

need of the accommodation.³ This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(w) *Undue hardship*—(1) *In general.* *Undue hardship* means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (w)(2) of this section.

(2) *Factors to be considered.* In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their du-

³Contractors must engage in such an interactive process with an individual with disabilities whether or not a reasonable accommodation ultimately is identified. Contractors must engage in the interactive process because, until they have done so, they may be unable to determine whether a reasonable accommodation exists that will result in the person being qualified.

ties and the impact on the facility's ability to conduct business.

(x) *Qualification standards* means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(y) *Direct threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual with a disability poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;

(2) The nature and severity of the potential harm;

(3) The likelihood that the potential harm will occur; and

(4) The imminence of the potential harm.

(z) *Compliance evaluation* means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of Section 503 of the Rehabilitation Act of 1973.

[61 FR 19350, May 1, 1996, as amended at 70 FR 36265, June 22, 2005]

§ 60-741.3 Exceptions to the definitions of "individual with a disability" and "qualified individual with a disability."

(a) *Current illegal use of drugs*—(1) *In general.* The terms *individual with a disability* and *qualified individual with a disability* do not include individuals currently engaging in the illegal use of drugs, when the contractor acts on the basis of such use.

(2) “*Drug*” defined. The term *drug* means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(3) “*Illegal use of drugs*” defined. The term *illegal use of drugs* means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as updated pursuant to that act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) *Construction*. (i) Nothing in paragraph (a)(1) of this section shall be construed to exclude as an “individual with a disability” or as a “qualified individual with a disability” an individual who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) In order to be protected by section 503 and this part, an individual described in paragraph (a)(4)(i) of this section must satisfy the requirements of the definition of *qualified individual with a disability*.

(5) *Drug testing*. It shall not be a violation of this part for the contractor to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (a)(4)(i)(A) and (B) of this section is no longer engaging in the illegal use of drugs. (See § 60-741.24(b)(1).)

(b) *Alcoholics*—(1) *In general*. The terms *individual with a disability* and *qualified individual with a disability* do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment,

by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) *Duty to provide reasonable accommodation*. Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to property or the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education and other job-related requirements of such position.

(c) *Contagious disease or infection*—(1) *In general*. The terms *individual with a disability* and *qualified individual with a disability* do not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason of the currently contagious disease or infection, is unable to perform the essential functions of the employment position such individual holds or desires.

(2) *Duty to provide reasonable accommodation*. Nothing in paragraph (c)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (c)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education and other job-related requirements of such position.

(d) *Homosexuality or bisexuality*. The term *impairment* as defined in this part does not include homosexuality or bisexuality, and therefore the term *individual with a disability* as defined in this

§ 60-741.4

41 CFR Ch. 60 (7-1-09 Edition)

part does not include an individual on the basis of homosexuality or bisexuality.

(e) *Other conditions.* The term *individual with a disability* does not include an individual on the basis of:

(1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;

(2) Compulsive gambling, kleptomania, or pyromania; or

(3) Psychoactive substance use disorders resulting from current illegal use of drugs.

§ 60-741.4 Coverage and waivers.

(a) *Coverage*—(1) *Contracts and subcontracts in excess of \$10,000.* Contracts and subcontracts in excess of \$10,000 are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) *Positions engaged in carrying out a contract.* (i) With respect to the contractor's employment decisions and practices occurring before October 29, 1992, this part applies only to employees who were employed in, and applicants for, positions that were engaged in carrying out a Government contract; with respect to employment decisions and practices occurring on or after October 29, 1992, this part applies to all of the contractor's positions irrespective of whether the positions are or were engaged in carrying out a Government contract. A position shall be considered to have been engaged in carrying out a contract if:

(A) The duties of the position included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract or a provision of the contract; or

(B) The cost or a portion of the cost of the position was allowable as a cost of the contract under the principles set forth in the Federal Acquisition Regulation at 48 CFR Ch. 1, part 31: *Provided*, That a position shall not be considered to have been covered by this part by virtue of this provision if the cost of the position was not allocable

in whole or in part as a direct cost to any Government contract, and only a de minimis (less than 2%) portion of the cost of the position was allocable as an indirect cost to Government contracts, considered as a group.

(ii) *Application.* Where a contractor or a division or establishment of a contractor was devoted exclusively to Government contract work, all positions within the contractor, division, or establishment shall be considered to have been covered by this part. (Appendix D of this part provides guidance on positions engaged in carrying out a contract.)

(3) *Contracts and subcontracts for indefinite quantities.* With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will not be in excess of \$10,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds \$10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(4) *Employment activities within the United States.* This part applies only to employment activities within the United States and not to employment activities abroad. The term *employment activities within the United States* includes actual employment within the United States, and decisions of the contractor made within the United States, pertaining to the contractor's applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or