APPENDIX D TO PART 60–741—GUIDELINES REGARDING POSITIONS ENGAGED IN CARRYING OUT A CONTRACT

As stated in §60–741.4(a)(2), with respect to the contractor’s employment decisions and practices occurring before October 29, 1992, this part 60–741 applies only to employees who were employed in, and applicants for, positions that were engaged in carrying out a Government contract. The regulatory definition includes positions whose duties involved 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. Alternatively, under §60–741.4(a)(2)(i)(B) (“prong B”), positions are deemed to have been engaged in carrying out a Government contract if their duties included work that fulfilled a contractual obligation, or work that was necessary to, or that facilitated, performance of the contract. This appendix provides guidance as to the application of prong A of the definition.

1. The regulatory definition includes positions whose duties involved work that fulfilled a contractual obligation. Such work includes work producing the goods or providing the services that were the object of the contract and also work that fulfilled ancillary contract obligations. For example, if a contract required the contractor to keep certain cost records or to meet certain quality control standards, employees who were engaged in such functions were fulfilling a contractual obligation. Positions are also included if their duties included work that was necessary to or 1

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1 Prior to October 29, 1992, section 503 applied only insofar as the contractor was “employing persons to carry out” a Government contract. On that date, the act was amended to apply to all of a covered contractor’s work force, irrespective of whether particular positions are engaged in carrying out a Government contract. Accordingly, the guidance contained in this appendix will be relied on by OFCCP in monitoring and enforcing compliance with section 503 only with respect to the contractor’s employment decisions and practices occurring before October 29, 1992. (Moreover, prior to that date, section 503 covered only contractors holding a contract “in excess of $2500”; this figure was amended on October 29, 1992 to “in excess of $10,000.” Consequently, this appendix makes reference to the $2500 threshold level.)
could have made the goods locally at its plant in Chicago. If a contractor employed security guards or watchmen to protect its plant producing goods for the Government from vandalism or theft of equipment, that because in its business judgment it was prudent to do so, employees who were engaged in those tasks were contributing to performance of the contract and were covered.

7. If a position’s regular duties included work that contributed to the performance of the contract, and the contract met the act’s dollar threshold for coverage, it is irrelevant that such work was only a portion of the position’s total duties or that it took only a small amount of time. For example, a Government agency may have contracted to lease a photocopying machine under terms that obligated the leasing company to provide repair and maintenance service. The technician assigned to provide such service was “carrying out the contract” regardless whether he or she provided similar service for numerous private customers and spent only a small fraction of his or her time working on the agency’s machine. Similarly, individuals who worked on an assembly line manufacturing automobiles, a portion of which were sold under contract to the Government, while the bulk were sold commercially, were covered. That 95% of the vehicles they produced were sold elsewhere does not negate the fact that the individuals were carrying out the contract to make vehicles for the Government.

8. A group of employees may also have performed duties that simultaneously contributed to performance of both Government and non-Government contracts. In this situation, if the contract exceeded $2500 and the duties of the position in fact contributed to carrying out the contract, the position was covered. For example, the Government may have contracted with airline carriers to provide repair and maintenance service. The technician assigned to provide such service was “carrying out the contract” regardless whether he or she provided similar service for numerous private customers and spent only a small fraction of his or her time working on the agency’s machine. Similarly, individuals who worked on an assembly line manufacturing automobiles, a portion of which were sold under contract to the Government, while the bulk were sold commercially, were covered. That 95% of the vehicles they produced were sold elsewhere does not negate the fact that the individuals were carrying out the contract to make vehicles for the Government.

9. These principles are illustrated by the final decision of the Department in OFCCP v. Monongahela Railroad Co., 85–OFC–2 (Administrative Law Judge Recommended Decision, April 2, 1986), aff’d, (Deputy Under Secretary for Employment Standards, March 11, 1987). Monongahela involved the interpretation of the term “necessary” in the context of the definition of the term “subcontract” under this part 60–741. “Subcontract” is defined in relevant part as any agreement for the furnishing of supplies or services “which in whole or in part is necessary to the performance of any one or more [Government] contracts.” The decision held that a railroad company’s transport of coal was necessary to the power company’s obligation to supply the Government with power and that the railroad company was therefore a covered “subcontractor.” The decision reached this result even though numerous other carriers also transported coal to the power company, the coal that the carrier delivered was used to generate electricity for the Government and for nongovernmental customers alike, and the power company sold only a small fraction (less than 1%) of its output to the Government. That is, the decision found that the crucial factor is whether the activity contributes to the performance of a Government contract, regardless of whether the contractor could have performed the contract some other way, and regardless of whether the activity contributes as well, and predominantly, to carrying out non-Government contracts.

10. Although the act broadly reached all positions that contributed to or facilitated the performance of the Government contract, its coverage was not limitless. First, positions were covered only if they bore an appropriate relationship to a covered contract. The contract must have been for the purchase, sale, or use of personal property or nonpersonal services, must have been for an amount in excess of $2500, and must not have been otherwise exempt.

11. Second, the breadth of coverage depended to a large extent on how the contractor chose to organize its work force to perform its contract obligations. A contractor who segregated contract from noncontract work necessarily employed fewer persons to carry out its contracts than one who did not. To continue the example given above, if a plant with several assembly lines produced automobiles, some of which were shipped to the Government and others sold commercially, the application of section 503 would have been limited if the Government contract automobiles were made on only one of the assembly lines. In that case, employees who were on the other lines, which never produced automobiles for the Government, were outside the act. If, however, the contractor did not segregate the contract from noncontract production, the employees on each of the lines were covered.

12. Third, while the relationship between the work of a position and the performance of the contract need not have been direct, the relationship must have been real and not hypothetical. For example, a firm may have done substantial business with both the Government and private customers. Individuals who were employed to plan and design new
facilities that were intended for use with non-Government work would not be deemed to have been covered merely because of the possibility that at some point in the future the facilities would be used to carry out Government contracts. Again, a firm may have been partly unionized and partly non-unionized. Assume the Government contract was performed outside the union's jurisdiction in the non-union part of the work force. An individual who was assigned to represent management in dealing with the union would not have been covered simply because the arrangements he or she made with the union might subsequently influence the personnel practices followed for the nonunion employees as well.

13. Coverage depended on the regular or assigned duties and responsibilities of the position. A person that held a position did not go in and out of coverage as she performed first contract and then noncontract work if, throughout the period, one of the duties of the position was to perform contract-related work as the need or occasion arose. For example, the photocopy machine technician who was assigned responsibility to repair machines leased to the Government and to private firms was covered throughout the contract term, including the period before he or she first repaired the Government's machine. Discrimination against the employee was not permissible simply because the discrimination was effected on a day when the technician was servicing a private firm. Likewise, workers who were on an assembly line whose products were shipped at times to the Government and at times to private customers were covered, as were employees of the airline carrier whose duties included at times helping to transport Federal employees pursuant to a contract.

14. On the other hand, a person whose duties were permanently changed may have gained or lost coverage as a result. For example, an engineer who had been working on developing weapons under a contract with the military, and who accordingly was covered, may have been transferred to work on development of civilian aircraft for private customers. If the new position did not include any contract-related duties, the individual lost protection under the act at the time of the transfer.

15. It is the position's regular or assigned duties that were controlling. If a portion, however small, of a position's regular duties was necessary to or facilitated carrying out a Government contract, the position was covered. On the other hand, the isolated and unanticipated performance, outside the position's regular duties, of a contract-related task will not result in a finding of coverage. For example, suppose another employee of the photocopy machine company, whose regular duties were in no way contract-related, was unexpectedly needed to substitute for the technician who repaired the machine leased to the Government. Assuming substitution in such situations was not one of the employee's regular or foreseeable duties, his or her isolated performance of the task on a particular occasion would not result in a finding of coverage. In some cases, there will be a formal written position description that will serve as evidence of the position's actual duties and responsibilities. In other cases, there may not be a written position description, or the position description may be inaccurate or incomplete. In all cases, however, it should be possible to identify the position's actual duties, and to make a determination of coverage on that basis.

16. The fact that a position is deemed not to have been engaged in carrying out a Government contract does not affect the individual's rights under the Americans with Disabilities Act of 1990.

PART 60–742—PROCEDURES FOR COMPLAINTS/CHARGES OF EMPLOYMENT DISCRIMINATION BASED ON DISABILITY FILED AGAINST EMPLOYERS HOLDING GOVERNMENT CONTRACTS OR SUBCONTRACTS

Sec. 60–742.1 Purpose and application.
60–742.2 Exchange of information.
60–742.3 Confidentiality.
60–742.4 Standards for investigations, hearings, determinations and other proceedings.
60–742.5 Processing of complaints filed with OFCCP.
60–742.6 Processing of charges filed with EEOC.
60–742.7 Review of this part.
60–742.8 Definitions.

Authority: 42 U.S.C. 12117(b).

Source: 57 FR 2962, 2965, Jan. 24, 1992, unless otherwise noted.

§ 60–742.1 Purpose and application.

The purpose of this part is to implement procedures for processing and resolving complaints/charges of employment discrimination filed against employers holding government contracts or subcontracts, where the complaints/charges fall within the jurisdiction of both section 503 of the Rehabilitation Act of 1973 (hereinafter “Section 503”) and the Americans with Disabilities Act of 1990 (hereinafter “ADA”). The promulgation of this part is required pursuant to section 107(b) of the ADA. Nothing in this part should be deemed