

**APPENDIX B: AGENCY'S RESPONSE TO THE REPORT**

U.S. Department of Labor

Office of Federal Contract Compliance Programs  
200 Constitution Avenue, N.W.  
Washington, DC 20210



March 20, 2020

Mr. Elliot P. Lewis  
Assistant Inspector General for Audit  
Office of the Inspector General  
200 Constitution Avenue, NW  
Room S-5502  
Washington, DC 20210

Dear Mr. Lewis:

Thank you for the opportunity to review and comment on the Office of the Inspector General's (OIG) draft report 04-20-001-14-001, entitled "OFCCP Did Not Show It Adequately Enforced EEO Requirements on Federal Construction Contracts."

The Office of Federal Contract Compliance Programs (OFCCP) is the agency within the Department of Labor (DOL) that is responsible for enforcing the nondiscrimination and equal employment opportunity obligations imposed on federal contractors and subcontractors by Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). These laws, and OFCCP's regulations implementing them, prohibit employment discrimination by covered contractors and require that they provide equal employment opportunity to all persons regardless of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. They also prohibit contractors from discharging or in any other manner discriminating against employees or applicants who inquire about, discuss, or disclose their compensation or, in certain circumstances, the compensation of their coworkers.

In fiscal year (FY) 2019, through effective enforcement and proactive compliance assistance, OFCCP had by far its most successful year in both enforcement and compliance assistance. OFCCP obtained a record \$40,569,816 in monetary settlements for affected class members during FY 2019, more than \$16 million more than the next highest year in FY 2017. As a comparison, the three-year total of monetary settlements for FY 2017-2019 is the highest three-year period on record and exceeded the prior seven years (FY 2010-2016) combined. In the same manner as enforcement, OFCCP had its best compliance assistance year on record. In FY 2019, OFCCP answered over 4,500 Help Desk inquiries, the highest ever in a single year, and provided helpful guidance through compliance assistance guides, answers to frequently asked questions, and stakeholder events. While the FY 2019 settlements were largely with supply and service contractors, OFCCP will bring the same approach to construction reviews and anticipates similar results in the coming years.

The OIG's audit covered only OFCCP's construction enforcement program. Executive Order 11246's requirements apply to federal construction contractors, subcontractors, and federally assisted construction contractors and subcontractors with a contract in excess of \$10,000. These contractors are required to comply with the obligations found in the Executive Order 11246 Equal Opportunity Clause of their contracts. They must also comply with the Standard Federal Equal Employment Opportunity Construction Contract Specifications, including making good-faith efforts to meet participation goals for minorities and women by taking the 16 affirmative action steps that are specific to construction contractors. Additionally, federal construction contractors and subcontractors with a direct government contract in excess of \$15,000 are required to comply with Section 503, and federal construction contractors and subcontractors with a direct government contract of \$150,000 or more are required to comply with VEVRAA.

With this general overview and clarification of OFCCP's authority, a few areas in the report require specific mention.

- Improving Contractor Compliance

OFCCP carries out its mission to hold contractors responsible for complying with their nondiscrimination and equal employment opportunity obligations not just through conducting compliance evaluations and complaint investigations but also by providing compliance assistance. By engaging in compliance assistance, OFCCP is able to expand its reach beyond those construction contractors that are scheduled for compliance reviews to those that need guidance to improve compliance with their obligations. Through compliance assistance, contractors and OFCCP work together to provide workers with equal employment opportunities. Therefore, it is important to recognize not only the enforcement activities that OFCCP has engaged in but also its compliance assistance activities, which touch more contractors. These efforts include a recent complete redesign and publication of the Construction Contractors Technical Assistance Guide. This guide is available on the OFCCP website and provides employers with a clear understanding of the obligations that come with federal construction contracts and subcontracts. Further, OFCCP has launched on-demand learning for all federal contractors with its Contractor Compliance Institute, which educates all contractors regarding the basic requirements included in the equal opportunity clauses of their contracts, including nondiscrimination obligations, posting and listing requirements, and recordkeeping requirements. Additionally, OFCCP has set up an online contractor assistance portal, which is an outgrowth of the OFCCP Help Desk. These tools enable contractors to directly ask OFCCP experts specific questions regarding compliance.

- Resource and Budgetary Constraints

Over the years, budgetary constraints and a shrinking workforce have challenged OFCCP's ability to evaluate the universe of construction contractors. Working within these constraints, OFCCP has focused on efficiencies including updating its existing compliance management system from a paper-based model to an online model. Additionally, OFCCP has explored and is seeking Office of Management and Budget (OMB) approval to conduct compliance checks of construction contractors. This will

allow OFCCP to use its resources more efficiently when scheduling, conducting, and documenting the results of compliance evaluations. Furthermore, OFCCP is seeking OMB approval to collect contract notification letters from construction contractors in an online portal. This will enhance OFCCP's knowledge of the universe of federal construction contractors and enable OFCCP to build a more effective scheduling list for federal construction contractors.

- Responses to OIG's Recommendations

1. Develop a risk-based approach to select construction contractors for EEO compliance evaluations.

**OFCCP:** Construction contracts and subcontracts are often short-term in duration, making it particularly challenging to ensure that contractors are scheduled for compliance reviews while they are still performing work on the federal contract. During OIG's review period, OFCCP had two internal guidance documents that directed agency staff on scheduling procedures for construction contractors. The first, 1990-01, directed OFCCP offices to create scheduling lists based on contract notification letters they received. The second, 2015-02, described the scheduling process for mega construction projects. These guidance documents no longer reflect current scheduling practices and are in need of updates. OFCCP has taken significant steps to centralize its scheduling of construction contractor compliance evaluations to ensure that its scheduling policies and practices comport with Fourth Amendment standards and case law, including *Baker DC, LLC v. Acosta*, No. 1:17-CV-530, 2018 WL 1696799 (S.D. Ohio Apr. 6, 2018). In this effort, OFCCP has developed a Notification of Construction Contract Award Portal (NCAP) in which OFCCP uploads all contract award notifications. OFCCP will use NCAP to develop a central scheduling list to neutrally select construction contractors for compliance evaluations. OFCCP anticipates making the NCAP portal available to federal construction contractors and subcontractors for their use in Fiscal Year 2020. OFCCP has committed to publishing its scheduling methodology for construction compliance evaluations. Furthermore, the agency commits to studying the best strategies for identifying and scheduling likely violators in this industry.

2. Update participation goals for minorities and females, and implement processes to keep all participation goals current.

**OFCCP:** The current participation goals for construction contractors and subcontractors were originally published in 1978, based on 1970 Census data, and have not been substantially modified since then. While engaging in rulemaking to update the participation goals would be an extensive undertaking, OFCCP is committed to exploring this option.

OFCCP emphasizes that the participation goals are not quotas, and OFCCP does not find contractors to have violated Executive Order 11246 if they fail to meet the goals. Contractors are required to make good-faith efforts to meet the goals, as set forth in the

Standard Federal Equal Employment Opportunity Construction Contract Specifications, which are incorporated into every covered construction contract and subcontract.

OFCCP also notes that construction contractors are required to provide equal employment opportunity for all individuals. In assessing whether contractors have discriminated on a protected basis, OFCCP uses updated data, including data that contractors have to collect and maintain about their applicants and employees. OFCCP analyzes these data for each race/ethnic group. Among other things, OFCCP evaluates the percentage of hours worked by each minority group and the contractor's hiring and placement practices and decisions, using the applicant/referral records contractors are required to maintain, as well as payroll and other records. As appropriate, OFCCP's evaluations rely on current data about the proportion of qualified workers from each group in the relevant geographic area.

In conclusion, OFCCP appreciates the OIG's support of OFCCP's mission to enforce federal construction contractors' and subcontractors' nondiscrimination and equal employment opportunity obligations. We thank you for the opportunity to review the draft report and to provide comments on the recommended actions to help further OFCCP's mission.

Sincerely,



Craig E. Leen  
Director