

May 16, 2023

Electronic Submission via Reginfo.gov

https://www.reginfo.gov/public/do/PRA/icrPublicCommentRequest?ref_nbr=202304-1250-001

Attn: The Office of Management & Budget (OMB)

Re: Comment on OMB CONTROL NUMBER: 1250-0003

ICR REFERENCE NUMBER: 202304-1250-001

TITLE: Supply and Service Program

HR Works, Inc. appreciates the opportunity to provide comments on the revised version of the proposed rule for Supply and Service Program; Proposed Approval of Information Collection Requirements (OMB No. 1250-0003) which was released on April 18, 2023. HR Works is a human resource outsourcing and consulting firm. Our services include affirmative action plan development, EEO-1 and VETS-4212 reporting, and consultation on the implementation of affirmative action programs and related requirements. In addition to being a Federal subcontractor ourselves, we provide affirmative action-related services to hundreds of clients, which represent a wide variety of employment industries, ranging in size from 50 to 30,000 employees, and are geographically dispersed throughout the United States. We believe that, as proposed, the Scheduling Letter and Itemized Listing changes will be overly burdensome on contractors and will not further OFCCP's mission of ensuring contractor compliance with E.O. 11246, Section 503, and VEVRAA. Since OFCCP is looking to significantly expand the amount of information that contractors must provide at the onset of a compliance review, we assert the following: (1) the 30 day submission deadline does not provide enough time to provide all the information in the Scheduling Letter and Itemized Listing; (2) OFCCP needs to provide additional clarification on certain aspects of these proposed changes prior to finalization; and (3) in some cases, OFCCP is using the Scheduling Letter and Itemized Listing to issue rules without following the regulatory process.

HR Works is providing comments below on some of the key aspects of the revised version of the proposed changes and how these changes may impact contractors.

ADMINISTRATIVE MATTERS

Deadline for Submission of Audit Information

It remains a concern that the revised proposed changes still require contractors to submit their responses to this significantly enhanced scheduling letter within 30 days of receipt. These changes would significantly increase the amount of data OFCCP requires contractors to submit at the onset of a compliance review and OFCCP is neglecting to give contractors additional time to prepare and submit the information. Instead, OFCCP continues to emphasize that failure to provide the requested information within 30 calendar days may lead to enforcement proceedings. In the past, contractors could request and receive extensions for at least

some items from the Itemized Listing. HR Works understands that the Agency may argue that this change is consistent with OFCCP's [Directive \(DIR\) 2022-02](#), but it should be noted that this DIR does not acknowledge that OFCCP's rules do not require contractors to maintain records in the form in which they are requested by the Itemized Listing and that a contractor's need for additional time to gather this additional data cannot be considered an explicit indicator of non-compliance.

Regardless of their size, contractors will need more time to prepare the new and expanded items, in addition to time to ensure data integrity prior to submission. HR Works urges OFCCP to revisit the estimated impact that these proposed changes will have on contractors, and that, prior to finalizing these changes, the 30-day submission deadline be amended to no less than 60 days and/or that an option to request an extension with liberal consideration from OFCCP be granted.

Burden Estimate

The revised proposed changes include a reduced estimated burden, down from 39 hours to 37.5 hours. As it were, the prior estimate of 39 hours seemed to be an underestimation of the burden on contractors. HR Works believes that given the lack of substantive changes between the initial proposed scheduling letter and the revised version, a burden of 37.5 hours is inaccurate, and this estimate does not comport with the reality for most contractors.

Use of OFCCP's Contractor Portal, Email or Kiteworks as Methods for Contractors to Utilize When Uploading and Submitting Their Itemized Listing Data

HR Works acknowledges that in this revised version of the scheduling letter, OFCCP is offering additional methods for electronic submission of the Itemized Listing, including use of Kiteworks' file sharing system. As Kiteworks appears to be a new system, HR Works would like OFCCP to provide advanced guidance to contractors on how to use OFCCP's Kiteworks file sharing system for submission of Itemized Listing data so that contractors can be ready to complete submissions in a timely manner, without issue. HR Works also urges OFCCP to publish information about the data security offered by Kiteworks, in acknowledgment of the sensitivity most organizations, and especially Federal contractors, have to establishing a confidence level that any software in use by the organization offers an appropriate level of security based on the type of information being transmitted or stored.

With regard to use of OFCCP's Contractor Portal for submission of Itemized Listing data, HR Works' clients experienced a number of issues with user access to the Contractor Portal in 2022. We request that the Agency ensure these issues have been thoroughly identified and resolved prior to using the portal for audit submissions. In several of our clients' cases in 2022, users from other companies appeared as though they had access to a contractor's account. Additionally, the system commonly accepted invalid data without prompting an error message. It remains impossible for portal account holders to quickly remove the access of an Admin user, as might be necessary in the event of a termination. Instead, contractors must contact OFCCP to remove an Admin user and wait for the change to be processed. Ultimately, where there are data integrity issues, we question whether there are also security concerns.

HR Works would also like clarification as to whether the Contractor Portal will be updated to accommodate different user access permission, beyond the "Admin" and "Non-Admin" categories currently available. If there is more than one active user for a contractor's account in the portal, can the contractor limit what types of data can be accessed on an individualized basis? The information to be submitted under the Itemized Listing is considerably more sensitive than the current information in the Contractor Portal, including individual-level compensation data. HR Works is asking OFCCP to provide guidance on how various user permission levels can be set in the portal, as in our experience, there will be situations where a contractor may have one contact who they'd like to grant user access for certifying in the portal but designate a different individual to be responsible for handling OFCCP audit submissions due to the various levels of sensitive information.

Identification of Action Oriented Programs

OFCCP's initial proposed language stated that contractors were required to provide a "list" "identifying all action-oriented programs designed to correct any problem areas." The revised version would require contractors to provide "all documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b)." HR Works would like clarification on the updated language and whether the Agency's revised phrasing creates an obligation to provide data from the prior plan year, the current plan year, or both. HR Works believes that, as now proposed, the phrasing could lead to confusion among Agency compliance officers. Contractors' opportunity to execute action-oriented programs will depend in part on how far into the AAP year the contractor is when the compliance evaluation commences. If clarification cannot be provided, HR Works requests that OFCCP retract the words "and execution," as this request for prospective documentation will be unachievable for some contractors simply due to timing.

Utilization Analysis Evaluating Individuals with Disabilities

OFCCP continues to propose expanding the amount of information contractors must provide related to underutilization of individuals with disabilities. HR Works would like clarification on what specific documentation OFCCP expects contractors will provide to indicate compliance Item 11 of the Itemized Listing. We anticipate that documentation beyond the Utilization Analysis will be required of the majority of contractors undergoing compliance evaluation, as the Agency itself has described the disability utilization goal as "aspirational" and a vast majority of employers fall short of 7% disability utilization in at least one job group. As an example of the clarification requested, would this obligation be met if a contractor reviewed their job descriptions and accommodation process for applicants? Is the representation across job groups or just certain groups?

POST-SECONDARY INSTITUTIONS AND CAMPUS-LIKE SETTINGS

Post-Secondary Institutions and Contractors With "Campus-Like Settings"

The revised proposed Scheduling Letter reflects a rejection of one of HR Works' previously submitted key concerns regarding OFCCP's regulatory authority. HR Works has concerns with the proposal to require post-secondary institutions and contractors with "campus-like settings" to submit all AAPs and Itemized Listing

information for the entire campus in the city where OFCCP schedules the compliance review. All three sets of regulations enforced by the Agency reference that OFCCP will review the "written affirmative action program" (singular) in the relevant "compliance review" sections. HR Works questions whether the proposed change for "campus-like settings" is attempting to use the Scheduling Letter to make a regulatory change. We would argue that this change requires the Agency to follow the process for formally amending the regulations to address "campus-like settings," as the scope of an audit has historically been limited to the establishment identified in the Scheduling Letter. It is our view that OFCCP regulations arguably do not support an expansion of audit scope. To better understand this proposed change and whether formal regulatory changes are needed, HR Works further asserts that the Agency should provide clarity on what it intends to do with this information and how providing it will allow OFCCP to make more "efficient use of its resources."

EMPLOYMENT ACTIVITY AND SELECTION PROCEDURES

Support Data for Promotions and Terminations

HR Works applauds the Agency's change to the proposed language removing the requirements that contractors report promotion data broken out by competitive and non-competitive movements and provide data on supervisor's compensation for each promotion. Additionally, HR Works applauds the Agency's retraction of the proposed requirement for contractors to provide the reason for each termination. HR Works believes these changes will reduce the burden on contractors when preparing the Item 18 data for a compliance evaluation.

Request for Policies Relating to the Use of AI and Other Technology-Based Selection Procedures

HR Works understands that OFCCP is placing a focus on contractors' use of artificial intelligence (AI) and that the use of such tools raises potential questions related to equal opportunity and discrimination pursuant to the [Uniform Guidelines on Employee Selection Procedures \(UGESP\)](#). However, it remains a concern for HR Works that the Itemized Listing request for documentation of policies and practices regarding the use of AI, algorithms, automated systems and other technology-based selection procedures is yet another burden for contractors that will in most cases require additional time and resources. It will be unclear to most employers what documentation should exist or be created, and against what regulatory standards OFCCP compliance officers will be assessing such documentation. Notably, jurisdictional enforcement of the UGESP falls under the Equal Employment Opportunity Commission (EEOC) and while agencies may jointly pursue initiatives and enforcement actions, it does not appear that either OFCCP or EEOC has a specific regulatory foundation on the use of AI in employment. As such, HR Works recommends that, prior to introducing this into the compliance evaluation process, OFCCP continue to define its expectations in this regard and that formal regulatory actions be taken prior to burdening contractors with another item for submission.

Should OFCCP not retract this requirement, HR Works requests that OFCCP provide a list of best practices to help contractors meet this requirement including, but not limited to, the provision of guidance on selecting vendors and additional clarification for contractors and Agency staff on the following questions:

- Would contractors who do not use AI tools or other technologies still be required to develop policies related to this matter or would they indicate that no such tools are used in their employment decisions?
- How does OFCCP intend to evaluate this? As examples, are Agency staff trained to evaluate this; how will they determine acceptability on these items; and would the focus be limited to what the contractor has control over versus what a software vendor may control?
- What specific policies or practices would contractors be required to develop?

COMPENSATION

Compensation Data for Staffing Agency Employees

In this revised version of the proposed Itemized Listing, OFCCP retains an expanded definition of “temporary employees” to include “those provided by staffing agencies.” The Agency has noted this change as an attempt to provide clarification, but it does the opposite. If OFCCP is attempting to get pay data for employees not on the contractor’s payroll, this change is problematic. In most cases, contractors do not determine compensation for staffing agency employees and may not even know the wage rates the staffing agency is paying its employees nor does the contractor have any control over the staffing agency’s compensation structure or decisions. Furthermore, these individuals would never be included in the contractor’s compensation analysis or AAP. It is additionally unclear how contractors would gain access to this data. We have recently seen a similar expansion of reporting “labor contractors” in California’s Pay Data Report, but even California’s Civil Rights Department does not expect employers to have access to the information and instead places the obligation to provide the information, and responsibility for failing to do so, upon the staffing agency. Because OFCCP’s regulations do not define “employee,” contractors have historically relied upon the EEOC’s definition, which only includes workers on the contractor’s payroll. It is incongruous to exclude these staffing agency employees from most AAP analyses and then expect the contractor to gain access to and provide information about those workers’ compensation. If collecting staffing agency employee information is the intent, OFCCP should develop its own definition of “employee” either through regulatory rulemaking or via updated guidance prior to finalizing these changes. Otherwise, the phrase “including those provided by staffing agencies” should be removed from the final version of the Itemized Listing.

HR Works understands that in opting not to make changes to this proposed requirement that OFCCP asserts that they have already provided guidance for determining whether an individual is an “employee,” and that this existing guidance would still apply when assessing the status of temporary employees. However, HR Works would argue that OFCCP’s current guidance seems to provide clarity with respect to the concept of independent contractor versus employee under the Darden factors but does little to clarify how an employer would determine “employee” status related to an employee on a contractor’s payroll versus a temporary employee whose employer of record is a staffing agency. HR Works is requesting that adequate guidance or relevant examples of how to make this assessment outside of the independent contractor lens be provided by the Agency.

Compensation Snapshot

In the revised proposed Itemized Listing OFCCP retains the requirement for submission of both current and prior year compensation data, increasing the requirement from providing only the current year's compensation data to providing two years of compensation data. While OFCCP asserts that this change will improve efficiency, it is our expectation that the change will instead have the opposite effect. Contractors will be burdened to gather additional data that will in many cases be unnecessary, as systemic compensation discrimination is not widespread in the contractor community. Furthermore, OFCCP staff will spend additional time evaluating compensation data, absent any indication that compensation discrimination has occurred.

It is the view of HR Works that the Agency has greatly underestimated the additional efforts and time that will be required to provide the additional snapshot within 30 days. As previously mentioned, it is recommended that OFCCP consider a reasonable timeframe for submission of data. It is also arguable whether providing OFCCP with additional data will speed up the review process, as more information introduced into the audit process has a greater likelihood of increasing the review time and lengthy compensation investigations may result. Over a two-year period, the employees, their individual compensation, and their job titles will change considerably when viewing an employer's workforce as a whole. Compensation is a "moving target," adding complexity to any attempts OFCCP might make to analyze multiple years of data simultaneously. Additionally, OFCCP has asked contractors to self-audit and self-correct barriers to equal opportunity in compensation practices. Looking at multiple years of data discredits contractors who have taken steps to improve equity in the preceding year when OFCCP audits practices the contractor may have identified and corrected in conformance to principles of affirmative action.

In the event that OFCCP opts not to retract or modify this requirement, HR Works believes that the Agency must consider whether the current timeframe of 30 days for contractors to submit two years of compensation data and factors that impact compensation of "temporary employees," including those provided by "staffing agencies" is truly unreasonable. HR Works believes that this is not a sufficient timeframe. Additionally, OFCCP should provide clarification as to which party (the contractor or the staffing agency) would be held accountable by the Agency. Further, we ask that OFCCP provide transparency with regard to the Agency's methodology for reviewing and comparing two years of compensation data so that contractors may anticipate and be prepared to respond to questions about their compensation practices.

CONCLUSION

HR Works is asking OFCCP to address the following key concerns with the proposed changes to the Scheduling Letter and Itemized Listing:

- Provision of adequate time to submit the Scheduling Letter and Itemized Listing materials;
- Functionality and security of Kiteworks and the Contractor Portal, plus guidance on the use of the Agency's Kiteworks file sharing system;
- Impact and number of hours that will be required for contractor compliance with the new and expanded Itemized Listing;
- Need for additional clarification and guidance from OFCCP on some of the proposed changes; and

- Appropriate utilization of the regulatory process for some of the proposed changes.

If approved, the revised proposed version of the Scheduling Letter and Itemized Listing will have an expanded impact on contractors and OFCCP's estimates simply do not reflect the reality for most contractors. Thirty (30) calendar days is not enough time for most contractors to provide the extensive amount of additional data that OFCCP is proposing to collect, much of it not in a format that conforms to prepared AAP reports. It is imperative that contractors be provided with more than 30 days to comply if these changes are implemented as proposed.

If the Agency makes changes to the proposed Scheduling Letter and Itemized Listing in an effort to address the time commitment and data volume burdens placed on contractors, OFCCP can be successful in meeting their goal of reducing delays in the compliance review process while effectively enforcing the regulations. HR Works encourages OFCCP to look more critically at the extent of information requested, the reasonableness of response deadlines, and consistency with existing regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "SC", is positioned above the typed name.

Shannon L. Craig
Vice President, Compliance Services