

OMB Approves Construction Contractor “Compliance Check” Scheduling Letters – With All Signs Pointing to Increase in Construction Contract Audit Activity

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Federal construction contractors are wise to take note of two major developments involving their compliance obligations under federal equal employment opportunity (EEO) laws enforced by the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

First, on March 27, 2020, the Department of Labor's Office of Inspector General (OIG) published a [report](#) titled "OFCCP Did Not Show It Adequately Enforced EEO Requirements on Federal Construction Contracts." Ouch.

Second, on April 7, 2020, the White House Office of Management and Budget (OMB) approved two new information collections - one for direct federal construction contractors and the other for federally assisted construction contractors - that will enable the OFCCP to schedule construction contractors for an ostensibly more streamlined form of compliance evaluation called the "compliance check." Although the OFCCP has not publicly announced a timetable for scheduling construction contractors for compliance checks, given the OIG's findings and recommendations, which are summarized below, we do not expect the OFCCP to delay its activities significantly.

OIG Report Findings: OFCCP's Construction Contractor Program Enforcement Lacking

Between fiscal years 2014 and 2018, there were 9,474 federal construction contractors with contracts valued collectively at \$145 billion - figures that do not include covered federal construction *subcontractors* subject to the same EEO obligations as direct contractors. Based on an examination of construction audits and discrimination complaint investigations closed by the agency during that period (more precisely, from October 1, 2013, through March 31, 2019), the OIG found - as the name of its report reflects - that the OFCCP did not adequately enforce EEO laws applicable to federal construction contractors during that period.

The OIG in its report articulates two main findings that support that conclusion. First, it found that the **OFCCP did not use a "risk-based approach" to select construction contractors for EEO compliance evaluations.** The OIG's second major finding was that the **OFCCP used outdated 1970 census data in setting minority and female participation goals that did not reflect significant increases in the participation rates for these groups.**

The OIG's analysis and factual conclusions with respect to both points are summarized below.

OFCCP Must Develop Neutral Criteria for Selecting Contractors for Review

Although the OFCCP asserted that it employed a neutral process for selecting all construction contractors for review that focused primarily on the amount of, start and end dates of, and the number of employees working on, the contract - a process "intended to ensure that all contractors had an equal chance of being selected for compliance evaluations, without bias" - the OIG found the OFCCP's selection process in fact to be non-neutral. It noted that of the 1,013 construction compliance evaluations completed during the review period, the OFCCP selected only 56% of the contractors it audited using the neutral selection process and failed to document its rationale for selecting the remaining 44% for review.

The report points to a 2018 federal district court ruling that found the OFCCP improperly expedited a compliance evaluation of one of several subcontractors on a mega construction project based not on the neutral selection process described above but rather on the OFCCP's receipt during a public outreach event of informal, verbal discrimination complaints against the subcontractor.

At issue in that case, *Baker DC LLC v. Acosta*, was whether the OFCCP's out-of-order selection of the subcontractor violated the company's Fourth Amendment right to be free from unreasonable searches and seizures (the subcontractor, Baker DC, refused the OFCCP on-site access to employment personnel and records). The district court ruled in Baker DC's favor, finding the OFCCP's deviation from its stated process was improper.

Based on its own review, coupled with the district court's findings in *Baker DC*, the OIG's first of two recommendations was that the OFCCP put into place "a risk-based approach to select construction

contractors for EEO compliance evaluations." For its part, the OFCCP responded by noting that it was in the process of seeking OMB approval of the two new construction contractor "compliance check" scheduling letters referenced above, which will allow it to "use its resources more efficiently" when evaluating construction contractor compliance with their EEO obligations. In addition, the OFCCP indicated that it plans to roll out a new case management system in fiscal year 2021 (October 1, 2020-September 30, 2021) that will allow it to, among other things, "centralize construction scheduling" and prioritize the review of contractors "by risk of non-compliance."

Specifically, the OFCCP reportedly is seeking approval to develop an online portal for collecting contract notification letters, which it contends will help to more accurately identify the "universe of federal construction contractors" and enable the agency to "build a more effective scheduling list for federal construction contractors." In fact, the OIG report notes that the OFCCP, in light of the *Baker DC* ruling, has already begun developing this portal, called the Notification of Construction Contract Award Portal. According to the OFCCP, the portal enables the agency to upload all contract award notifications and will be used to "develop a central scheduling list to neutrally select construction contractors for compliance evaluations" beginning as soon as this fiscal year (2020).

OFCCP Must Update Its Minority and Female Participation Rate Goals

In its report, the OIG observes that between 1970 and 2018, the participation rates of minorities and women increased by 31.5 and 3.5 percentage points, respectively. Indeed, "[t]he population of the United States had increased by 52% 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." Likewise, the representation of women in the workplace also has grown from 38.1% in 1970 to 46.9% in 2018. Nevertheless, the OFCCP has continued to rely on outdated, 1970 census data to establish the minority and female participation rate goals that are used to assess construction contractors' good faith efforts to promote equal employment opportunity.

According to the OIG, "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." In fiscal year 2016, for example, fully 61% of construction contractors met the 1970 minority participation rate goal, having not been measured against more recent data showing the minority population more than doubled since that time. As to female participation, 81% of the contractors reviewed failed to meet even the 1970 nationwide female participation rate goal.

Accordingly, the OIG recommended that the OFCCP update the participation goals for minorities and women and "implement processes to keep all participation goals current." The OFCCP has indicated that it "will explore" the feasibility of undertaking formal rulemaking to update its minority and women participation goals, but did not identify a specific timetable for doing so.

As noted above, the OMB this week approved the OFCCP's proposed construction contractor compliance check scheduling letters. We expect the agency to move relatively quickly to publicize its neutral criteria for selecting construction contractors for review and, shortly thereafter, start announcing which companies are on the list.

We urge construction contractors seeking to get ahead of the potential surge in new audit activity to revisit the tips and strategies we provide in our February 14, 2020, client alert: "[Construction Contractors Take Note: OFCCP's Industry-Focused Technical Assistance Guide \(TAG\) May Prove Helpful in Preparing for Anticipated 'Compliance Check' Reviews.](#)"

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