



GAUCHER ASSOCIATES

Human Resource Compliance Specialists

50 Oliver Street, Suite 212

North Easton, MA 02356

Tel: (781) 341-9477

Fax: (781) 341-6091

November 12, 2020

Tina Williams
Director, Division of Policy and
Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: OMB Control Number 1250 – [NEW]
Affirmative Action Program Verification Interface.

Dear Ms. Williams:

Gaucher Associates greatly appreciates the opportunity to review and submit comments to the Office of Federal Contract Compliance Program's proposed Affirmative Action Program Verification Interface. However, we understand that, if the intent of the Federal Register Notice is to permit interested parties to provide sufficient information to convince the OFCCP to not develop an "AAP-VI", then we are on a fool's errand. The OFCCP is already in the process of developing such an "interface", and admits as much in the Notice. But we will respond anyway, if only to go on record in opposition.

Gaucher Associates, Inc. is a Human Resources consulting firm specializing in employment law compliance matters, including EEO and Affirmative Action, with offices in Massachusetts, Rhode Island, Georgia, Florida, Arizona and California. Founded in 1994 by Richard A. Gaucher, Gaucher Associates has provided EEO/AA consulting services to, written AA programs for, or represented before the OFCCP, over 250 employers (mostly federal contractors) for over twenty-five years.

For the record, I was employed by the Office of Federal Contract Compliance Programs (OFCCP) for 17 years, eight as a field compliance officer, working out of the Milwaukee District Office, and the remaining nine as the Director of Operations in the OFCCP's Boston Regional Office. I also served as a member of the OFCCP's Task Force on Directives and the Manual, which eliminated a number of outdated or redundant directives and wrote the current Federal Contract Compliance Manual. I also prepared the regulations segment of a training course for new compliance officers, and was a member of the agency's Reinventing Government committee for Administrative Issues. I left the government in November of 1996, and joined Gaucher Associates, where I am currently Senior Vice President.

Background

The proposed information collection request appears to be in response to a 2016 General Accountability Office (GAO) report critical of the OFCCP's ability to monitor each and every Federal contractor establishment to ensure that they are meeting their contractual obligations (for those contractors with workforce of 50 or more employees and contract amounts above the regulatory thresholds). The GAO determined that this was the case because in "in 2015, close to 85% of contractor establishments did not submit an AAP within 30 days of receiving a scheduling letter..."

As both an auditor and a preparer of Affirmative Action Programs for over forty years, I am not surprised. However, I do not see in this evidence of a failure on the part of Federal contractors to take appropriate action to develop, maintain, and annually update an AAP. There are many reasons why a Federal contractor may have difficulty meeting the 30-day deadline specified in the OFCCP's compliance evaluation scheduling letter for submission of both an AAP and supporting data. Among those reasons is the fact that the standard Scheduling Letter not only requires submission of the AAP but also responses to 21 requests for additional information in the Itemized Listing to the Scheduling Letter.

As part of its response to the GAO, on August 24, 2018, the OFCCP issued Directive 2018-07, [SUBJECT: Affirmative Action Program Verification Initiative, which referenced the GAO report, and provided guidelines for establishing a process to achieve "...comprehensive compliance by establishing a program for verification of compliance by all contractors with AAP obligations. This verification would initially take the form of OFCCP review of a certification, followed by potential compliance checks, and could later take the form of annual submission of AAPs to OFCCP for review."

Previous AAP Verification Proposals

Program Summary

On March 20, 1979, the OFCCP published a proposal in the Federal Register (44 FR 17136) to add a requirement for submission of an annual "AAP program summary" to its regulations at 41 CFR Part 60-2. Comments regarding the proposed AAP summary asked for more information about (1) the extent of the information to be required in the summary, (2) the need for and use to which the summary would be put, and (3) alternative sources of the information to be collected in the summary (i.e. the annual EEO-1 report).

On April 17, 1979, the OFCCP published a further explanation of the proposed AAP summary (44 FR 22761), and on December 28, 1979, a final version of the regulation was published (44 FR 77000ff), amending the OFCCP's regulations to add, at 41 CFR 60-2.14, wording intended to establish an annual AAP summary. The final regulation read as follows:

The affirmative action program shall be summarized and updated annually. The program summary shall be prepared in a format which shall be prescribed by the Director and published in the Federal Register as a notice before becoming effective. Contractors and subcontractors shall submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.

The current version of this regulation, now at 41 CFR 60-2.31 is as follows:

The affirmative action program must be summarized and updated annually. The program summary must be prepared in a format which will be prescribed by the Deputy Assistant Secretary and published in the FEDERAL REGISTER as a notice before becoming effective. Contractors and subcontractors must submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.”

Since 1979, no notice providing a format for the AAP program summary has been published, and the regulation remains dormant..

EO Survey

On October 5, 1999, the OFCCP published a Notice in the Federal Register (64 FR 54056) proposing to establish an “Equal Opportunity Survey” (EO Survey), collecting information from Federal contractors in three parts, (1) general information on the status of the federal contractor’s affirmative action plan, (2) aggregated personnel data, and (3) compensation data. This notice proposed an initial mailing to 7,000 Federal contractors establishments “flagged” by the agency’s Equal Employment Data System (EEDS) as being potentially “out of compliance”. A second mailing to another 53,000 “flagged” establishments was contemplated.

The EO Survey was finalized on November 13, 2000 (165 FR 68022-68047). In this case, the OFCCP stated that “the Equal Opportunity Survey...will aid contractors in assessing their pay and other personnel practices, while increasing the efficiency and effectiveness of program monitoring.” So no more talk of identifying contractors that were “out of compliance”. EO Survey data was collected by EEO-1 category.

Interestingly, at the same time that the EO survey required contractors to submit personnel and compensation data by EEO-1 category, the agency was arguing that those categories could not be used as Job Groups (except for contractors with fewer than 150 employees) because “...inappropriate mingling of many highly disparate jobs in large EEO–1 category-based job groups would likely occur for larger employers. Such mingling risks ignoring potentially vast differences in job content, wage rates and opportunities.” So it was OK for the EO survey, but not for Affirmative Action Programs.

In 2002 the OFCCP commissioned a study of the efficacy of the EO Survey, which found that it was an inadequate predictor of systemic discrimination, and on September 8, 2006, notice was published in the Federal Register rescinding the EO Survey regulations (71 FR 53032). Although the “AAP Summary” would be an annual event, the EO Survey was not. Thus far, then, the OFCCP has made two attempts to require contractors to submit evidence of the existence of an AAP in some form.

AAP Verification: The Current Proposal

The OFCCP’s current proposal has two parts. Part 1 involves a requirement that contractors answer these three questions:

1. Entity has developed and maintained affirmative action programs at each establishment, as applicable, or for each functional or business unit.

2. Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable.
3. Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs.

These questions are remarkably similar to those found in the OFCCP's regulations at 41 CFR 60-1.7(b), Requirements for bidders or prospective contractors:

(1) Certification of compliance with part 60-2: Affirmative Action Programs. Each agency shall require each bidder or prospective prime contractor and proposed subcontractor, where appropriate, to state in the bid or in writing at the outset of negotiations for the contract:

- (i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to part 60-2 of this chapter;
- (ii) whether it has participated in any previous contract or subcontract subject to the equal opportunity clause;
- (iii) whether it has filed with the Joint Reporting Committee, the Deputy Assistant Secretary or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

As you can see, this is already a "certification of compliance". Granted, it isn't done on an annual basis, but as part of the contract process, but it does require that contractors (or prospective contractors) respond, presumably in the affirmative to at least one of the three questions.

Why are contractors being asked to again certify their compliance, if not annually, at least every two years (option 3, see below)? According to the ICR, "[t]he General Services Administration (GSA) collects and maintains responses to questions similar to those in the 'Annual Certification' section...from all entities holding federal contracts, regarding whether the contractor has properly developed and maintained AAPs at its establishments. OFCCP contacted GSA to initiate the process of sharing the certification data that GSA collects using the System for Award Management (SAM), but **the two agencies were not able to come to an agreement on sharing this data.**[emphasis added].

It appears that because these two agencies can't come to an agreement on sharing data, the entire contractor universe is now called upon to duplicate certification in some fashion? Perhaps the OFCCP should enlist the services of the Federal Mediation and Conciliation Service. I'm sure that any of the larger contractor organizations would also be willing to mediate this issue. But we fail to see the need for another "certification of compliance", simply because the OFCCP can't reach an agreement with the GSA on sharing data.

Notably, the OFCCP is presenting this proposal as a means "[t]o eliminate duplication of effort, and DOL recommends that GSA remove its affirmative action compliance question from the SAM portal. In the spirit of inter-governmental cooperation, DOL would share an AAP verification data file with GSA." Again, the data is already there, so shouldn't the GSA, "in the spirit of inter-governmental cooperation," share its data with the OFCCP, relieving Federal contractors of an added burden. And how do we know, if the OFCCP and the GSA can't come to an agreement now, that the GSA would, in fact, stop asking Federal contractors to certify compliance with the AAP requirement? Finally, the certification question will remain part of the contract process, at the Federal Acquisition Regulations Part 52. There is clearly a duplication of effort across federal agencies.

We would also note with respect to the GAO's concern regarding the possibility that Federal contractors might not be preparing and/or updating their AAPs annually, that the agency does have the option, under its current regulations, of conducting "preaward" compliance reviews, which do not require a 30-day period in which to prepare and submit the AAP and supporting data.

During my time with the OFCCP, the agency was under a consent decree as a result of an action filed by the Women's Equity Action League (against the EEOC as well), which required periodic pre-award compliance reviews of educational institutions. Each office conducted compliance reviews on a regular basis of educational institutions that had been awarded contracts of a certain size. Although the consent decree is no longer in effect, the regulations providing for pre-award compliance reviews remain in place. The OFCCP provides a "pre-award database" that Federal contracting officers may use to verify that a prospective contractor establishment has been audited within the past two years. The database is updated daily. If an establishment is not on the list, contracting officers are instructed to pass the establishment name and location to the appropriate OFCCP Regional Office, for a pre-award compliance review. The agency seldom acts on these requests, and after a specified length of time, the contracting officer moves forward with the award, with or without an OFCCP "EEO Clearance."

Part 2 of the OFCCP's proposal, is to provide a secure "portal" (AAP-VI) through which contractors that have been sent a compliance evaluation scheduling letter could submit their AAPs and supporting data. The OFCCP currently conducts something less than 5,000 compliance evaluations of one sort or another (full compliance evaluation, compliance checks, and a variety of "focused" compliance reviews. At the present time, contractors have a variety of methods for submitting their data. To the best of my knowledge, none of those methods have been found to be insecure, to the extent that proprietary or confidential information has been compromised between leaving the contractor and receipt by the OFCCP. So it works.

The ICR offers a variety of justifications for this proposed change, all of which refer to inter-agency and governmental requirements, such as the Federal Information Security Modernization Act of 2002, as well as "...strict access controls and standards established by the National Institute of Standards and Technology (NIST). In its publication NIST SP 800-53, NIST details the security protocols and standards with which all federal agencies must comply." Note that this appears to refer to Federal agency internal requirements, not necessarily to how agencies interface with the public.

While the OFCCP's regulations, beginning with the Equal Opportunity Clause at 41 CFR 60-1.4(a), call for contractors to "...furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto..." nothing in the regulations requires that they be provided through a "secure portal". We appreciate the fact that the OFCCP is concerned with the safety and integrity of the data submission process, but so far it seems to be working well.

In any event, while the ICR assures us that "[o]nly a handful of employees would have access to "AAP-VI", but the data would apparently be fed into the OFCCP's Case Management System (CMS), to which all of OFCCP's staff would have access. So once the data is in the OFCCP's hands, there are no guarantees that it could not still be "hacked", or otherwise compromised. Sending data through a secure portal would not change this.

As a consulting firm, Gaucher Associates has to have systems in place to protect the integrity and security of our clients' data. Many of our clients have similar security systems. There is no reason to think that OFCCP employees are immune to "phishing" emails and the like. There are no

guarantees, but so far the process of submitting AAPs and supporting data to the OFCCP seems to be working without significant issues. There does not seem to be a need for AAP-VI on that account.

The Alternative Options

The ICR offers three options for consideration:

1. An annual certification, but no change in how AAPs and supporting documentation are submitted in response to a scheduling letter;
2. Annual certification and uploading of current AAPs annually through AAP-VI;
3. Certification biannually and no change in the current method of submitting AAPs and supporting documentation in response to a scheduling letter.

Given the best of a bad deal, the “best” option for the contractor community, the one least obtrusive, would be option 3, certification every two years, and no need to actually submit an AAP unless and until a contractor receives a scheduling letter.

But this remains duplicative of the GSA’s contracting process. As contracts are renewed, new contracts entered into, or current contracts modified, the questions continue to be asked, whether the prospective contractor “...has developed and has on file at each establishment affirmative action programs pursuant to part 60-2...” Option 3 does not remove the duplication. And that would be true of option 1 as well. Whether the certification is requested annually or semiannually, it remains duplicative of the GAO’s process.

Another problem that arises, though, is that there is likely a corollary to Maslow’s well-known “law of the hammer” (“it is tempting, if the only tool you have is a hammer, to treat everything as if it were a nail”) where if you have a tool, it is difficult to resist using it. Having AAP-VI would seem to me to invite an attempt, at some point in the future, to actually use it.

The fact that the agency can propose, even as an option, having contractors submit their AAPs annually, raises a whole host of questions, starting with who is going to look at the submissions. The OFCCP currently employs fewer than 500 employees. If there are at least 100,000 Federal contractor establishments for which AAPs would be anticipated, the majority of them submitted on their renewal date, which would largely be January 1st of each year, the flow would be enormous. Where is the staff to review all of these documents?

A second question, which relates to the GAO’s concern about their finding that 85% of AAPs requested for audit required an extension of time beyond the standard 30 days, is what does the agency consider to be an AAP for this purpose.

The OFCCP’s regulations at 41 CFR Part 60-2, particularly SubPart B, describe the required contents of an Executive Order AAP in some detail. 41 CFR Part 60-2.10 describes the general purpose of the AAP; 60-2.11 contains the requirements for an organizational profile; 60-2.12 the Job Group Analysis, and so on. It is not until 41 CFR 60-2.17, “Additional required elements of affirmative action programs” that we leave data requirements and move into what is generally captured in an AAP narrative. These include such items as who is responsible for implementation

of the AAP, identification of problem areas, a description of action-oriented programs to address identified problem areas, and so forth.

When the OFCCP published Directive 2018-07, stating that the OFCCP was developing a "...process whereby contractors would certify on a yearly basis compliance with AAP requirements" it also stated elsewhere in the directive that verification "...could later take the form of annual submission of AAPs to OFCCP for review."

Shortly thereafter, the OFCCP issued Directive 2018-08 (September 19, 2018, Subject: Transparency in Compliance Activities), which stated that the AAP narrative must be submitted within the initial 30 day period specified in the scheduling letter, but that contractors may have an additional 30 days to submit the supporting data exhibits. As the directive puts it:

"OFCCP will provide a 30-day extension for contractors to provide supporting data related to the EO 11246, VEVRAA and Section 503 AAPs, provided that: 1) the contractor requests the extension any time prior to the initial 30-day due date for the AAPs and 2) the contractor timely submits the basic EO 11246, Section 503 and VEVRAA AAPs within the initial 30-day period after receiving the Scheduling Letter and Itemized Listing. See Directive 2018-07, Section 7 (stating that the AAP Verification Program includes '[r]equesting proffer of the AAP by contractors when requesting extensions of time to provide support data in response to a scheduling letter.')

Directive 2018-08 presented something of a problem. We explained the issue to the OFCCP, the need for supporting data before writing the narrative, on September 14, 2018. On September 21, 2018 we received a response from Margaret Kraak of the OFCCP's National Office. Ms. Kraak said "...you have raised some very good points and we are working on the answer." But permitting submission of an AAP narrative prior to the supporting data is no help at all, unless the narrative contains no data at all.

So if submission of an AAP for "verification" purposes would be satisfied by submission of a data-free AAP narrative (think Section 503 or VEVRAA narratives), this would at best be a minor annoyance. But if the entire AAP, with its supporting data is to be submitted, on the anniversary date of the AAP, this is a problem.

The delay in submitting an AAP with its' supporting documentation within the 30 day time frame of the scheduling letter, as noted by the GAO, can be due to many reasons. For example, an AAP requested after six or more months have elapsed since the anniversary date of the AAP requires assembly (and analysis) of an additional six (or more) months of data. This is not a push-button process. Some scheduling letters arrive so close to the start of a new AAP year that it makes more sense for a contractor to submit an AAP based on that date, rather than submitting a "stale" AAP.

But for most contractors, "turning on a dime", and generating a complete AAP, with data analysis, collection of detailed outreach and recruiting information, during the time between the end of the previous AAP year and the start of the new year, is virtually simply impossible, unless a contractor were to "cap" data collection something like three months before the AAP anniversary date, and use twelve months of data preceding that date to prepare the new AAP. That is, a contractor with a January 1, 2021 AAP anniversary date might want to use a data period for analysis spanning the period from October 1, 2019 through September 30, 2020. It's not clear from the regulations whether that would be acceptable to the agency, but when I was a compliance officer in Milwaukee in the 1980's, that was how the University of Wisconsin-Madison prepared its AAPs.

And there's more—the OFCCP indicates that its portal will present EEO-1 reports for review by a contractor, in order for it to affirm that its establishments are covered by AAPs (as applicable). One issue is this—for many years, the OFCCP's scheduling letter has requested that contractors provide copies of the EEO-1 reports for three years for the establishment being evaluated. We have always pointed out that presumably, the OFCCP has at least the two "oldest" EEO-1 reports (since it forms the data pool for selections), but the agency has ignored this comment.

Are we now to understand that the OFCCP has in fact an updated database of EEO-1 reports, and really didn't need those EEO-1 reports it was asking for? If not, what would a contractor be looking at, given that the size and number of facilities that the regulations say should have a written AAP may not be consistent with what it knows to be the current number of such establishments?

Let's go further—the regulations state that facilities with 50 or more employees must have their own AAPs, unless they are part of a FAAP. So would the submission be a copy of the FAAP? In addition, the OFCCP has provided the public with its methodology for selecting contractor establishments for compliance evaluations. Depending on which source is being used, the minimum size for a facility identified for an evaluation is either 100 or more employees, or 70 or more. During the last year of the EO Survey, the OFCCP advised companies with establishments of fewer than 100 employees to not bother to submit the Survey.

And if that weren't enough, the OFCCP has recently published a Frequently Asked Questions on "Campuses", presumably extending beyond institutions of higher education to those firms that build what are referred to as "campuses", such as Microsoft, Google, and Oracle. This is clearly a matter of prosecutorial discretion. But there is every reason for a contractor with a centralized human resources and corporate headquarters, and many satellite offices within the same labor market area, such as a local banking institution, to think that they might also qualify as a "campus", and be able to consolidate local bank branches into a single AAP.

Summary

In summary, it is our view that the OFCCP is requesting duplicative information, simply because it hasn't been able to reach an agreement with the General Services Administration on sharing of certification data that already exists. In addition, at this point it is not clear exactly what a contractor would be looking at in terms of a certification, and if submission of AAPs were added, exactly what would be expected in the way of an AAP, or how many AAPs, or what. This proposed information collection request should at least go back to the drawing board, if not be withdrawn entirely.

Sincerely,

Stan Koper
Vice President
Gaucher Associates

cc: Richard A Gaucher
Marian Bireley
Corrin DeBettencourt