

U.S. Department of Labor

Office of Inspector General—Office of Audit

REPORT TO THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS



OFCCP DID NOT SHOW IT ADEQUATELY ENFORCED EEO REQUIREMENTS ON FEDERAL CONSTRUCTION CONTRACTS

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BRIEFLY...

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MARCH 27, 2020

WHY OIG CONDUCTED THE AUDIT

In 2016, the Government Accountability Office (GAO) concluded the Office of Federal Contract Compliance Programs (OFCCP) used methods to select contractors for compliance evaluations in the supply and service industries that may not have focused on contractors posing the greatest risks. We were concerned the same risks could exist in the construction industry, the only other industry classification reviewed by OFCCP. We determined there were 9,474 federal construction contractors and the federal government obligated \$145 billion for construction contracts between Fiscal Year (FY) 2014 and 2018.

This report presents the results of our audit of OFCCP's effectiveness in enforcing Equal Employment Opportunity (EEO) laws that prohibit discrimination against applicants and employees on federal construction contracts.

WHAT OIG DID

We conducted a performance audit to answer:

Did OFCCP adequately enforce EEO requirements on federal construction contracts?

To determine this, we reviewed processes and data from October 1, 2013, to March 31, 2019.

READ THE FULL REPORT

<http://www.oig.dol.gov/public/reports/oa/2020/04-20-001-14-001.pdf>

WHAT OIG FOUND

OFCCP did not adequately enforce EEO requirements on federal construction contracts. We based this conclusion on the results below:

OFCCP did not use a risk-based approach to select construction contractors for EEO compliance evaluations. Federal guidance and OFCCP's strategy for selecting contractors requires the agency to focus resources on those who posed the greatest risk of noncompliance. Instead, OFCCP chose contractors without using a risk assessment. OFCCP said its outdated computer system prevented it from selecting contractors using a risk-based approach. However, we identified data in OFCCP's computer system and processes that could have been used to measure contractor risk.

OFCCP's stated enforcement focus was to find and resolve systemic discrimination. However, we determined OFCCP's selection process identified systemic discrimination in 1 percent of the contractors evaluated. By applying a risk-based approach focused on contractors with the greatest risk of non-compliance, OFCCP might have identified more systemic discrimination.

Minority and female participation goals were based on 1970 Census data. Federal regulations requires OFCCP to update affirmative action goals using relevant workforce data. However, contractor compliance was based on 50 year-old U.S. Census Bureau data. These goals did not reflect the 31.5 and 3.5 percentage point increase of minorities and women, respectively, in the construction workforce from 1970 to 2018. OFCCP stated it chose not to update these goals to avoid a potentially costly, lengthy rulemaking process. However, using outdated goals may have hindered OFCCP's enforcement of EEO laws.

WHAT OIG RECOMMENDED

We made 2 recommendations to OFCCP to improve its selection process and update participation goals and timetables with a process to keep them current.

OFCCP agreed with our recommendations and has already started taking some action.

TABLE OF CONTENTS

INSPECTOR GENERAL’S REPORT 1

RESULTS 2

 OFCCP did not use a risk-based approach to select construction
 contractors for EEO compliance evaluations..... 3

 Minority and female participation goals for individual construction
 contractors were based on 1970 census data..... 8

OIG’S RECOMMENDATIONS 12

 Summary of OFCCP’s Response..... 13

EXHIBIT 1: OFCCP AUDIT STEPS FOR AFFIRMATIVE ACTION
REQUIREMENTS 14

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA..... 19

APPENDIX B: AGENCY’S RESPONSE TO THE REPORT 22

APPENDIX C: ACKNOWLEDGEMENTS 26



INSPECTOR GENERAL'S REPORT

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This report presents the results of our audit of the Office of Federal Contract Compliance Programs' (OFCCP) effectiveness in enforcing Equal Employment Opportunity (EEO) laws that prohibited discrimination against applicants and employees on federal construction contracts. OFCCP is responsible for enforcing Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act. These laws prohibited federal contractors from discriminating against applicants and workers based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations. OFCCP enforces EEO laws by conducting compliance evaluations, complaint investigations, stakeholder engagements, and compliance assistance.

In 2016, the Government Accountability Office (GAO) concluded OFCCP used methods to select contractors for compliance evaluations in the supply and service industries that may not have focused on the contractors posing the greatest risks. We were concerned the same risks GAO found in the supply and service industries could exist in the construction industry, the only other industry classification reviewed by OFCCP.

Using data from USASpending.com, we determined the federal government obligated \$145 billion for construction contracts between Fiscal Year (FY) 2014 and 2018. We also determined there were 9,474 federal general construction

contractors during this same period. This number did not include federal subcontractors subject to the same laws as contractors. Therefore, we conducted an audit to answer the following question:

Did OFCCP adequately enforce EEO requirements on federal construction contracts?

To answer our objective, we examined the processes OFCCP used to select contractors for construction compliance evaluations and identify discrimination. We also interviewed OFCCP officials, and analyzed data from construction compliance evaluations and complaint investigations closed from October 1, 2013, to March 31, 2019. We reviewed case files for all construction compliance evaluations and complaints closed in FY 2016.

RESULTS

Our review of processes and data analyses showed that OFCCP did not adequately enforce EEO requirements on federal construction contracts. We found that:

- **OFCCP did not use a risk-based approach to select construction contractors for EEO compliance evaluations.** Federal guidance and OFCCP's strategy for selecting contractors requires the agency to focus resources on those who posed the greatest risk of noncompliance. Instead, OFCCP chose contractors without using a risk assessment. OFCCP said its outdated computer system prevented it from selecting contractors using a risk-based approach. However, we identified data in OFCCP's computer system and processes that could have been used to measure contractor risk. We determined that OFCCP found 1 percent systemic discrimination when it chose contractors without assessing risk. A risk-based approach may have allowed OFCCP to focus on contractors with the greatest risk of non-compliance, and identified more systemic discrimination.
- **Minority and female participation goals for individual construction contractors were based on 1970 Census data.** Federal regulations requires OFCCP to update affirmative action goals based on relevant workforce data. However, the minority and female participation goals used to measure individual construction contractors' progress toward achieving

EEO goals were based on 50 year-old U.S. Census Bureau data. They did not reflect the 31.5 and 3.5 percentage point increase, respectively, in the minority and female construction workforce from 1970 to 2018. OFCCP stated it chose not to update them to avoid a potentially costly, lengthy rulemaking process that might not increase representation. However, using outdated participation goals to identify deficient employment practices may have hindered OFCCP's ability to enforce construction contractors' compliance with EEO laws and leverage resources to protect the greatest number of workers from discrimination.

OFCCP DID NOT USE A RISK-BASED APPROACH TO SELECT CONSTRUCTION CONTRACTORS FOR EEO COMPLIANCE EVALUATIONS

Federal guidance and OFCCP's strategy for selecting construction contractors for compliance evaluations requires the agency to focus resources on those who posed the greatest risk of noncompliance. Instead, OFCCP chose construction contractors without using a risk assessment. OFCCP indicated its outdated computer system and data limitations prevented it from selecting contractors based on a risk assessment. However, we identified data in OFCCP's computer system and processes that could have been used to quantify contractor risk. We determined that OFCCP found 1 percent systemic discrimination by choosing contractors without assessing risk for evaluations from October 1, 2013, to March 31, 2019. A risk-based approach may have allowed OFCCP to analyze construction contractors for risk, then select contractors with the greatest risk of non-compliance for evaluation, and identify systemic discrimination based on the best available information.

OFCCP IS REQUIRED TO USE RISK MANAGEMENT FOR PROGRAM EFFICENCY AND EFFECTIVENESS

OMB Circular A-123 requires agencies to add risk management to existing business processes. OFCCP's public-facing website¹ indicated that its enforcement-related strategy is to: (1) prioritize enforcement resources by focusing on the worst offenders; (2) encourage employers to engage in self-audits of their employment practices; and (3) achieve maximum leverage of resources to protect the greatest number of workers from discrimination.

¹ <https://www.dol.gov/ofccp/aboutof.html>, DOL Home, OFCCP, About OFCCP.

OFCCP's enforcement focus was to find and resolve systemic discrimination.² OFCCP's internal guidance requires employees to document why they selected contractors for review, in memoranda to the National Office, compliance evaluation case files, or both. In addition, the Federal Contract Compliance Manual requires OFCCP field managers to review and approve all case files prior to closing compliance evaluations.

NO ASSURANCE CONSTRUCTION CONTRACTORS POSING THE GREATEST NONCOMPLIANCE RISK WERE SELECTED FOR EVALUATION

OFCCP did not comply with its own strategy to select federal construction contractors with the greatest risk of non-compliance or OMB Circular A-123 related to risk management. Instead, OFCCP officials said they primarily selected construction contractors based on the contract's amount, start and end dates, and number of workers after forming neutral lists for compliance evaluations. OFCCP referred to this process as neutral selection and considered it a primary component in its enforcement process. This approach was intended to ensure that all contractors had an equal chance of being selected for compliance evaluations, without bias. One neutral procedure was used to select mega construction projects (MCP) and a second to select non-MCP. OFCCP defined MCP as construction lasting more than a year, valued at \$25 million or more, and being highly visible in the community.

OFCCP is prohibited from expediting compliance evaluations based on complaints. In 2018 a district court found that OFCCP expedited the review of a construction contractor based on the prior receipt of informal verbal complaints of discrimination³. The court ruled that OFCCP's selection of the construction contractor was therefore not based on neutral criteria, in violation of the Fourth Amendment. As a result, OFCCP said it will no longer expedite otherwise neutrally scheduled compliance reviews based on complaints, even if it is an anomaly. Rather, OFCCP will investigate the complaint as long as it meets specific criteria⁴, independent of any

² OFCCP defined systemic discrimination as cases that satisfied one of two criteria. First, it could have been a case with a measurable pattern of discrimination based on findings from regression analysis or any other aggregate statistical measure, such as mean differences. Second, it could have been a case where an identified practice applicable to multiple applicants or employees resulted in discrimination, such as passing an employment test to be eligible for a job or the practice of steering members of a protected class toward lower paying jobs at the time of hiring.

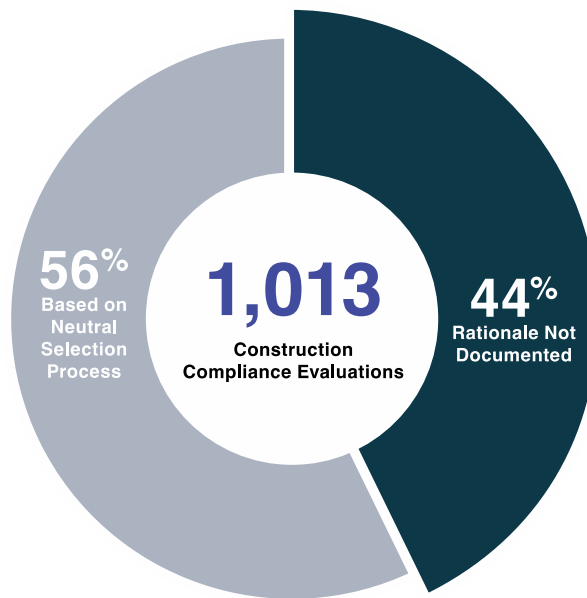
³ Baker DC, LLC v. Acosta, No. 1:17-CV-530, 2018 WL 1696799 (S.D. Ohio Apr. 6, 2018).

⁴ According to OFCCP, the complaint must be in writing and include the following: 1. Name, address and telephone number or email address of the complainant; 2. Name and address of the employer allegedly committing the discrimination; 3. Description of the alleged discriminatory acts, including the basis or bases of discrimination; and 4. Signature of the complainant or the complainant's representative.

scheduled compliance review. However, OFCCP could schedule contractors for a compliance evaluation based on risk by particular industries, sectors, geographic regions, or types of employment practices.⁵

Our data analyses of records in OFCCP’s case management system for all 1,013 construction compliance evaluations closed from October 1, 2013, to March 31, 2019, showed OFCCP chose 56 percent of its cases using the neutral selection process. OFCCP did not document its rationale for selecting the remaining 44 percent of contractors, as required by internal guidance (see Figure 1). Separately, we reviewed case files for the 171 compliance evaluations closed in FY 2016 to determine why contractors were selected for review. OFCCP employees did not document the reason they selected contractors in 92 percent of these cases.

FIGURE 1: OFCCP CASE SELECTION RATIONALE (OCTOBER 1, 2013 – MARCH 31, 2019)



Source: OFCCP’s Case Management System

⁵ Any such risk-based analysis must still comport with the requirements of the Fourth Amendment. Thus, pursuant to the holding of the United States Supreme Court in *Marshall v. Barlow’s*, 436 U.S. 307, 98 S.Ct. 1816 (1978), OFCCP would have to ensure that the basis of its administrative plan for selecting contractors for compliance evaluations is derived from neutral sources.

OFCCP FOUND SYSTEMIC DISCRIMINATION IN 1 PERCENT OF CONSTRUCTION COMPLIANCE EVALUATIONS BASED ON ITS NEUTRAL SELECTION PROCESS

Selecting contractors without a risk assessment for compliance evaluations did not satisfy OFCCP’s goal of finding and remedying systemic discrimination. Based on our data analyses of 1,013 compliance evaluations, we determined OFCCP found 1 percent systemic discrimination in cases selected by the neutral selection process, and no systemic discrimination for cases where the selection method was not documented. Additionally, 57 percent of construction contractors selected through the neutral selection process had recordkeeping or technical violations. Separately, 43 percent of construction contractors selected without a documented approach had recordkeeping or technical violations. Recordkeeping or other technical violations could have made it more difficult for OFCCP to determine if federal contractors discriminated against protected classes or were not pursuing affirmative action in recruitment practices, EEO policies, training, or hiring.

OFCCP CITED SYSTEM AND DATA LIMITATIONS AS REASONS FOR NOT APPLYING A RISK-BASED APPROACH FOR SELECTING CONTRACTORS

OFCCP officials explained they could not identify the universe of construction contractors because a complete database of federal construction contracts did not exist. OFCCP employees created lists of contractors available for evaluation from contract notifications, memorandums of understanding, federal procurement databases, and physical observation of construction in progress. OFCCP also could not provide us the individual or aggregate value of the contracts involved in cases it closed from October 1, 2013, to March 31, 2019, because its Case Management System (CMS) did not have a field for recording the dollar value of contracts.

Further, OFCCP could not provide the number of construction-specific complaints it received because complaints without a North American Industry Classification System (NAICS)⁶ code were categorized as supply and service complaints. Seventy-six percent of the complaints OFCCP received lacked a NAICS code. OFCCP also did not require employees to complete a CMS field

⁶ NAICS is the standard used by federal statistical agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy.

called “evaluation reason” as the definitions in the system handbook did not match the selection reasons from the drop-down menu, and there was no guidance on how to resolve the issue. OFCCP field managers did not ensure case files contained the reason contractors were selected before they approved cases to be closed.

However, our data analyses and case reviews showed OFCCP had alternative reliable sources to capture information that could have identified characteristics of contractors not complying with EEO laws. For example,

- EEO-1 — An employer information report that certain companies⁷ are required to file with the Equal Opportunity Commission (EEOC) to provide data about employees’ ethnicity, race, and sex, by job category. OFCCP told us it did not use information from the EEO-1, because it could take EEOC up to a year to provide it and because companies did not reliably identify themselves as contractors. However, OFCCP could have analyzed this historical information to identify characteristics of EEO violators.
- Complaints — Complainants are required to provide their name and address and that of the contractor, the alleged violation, acts considered to be a violation, pertinent dates, and disability facts, if applicable, to OFCCP to investigate. Complaints could be used to analyze for violation trends.
- Closed compliance evaluations — The results could provide valuable information on employers with the greatest risk of noncompliance with EEO requirements. For instance, we identified cases with systemic discrimination had common characteristics, such as 80 percent had only one facility, 70 percent shared the same geographical location, and 90 percent had been selected for their first compliance evaluation.

OFCCP’s CMS did have multiple fields for documenting why contractors were selected. This included the NAICS code, number of employees, number of complaints resolved, number and type of construction violations per contractor, and construction remedies.

Looking forward, OFCCP officials said they planned to implement a new case management system in FY 2021 to include construction modules and reporting

⁷ Companies subject to Title VII of the Civil Rights Act of 1964 with 100 or more employees, and federal government prime contractors or first-tier subcontractors subject to Executive Order 11246 with 50 or more employees and a prime contract or first-tier subcontract amounting to \$50,000 or more.

capabilities. This new system would allow OFCCP to centralize construction scheduling, giving it the ability to perform data analyses and schedule contractors for compliance evaluations. It would also have features that do not currently exist such as ad hoc reporting of real-time transactional data and summary counts. Moreover, OFCCP could use this system to schedule contractors by risk of non-compliance.

MINORITY AND FEMALE PARTICIPATION GOALS FOR INDIVIDUAL CONSTRUCTION CONTRACTORS WERE BASED ON 1970 CENSUS DATA

Federal regulations requires OFCCP to update minority and female participation goals based on relevant workforce data.⁸ However, the minority and female participation goals used to measure individual construction contractors' progress toward achieving equal employment opportunity were based on 50 year-old U.S. Census data. They did not reflect the 31.5 and 3.5 percentage point increase, respectively, in the minority and female construction workforce from 1970 to 2018. OFCCP officials stated they chose not to update the baseline for these goals to avoid a potentially costly and lengthy rulemaking process that might not increase representation. However, using participation goals based on outdated data to identify and remedy deficient employment practices may have hindered OFCCP's ability to enforce construction contractors' compliance with EEO and achieve maximum leverage of resources to protect the greatest number of workers from discrimination.

FEDERAL REGULATIONS REQUIRES OFCCP TO UPDATE PARTICIPATION GOALS BASED ON RELEVANT WORKFORCE DATA

The equal opportunity clauses at 41 CFR 60-4.3 established participation goals to measure progress toward achieving equal employment opportunity and 16 affirmative action steps to determine if contractors made a good faith effort to meet goals (see Exhibit 1). Other federal regulations require participation goals for protected groups to be based on workforce, demographic, or other relevant data for construction projects in geographical areas. These goals were intended to be attainable when contractors complied with all aspects of affirmative action

⁸ 41 CFR 60-4.6 requires OFCCP to set participation goals for minorities and females who worked with federally-funded construction contractors. Beginning in 2014, VEVRAA required federal construction contractors to set a hiring benchmark for protected veterans. At the same time, OFCCP set a nationwide participation goal of 7% for qualified Individuals with Disabilities.

requirements. Participation goals are required in all invitations, bids or solicitations for federal or federally assisted construction contracts greater than \$10,000.

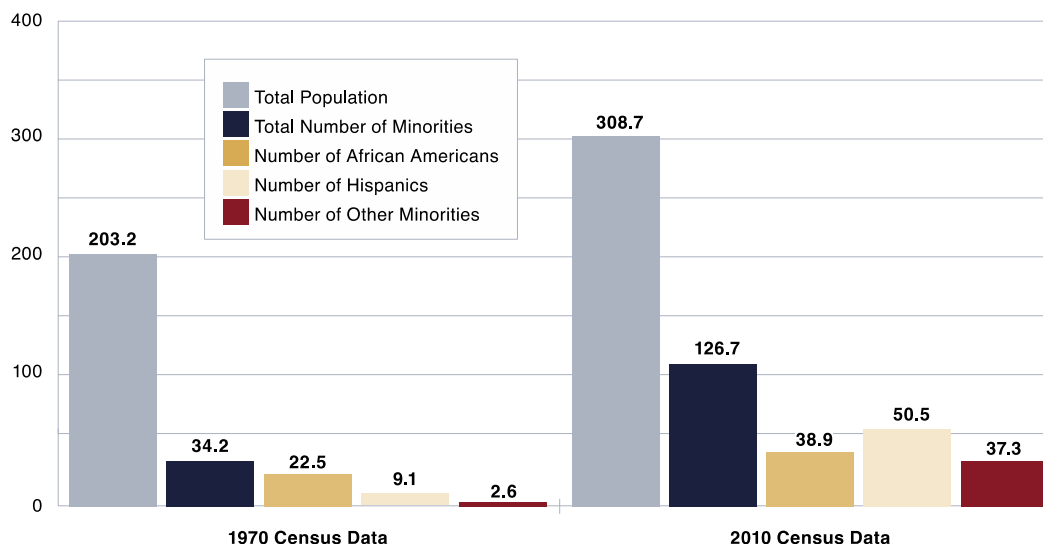
OFCCP created its minority participation goals in 1978, based on 1970 Census data, that varied by standard metropolitan statistical area⁹ or economic area. National participation goals for females in construction were set at 3.1 percent, 5.1 percent, and 6.9 percent for 1978, 1979, and 1980, respectively. A nationwide goal was set for each year because data did not exist to set female goals by geographical area. Contractors were required to meet these goals by specified dates. However, amendments to these goals set the deadlines as indefinitely or until further notice. The justification for extending the minority date was cited in federal regulations as an assumption that EEO efforts would increase minority participation in the workforce to at least the 1970 workforce figures. However, no justification was provided for extending the timetable indefinitely for female construction participation goals. Goals should be time-constrained to create urgency and motivation to achieve them. Additionally, this will ensure the goals are relevant and useful.

CONTRACTOR COMPLIANCE WAS BASED ON 50-YEAR-OLD DATA

Our review of 171 compliance evaluations closed in FY 2016 found that OFCCP had not updated minority and female participation goals since their creation in 1978 based on 1970 Census data. We found these participation goals did not reflect the 31.5 and 3.5 percentage points increase of minorities and women, respectively, in the national construction workforce from 1970 to 2018. The population of the United States had increased by 52 percent from 203.2 million to 308.7 million from 1970 to 2010. Over that 40-year period, the number of minorities has more than tripled nationwide (see Figure 2).

⁹ Metropolitan statistical areas contain at least one urbanized area of 50,000 or more population.

FIGURE 2: U.S. POPULATION CHANGES FOR MINORITIES FROM 1970 TO 2010 (IN MILLIONS)



The percentage of women in the U.S. workforce has also grown steadily nationwide. In 1970, the Bureau of Labor Statistics found women represented 38.1 percent of the U.S. workforce and by 2018, they represented 46.9 percent. A 2014 study by the US Army Corps of Engineers on women in construction cited that they chose to work in construction primarily for better wages. The wage gap between women and men was much smaller in the construction industry among all industries. Women earned on average 95.7 percent of what men earned in construction compared to 81.1 percent on average in other industries.

OFCCP’S DECISION-MAKING PROCESS WAS BASED UPON OUTDATED INFORMATION

Using participation goals based on outdated data to identify deficient employment practices may have hindered OFCCP’s ability to enforce construction contractors’ compliance with EEO and achieve maximum leverage of resources to protect the greatest number of workers from discrimination. For example,

- 55 percent of all construction contractors in FY 2016 compliance evaluations did not comply with all of the affirmative action steps designed to help them achieve participation goals.
- 61 percent of construction contractors in our FY 2016 case reviews met the 1970 minority participation goals set by geographical area, while the minority population had more than doubled nationwide.

- 22 percent of construction contractors did so by employing one minority race since all minority groups were aggregated into one goal. Aggregated goals in this manner could allow contractors to comply with affirmative action goals, despite having discriminatory practices for other minority groups.
- 81 percent of the cases we reviewed did not meet the nationwide female employment participation goal required of federal construction contractors. This one nationwide goal did not take into consideration the changes in regional female workforce demographics.

Without goals based upon current workforce, changing demographics, or relevant data by geographical area, OFCCP could not accurately assess contractors' efforts to provide equal employment opportunity. This adversely impacted OFCCP's ability to accurately report progress towards achieving its mission of equal employment opportunity in construction contracting.

OFCCP CHOSE NOT TO UPDATE PARTICIPATION GOALS CITING A POTENTIALLY COSTLY AND LENGTHY RULEMAKING PROCESS

In 2010, OFCCP proposed updating minority and female participation goals in 41 CFR 60-4. It indicated that data showed minority and female workers continued to be underrepresented in federal construction contracting. It proposed revising affirmative action requirements to reflect the realities of the labor market and its employment practices. The change was expected to strengthen and enhance job training and recruiting and increase diversity in construction. OFCCP indicated the equal opportunity rights of some protected classes could be impaired without the change.

Instead, OFCCP officials said during our audit that they chose to focus on ways to facilitate relationships between contractors and local job sources to help contractors meet existing affirmative action requirements. By doing so, OFCCP officials stated they chose to avoid a potentially costly and lengthy rulemaking process. According to OFCCP officials, updated goals might not increase the number of minorities and women gaining employment in construction.

The rulemaking process could take several years. The process begins with the publication of the proposed rule in the Federal Register to allow the public an opportunity to comment on it. For significant rules, the agency proposing the rule must estimate the costs and benefits of the rule and consider alternate solutions. Towards the end of the rulemaking process, the agency formulates its reasoning and conclusions on public comments, scientific data, expert opinions, and facts.

Congress and the Government Accountability Office must review the rule and provide approval before it can take effect.

The participation goals were based on the geographical representation of protected classes in 1970 when they were created. They were required to be based on uniform and consistent data that identified workers' commuting ties to geographical areas. In 1970, the U.S. population lived in 660 counties in metropolitan statistical areas and 183 economic areas. By 2010, the U.S. became more urbanized. According to the 2010 Census, 80.7 percent of the U.S. population lived in urban areas – densely, developed residential, commercial, and other nonresidential areas. The population in rural areas continued to decline as a percentage of the national population. As of 2010, California was the most urban state with 95 percent of its population residing in urban areas followed by New Jersey with 94.7 percent. In contrast, Maine and Vermont were the most rural states with 61.3 and 61.1 percent of their population, respectively, residing in rural areas.

According to the Administrative Procedure Act, agencies must publish changes to the CFR informing the public of how amendments add, revise, or remove regulations. As a result, updating the participation goals would require OFCCP to go through the rulemaking process, which could be a lengthy process but not a justified reason to avoid it. Not updating participation goals might have negatively impacted minority and female workers by not offering EEO-related protection, and contractors might not have been properly informed of EEO-related requirements. Construction contractors were evaluated on whether they made good-faith efforts to meet the participation goals. Without goals that considered the most current labor market, such as shifts in U.S. workforce demographics, OFCCP could not accurately evaluate contractors' affirmative action efforts with the data it obtained for compliance evaluations. OFCCP's 2010 proposal stated updated goals would strengthen training and recruitment, diversity in construction, and worker protections.

OIG'S RECOMMENDATIONS

We recommend the Director for OFCCP:

1. Develop a risk-based approach to select construction contractors for EEO compliance evaluations.
2. Update participation goals for minorities and females, and implement processes to keep all participation goals current.

SUMMARY OF OFCCP'S RESPONSE

In its response, OFCCP agreed with our recommendation to develop a risk-based approach to select construction contractors for evaluation. OFCCP also agreed to update the participation goals for minorities and females. OFCCP said it is committed to engaging in rulemaking to update the participation goals. We included management's response in its entirety in Appendix B.

We appreciate the cooperation and courtesies OFCCP extended us during this audit. OIG personnel who made major contributions to this report are listed in Appendix C.



Elliot P. Lewis
Assistant Inspector General for Audit

EXHIBIT 1: OFCCP AUDIT STEPS FOR AFFIRMATIVE ACTION REQUIREMENTS

The Office of Federal Contract Compliance Programs was 1 of 4 major programs within DOL's Employment Standards Administration. Employment Standards Administration was abolished in 2009 to improve its efficiency by reporting directly to the Secretary of Labor. OFCCP retained responsibility for Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act, as follows:

- **Executive Order 11246, as amended.** Prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do more than \$10,000 in government business in one year, from discriminating in employment decisions upon the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. In addition, contractors and subcontractors are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.
- **Section 503 of the Rehabilitation Act, as amended.** Prohibits businesses with a federal contract of more than \$15,000 from discriminating against qualified individuals with disabilities upon the basis of their disability in all employment practices, and requires they take affirmative action to employ and advance individuals with disabilities in employment.
- **The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), as amended.** Prohibits businesses with a federal contract of \$150,000 from discriminating against protected veterans in all employment practices, and requires that they take affirmative action to employ and advance qualified protected veterans in employment.

Below are the objective criteria OFCCP used to determine if contractors complied with affirmative action obligations or had deficient employment practices.

**EXECUTIVE ORDER 11246 – COMPLIANCE TESTS
BASED UPON 16 AFFIRMATIVE ACTION STEPS**

1. Has the contractor established and maintained a current list of minority and women's recruitment sources, provided written notification to these recruitment sources and to community organizations when it or its unions had opportunities available, and maintained a record of the organizations' responses? (41 CFR 60-4.3(a)7.b)
2. Has the contractor maintained a file of the name, address, and telephone number of each minority and female walk-in applicant and minority-group person or female referred from a union, recruitment source, or community organization, and the action taken with respect to each individual? If such individual was sent to the union hiring hall for referral and was not referred back to the contractor by the union, or if referred, was not employed by the contractor, did the contractor document this in the file with the reason therefore, along with whatever additional actions the contractor may have taken? (41 CFR 60-4.3(a)7.c)
3. Has the contractor provided immediate written notification to OFCCP when the union or unions with which it has collective bargaining agreements did not refer to the contractor members of minority groups or women sent to the union by the contractor, or when the contractor had other information that the union referral process impeded the contractor's efforts to meet its obligations? (41 CFR 60-4.3(a)7.d)
4. Has the contractor directed its recruitment efforts, both oral and written, to minority, women, and community organizations, to schools with minority and women students, and to minority and women recruitment and training organizations serving the contractor's recruitment area and employment needs? Not later than one month before the date for the acceptance of applications for apprenticeship or other training by any recruitment sources, the contractor should have sent written notification to organizations such as the above, describing the openings, screening procedures and tests to be used in the selection process. (41 CFR 60-4.3(a)7.i)
5. Has the contractor encouraged present minority and female employees to recruit other minorities and women? Where reasonable, did the contractor provide afterschool, summer, and

- vacation employment to minority and female youth both onsite and in other areas of a contractor's workforce? (41 CFR 60-4.3(a)7.j)
6. Has the contractor developed on-the-job training opportunities or participated in training programs for recruiting areas that expressly include members of minority groups and women (including upgrading programs and apprenticeship and trainee programs relevant to the contractor's employment needs), especially those programs funded or approved by the Department of Labor? The contractor should have provided notice of these programs to the recruitment sources compiled under item 1 above. (41 CFR 60-4.3(a)7.e)
 7. Has the contractor disseminated its EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement?; by publicizing it in the company newspaper, annual report, etc.?; by specific review of the policy with all management personnel and with all minority and female employees at least once a year?; and by posting the company's EEO policy on bulletin boards accessible to all employees at each location where construction work is performed? (41 CFR 60-4.3(a)7.f)
 8. Has the contractor reviewed, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions, including specific review of these items with onsite supervisory personnel (superintendents, general forepersons, etc.) prior to the initiation of construction work on any site? A written record should have been made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter. (41 CFR 60-4.3(a)7.g)
 9. Has the contractor disseminated its EEO policy externally by including it in any advertising in the news media, specifically including minority and women's news media, and providing written notification to and discussing the contractor's EEO policy with other contractors and subcontractors with whom the contractor did or anticipated doing business? (41 CFR 60-4.3(a)7.h)

10. Has the contractor conducted, at least annually, an inventory and evaluation of all minority and female personnel for promotional opportunities, and encouraged these employees to seek or to prepare, through appropriate training, for such opportunities? (41 CFR 60-4.3(a)7.l)
11. Has the contractor conducted a review, at least annually, of all supervisors' adherence to and performance under the contractor's EEO policies and affirmative action obligations? (41 CFR 60-4.3(a)7.p)
12. Has the contractor ensured and maintained a working environment free of harassment, intimidation and coercion at all sites and in all facilities at which the contractor's employees are assigned to work? The contractor, where possible, should have assigned two or more women to each construction project. The contractor should have specifically ensured that all supervisory personnel were aware of and carried out the contractor's obligation to maintain such a working environment, which specific attention to members of minority or women's groups working at such sites or in such facilities. (41 CFR 60-4.3(a)7.a)
13. Has the contractor validated all tests and other selection requirements where there is an obligation to do so under 41 CFR 60-3? (41 CFR 60-4.3(a)7.k)
14. Has the contractor ensured that seniority practices, job classifications, work assignments and other personnel practices had no discriminatory effect, and has it continually monitored all related personnel employment activities to ensure that the EEO policy and the contractor's obligations under these specifications were being carried out? (41 CFR 60-4.3(a)7.m)
15. Has the contractor ensured that all facilities and company activities were non-segregated, except for providing separate or single-user toilet and necessary changing facilities to assure privacy between the sexes? (41 CFR 60-4.3(a)7.n)
16. Has the contractor documented and maintained a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations? (41 CFR 60-4.3(a)7.o)

**EXECUTIVE ORDERS 11246, 11375, 12086, AND
13672, SEX DISCRIMINATION GUIDELINES**

17. Has the contractor complied with 41 CFR Part 60-20, Sex Discrimination Guidelines?

**EXECUTIVE ORDERS 11246, 12086, AND 13672,
RELIGION OR NATIONAL ORIGIN DISCRIMINATION
GUIDELINES**

18. Has the contractor complied with 41 CFR Part 60-50, Religion or National Origin Discrimination Guidelines?

APPENDIX A: SCOPE, METHODOLOGY, & CRITERIA

SCOPE

The scope of the audit covered results and remedies of OFCCP’s construction compliance evaluations and complaint investigations of federal construction contractors, and community outreach to employees and contractors for the period October 1, 2013, to March 31, 2019.

We evaluated how OFCCP selected construction contractors for compliance evaluations and complaint investigations and determined if they were complying with EEO requirements. We performed fieldwork at OFCCP’s National Office in Washington, DC, and regional offices in Atlanta, GA, Dallas, TX, and New York, NY. We interviewed OFCCP officials in the regional offices.

METHODOLOGY

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

To answer our audit question, we evaluated OFCCP’s Enterprise Risk Management approach to construction contractors, its policies and procedures for enforcing EEO requirements, and its process for selecting construction contractors for compliance evaluations.

We interviewed OFCCP officials to obtain an understanding of the program and the process for educating contractors, job seekers, and wage earners of their obligations, rights and remedies; and, the process for reporting complaints, evaluating their legitimacy, and assigning them to compliance officers for investigation. We questioned officials about the processes used to monitor the quality, accuracy, and reliability of information reported and how they used it to evaluate program goals, quality, timeliness, oversight, effectiveness, and contractor compliance.

We did not use sampling on this audit. We analyzed data for all 1,013 construction compliance evaluations and 123 complaint investigations closed between October 1, 2013, and March 31, 2019. We also examined documentation for 171 of the 172 construction compliance evaluations and 19

complaint investigations closed during FY 2016 to determine the outcomes such as discrimination, results for workers, or debarment. OFCCP could not locate 1 of the construction compliance evaluations. We examined reporting directives and procedures to identify performance key performance indicators, their definitions, targets, actual results, reporting periods, and validation processes to evaluate contractor compliance and program effectiveness for the period October 1, 2013, through March 31, 2019.

Our work included a review of individuals with disabilities and protected veterans. However, we did not identify any specific issues we believe should be included in this report.

RELIABILITY ASSESSMENT

To assess data reliability, we obtained data for all work performed during the audit scope from the OFCCP's Case Management System. We then performed multiple analytical tests and completeness checks on the management reports and determined the data was valid, complete, accurate, and consistent. We assessed the controls on the management information system. All 2016 performance data was traced back to source documents and did not reveal any unsupportable information. We determined that the data were sufficiently reliable for the purposes of this report.

INTERNAL CONTROLS

In planning and performing our audit, we considered OFCCP's internal controls relevant to our audit objective by obtaining an understanding of those controls, and assessing control risks for achieving our objective. The objective of our audit was not to provide assurance of the internal controls; therefore, we did not express an opinion on OFCCP's internal controls. Our consideration of internal controls for administering the accountability of the program would not necessarily disclose all matters that might be significant deficiencies. Because of the inherent limitations on internal controls, or misstatements, noncompliance may occur and not be detected.

CRITERIA

- Code of Federal Regulations, Title 41, Public Contracts and Property Management, Subtitle B, Chapter 60-4 (October 3, 1980)
- Executive Order 11246, as amended – Equal Employment Opportunity (July 21, 2014)
- Federal Contract Compliance Manual (October 2014)
- OMB Circular No. A-123, Management's Responsibility for Enterprise Risk Management and Internal Control (July 15, 2016)

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

APPENDIX C: ACKNOWLEDGEMENTS

Key contributors to this report were:

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