

February 22, 2021

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Tina Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Ave., N.W., Room C-3325
Washington, DC 20210

Re: Comments of the Center for Workplace Compliance on the Office of Federal Contract Compliance Programs' Proposed Information Collection Request, *Construction Scheduling Letter* (Docket OFCCP-2020-0004-0001)

Dear Ms. Williams:

The Center for Workplace Compliance ("CWC") appreciates the opportunity to submit these comments regarding the Office of Federal Contract Compliance Programs' ("OFCCP") proposed Information Collection Request ("ICR"), *Construction Scheduling Letter*, notice of which was published in the *Federal Register* on December 23, 2020.¹

OFCCP is proposing a new Scheduling Letter, with an accompanying Itemized Listing, which the agency would use to notify both construction contractors and federally-assisted construction contractors that they have been selected for a compliance review. OFCCP avers that the new scheduling letter will offer construction contractors with "certainty and consistency" in how the agency plans to conduct these compliance reviews to align them with the scheduled compliance reviews under its supply and service program.

OFCCP has conducted compliance reviews of construction contractors for many years, and routinely seeks some (but not all) of the data and information in the proposed Scheduling Letter and Itemized Listing *onsite*, rather than requesting it in advance as is common practice with supply and service contractors. By proposing to evaluate contractors' compliance *offsite* before determining whether an onsite review is warranted, OFCCP expects that this new scheduling letter will reduce the burden that both construction contractors and the agency will experience during a compliance review.

CWC appreciates the agency's efforts to more efficiently fulfill its enforcement responsibilities. However, we are concerned that as drafted the proposed Scheduling Letter and Itemized Listing will actually increase the burdens on both contractors and OFCCP because it would require contractors to submit (and require OFCCP to review) more information than what OFCCP reviews in an onsite review, and more information than what a supply and service contractor routinely provides during an audit. Accordingly, we recommend a simpler and more efficient approach, as explained in more detail below.

¹ 85 Fed. Reg. 84,002 (December 23, 2020).

Statement of Interest

CWC² 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 and other workplace requirements. Formed in 1976, CWC's membership includes approximately 200 major U.S. employers collectively providing employment to millions of workers. CWC's members are firmly committed to the principles and practice of equal employment opportunity and meaningful affirmative action.

Nearly all CWC members are subject to the nondiscrimination and affirmative action requirements of Executive Order ("E.O.") 11246, Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA"), Section 503 of the Rehabilitation Act of 1973 ("Section 503"), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant interest in ensuring that OFCCP's regulations and paperwork requirements, including those applicable to construction contractors, efficiently and effectively accomplish their underlying policy objectives.

Background and Overview

OFCCP's regulations implementing E.O. 11246, VEVRAA, and Section 503 permit the agency to conduct several types of compliance evaluations to assess contractors' compliance.³ One of these evaluations is the "compliance review," which is inherently the most burdensome for both contractors and OFCCP. The compliance review conducted by OFCCP is a "comprehensive" analysis of a contractor's written affirmative action programs ("AAPs"), personnel and hiring practices, and the results and effectiveness of the contractor's affirmative action efforts.⁴ A scheduling letter is used by OFCCP to initiate the compliance review process and lists the data and documents that a contractor must gather and submit to the agency for evaluation within a specified timeframe.

During a typical construction compliance review, OFCCP notifies the contractor that it must assemble information on its personnel and employment practices, its applicable written AAPs, and supporting documentation in preparation for an OFCCP onsite review. These items, roughly 14 in total, are then reviewed onsite with OFCCP. Requiring an onsite review to review this information in every instance, as part of the construction compliance review process, can be burdensome both to the contractor and to OFCCP. In contrast, supply and service contractors historically have provided similar information offsite, during what is known as the "desk audit" phase of a compliance review.

OFCCP's Proposal

Through the newly proposed construction compliance review Scheduling Letter and Itemized Listing, the agency would initiate an *offsite* review of data and records supplied by the construction contractor, which OFCCP believes will result in "greater efficiency" for both the contractor and the agency. OFCCP explains that this will occur because in many instances it will be able determine a construction contractor's compliance offsite, as it does during compliance reviews of supply and service contractors, and will only come onsite if it identifies "indicators of potential discrimination or other compliance problems identified."

² Formerly the Equal Employment Advisory Council ("EEAC").

³ 41 C.F.R. §§ 60-1.20, 60-300.60, and 60-741.60.

⁴ 41 C.F.R. §§ 60-1.20(a)(1), 60-300.60(a)(1), and 60-741.60(a)(1).

The proposed Scheduling Letter and Itemized Listing is in some ways modeled after the compliance review scheduling letter used for supply and service contractors in that it requires submission of a standardized set of requested data and documents, applicable to each of the three laws that OFCCP enforces. In contrast to its supply and service counterpart, the proposed Scheduling Letter and Itemized Listing would require construction contractors to assemble and provide *offsite* even more data and information than what is currently produced for OFCCP's review *onsite*. As a result, it is difficult to understand whether and to what extent this new letter will truly increase efficiency for either party.

Summary of CWC's Recommendations

CWC supports OFCCP's stated goal reducing burdens on both the contractors and the agency, while increasing the efficiency of the agency's limited resources. However, we respectfully submit that the proposed Scheduling Letter and Itemized Listing will not accomplish these goals.

As an alternative, we recommend revising and reducing the number of items in the proposed Scheduling Letter and Itemized Listing to match the 14 items the agency currently seeks from construction contractors during a typical onsite review, such as the sample scheduling letter found in its Federal Contract Compliance Manual ("FCCM"). In addition, we recommend replacing the proposed Section 503/VEVRAA items in their entirety with those Section 503/VEVRAA items currently requested from supply and service contractors. Doing so would directly reduce the number of items submitted to OFCCP, which in turn will reduce the burdens experienced by both parties.

The Proposed Construction Compliance Review Scheduling Letter Will Not Result in "Greater Efficiency"

In its 2014 ICR Supporting Statement to OMB, OFCCP stated that "[g]enerally construction companies are small and the recordkeeping activities are performed by [construction contractors'] administrative support staff."⁵ OFCCP then told OMB that construction administrative support staff would inherit 70% of the burden to comply with the agency's recordkeeping requirements for construction contractors.⁶

The administrative support staff for construction contractors, who will be predominantly responsible for collecting and submitting documents and support data in response to the proposed scheduling letter, often have fewer compliance resources in comparison to those utilized by supply and service contractors. Furthermore, because of the transient nature of the personnel working at a construction worksite at any given time, the underlying personnel activity information is often maintained by paper records, not by electronic means, at the contractors' construction worksites. Compiling and distilling information from paper records in order to respond to a scheduling letter will often be orders of magnitude more burdensome than OFCCP anticipates.

Given these limitations, and keeping in mind OFCCP's goal of a more efficient compliance review, we offer the following recommendations:

⁵ See *OFCCP Justification Statement for OFCCP Construction Recordkeeping and Reporting Requirements*, OMB Control No. 1250-0001, ICR Ref. No. 201406-1250-001, uploaded to OMB on December 17, 2014, p. 29, n. 36.

⁶ *Id.*, p. 29.

1) The Construction Scheduling Letter Should Request the Same Information Currently Listed in the FCCM

OFCCP's proposed Scheduling Letter and Itemized listed increases from 14 to 16 the items needed to evaluate compliance with E.O. 11246, including detailed contract and subcontracting data that today are requested on a case-by-case basis. Put simply, increasing the number of data items construction contractors must gather and produce to OFCCP will increase—not decrease—the burdens on both construction contractors and the agency. Further, by increasing the amount of data that construction contractors provide OFCCP with upfront, the agency's compliance officers will spend just as much time, if not longer, in reviewing the records and data, which will likely lead to a backlog of aged cases under the construction compliance review program. This will have the opposite effect of what OFCCP hopes to achieve with this proposal. We recommend a simpler approach, whereby OFCCP would request the current 14 items listed in the construction compliance review sample scheduling letter (*i.e.*, L-9 – Construction Compliance Evaluation Notice) of OFCCP's FCCM. Maintaining the status quo would be a more efficient instrument to achieve OFCCP's goal of greater efficiency. Of course, to the extent a contractor's desk audit submission is in need of further clarification or additional information, OFCCP can (and does) routinely follow up as necessary.

2) Items Required Under Section 503 and VEVRAA Should Be the Same as Those Requested of Supply and Service Contractors

For construction contractors subject to Section 503 and VEVRAA, OFCCP proposes that contractors submit several categories of information beyond those required for supply and service contractors. For example, under the Section 503 and VEVRAA sections of the proposed Itemized Listing, OFCCP asks construction contractors to provide all "communications with unions and community organizations regarding the company's EEO obligations and recruitment efforts to hire" individuals with disabilities or protected veterans during the last 12 months. This information is not sought from supply and service contractors during a compliance review and is simply not needed at the desk audit stage. To demonstrate Section 503/VEVRAA compliance, we recommend that OFCCP simply request from construction contractors the same Section 503/VEVRAA items requested in the scheduling letter already used for supply and service compliance reviews. OFCCP has not made the case that construction contractors should be subject to additional burdens in a scheduling letter for a routine compliance review.

3) Contractors Should Not Be Required to Provide Detailed Contract and Subcontract Data

During a typical construction compliance review, contractors are expected to provide OFCCP with a list of federal, federally-assisted, and non-federal construction projects by name and location in the applicable geographic area, and designate whether each listed contract is either a commercial or residential project (*e.g.*, prime construction contracts).⁷ In addition, OFCCP *may* seek additional information on each of the listed federal construct projects from construction contractors, such as the funding agency, contract amount, date of award, date when construction started, percent of the project completed so far, and estimated completion date. Under the proposed letter, however, OFCCP plans to mandate that construction contractors provide this discretionary, additional information on each of their federal construction projects in every compliance review, which would result in an increased reporting burden.

⁷ See Item 9 of the FCCM's L-9 Letter of Sample On-Site Documents for a Construction Compliance Review.

We respectfully submit that the responsibility for maintaining this federal contract information rests with the federal government, not with construction contractors. To shift this responsibility to construction contractors during a compliance review only adds to the overall burden that contractors will face when responding to the proposed Scheduling Letter and Itemized Listing. Thus, we recommend that the detailed federal contract information above be removed from the proposed scheduling letter. OFCCP could of course, in its discretion, continue to seek this information on a case-by-case basis.

OFCCP also proposes that scheduled contractors provide a listing of all federal subcontracts, including the subcontractor's name, dollar amount of the subcontract, and the subcontractor's Employer Identification Number ("EIN"). OFCCP already has a mechanism for obtaining this detailed subcontract information, as prime contractors are already required to submit directly to OFCCP a construction subcontract notification letter within 10 working days after any construction subcontract has been awarded in excess of \$10,000.⁸ To require construction contractors to provide this prime or subcontract information in a separate process is duplicative and unnecessary.

4) OFCCP Should Revise the Scheduling Letter to Clarify that Contractors May Continue to Provide Documents in the Format in Which They Are Maintained

OFCCP is aware that a significant number of selected construction contractors that receive a compliance review scheduling letter still submit their responsive data and documents in paper format and expects that practice to continue under its proposed letter.⁹ OFCCP estimates that "approximately 50 percent" of contractors selected for a construction compliance review will submit the required documents in paper format to the agency.¹⁰ Despite this, OFCCP's proposed letter encourages construction contractors to provide their responsive documents and data in electronic format to reduce OFCCP's time needed to complete the evaluation.¹¹ While it goes without saying that electronic submission can, in certain circumstances, ease the burden on both parties, OFCCP's proposed letter should clarify that contractors are permitted to provide their responsive data and documents to OFCCP in the original format that they are maintained by the contractor. Absent this clarification, contractors may believe they need to convert their paper documentation into an electronic format for submission purposes, which would be inefficient and needlessly burdensome.

Conclusion

In short, as currently proposed, we believe that OFCCP's construction compliance review Scheduling Letter and Itemized Listing would impose a significant additional burden on construction contractors based upon the increased amount of data and documentation the agency seeks to collect. Similarly, the proposed letter would unnecessarily increase the burdens on OFCCP by substantially increasing the volume of information that must be reviewed. We urge OFCCP to consider modifying its proposal consistent with the recommendations made above to ensure that the new letter achieves its goal of increasing efficiency in the interests of OFCCP and the contractor community.

⁸ See 41 C.F.R. § 60-4.2(d)(3).

⁹ See *OFCCP Justification Statement for Construction Compliance Review Scheduling Letter and Itemized Listing*, <https://www.regulations.gov/document/OFCCP-2020-0004-0002>, p. 12.

¹⁰ *Id.*

¹¹ See OFCCP's Proposed Scheduling Letter and Itemized Listing, p. 2.

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CWC appreciates the opportunity to offer these comments regarding OFCCP's proposal. Please do not hesitate to contact me if CWC can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in cursive script that reads "Gilberto Garcia, Jr.".

Gilberto Garcia, Jr.
Senior Counsel
Center for Workplace Compliance