

January 20, 2023

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

Tina T. Williams
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 its Supply & Service by Berkshire Associates Inc.; OMB Control No. 1250-0003

Dear Ms. Williams:

Berkshire Associates (“Berkshire”) submits the following comment in response to the Office of Federal Contract Compliance Program’s (“OFCCP”) request for a three-year approval under the Paperwork Reduction Act (“PRA”) for a revised Information Collection Request (“ICR”) published in the November 21, 2022 edition of the *Federal Register*. The OFCCP’s ICR seeks to make significant revisions to the Scheduling Letter and Itemized Listing (“Scheduling Letter”) used by the agency to initiate Supply and Service compliance reviews 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.

BACKGROUND ON BERKSHIRE AND ITS CLIENTS

Berkshire is a human resources consulting and technology firm specializing in affirmative action compliance, pay equity, DEI, and applicant tracking. Berkshire’s clients vary in size from small establishments with one affirmative action plan (“AAP”) to nationwide 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 over 7,000 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 almost 40 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, we are concerned that significant portions of the proposed data collection go well beyond the current regulatory requirements and therefore are not appropriately proposed 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

Under the PRA, any data collection must (1) minimize the burden on those individuals and entities most adversely affected and (2) maximize the practical utility of and public benefit from information collected by or for the federal government while meeting certain confidentiality standards.¹ We respectfully submit that OFCCP's proposed ICR does not meet either of these standards. On the contrary, the ICR would significantly increase the burden on federal contractors and subcontractors – tremendously increasing the amount of information every contractor would submit during a compliance review – without any showing that there are significant benefits to collecting such detailed data from every contractor, or even that OFCCP has the appropriate resources to review such a significant amount of data in every compliance review.

Much of the agency's proposal reflects a desire to obtain as much information as possible from every contractor subject to a compliance review. Under the agency's current regulations, however, the Scheduling Letter is used by OFCCP to initiate the desk audit phase of a compliance review. The desk audit is used to determine "whether all elements required by the [AAP] regulations" are included in a contractor's AAP. 42 CFR Section 60-1.20 (a)(1)(i). Importantly, under the agency's current regulations, after the desk audit, the agency may conduct further review "to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit, to verify that the contractor has implemented the AAP and has complied with those regulatory obligations not required to be included in the AAP, and to examine potential instances or issues of discrimination."

The current regulatory scheme reflects a more appropriate balance between the burden of an expansive ICR such as the one proposed here and the possible benefits of gathering such broad information from every single contractor. The proposed revisions to the Scheduling Letter change how OFCCP will conduct compliance evaluations – collapsing what is currently three phases of review into essentially one for all contractors. *See* 42 CFR Section 60-1.20 (a)(1) (noting a "compliance may proceed in three stages"). The OFCCP's Supporting Statement does not provide sufficient justification for why this is necessary or what benefits would accrue from such an expansive revision to this ICR.

¹ *Dole v. United Steelworkers of America*, 494 U.S. 26, 32 (1990).

In addition, throughout the OFCCP's proposed ICR, there are a number of reporting requirements that either conflict with or go well beyond the required components of an AAP specified in the agency's current regulations. These include the following, among others:

- The requirement to provide detailed data about promotions, including whether the promotion was competitive or non-competitive, the previous supervisor, current supervisor previous compensation, current compensation, department, job group and job title from which and to which the person(s) was promoted, requests data well beyond what is required to be included in an annual AAP.
- The request to submit detailed data about terminations, including the specific reason for each termination, is also nowhere in the current regulations.
- The requirement to provide affirmative action plans for an entire city where a contractor uses a campus-like setting is also not grounded in the current regulations which specify that AAPs are to be developed by establishment and that compliance reviews will be conducted by establishment unless a contractor receives explicit approval from the agency to prepare functional affirmative action plans.
- The request to provide documentation regarding recruiting, screening, and hiring processes, including the use of any artificial intelligence tools, where nothing in the agency's current regulations require this information to be in an annual AAP.
- The request to provide two compensation snapshots, and all relevant factors that determine compensation, also seeks information that is beyond what is required to prepare an annual AAP. Indeed, even the current ICR requirement to compile a single compensation snapshot is found nowhere in the current regulations, which require that a contractor "review its compensation systems" without specifying how that be done.²
- The request to provide a "list identifying all action-orientated programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b)" also goes beyond the current regulations which require contractors to "develop" and "execute" such programs, but not record such work in a list format.
- The request to provide various employment policies, including employment agreements and arbitration agreements, is also beyond what is required to determine if a contractor has included all "elements required by the [AAP] regulations" in its AAP.

Under the Administrative Procedure Act (APA), a federal agency must engage in notice and comment rulemaking to impose new substantive requirements. See *American Federation of Labor and Congress of Industrial Organizations v. National Labor Relations Board*, 466 F.Supp. 68, 93 (D.D.C 2020) (notice and comment rulemaking required when an agency action binds the agency or

² The request to include compensation data for "all employees. . . including those provided by staffing agencies" is confusing and should be removed. Most workers provided by staffing agencies are not considered a contractor's "employee." More importantly, contractors do not set the compensation for workers provided by staffing agencies and do not have access to each worker's individual pay information. The OFCCP has not explained why this information is needed, or how it would be used to evaluate whether a contractor has prepared an AAP that includes all required elements.

private parties, changes the substantive standards or “trenches on substantial private rights and interests”). The OFCCP’s proposed revisions to its Scheduling Letter also are clearly intended to direct and facilitate “agency action,” which falls squarely within the scope of the APA. 5 U.S.C. § 551(13). Indeed, the very purpose of this information collection is to outline the data OFCCP will seek when it schedules a contractor establishment for a compliance evaluation.

Because many of the proposed revisions go beyond what is currently required when preparing an annual AAP, the proposal imposes significant burdens on respondents. The OFCCP’s Supporting Statement estimates that the burden on contractors will increase 11 hours, from 28 to 39 hours. Contractors have been telling OFCCP for years that it takes significantly more time to respond to the Scheduling Letter than OFCCP estimates. Yet the agency continues to add new collection requirements without significantly increasing the burden estimates, despite receiving information during the ICR approval process that the burden estimates do not reflect the time it takes contractors to gather, verify, and produce such data to the OFCCP. Based on our experience helping contractors respond to the current Scheduling Letter and respond to requests for more information during a review, the agency’s burden estimate is woefully low.

The burden imposed by this ICR is even greater where so many of the requested items are not a currently required component of an AAP under the OFCCP’s regulations. This means that the items are only being gathered and verified by contractors when responding to the ICR once received. Compiling this data, verifying that it is accurate, and preparing it for submission after review by various stakeholders simply cannot be completed in the estimated 38 hours. Moreover, in many instances, contractors would need to develop new systems or processes to collect and maintain the requested data. In still other instances, contractors would have to manually combine data from multiple data sources to respond to the ICR.

By way of example, we think it is likely that it could take many contractors well over 11 additional hours to comply with just one of the OFCCP’s new requests – the request for detailed promotional data. Most contractors do not currently store the type of detailed information requested for each promotion in their HRIS or similar readily retrievable format. Instead, this information will likely need to be manually compiled. Even for a small contractor with little promotional activity, gathering and verifying this information could take more 11 hours. Based on our experience, it seems highly likely that it could take 30-60 minutes to gather, compile and verify the requested data for each individual promotion. Based on this estimate, a contractor with only 22 promotions would easily spend 11 additional hours responding to this request alone. For a large contractor with significantly more promotional activity, the time could be significantly greater. We provide this insight based on prior experience in reviewing the data that contractors typically record in their HRIS about promotions and in helping contractors respond to similar requests in current compliance reviews. It is consistently the case that the types of information requested by OFCCP about promotional activity are not easily retrievable and must be manually compiled. Doing this work has often taken our clients several hours, even when the request is tailored to a single job title or job group. Compiling this information across an entire AAP would take significantly longer.

We also respectfully submit that OFCCP has underestimated the cost of this ICR to the federal government. The OFCCP’s Supporting Statement estimates that it will take 32 hours for OFCCP staff to review a contractor’s response to the proposed Scheduling Letter. However, this is the same amount of time the OFCCP estimated it would take its staff to review information submitted in response to

the current Scheduling Letter, which requires the production of significantly less information. It simply strains credibility to suggest that it will take OFCCP staff the same amount of time to review a voluminous amount of additional information.

If the OFCCP decides to move forward with even portions of this revised ICR, the agency also should expand the amount of time contractors have to respond to the ICR. Since the Scheduling Letter was implemented, the agency has consistently added items that need to be collected, verified, and produced by federal contractors in response to this ICR over the years. Yet the time allotted for responding has remained at 30 calendar days.³ It is quite simply implausible that the time needed to respond has remained the same while the information to be collected has steadily grown. This issue is particularly problematic here – where so many requests in the ICR are not items that are required to be included in an annual AAP under the agency’s current regulations.

To impose such a burden on respondents, OFCCP must demonstrate that the benefit of collecting such information outweighs those burdens. OFCCP’s Supporting Statement does not meet this requirement. As reflected in the agency’s own enforcement numbers year after year, the vast majority of contractors receive a notice of compliance during a compliance review – indicating that the vast majority of contractors are complying with their affirmative action regulations. Requiring more detailed information from all contractors through an ICR – rather than requiring such information from only those contractors where a review of the contractor’s AAP reveals the need for such detailed information – imposes unnecessary burdens on the majority of federal contractors who are in compliance with their affirmative action obligations, without any apparent benefit to the agency.

CONCLUSION

As an AAP vendor, one of Berkshire’s primary goals is to help each of its clients comply with their affirmative action and discrimination reporting obligations. We provide these comments to the OFCCP based on our real-world experiences helping thousands 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 reporting obligations fundamentally change a contractor’s AAP compliance requirements and are more appropriately proposed through formal rulemaking. In addition, 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 AAPs. 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. Imposing significant additional burdens on every contractor simply because the agency desires to have more information - without identifying any need for or benefit of collecting such vast amount of information - simply cannot be justified under the PRA.

³ At a minimum, the OFCCP should calculate the 30 days as business days and only from the date of actual receipt of the Scheduling Letter by the appropriate company official.

Berkshire appreciates the opportunity to 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,

A handwritten signature in blue ink that reads "Lynn A. Clements". The signature is written in a cursive style with a large initial "L" and "C".

Lynn A. Clements
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