" for a compliance review because they will not know what data has to be submitted until the Scheduling Letter and Itemized Listing is actually received. In this regard, the proposal also negatively impacts the value of the agency's courtesy advance notification process, which has been widely touted as an effective way to enhance the efficiency of compliance reviews.

However, the VEVRAA and Section 503 regulations merely require that these data analyses be "compiled annually." 41 CFR Section 60-300.44(k) ("the contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years) and 41 CFR Section 60-741.44(k) (same) emphasis added. Similarly, the OFCCP's current information collection request seeks summary employment activity data by job group, race and gender for the six-month update period, even though the EO 11246 regulations do not specifically require that contractors monitor personnel activity more frequently than annually. *See* 41 CFR Section 60-2.17 (contractors must perform in-depth analyses of its total employment process; implement an auditing system that periodically measures the effectiveness of its total affirmative action program; monitor records of all personnel activity and require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained) (emphasis added).



For the above reasons, Berkshire respectfully submits that the OFCCP not move forward with any of the proposed changes to require monthly data updates. Simply put, more than any other revision in the proposed ICR, the requirement to provide monthly data significantly impedes, rather than enhances, a contractor's ability to voluntarily comply with all of its affirmative action and nondiscrimination obligations. As a result, these proposals undermine, rather than further, the agency's goals of certainty, transparency and efficiency. Should the OFCCP decide that this information is critical to its enforcement process, Berkshire believes that changes of this nature should be proposed through formal rulemaking, with public notice and comment, and not through the information collection approval process.

II. OFCCP'S REQUESTS FOR PROMOTION POOL DATA

Several provisions of the proposed Section 503, VEVRAA and Supply and Service Itemized Listings seek promotion pool data. For example, Item 17 of the Supply and Service Itemized Listing requests that contractors "provide the total number of promotions by gender and by race/ethnicity, and provide the pool of candidates from which the promotions were selected by gender and by race/ethnicity" by job group or job title. Similarly, Item 11 of the Section 503 Focused Review Itemized Listing and Item 11 of the VEVRAA Focused Review Itemized Listing seeks promotion pool information for each promotion.

As an initial matter, Berkshire wants to emphasize that not all promotional decisions have a pool of candidates from which the employee was promoted. Many of our clients define promotions to include career ladder progressions. Defined in various ways, a career ladder promotion, generally speaking, is a range of positions (often similar in nature) to which an employee may be promoted non-competitively up to the full-performance level of the overall role. In a career ladder promotion, the only candidate being considered is the person who is being promoted; there is no promotional pool.

Berkshire also believes that the OFCCP has significantly underestimated the burden associated with these new reporting requirements. The agency's Supporting Statement for the Supply and Service proposed information collection request indicates that the OFCCP estimates the "burden hours for assembling and submitting the requested documents to be approximately 29 hours per contractor" compared to the previous 27.9 hours per contractor. Although the agency notes that the increase in burden hours "accounts for . . . clarifying questions, such as providing the pool of candidates from which promotions were selected", Berkshire respectfully submits that it will take most contractors far longer than 1.1 hours to compile any required promotional pool data.

III. OFCCP'S PROPOSED ELECTRONIC DATA SUBMISSION REQUIREMENT

Many Berkshire clients currently submit their initial response to the Scheduling Letter and Itemized Listing electronically. However, not all of our clients' records are electronically-available. In addition, in some cases, an OFCCP compliance officer has specifically requested that submission be made in paper format. Our clients also have significant concerns about data security and transmission of confidential, sensitive, or trade secret information via electronic means without a secure portal. For these reasons, we recommend that the OFCCP continue to allow contractors the option of providing a response to the Scheduling Letter and Itemized Listing in a variety of formats.



Alternatively, if the OFCCP requires electronic submission, it should only do so once it has a secure portal that all contractors can use to safely transmit electronic information to the agency.

IV. OFCCP'S PROPOSED REVISIONS TO COMPLIANCE CHECK SCHEDULING LETTER AND ITEMIZED LISTING

Berkshire applauds the OFCCP's recent decision to utilize the compliance check process to conduct compliance evaluations. Compliance checks, which are a more limited review of certain components of a contractor's AAP, are an effective and efficient tool for determining whether covered contractors are complying with the basic recordkeeping requirements. Berkshire believes that compliance checks encourage robust voluntary compliance with all affirmative action requirements, without significantly burdening the contractor or the agency with a lengthy compliance review of every single required AAP component. The agency's decision to return to this type of compliance review is a welcome development, and we encourage the agency to increase the number of compliance checks versus other types of reviews each year.

With respect to the proposed changes to the Scheduling Letter and Itemized Listing used to initiate a compliance check, Berkshire has concerns about the agency's decision to require that contractors produce "written AAPs" under EO 11246, Section 503 and VEVRAA instead of the "AAP results" for the preceding AAP year. The agency has not provided any rationale for why the AAP results currently provided to the agency during a compliance check are inadequate. Our experience is that requesting the AAP results allows the agency to confirm that the contractor has developed the core components of an AAP because this documentation requires that the contractor create job groups, perform utilization analyses, and collect and analyze selection decision records to determine progress towards any placement goals. Since the compliance check is intended to be "more limited in scope than a compliance review as it is used to determine whether the contractor has maintained required records", we believe that production of the AAP results is an appropriately tailored way for the agency to confirm a contractor's overall compliance with its recordkeeping obligations under EO 11246.

If the agency decides to move forward with this portion of its proposal, Berkshire requests that the OFCCP clarify what documents it will expect a contractor to produce as its "written AAP", since that term is undefined in the regulations. We recommend that the written AAPs include the AAP components that must be made available for viewing by employees under Section 503 and VEVRAA. This would exclude the data metrics, which are expressly excluded from the AAP that must be available to applicants and employees upon request. *See* 41 CFR Section 60-300.41 (the full affirmative action program, absent the data metrics required by 60-300.44(k), shall be made available to any employee or applicant upon request) and 41 CFR Section 60-741.41 (the full affirmative action program, absent the data metrics required by 60-741.44(k), shall be made available to any employee or applicant upon request) (emphasis added). With respect to the EO 11246 AAP, Berkshire recommends that the agency require that a contractor produce its AAP narrative, without any data reports or personnel activity detail.

We also recommend that the OFCCP continue to request examples of reasonable accommodations from employers. The proposed revision would require that contractors produce "requests made for accommodations by persons with disabilities, whether the requests were granted or denied." While evaluating whether this change is appropriate, the OFCCP must keep in mind that there is currently no regulatory obligation that federal contractors track reasonable accommodation



requests or maintain a list of such requests. In addition, many accommodation requests, especially those related to requests for ergonomic items, are handled informally, and may be granted without regard to whether an individual has a disability, as that term is defined by Section 503. Given the current regulatory requirements, many Berkshire clients prepare a list of accommodations solely for the purpose of responding to the OFCCP's Scheduling Letter and Itemized Listing; this information is not information that is centrally tracked or maintained. Berkshire respectfully suggests that the current language seeking examples of reasonable accommodation requests is more appropriate given the actual recordkeeping obligations of federal contractors. In addition, Berkshire believes that the current request allows the agency to adequately confirm that a contractor is maintaining any records that it might create related to reasonable accommodation requests, such that a revision to require a more comprehensive list of accommodation requests is not justified.²

V. OFCCP'S PROPOSED REVISIONS TO THE SECTION 503 FOCUSED REVIEW SCHEDULING LETTER AND ITEMIZED LISTING

Berkshire supports the agency's decision to conduct focused reviews of a contractor's compliance with Section 503. We appreciate the agency's dedicated attention to these important affirmative action compliance obligations and are hopeful that the agency's efforts will aid contractors in their efforts to increase employment of individuals with disabilities. Berkshire respectfully suggests, however, that the agency delay any proposed changes to the Scheduling Letter and Itemized Listing for Section 503 focused reviews. Instead, we strongly urge the agency to conduct a number of focused reviews under the recently-approved Scheduling Letter and Itemized Listing before determining whether additional, or different, data, is needed for focused reviews under Section 503. Since these types of compliance reviews are entirely new, and appear to involve a required onsite component, there is already significant anxiety among the contractor community about how the agency will evaluate a contractor's compliance during a Section 503 focused review. Given this, we believe that the OFCCP should first collect data using the reporting letter approved in Fall 2018, which has yet to be used for any review.

With respect to the specific proposed revisions to the Section 503 focused review reporting requirements, Berkshire shares the following feedback. Regarding the proposed request for a copy of the contractor's EO 11246 AAP, Berkshire recommends that the OFCCP require that contractors produce only the job group analysis of their EO 11246 AAP narrative. Berkshire also supports the agency's decision to eliminate a specific request for documentation of a contractor's audit and reporting system since this information is generally included in a contractor's written Section 503 AAP. In addition, Berkshire supports the agency's decision to eliminate the request for a contractor's last three EEO-1 reports since these reports do not contain any information about employment of individuals with disabilities and are therefore not relevant to a focused review of a contractor's compliance with Section 503.

Berkshire has significant concerns about the agency's request for compensation and employment activity data. (Items 8, 11 and 12 of the proposed Section 503 Focused Review Scheduling Letter and Itemized Listing). On a practical level, our experience is that many contractors do not use the same unique identifier for each applicant and employee across systems. For example,

² Our recommendations in this regard apply equally to similar requests for a list of reasonable accommodations in the other proposed Scheduling Letters.



an individual's applicant identifier in a contractor's applicant tracking database is typically different than the employee identifier the individual may be provided in the contractor's human resource information systems (HRIS) upon hire. In addition, in many cases, individuals are given multiple applicant identifiers if they apply to more than one available employment opportunity. Given this, it will be extremely burdensome for many contractors to comply with the agency's request that "All applicant and employee level data provided in response to this letter must include a name or identifier unique to each applicant and employee. The unique identifier must be consistent across databases (i.e., self-identification information, compensation information, and employment activity data)." In many cases, we believe that a manual reconciliation of a contractor's applicant tracking and HRIS data will be required.

Our experience in helping contractors prepare thousands of AAPs each year also tells us that the disability status of an individual will, in many cases, not be consistent across all of the employment activity being requested. This is because an individual's status as an individual with a disability is not static and can change over time, indeed even overnight. Furthermore, as the OFCCP recognized when it revised the Section 503 regulations in 2014, individuals may not want to self-identify their disability status as an applicant but may feel more comfortable doing so once they become an employee, or after they have been employed for several years. Given the changing nature of an individual's disability status, Berkshire has concerns about the utility and practicality of providing disability status and employment activity data by individual employee. We also are unclear if the agency's proposed request includes documenting any changes in disability status for each individual employee.

Most importantly, Berkshire is concerned about why specific, individual-level employment activity and compensation data would be requested during a Section 503 Focused Review, particularly since the current and proposed ICR for a full compliance review only requires the production of summary information by race and gender and job group. When the Section 503 regulations were last revised, the agency made clear that:

OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under Executive Order 11246, and enforcement actions will not be brought solely on the basis of statistical disparities between individuals with, and without, disabilities in this data. Rather, Compliance Officers will look to see whether the contractor has fulfilled its various obligations under § 60-741.44, including its obligation, pursuant to § 60-741.44(f)(3), to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) and any other reasonable criteria the contractor believes is relevant, and has pursued different or additional recruitment efforts if the contractor concludes that its efforts were not effective.

78 FR 58681, 58702. The agency's current proposal suggests a troubling potential shift from the clear decision the agency made in 2013 during a formal rulemaking process. Moreover, gathering this detailed data will not allow the OFCCP to determine if individuals with disabilities are being discriminated against in selection decisions or being paid in a discriminatory manner. Because many disabled individuals choose not to self-identify, the collected data would only allow the OFCCP to compare individuals who voluntarily self-identified as disabled and those who did not.



VI. OFCCP'S PROPOSED VEVRAA FOCUSED REVIEW SCHEDULING LETTER AND ITEMIZED LISTING

Berkshire applauds the agency's decision to conduct focused reviews of a contractor's compliance with VEVRAA in future scheduling cycles. We appreciate the agency's dedicated attention to these important affirmative action compliance obligations and are hopeful that the agency's efforts will aid contractors in their efforts to increase employment of protected veterans. As with the agency's proposed revisions to the reporting requirements for Section 503 focused reviews, however, Berkshire has concerns about the burdens associated with and the limited utility of several of the agency's proposed revisions.

Berkshire disagrees that a contractor's EO 11246 AAP is needed to conduct a focused review under VEVRAA. All of the data metrics required under VEVRAA are completed by total workforce at the establishment and do not require any specific understanding of the contractor's overall structure or its AAP job groups. At a minimum, we urge the OFCCP to clarify that EO 11246 support data such as personnel activity detail by race or gender is not required to be produced during a VEVRAA focused review if the agency decides to continue to request a copy of the contractor's EO 11246 AAP.

Berkshire also has concerns about the agency's request for individual-level compensation and employment activity data. (Items 8, 11 and 12 of the proposed VEVRAA Focused Review Scheduling Letter and Itemized Listing) for many of the same reasons noted above in the discussion of the proposed changes to the Section 503 reporting requirements. The same practical problem exists for this data request. Most contractors do not use the same unique identifier for each applicant and employee across applicant tracking and human resource information systems. It is more often the case than not that an individual's applicant identifier in a contractor's applicant tracking database is different than the employee identifier the individual may be provided in the contractor's human resource information systems upon hire. Likewise, individuals who apply to more than one position, or requisition, or even on multiple occasions for the same opportunity, are often given a unique applicant identifier each time, rather than a single applicant identifier that is used across applications. Given this, it will be burdensome for many contractors to comply with the agency's request that "All applicant and employee level data provided in response to this letter must include a name or identifier unique to each applicant and employee. The unique identifier must be consistent across databases (i.e., self-identification information, compensation information, and employment activity data)."

Similarly, although perhaps to a lesser extent, an individual's protected veteran status can be recorded differently in different databases, or over the course of an employee's career. As the OFCCP is aware, an individual can choose to provide, or update, their protected veteran status at any time. It is not uncommon for an individual to self-identify as a protected veteran only after becoming an employee. In this case, the individual's applicant and hire record, or other future employment-related records such as those related to promotion or termination, would reflect different information about the individual's protected veteran status. As with the analysis of individual level employment activity by disability status, the changing nature of an individual's protected veteran status impacts the utility of collecting employment activity data by individual employee.



From a policy and compliance burden perspective, Berkshire is generally concerned about why specific, individual-level employment activity and compensation data is being requested during a VEVRAA Focused Review when only summary information about employment activity is requested during a more comprehensive, establishment-based compliance review. Indeed, when the VEVRAA regulations were last revised in 2014, the agency made clear that the data metrics information being collected would not be used to examine utilization of protected veterans or to determine if there were selection rate disparities between veterans and non-veterans:

OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under the Executive Order, and enforcement actions will not be brought solely on the basis of statistical disparities between veterans and non-veterans in this data. Compliance officers will look to see whether the contractor has fulfilled its obligations under § 60-300.44(f)(3) to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) as well as any other reasonable criteria the contractor believes is relevant, and has pursued different and/or additional recruitment efforts if the contractor concludes that its efforts were not effective.

78 FR 58613, 58637. The agency provides no explanation for why the summary applicant and hire information contained in the required VEVRAA data metrics is now somehow insufficient to evaluate the effectiveness of a contractor's recruitment efforts, which was the stated purpose of collecting veteran status information when the VEVRAA regulations were last revised. Given these concerns, Berkshire is opposed to the OFCCP's proposal to collect detailed, employee-level data about employment activity and compensation.

VII. OFCCP'S PROPOSED REVISIONS TO THE SUPPLY AND SERVICE SCHEDULING LETTER AND ITEMIZED LISTING

The ICR also seeks to make significant changes to the Supply and Service Scheduling Letter and Itemized Listing. Like many of the other proposed reporting requirements, these new reporting requirements would impose significant new compliance obligations on federal contractors, while adding limited utility to the OFCCP's enforcement efforts.

A. List of Subcontracts

The OFCCP's proposed Supply and Service Scheduling Letter requests, for the first time, that contractors provide the OFCCP with a list of the "three largest subcontractors based on contract value, excluding those expiring within six months" of receipt of the Scheduling Letter. of receipt of this letter." A footnote clarifies that the list should only include "subcontractors that perform work or provide supplies or services necessary to the performance of the federal contract, and those subcontractors who perform, undertake, or assume any portion of the contractor's obligation. While Berkshire appreciates that it is difficult for the OFCCP to currently gather subcontractor information, we respectfully submit that the agency cannot pass on its burden to identify covered subcontractors within its jurisdiction to others.



On a practical level, it will be extremely burdensome for contractors to gather this information. Contractors do not generally maintain a listing of their covered subcontractors, and certainly not by contract value or contract expiration date for each AAP establishment, which is the information called for by the proposed information collection request. Moreover, most contractors work with subcontractors on federal and non-federal work, and do not currently keep records about the contract value of the subcontractor's federal work. The reason that this information is not generally retained in this manner is because there is currently no regulatory requirement to collect or maintain such information. Although contractors are required to provide certain notices to subcontractors, the EO 11246, Section 503 and VEVRAA regulations do not contain any requirements to maintain a list of subcontractors that perform work or provide supplies or services necessary to the performance of the contractor's agreement with the Federal government. Furthermore, even if a contractor could identify its largest subcontracts, there is no way for the contractor to confirm that the OFCCP would agree that the contracts identified were both necessary to the establishment's government contract (if there is one) and the largest in terms of contract value.

Berkshire also understands this proposal to potentially require that contractors submit different subcontractor information depending on the contractor establishment selected for a compliance review. For example, many of Berkshire's clients hold multiple government contracts at the same time. In some cases, the work called for by the contract is performed across the company at all or most establishments. In other cases, however, specific company establishments work on particular government contracts, while other company establishments work on different federal contracts (or no federal contracts at all). The OFCCP's proposal appears to require that each establishment provide the three largest subcontracts that are necessary to that establishment's government contract work. If our understanding is correct, this significantly increases the burden associated with complying with this new requirement.

Should the OFCCP wish to move forward with this proposal, Berkshire believes that any new requirement to collect and maintain subcontractor data should be promulgated through notice and comment rulemaking, and not through the PRA process. Any rulemaking or PRA change also must appropriately account for the additional burden associated with this new requirement. Berkshire believes that this single new obligation could take contractors hours of time to comply each year. The agency's Supporting Statement for the Supply and Service proposed information collection request indicates that the OFCCP estimates the "burden hours for assembling and submitting the requested documents to be approximately 29 hours per contractor" compared to the previous 27.9 hours per contractor. Although the agency notes that the increase in burden hours "accounts for new questions added, such as requesting the top three subcontractors of the contractor and related information, as well as clarifying questions", Berkshire respectfully submits that it will take most contractors far longer than 1.1 hours to compile a list of the three largest subcontracts by contract value for each establishment.



B. Changes to the Way Contractors Perform Utilization Analyses

Items 3 – 6 of the agency’s proposed Supply and Service Scheduling Letter and Itemized Listing request information related to a contractor’s evaluation of its workforce representation as compared to the available pool of qualified individuals. These proposed items of the Scheduling Letter and Itemized Listing appear to require – for the first time - that all contractors evaluate workforce representation by specific minority/ethnicity groups, as well as by gender within minority groups, as part of their annual AAP. The proposed information collection requests also appear to impose a second, also entirely-new obligation to set placement goals by specific minority groups and/or for men or women of specific minority groups as part of a contractor’s annual AAP. Berkshire respectfully submits that these proposed information collection requests exceed the current regulatory requirements, are not accounted for in the agency’s estimates of burden and should only be implemented through a formal rulemaking process, with appropriate notice and public comment.

The current EO 11246 regulations do not require that contractors prepare utilization analyses by individual race, unless required to do so by the agency after the agency establishes a pattern of underutilization. *See, e.g.* 41 CFR Section 60-2.14. The regulations also make clear that any placement goals are set as a “single goal for all minorities” in the annual plan development process, but that a contractor could be required, presumably by the agency, to establish separate goals for particular minority groups. In accordance with these requirements, the OFCCP’s own sample Executive Order 11246 AAP does not include or evaluate availability data by particular minority/ethnicity group. *See Sample Executive Order AAP*, available on OFCCP’s website at https://www.dol.gov/ofccp/regs/compliance/AAPs/Sample_EO11246_AAP_final_01.03.18_Contr508.pdf.

Given the current requirements, the majority of Berkshire clients gather availability data, evaluate utilization and set placement goals solely on a total minority basis. A handful of Berkshire clients, especially those in areas of the country with large populations of specific minority groups, may also review more granular availability data by specific minority group. No Berkshire client currently evaluates availability information by gender and individual race. These facts highlight that the proposed information collection request, if finalized, would significantly change the annual AAP compliance requirements that contractors currently follow. Revisions of this nature should be accomplished through notice and comment rulemaking, and not through an information collection revision.

In addition, because the current regulations require only that utilization analyses be performed on a total minority basis, and not by specific race/ethnicity group, the burden estimates for these regulatory requirements do not account for the additional time required to gather and prepare these additional availability analyses. Moreover, availability data for women and men of a particular minority group is not readily available; in order to provide the information requested by the OFCCP’s proposed revisions, contractors would have to manually compile and create availability data for these populations. While the Supporting Statement for the proposed information collection revisions reflects a slight increase in the total burden hours for creating an initial AAP, preparing an annual update, and maintaining an AAP, the increase is solely “attributable to the higher number of contractor establishments used in the current ICR compared to the previous ICR.” The agency’s burden



estimates, therefore, do not include *any* increase in the number of hours to prepare these new utilization analyses.

If the agency decides to move forward with this part of its proposed revised information collection request, Berkshire recommends that the agency clarify the proposed information collection in several ways. First, the OFCCP should not require contractors to produce specific race/ethnicity/gender availability information for affirmative action plans that are already completed, but not yet submitted to the agency for review. Since the current regulations and Scheduling Letter do not require contractors to evaluate workforce representation and availability by particular minority group or for men or women of any one particular minority group, requiring production of this information after the beginning of a contractor's AAP year is inherently unfair. This is particularly true for placement goal analyses, which require that a contractor will make good faith efforts during the plan year to address any areas of underutilization. Since these requirements would not have been in place at the beginning of the current AAP year for many contractors, these contractors will have had no opportunity to evaluate and develop action-orientated programs to address any substantial disparities in the utilization of any one particular minority group or the utilization of men or women of any one particular minority group.

Second, if the OFCCP should explain how it will determine if a "substantial disparity" in the utilization of any one particular minority group exists. This term is currently undefined in the OFCCP's regulations and is not used in the regulatory sections related to total minority and female utilization analyses, which require that contractors set a placement goal when "the percentage of minorities or women employed in a particular job *group is less than would reasonably be expected* given their availability percentage in that particular job group." 41 CFR Section 60-2.15(b) (emphasis added). Berkshire recommends that the OFCCP provide flexibility for contractors to evaluate underutilization for particular minority races, as it does currently when contractors evaluate utilization for women and total minorities. Berkshire also requests that the agency clarify whether its current proposal requires contractors to establish placement goals for men or women of a particular minority group as part of its annual AAP process, or only when the agency determines that a substantial disparity exists. Finally, the OFCCP should clarify whether its proposal requires contractors to evaluate the utilization of Caucasians, when Caucasians are a "minority group" in the particular geographic area covered by the AAP. Demographics are shifting, and according to the U.S. Census Bureau the population of the United States will be majority people of color by 2043. Despite broadening the information to be provided to the agency during a compliance review, the OFCCP's current proposal is unclear as to the agency's expectations in such situations.

C. Results of Most Recent Compensation Analysis

Item 7 of the Supply and Service Scheduling Letter and Itemized Listing requests the "results of the most recent analysis of the compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities as explained in 41 CFR § 60-2.17(b)(3)." This is also a new reporting requirement, which is significantly more burdensome than the agency suggests, has limited value to the agency's ability to enforce the law, and raises important issues about attorney-client privilege.

As an initial matter, Berkshire wants to emphasize that the regulatory requirement is that the contractor "evaluate" its compensation "compensation system(s) to determine whether there are



gender-, race-, or ethnicity-based disparities.” Importantly, many contractors understand the current regulatory requirement to be flexible enough to encompass many types of compensation system evaluations. In some cases, the evaluation could be related to a specific component of the contractor’s compensation systems, such as evaluating the company’s system for setting starting pay and establishing new guidelines to prevent wage disparities at the start of an individual’s career. In other cases, a contractor’s evaluation might include a cohort analysis or other similar analyses that are not easily reportable to the agency. In yet other cases, the contractor’s evaluation could include a statistical analysis, but such formal analyses are not always completed on an annual basis for every establishment. Berkshire believes that it is critical that the OFCCP continue to allow contractors the flexibility to continue to evaluate their compensation systems in a manner that best advances the Company’s affirmative action and nondiscrimination obligations.

Berkshire’s experience in recent compliance reviews suggests that there also may be limited utility in gathering this data. The OFCCP typically performs its own analyses of the individual, employee-level compensation data that a contractor provides during a compliance review. The OFCCP’s analyses are often based on large groupings of employees who are dissimilar in more respects than they are similar. Because a contractors’ own evaluation of its compensation systems is often very different in nature, the results of the contractor’s compensation system evaluation would appear to add little to no value to the OFCCP’s current enforcement practices.

We also want to point out that there are practical difficulties with producing the results of any compensation system evaluation. Many contractors evaluate their compensation systems on a basis other than individual AAP establishment. Because most of the OFCCP’s supply and service compliance reviews are establishment-based (other than reviews of functional affirmative action plans), contractors who evaluate their compensation systems on a broader basis will have to choose between producing an analysis that covers employees and practices not subject to review or preparing an establishment-based analysis solely so that it can provide the results to the OFCCP. This is a Hobson’s choice that does not further the policy rationale for requiring that contractors regularly evaluate their compensation systems. In addition, in Berkshire’s experience, many evaluations of a contractor’s compensation systems are prepared at the direction of legal counsel under attorney-client privilege. Requiring that the results of such evaluations be produced to the OFCCP during a compliance review raises significant questions about waiver of the attorney-client privilege. Given these practical challenges, Berkshire recommends that the OFCCP remove this reporting obligation.

CONCLUSION

As an AAP vendor, one of Berkshire’s primary goals is to help each of its clients comply with all of its affirmative action and discrimination reporting obligations. We provide these comments to the OFCCP based on our real-world experiences helping hundreds of contractors prepare and maintain annual AAPs, conduct analyses of their compensation systems, and respond to OFCCP data requests during compliance reviews across the country. Quite simply, many of the proposed changes reflect an oversimplified and unrealistic notion of the process contractors follow to collect, reconcile and analyze voluminous data sets as part of their annual affirmative action programs. Adding numerous, new reporting obligations while also estimating that these expansive changes will only take a few additional hours per contractor diminishes the hard work being done by many contractors to ensure equal employment opportunity for all workers. Berkshire also believes that many of the proposed



reporting obligations fundamentally change a contractor's AAP compliance requirements and are more appropriately proposed through formal rulemaking.

Berkshire appreciates the opportunity submit these comments to the OFCCP. We would be happy to answer any questions you may have about our comments on the proposed revisions to the agency's scheduling documents.

Respectfully submitted,

Lynn A. Clements
Director, Regulatory Affairs
Berkshire Associates Inc.
8924 McGaw Court
Columbia, MD 21045
410.995.1195 ext. 1246