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December 26, 2015

Ms. Debra A. Carr

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: OFCCP-2015-0003

Dear Ms. Carr:

Gaucher Associates appreciates the opportunity to review and submit comments on the OFCCP’s proposed renewal of the Information Collection Request (ICR) titled “Non-Construction Supply and Service Information Collection - Proposed Renewal of Information Collection Requirements”.

Gaucher Associates, Inc. is a Human Resources consulting firm specializing in employment law compliance matters, including EEO and Affirmative Action, with offices in Massachusetts 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 clients in the past seventeen 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 I also served as a member of the OFCCP’s Task Force on Directives and the Manual, which eliminated a number of outdated or redundant directives and wrote the current Federal Contract Compliance Manual.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.

The current iteration of the OFCCP’s revised scheduling letter for supply and service compliance evaluations is different from the previous version in only a few respects. It would be simple if this request was for an extension of OMB approval under the Paperwork Reduction Act for the letter currently in use. However, it is not. Further, the OFCCP’s interpretation of the contents of the letter differ, in some respects, from what it has told the OMB.

**Cover Letter to Itemized Listing**

One change we note here is the revision of “compliance evaluation” to “compliance review”. This is confusing. The agency’s regulations at 41 CFR 60-1.20 identify a “compliance evaluation” as being one of four different types of activities, only one of which is a “compliance review”.

Further, a “compliance review” consists of only one of three activities: (1) desk audit, (2) onsite review, and (3) off-site “analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.”

It does not include off-site review of records, a compliance check (for which there is actually a separate letter), or a focused review. Does the OFCCP really mean to limit itself, when it sends this letter to a contractor, to only the desk audit, an onsite review, and subsequent to the onsite review, off-site analysis of data gathered onsite?

Our clients have been subjected recently to numerous and continuous requests for information, at least some of which are identified in the OFCCP’s own Federal Contract Compliance Manual as being solely matters for onsite investigation (e.g., compliance with the guidelines on religion and national origin at 41 CFR Part 60-50).

The cover letter further identifies as separate types of “compliance reviews” those directed at contractors with Functional AAP agreements, and reviews of corporate headquarters locations (CMCE, which stands for “Corporate Management Compliance Evaluation“ [emphasis added]).

Perhaps the OFCCP is also planning to change the name of the Standard Compliance Evaluation Report (SCER) back to Standard Compliance Review Report (SCRR)?

Finally, the cover letter provides various notifications, such as that the information collected may be shared with other Federal agencies. That was the case when the OFCCP inspected I-9 Forms, reporting results to Immigration and Customs Enforcement (ICE). I’m sure other agencies will be as interested.

**Itemized Listing**

When the OFCCP first proposed changes to its scheduling letter and itemized listing in 2011, there were only thirteen items. According to a report by another organization (DCI, I believe) the OFCCP had said that they would not address the new veteran and disabled regulations in the itemized listing. In fact they did, so this is the first time that we will be able to respond to those items before the Office of Management and Budget.

**Items 1-6: AAP Elements**

The first six items, under Executive Order AAP, are virtually unchanged. The OFCCP has decided to separate out the two types of organizational profiles, display vs. workforce analysis, but other than that there is no difference.

**Item 15: Request for EEO-1 Reports**

This had originally been Item 7 in the 2011 version of the itemized listing. As we commented, then, we don’t believe it is necessary to request the last three year’s EEO-1 reports. The OFCCP already has the EEO-1 reports for two of the last three years, making it unclear why they are asking contractors to provide data that they already possess. EEO-1 reports provided the basis for scheduling companies under the old Equal Employment Data System (EEDS), and they continue to do so for the Federal Contractor Selection System (FCSS). Requiring that contractors resubmit data that is already in the OFCCP’s possession seems both burdensome and unnecessary.

Then there is the question of what exactly the OFCCP does with this data. In point of fact, it uses the three years of data to complete an excel spreadsheet, which provides a “trend analysis”. Is a contractor’s workforce expanding or contracting? How does this impact the employment of minorities and women? The OFCCP’s Federal Contract Compliance Manual at Chapter 2, Desk Audit, contains an extensive discussion of how the data may be applied. But the rationale is thin. A contractor either has employment opportunities or it doesn’t. It may make progress on meeting goals if it has opportunities, or it may not. Since goals are established by job groups, which are often subsets of EEO-1 categories, how does an analysis by EEO categories tell a compliance officer anything useful? In fact, it doesn’t. So not only is two of the three year’s data already available to the OFCCP, but having data by EEO category, which doesn’t match goals by job group or much else, seems a waste of everyone’s time.

**Item 16: Collective Bargaining Agreement**

This had been Item 9 in the 2011 itemized listing (Item 8, a request for information regarding Family and Medical Leave policies was dropped). This asks for copies of collective bargaining agreements, or “other information…that would assist us in understanding your employee mobility system(s)…” This is unchanged from the current version.

**Item 17: Prior Year Goal Attainment**

This was Item 10 in the 2011 itemized listing, and provides for submission of data regarding prior year goal attainment and data on year-to-date goal attainment if the letter is received when the contractor is more than six months into its current AAP year. It should be noted that since percentage placement rate goals are established on an annual basis, lack of goal attainment when a year is not over, while perhaps a cause for concern, is not a violation of any existing OFCCP regulation. The new version proposes to expand the reference to good faith efforts, specifically requesting information on efforts to “remove identified barriers, expand equal employment opportunity, and produce measurable results.” This is taken from 41 CFR 60-2.17(c).

**Item 18: Personnel Activity Data**

Formerly Item 11 in the 2011 version of the itemized listing, this update contains some changes from the current version. We note that the itemization of racial/ethnic groupings for which data is requested has been relegated to a footnote. In addition, applicant and hiring data, formerly combined in the same paragraphs, has been separated out.

The 2011 version of the itemized listing had asked for personnel activity data both by job group and by job title. The final version, and this version, offer job group and job title as alternatives.

**Regulatory Justification**

In support for its 2011 request, in the final version, and in this version, the OFCCP cites a number of regulations, as follows:

41 CFR 60-1.12. This refers to general recordkeeping. Under this regulation, contractors are required to maintain data on personnel records. This of course includes records on hiring, promotion, and termination. It also includes a requirement that “expressions of interest” [in employment] received “through the internet or related electronic data technologies” where the contractor “considered the individual for a particular position” [emphasis added] must also be retained. And at 60-1.12(c)(ii) it notes that for any record, the contractor must be able to identify, “where possible, the gender, race, and ethnicity of each applicant or Internet Applicant…

41 CFR 60-2.11 – 2.12, refers to the AAP requirements for an organizational profile and job group analysis. It is not clear what these requirements have to do with personnel activity, but 41 CFR 60-2.11 does say that data for the organizational profile must include data, by job title, on the race and ethnicity of employees, identifying the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indian/Alaskan Native. Even assuming an update for the 1997 OMB racial classifications (Asian separated from Hawaiian/Pacific Islander), there is no reference to Whites, one of the classifications for which personnel activity is requested. The other regulation cited, 41 CFR 60-2.12 Job Group Analysis, refers to neither race, ethnicity, nor gender.

41 CFR 60-2.17(b)(2). This regulation refers to an AAP requirement to identify problem areas with respect to personnel activity, “to determine whether there are selection disparities.” No mention here of selection disparities either by job group or by job title, or even a specific numerical analysis of any sort.

41 CFR 60-2.17(d)(1) This is a requirement that the AAP include an audit and reporting system that would, among other things, “monitor records of all personnel activity…to ensure the nondiscriminatory policy is carried out”. Monitoring records does not necessarily imply numeric calculations, however.

41C FR 60-3.4. The remaining two regulatory citations are to the Uniform Guidelines on Employee Selection Procedures. Unfortunately, the Uniform Guidelines on Employee Selection Procedures (UGESP) are guidelines, not requirements. Throughout the UGESP, the operative word is “should”—users of selection procedures “should” do this, or “should” do that. The UGESP at 41 CFR 60-3.4, “Information on Impact”, says that “[e]ach user should [emphasis added] maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group…”

“Should” of course conveys the same meaning as “ought to”. According to the American Heritage College Dictionary, Third Edition, the first definition of “should” is “Used to express obligation or duty”. The same dictionary gives the first definition of “ought” as “Used to indicate obligation or duty”. The definitions are interchangeable. If you read the regulation at 41 CFR 60-3.4 to say that “[e]ach user ought to maintain and have available for inspection records or other information…”, it is clear that there is no requirement.

41 CFR 60-3.15. Although identified as “Required information”, this regulation again states that “[u]sers of selection procedures…should [emphasis added] maintain and have available for each job information on adverse impact of the selection process for that job…” Again, the operative word here is should. Employers/users “should” maintain data on selection by race/ethnicity and gender, and “should” analyze that data to determine if otherwise neutral selection procedures are having an adverse impact on the selection of applicants or candidates by race/ethnicity or gender. But again, read as “ought to maintain data on selection” and “ought to analyze that data”, makes it clear that while it may be a “good idea” to collect and analyze data on selection procedures, it is not a requirement of either of these regulations.

**Promotions Data**

The current request for promotions data is unchanged in the proposed renewal. The request is fairly simple, for total promotions by race/ethnicity and gender.

**Terminations Data**

As with the request for data on promotions, the request for terminations data is unchanged in the proposed renewal from the current version.

**Item 19: Compensation Data Collection**

In 2000 the OFCCP updated its itemized listing to include a request for compensation data during the desk audit phase of a compliance evaluation. At that time, the OFCCP asserted that it had always collected compensation information during an audit. That was not in fact the case.

Although the 2000 proposal originally included a request for a detailed employee roster with compensation data, this was modified in the final version to a request for summary data, by pay grade, band, etc. The 2011 proposal not only included a request for individual compensation data, but had also proposed a compensation report that was separate from a contractor’s AAP cycle, unless it happens to have an anniversary date of February 1st.

In the final version, and in this proposed renewal, the request for compensation data was dropped. The agency’s expectation in establishing a February 1 date for the compensation report was that contractors would have generated W-2 earnings statements by that date. As they told the OMB in their “Note to the Reviewer”, “[t]he selection of February 1 is not arbitrary but is chosen because it is the date by which contractors would have completed their W-2’s and other compensation data analysis for their employees, pursuant to the January 31 deadline mandated by the U.S. Internal Revenue Service (IRS). By the end of January, employers must furnish Copies B, C, and 2 of Form W-2 to employees. See http://www.irs.gov/businesses/small/article/0,,id=172179,00.html. OFCCP selected this date because we believe it is less burdensome for contractors if relevant compensation information is already available, in whole or in part, for tax purposes.” Having dropped the February 1st data, the argument that providing the data is “less burdensome” is no longer true, even if it were required. However, when you read what had been Item 13 in the 2011 proposal, you find that there is no necessary connection between W-2 data and the actual compensation report. The item read as follows:

“12. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1st (i.e., the data as it existed on the most recent February 1st date). Provide gender and race/ethnicity information and hire date for each employee by job title, EEO-1 Category and job group in a single file. Provide all requested data electronically in Excel format, if available. “ It doesn’t say “provide W-2 compensation data for all employees. There’s an implication that, given the timing, W-2 earnings data would be the most obvious choice.

The OFCCP, in its “Note to the Reviewer, also had this to say:

“Commenters argued that the February 1st start date is arbitrary and that there is no relationship between the data included on a W-2 form and the data that OFCCP requests. Furthermore, these commenters contended that this start date for compensation data together with a different AAP start date would result in two snapshots rather than one. The paramount aim of OFCCP’s selection of the February 1st start date was reducing burden to the contractor in terms of creating an additional compensation analysis that coincided with its AAP year. However, taking into account the input of contractors on this start date, OFCCP has revised the compensation data start date to correspond with the date of the workforce analysis in the contractor’s AAP.”

Clearly, “reducing the burden” is another way of saying the agency expected contractors to submit W-2 information, even though “[c]ommenters argued at the time that the February 1st start date was arbitrary and that there was no relationship between the data included on a W-2 form and the data that the OFCCP was requesting.

This is a significant observation, because the original 2011 itemized listing, written in anticipation of the submission of W-2 data, asked for the following:

“a. For all employees, compensation includes base salary, wage rate, and hours worked. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.”

And here’s how the current version reads:

a. For all employees, compensation includes base salary and or wage rate, and hours worked in a typical workweek. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee. “

That might be reasonable if the request was in fact for W-2 data, which would include additional compensation, of the sort described in the second sentence. But again that word “should” appears. The only compensation data actually requested is “base salary and or wage rate”.

The OFCCP, citing its own regulation at 41 CFR 60-1.20(f), also told the OMB, in its “Note to Reviewer”, that “if the contractor is concerned with the confidentiality of information such as …pay data, then …the use of an index of pay and pay ranges, consistent with the ranges assigned to each job group, are acceptable for purposes of the compliance evaluation.”

An “index of pay and pay ranges” would be something like this:

A >$20,000

B $20,000 - $29,999

C $30,000 - $39,999

D $40,000 - $49,999

E $50,000 - $59,999

F $60,000 - $69,999

G $70,000 - $79,999

H $80,000 - $89,999

I $90,000 -$99,999

J $100,000 - $109,999

K $110,000 - $119,999

L $120,000 - $129,999

M $130,000 - $139,999

N $140,000 - $149,999

O $150,000 - $174,999

P $175,000 - $199,999

Q $200,000 - $224,999

R $225,000 - $249,999

S $250,000 - $299,999

T $300,000 - $349,999

U $350,000 - $399,999

V $400,000 - $499,999

W $500,000 - $599,999

X $600,000 - $699,999

Y $700,000 - $799,999

Z $800,000 - $899,999

That may well be what the OFCCP told the OMB, but it’s not what it’s telling the contractor community. Instead, the wording of the itemized listing, “should be identified separately” seems to have morphed into “must be identified separately”.

For example, while Item 3 of the OFCCP’s current “FAQ” on the scheduling letter repeats the language of the itemized listing at paragraph 19.a. Item 11 of the FAQ says something very different. Here, it says “[f]or each employee in the workforce/organizational display, the contractor must [emphasis added] identify separately other compensation…” We are also seeing this demand in current compliance evaluations.

In the past, when the OFCCP was asking for aggregate compensation data, and its analysis at desk audit identified what it thought might be indications of a compensation problem, it would return to the contractor, and ask for additional information. Sometimes that request would include data on shift differentials, bonuses, paid, overtime, etc. And when our clients received that sort of request, they would review their files and try to estimate how much time, and how many employee hours, it would take to collect that data. While some items could be provided within days, it could take months to collect other data.

W-2 earnings for the year ending December 31st is a different proposition from a request for data extending back twelve months from say June 1st, spanning two different tax years. We believe that the OFCCP owes the OMB an explanation as to how they went from a request for compensation data by “pay range” to an extremely onerous and burdensome request that is being treated as a requirement, without any accounting to the OMB.

The OFCCP also cites as its regulatory justification, 41 CFR Sections 60-2.17(b)(3) and (d). 41 CFR 60-2.17 refers to “Additional required elements of affirmative action programs.” The specific regulation at 2.17(b)(3) says that a contractor “must perform in-depth analyses of its total employment process…” including its “compensation system(s) to determine whether there are gender, race, or ethnicity-based disparities.”

Further, 41 CFR 60-2.17(d) refers generally to inclusion of an internal audit and reporting system as part of the Affirmative Action Program. Item (d)(1), not specifically included in the citation, refers to monitoring records of “all personnel activity, including…compensation, at all levels…

The “Scope and application” of the AAP is described at 41 CFR 60-2.1, under which item (c) “When affirmative action programs must be developed” says that the required affirmative action programs “must be developed within 120 days from the commencement of a contract and must be updated annually.” We don’t see any reference to a February 1, compensation report as part of an AAP or its supporting documentation. Moreover, contractors must be doing a great job with the regulations and the letter as they are now, since the OFCCP has identified so few instances where there is compensation discrimination. We believe that this item should remain as it is in the current letter. We appreciate the fact that many commenters have noted that the data currently requested, in and of itself, has little utility in identifying compensation discrimination. Nor should it, since this is only a preliminary evaluation of a limited set of contractor data, from which the agency may decide, based on various “indicators”, to proceed with further investigation.

**Items 7 through 14: Veteran/Disability Items**

A number of items proposed in the original 2011 version of the itemized listing were dropped. These included a request for copies of two years of VETS-100/100A forms. Instead, the OFCCP added these eight new items, four under VEVRAA and four under Section 503 of the Rehabilitation Act. No opportunity was provided at the time to comment on these items.

Items 7 through 10 track with Section 503 requirements, while 11 through 14 cover VEVRAA items. Item 7 and Item 11 both require reports on the results of the effectiveness of outreach and recruiting efforts on behalf of individuals with disabilities and protected veterans, respectively. Items 8 and 12 both request documentation of audit and reporting. Items 9 and 13 request “documentation of the computations or comparisons...” described in the respective regulatory citations under Section 503 and the VEVRAA. Items 10 and 14 diverge. Item 10 requests data on “the utilization analysis evaluating the representation of individuals with disabilities”, while Item 14 requests “[d]ocumentation of the hiring benchmark adopted…” Here there is a choice according to the cited regulation, between adopting the OFCCP’s stated hiring benchmark percentage (updated annually), or explaining how a contractor has developed its own.

The wording of Item 10 presents a problem with respect to what is intended to be a “year-to-date” report. This reflects a fundamental misunderstanding of what exactly a “utilization analysis” is, and how it is arrived at. In developing a utilization analysis for Minorities and Females, contractors review at least two factors, internal availability of Minorities and Females who are or may become qualified for promotion to each Job Group, and external availability, based on a weighted average of Census data for different jobs within particular geographic areas. This utilization analysis is performed once, at the start of a contractor’s AAP year. Tracking “progress” toward meeting goals that may have been established at that time, is simply a matter of collecting placement data (hires and promotions) to each Job Group with a goal.

But that’s not what the OFCCP is asking for here. It is not asking contractors to report on “goal attainment” for IWDs in the same way as it does for Minorities and Females. It is not asking for a report showing whether or not placements of individuals with disabilities during a six month period equaled or exceeded the 7% goal it has imposed. Instead, what it is asking contractors to do is to perform a complete utilization analysis “de novo”. It would be as though the OFCCP were asking contractors to prepare a six month update to the workforce analysis. Granted, the agency has said, in effect, “give us the hires and promotions and terminations for the six month period, and we’ll figure it out. But it is still not consistent with the “utilization analysis” as contractors know it.

By contrast, the request for a six month update on the OFCCP’s hiring benchmark for protected veterans is consistent with a six month goal attainment report for Minorities and Females, except that it would require only data on hires.

**Items 20 through 22: Additional Veteran/Disability Items**

Only one of these, Item 20, requesting copies of reasonable accommodation policies and records of accommodations granted, is a carryover from the original proposed 2011 itemized listing. This item suggests that contractors might have written policies regarding reasonable accommodation to individuals with disabilities. The EEOC, as I understand it, frowns on “written” accommodation policies, as they may have a tendency to become “one size fits all”. The EEOC prefers that each request for an accommodation by an individual with a disability be treated on a case-by-case basis. Further, as with the issue of confidentiality and compensation, contractors may be reluctant to release information on accommodations made, at least without specific assurances that confidentiality of the information provided will be maintained.

Item 21 appears to be duplicative. It requests “[y]our most recent assessment of your personnel processes, as required by 41 CFR § 60-300.44(b) and § 60-741.44(b), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.” These are both AAP items, and should be fully covered by the request at items 8 and 12.

Item 22 is similar to the retention of the compensation data request after the original implication that W-2 data was being requested, was dropped. Here, the OFCCP’s original proposals to change to its Section 503 and VEVRAA regulations included a provision to conduct evaluations of all physical and mental job qualification requirements on an annual basis. That was dropped, and (except for a typo) the current regulations at 41 CFR 60-300.44(c) and 741.44(c) read the same as the previous regulations. For example, 41 CFR 60-741.44(c) currently reads as follows:

“(c) Physical and mental qualifications. (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business necessity.”

The previous regulation read thusly:

“(c) Physical and mental qualifications. (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the periodic review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business necessity.”

The regulation did not change. Nor has the OFCCP’s understanding of how compliance should be evaluated. According to the previous compliance manual,

“The AAP must contain the contractor's schedule for the review of all physical and mental job qualification requirements.

1. Scheduled Review: To be acceptable, the AAP must either affirm that the review of physical and mental job qualification requirements has been completed, or provide a specific time schedule by which jobs are to be reviewed. Where the AAP indicates that the review has been completed, the contractor is not required to review those physical and mental job qualification requirements again unless there is a change in working conditions. The AAP should state, however, that where there is such a change in working conditions--for example, through increased automation--the requirements will be reevaluated.

And this is how the current compliance manual evaluates the “schedule for review of all physical and mental job qualification requirements:

1H03 CONTRACTOR REVIEW OF PHYSICAL AND MENTAL QUALIFICATIONS

An AAP must contain the contractor’s schedule for the review of all physical and mental job qualification requirements to ensure that, to the extent they tend to screen out qualified individuals with disabilities, they are job-related and consistent with business necessity.

a. Scheduled Review. To be acceptable, an AAP must affirm that the contractor completed a review of the physical and mental job qualification requirements. If it is a newly covered contractor, the AAP must provide a specific and reasonable time by which the contractor will review the jobs qualifications. When the AAP indicates that the contractor completed the review and the qualification standards remain unchanged, the contractor is not required to review those physical and mental job qualification requirements again unless there is a change in working conditions. The AAP should state, however, that when there is such a change in working conditions the contractor will reevaluate the requirements.

So the regulations didn’t change, nor has the interpretation. A contractor need only “affirm” that it has completed a review of physical and mental job qualification requirements. So where did this language come from:

“Your most recent assessment of physical and mental qualifications, as required by 41 CFR § 60-300.44(c)and § 60-741.44(c), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.”

It would appear that the language of Item 22 would have been appropriate had the proposed regulatory changes been implemented. But since they weren’t, it seems out of place, to say the least.

**Summary**

We urge the OFCCP to consider our comments carefully, as well as the ways in which their interpretation of their application would increase the burdens on contractors beyond those originally claimed.

Sincerely,

Stan Koper

Vice President

Gaucher Associates

cc: Richard A Gaucher

 Robert A. Anzalone