

ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

November 13, 2020

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

Re: Information Collection Requirement, Affirmative Action Program Verification Interface (AAP-VI)
OMB Control No. 1250-New

Dear Ms. Williams,

We are writing on behalf of Roffman Horvitz, P.L.C., to comment on the New Information Collection Requirement, Affirmative Action Program Verification Interface (AAP-VI).

Roffman Horvitz is a boutique law firm founded by the former shareholders and OFCCP compliance practice group managers at the nation's largest employment law firm. With a team of attorneys specialized in assisting federal contractor employers on compliance with Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA), Roffman Horvitz is devoted to representing government contractors' interests in these areas. The firm's client base ranges from Fortune 100 companies to small-business owners. The ICR will impact all the firm's clients by requiring them to certify annually or bi-annually their compliance with the AAP requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, and VEVRAA and upload their audit submissions through a new electronic platform created by the OFCCP.

The ICR explains that its purpose is to respond to the Government Accountability Office (GAO) 2016 *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance* report's recommendation¹ for OFCCP to regularly collect AAP information from covered federal contractors and subcontractors.² OFCCP hopes that its proposed annual certification and electronic upload of AAPs for scheduled contractors will address the GAO's

¹ Government Accountability Office, *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, September 2016, available at <https://www.gao.gov/assets/680/679960.pdf> (last accessed November 5, 2020).

² Unless a subcontractor self-identifies on the EEO-1 submission, we do not understand how OFCCP will verify or validate that it has obtained certifications from all covered subcontractors. To our knowledge, there is no database of covered supply and service subcontractors.

concerns about the low percentage of government contractors being scheduled for audit and will increase contractor compliance.

Roffman Horvitz supports the OFCCP's goals of rooting out discriminatory practices in federal contractors and appreciates its efforts to ensure greater contractor compliance with its governing regulations. However, certain areas of the ICR need clarification and revision in order to be more closely aligned with contractors' current practices of developing AAPs.

1. Login.gov

The OFCCP intends to send an email to "every known federal contractor establishment," but it does not identify how it will develop that email list. The OFCCP needs to be transparent about what emails it intends to use and how it obtained its list. For example, the EEO-1 report solicits two different emails: the certifying official and the company contact. If OFCCP intends to derive its login.gov email address list from the EEO-1 submissions, it should target the individual who is responsible for certifying the report as well as the company contact. For contractors with FAAP agreements, OFCCP also should send it to the FAAP agreement contact person. The government contractor should have the right to control who has access to Login.gov.

2. Account Profile

The ICR envisions that government contractors will be required to "verify" the Establishment Name, Parent Name, Unit Number, Headquarter Number, Establishment Address, Establishment Status, EIN, DUNS, NAICS, Employee Count and contact information. Our clients have two concerns with this process. First, it seems to require that an employer that prepares its AAPs on a Functional AAP basis still will have to "validate" the list of establishments. OFCCP should preliminarily ask the contractor to identify whether it prepares its plans on an Establishment basis, a Functional basis, or a hybrid basis. A contractor that prepares its AAPs only on a Functional basis should be relieved from having to validate each of its establishment locations.

Second, it would be better for OFCCP to afford contractors the option of importing establishments from the EEO-1 report, or allowing them to enter the list of non-FAAP locations for which they prepare AAPs. OFCCP should not be pre-populating these fields from another database source unless the contractor indicates that it prepares AAPs only on an establishment basis.

Finally, OFCCP also needs to explain for what purpose the employer needs to verify or validate the field called "Establishment Status." If OFCCP is receiving a data feed from EEOC, it should proactively exclude Statuses 6 and 8 because those locations do not have 50 or more employees and would not have any obligation to prepare AAPs.

3. AAP Upload

OFCCP envisions that if it schedules a contractor for a compliance evaluation, the designated user for that contractor will select the scheduled establishment(s), functional business unit, or corporate headquarters and upload the applicable AAPs. (This statement further underscores the need to allow the contractor to select the way in which it prepares its AAPs. See our comment under #2 above).

The upload format (as well as burden estimate) needs to take into account the different file types that employers use in responding to the Itemized Listings, too. The OFCCP has different types of compliance evaluations, and the information that the contractor needs to submit varies depending on the type of audit. For example, when OFCCP conducts a compliance check, one of the pieces of information that OFCCP requests is proof of the job listings with the Employment Service Delivery System. Several third-party vendors supply this proof to the contractor in Excel workbooks with “live” hyperlinks to the respective state databases. The Verification Interface needs to be able to accept different types of documents, like zip files, password protected compensation workbooks in Excel format, and other documents in PDF format.

4. Annual Certification Options

The ICR provides three certification options from which every contractor must select when making their annual certification:

- Under option 1, contractors will be certifying that they are compliant for the year and have “developed and maintained affirmative action programs at each establishment, as applicable, or for each function or business unit”³.
- Contractors will certify noncompliance under Option 2 which states that they have been party to a qualifying federal contract for 120 days or more and have not developed and maintained affirmative action programs at each establishment.⁴
- Finally, under option 3 new contractors will certify that they are not covered by the applicable regulations because they have not been party to a qualifying federal contract within the last 120 days.⁵

These options do not take into account the difficulty some larger contractors with multiple establishments may face in certifying their compliance if there is one certification deadline for all contractors. Many larger contractors will not have sufficient time between when their current plans expire and the certification deadline if the first deadline is 90 days after the verification interface first goes live. It takes a long time to prepare affirmative action plans, and for that reason alone, we echo the National ILG’s comment and request that contractors have at least 180 days in which to certify and certainly not less than 120 days.

³ ICR at 7.

⁴ *Id.*

⁵ *Id.*

Other large multi-establishment contractors have staggered implementation dates throughout the calendar year, and their AAPs will not all be ready on the same certification date. The interface should anticipate and permit staggered certification dates for these employers.

These certification options also do not take into account mergers and acquisitions. If a government contractor acquires new establishments close to the certification deadline, it is unfair to expect it to have AAPs in place for these newly-acquired establishments, but the contractor would be forced to select option two and certify noncompliance.

- The contractor probably has been a party to other contracts for more than 120 days and has plans for most of its facilities, but not all of them arising out of the merger or acquisition, so it cannot selection option 1.
- Option 3 does not apply, either; the contractor has been party to a federal contract within the last 120 days, but it does not have plans for all the facilities because some of them are too new as a result of a recent merger or acquisition.

Under the current three certification options, these contractors are left without a real choice. They cannot certify they are compliant without having AAPs fully created for each establishment, but have been party to a federal contract in the last 120 days, and are left certifying that they are not compliant when their plans are still in development. A contractor should not have to select noncompliance under option 2, simply because it acquired or merged with another organization and now has new facilities too close to the certification deadline to finalize all of its AAPs. The OFCCP should consider an additional option for certification after merger or acquisition that allows these larger contractors to certify that they are in the process of creating the remaining AAPs and will have them completed within a reasonable time. We note that OFCCP gives brand new contractors 120 days to prepare their AAPs and another 90 days in which to certify. See ICR Justification, page 7, footnote 12. This same rationale should be applied to contractors who have recently concluded a merger or acquisition.

Finally, we also reiterate the comment that NILG submitted about the time it takes to prepare the data analyses in the annual affirmative action plans. OFCCP has always envisioned that contractor affirmative action plans are meaningful business documents. In order for organizations to rely on the results of the analyses to set business objectives, the organizations need adequate time and resources to ensure that all of the data is internally reliable, consistent, and accurate. Setting an arbitrary certification deadline, without proper regard for the time it takes to prepare plans thoroughly, may frustrate contractors' ability to conduct meaningful analysis which seems inconsistent with OFCCP's intent.

5. Alternative Options

The OFCCP has also suggested three alternative options for the AAP Verification Interface. Option 1 would require contractors to certify annually, but they could submit AAPs through email or other delivery process. Option 2 would require contractors to certify annually and make annual electronic submissions of their AAPs. Finally, Option 3 would require contractors to certify every two years, and they could submit AAPs through email or other delivery process.

We support option 3. We believe the annual frequency of contractor certification suggested in Options 1 and 2 only exacerbates the problem for larger contractors who find themselves against the deadline to certify with some AAPs still in the process of being created or updated. Going with option 3's bi-annual certification will better align with OFCCP's published burden estimate.

Furthermore, Option 2's requirement for all contractors to submit their AAPs annually via the interface appears only to burden contractors with no benefit to the OFCCP. The GAO report that spurred this ICR reported that the OFCCP's processing times for AAPs with no violations can run as long as 120 days. We know that calculation is not accurate, and AAPs with violations have taken as long as seven years to resolve (if not longer).⁶ In light of OFCCP's limited time and resources, it is unlikely that it could conduct a meaningful analysis of the AAPs for any significant portion of the 116,898 contractor establishments under its jurisdiction. Meanwhile, contractors will be concerned for the security of their data being stored electronically with OFCCP. Additionally, even though we believe AAPs would be exempt from FOIA, this exemption would not stop requestors from seeking them and would compel contractors to object to the requests, which takes time and resources. Thus, the burden of any additional requirement of an annual AAP upload for each of the contractor's establishments outweighs the benefit for the OFCCP.

Finally, there may be some contractors who would appreciate the ability to upload their AAPs and supporting documentation in a compliance review through this interface, rather than continuing to email or send their materials via a delivery service. We encourage OFCCP to allow organizations to use the interface voluntarily in this manner, if they would prefer to.

6. Burden Estimate

The OFCCP needs to re-assess the burden estimates it included in the ICR. The ICR states that all contractors covered by the AAP requirements of Executive Order 11246, Section 503, and VEVRAA will be required to complete the certification, but it is not clear whether the certification will apply to construction contractors.⁷ If OFCCP intends for the certification to apply to direct federal construction contractors who prepare AAPs for protected veterans and individuals with disabilities, it should state that clearly. On page 1 of the ICR, OFCCP cites to its jurisdictional infographic in footnote 1, which references construction contractors, but then OFCCP makes no mention of the implementing regulations affecting construction employers 41 CFR Part 60-4; it uses only the number of supply and service contractors in calculating its burden estimate; and, it cites only to the 60-2 regulations for supply and service contractors on page 4 of the ICR.⁸

OFCCP should clarify whether it expects direct federal construction contractors subject to AAP coverage under section 503 and VEVRAA to comply with the AAP VI certification requirement and, if so, OFCCP should adjust the burden estimate to account for the addition of construction contractor establishments.

⁶ GAO at 27.

⁷ ICR at 1.

⁸ ICR at 10, n.17.

Finally, we believe that the OFCCP's time estimates for registering, using, and uploading to the interface are significantly lower than it should be projecting. It will take much more time for larger organizations to register, verify their establishment lists from year to year, and create the upload-able documents that OFCCP envisions receiving in compliance evaluations.

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Thank you for the opportunity to comment on the New Information Collection Requirement, Affirmative Action Program Verification Interface (AAP-VI).

Respectfully submitted,

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