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Diversity and Government Contracts

By Jamie Gorelick and Joanne Waters

Companies considering contracting with the federal government must be prepared to demonstrate the diversity of their workforce as part of the fulfillment of affirmative action obligations imposed by federal law. While the requirements are not new, the Department of Labor under the Obama Administration is placing greater emphasis on ensuring that affirmative action requirements are fulfilled.

The strategy laid out by Labor Secretary Hilda L. Solis, called "Good Jobs For Everyone,"

stresses the Department's commitment to increased compliance and investigation and enhanced workplace representation of all covered groups, with special attention paid to veterans and people with disabilities. Consequently, companies should expect stricter interpretation and tougher enforcement of affirmative action requirements.

The Office of Federal Contract Compliance Programs is the agency tasked with carrying out this effort. The OFCCP is developing an outreach program, intended to enhance its visibility within the contractor community and address the concerns of groups it is tasked with protecting – women, minorities, covered veterans, and qualified individuals with disabilities. It has sought additional funds for this purpose.

THE BASIC REQUIREMENTS

Companies that have a federal contract worth \$50,000 or more

and 50 or more employees are obligated to implement a written affirmative action plan that analyzes the representation of women and minorities in both recruitment and advancement and, where it's deemed necessary, outlines good faith efforts to increase that representation.

The affirmative action plan for women and minorities must include: (1) an organizational profile, (2) job group analysis, (3) availability analysis, (4) personnel activity review and analysis, (5) compensation analysis, (6) identification of problem areas, (7) goal setting, (8) identification of roles and responsibilities for developing and implementing the contractor affirmative action program (9) an "action-oriented" program designed to increase representation of women and minorities where the representation appears less than would reasonably be expected and (10) monitoring and auditing of employment processes.

Contractors also must implement a written affirmative action program to advance and employ qualified individuals with disabilities.

Companies with a federal contract worth at least \$100,000 are also required to implement a written affirmative action plan that analyzes personnel practices related to certain veterans -- specifically efforts to attract, employ and advance these veterans.

In addition, all covered contractors must have applicant-tracking and other systems that allow them to measure the effectiveness of their affirmative action programs.

A covered federal government contractor is exposed to possible penalties, cancellation, termination or suspension of a contract and even debarment from further contracts if it is found to be out of compliance.

Management of these companies will need to track progress against specified goals.

MORE COMPLIANCE REVIEWS

The OFCCP plans to increase the number of compliance reviews it does each year, and to conduct multi-establishment and industry-specific reviews, with a particular emphasis on the construction industry. The OFCCP has received funding to hire 213 additional employees to implement its investigation and enforcement goals.

The office is paying special attention to systemic discrimination -- that is, cases where discriminatory practices are a pattern in a contractor's business and affect large numbers of people. During a compliance review, the initial screening by

OFCCP is an analysis of contractor affirmative action plans and reports (for example, as they reflect hire rates of males versus females or minorities versus non-minorities).

Seeming disparities can lead to a broader investigation that can be quite intrusive. It can include requests for additional documentation, on-site visits, interviews and reviews of records and processes.

Even as the OFCCP focuses on systemic discrimination, contractors should be aware that it also is stepping up enforcement of individual discrimination claims, such as harassment, retaliation, termination and failure to promote.

VETERANS AND PEOPLE WITH DISABILITIES

The OFCCP plans to publish a Notice of Proposed Rule-Making and then final rules that will strengthen protections for covered veterans and individuals with disabilities.

Federal contractors should evaluate their application process to make sure it doesn't prevent or deter disabled individuals from applying. For example, if a contractor currently uses only an online application process, it should determine whether it would be feasible to make the online process fully accessible.

If it isn't feasible, the contractor should identify other types of reasonable accommodations that could provide an alternative to submitting the application online. These include making information available in Braille, providing readers or interpreters and, for pre-employment tests, in the case of certain disabilities allowing more time to complete the test.

Federal contractors also may wish to review the "G-FIVE Initiative" (the Good-Faith Initiative for Veterans Employment). The OFCCP considers several factors in choosing a contractor for this recognition, including whether or not the contractor (1) employs covered veterans, (2) has increased the numbers of covered veterans it employs, (3) has partnerships with local veterans service organizations, (4) targets veterans in its job advertisements and (5) provides veterans on-the-job training opportunities.

If selected for recognition, a contractor could avoid compliance reviews for three years.

SUPPLIER DIVERSITY

Supplier diversity is considered critical. A federal prime contractor whose contract for goods and services is expected to exceed \$550,000 must, at the request of the contracting officer, negotiate a small business subcontracting plan. The plan should reflect potential subcontracting opportunities and set goals (expressed as percentages of total planned subcontracting dollars) for subcontractors that are small businesses, including disadvantaged, women-owned, veteran-owned, service-disabled veteran-owned and HUBZone (Small Business Administration-designated "Historically Underutilized Business Zones") enterprises.

As is the case with affirmative action obligations, a

small business subcontracting plan can be critically important, and a federal contractor that willfully or intentionally fails to implement it may face serious consequences.

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Even long-time government contractors can run afoul of affirmative action requirements, but they are especially likely to surprise a company that is new to the game or only rarely contracts with the federal government.

Once a company becomes a covered federal government contractor it is exposed to possible penalties, cancellation, termination or suspension of a contract, and even debarment from further contracts, if it is found to be out of compliance with these affirmative action obligations and other non-discrimination rules.

In addition, it will need to spend substantial management time and legal expense to defend against any adverse

findings. A single compliance review could take years for closure. Companies must understand these requirements before they consider wading into federal government contracting.



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