

**DEPARTMENT OF LABOR****Office of Federal Contract Compliance Programs****41 CFR Part 60-741**

RIN 1215-AA84

**Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities; Separate Facility Waivers**

**AGENCY:** Office of Federal Contract Compliance Programs (OFCCP), Employment Standards Administration, Labor.

**ACTION:** Final rule.

**SUMMARY:** This rule amends the regulation that permits Federal contractors to seek waivers from the requirements of Section 503 of the Rehabilitation Act of 1973 for those facilities that are not connected with the performance of a covered contract. Section 503 requires Government contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. The Rehabilitation Act Amendments of 1992 expressly incorporated into Section 503 the existing separate facility waiver regulation. The 1992 Amendments also required publication of regulations that list the standards to be used for granting separate facility waivers and, accordingly, this rule lists factors that will be considered when determining whether to grant such waivers.

**EFFECTIVE DATE:** August 21, 2000.

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**SUPPLEMENTARY INFORMATION:****I. Background**

Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503 or the Act), requires parties holding Federal Government contracts and subcontracts in excess of \$10,000 to

take affirmative action to employ and advance in employment qualified individuals with disabilities. OFCCP administers Section 503 and has published implementing regulations at 41 CFR Part 60-741, 61 FR 19336 (May 1, 1996).

One provision in the regulations permits Federal contractors and subcontractors to seek a waiver from the requirements of Section 503 for facilities that are not connected with the performance of a covered contract or subcontract, that is, "separate facilities." 41 CFR 60-741.4(b)(3). The history of the Section 503 separate facility waiver regulation was recounted in the notice of proposed rulemaking (NPRM), 61 FR 5902, 5902-03, published on February 14, 1996, and readers interested in that background information may refer to that discussion. Most importantly to this rulemaking is that the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (1992 Amendments), revised Section 503 to provide that if an entity holds a covered contract all its establishments and all its workforce are subject to Section 503, absent the granting of a waiver. Section 505(b) of the 1992 Amendments (Waiver Amendment) expressly incorporated the existing separate facility waiver regulation (with minor editorial changes) into Section 503.

The text of the Waiver Amendment, as it appears at 29 U.S.C. 793(c)(2)(A)-(B), reads as follows:

(A) The Secretary of Labor may waive the requirements of the affirmative action clause required by the regulations promulgated under [Section 503(a)] with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this Act.

(B) Such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

The affirmative action clause referenced in the statute is published at 41 CFR 60-741.5 and lists contractors' basic obligations under Section 503, including the obligation to comply with the regulations. Accordingly, a waiver of the affirmative action clause exempts covered contractors from the obligation to comply with Section 503 and its implementing regulations.

The Amendment requires OFCCP to make two separate findings to justify granting a waiver. As a threshold requirement, OFCCP must find that the facility for which the waiver is sought

is in all respects separate and distinct from activities related to the performance of a covered contract. If the facility satisfies this "separate and distinct" requirement, OFCCP must additionally find that granting the waiver will not interfere with or impede the effectuation of the Act.

On February 14, 1996, OFCCP issued a proposed rule, 61 FR 5902, that set forth the standards that the agency would use to determine whether to grant separate facility waivers. A notice correcting certain technical errors in the NPRM was published on March 8, 1996, 61 FR 9532. The comment period ended April 15, 1996.

An individual Government contractor, an organization representing Government contractors and an organization representing disability rights agencies submitted comments. The submissions have been logged into the record for this rulemaking as Comments 1, 2 and 3, respectively, and they have been considered in the development of this final rule. Below is a discussion of the comments (referenced as "Com." or "Coms.") and an explanation of the changes made from the proposed rule to this final rule. For an explanation of provisions adopted unchanged from the proposed rule and on which no comments were made, see the NPRM preamble.

**II. Analysis of Public Comments and Revisions***General Issues Concerning Regulatory Approach*

On May 1, 1996, a final rule was issued that comprehensively revised the Section 503 regulations published at 41 CFR Part 60-741. 61 FR 19336. The revision continued the existing separate facility waiver regulation without substantive change. 41 CFR 60-741.4(b)(3). Today's final rule amends § 60-741.4(b)(3).

The NPRM announced that the long-standing practice of interpreting the separate facility waiver regulation narrowly so as to "jealously guard" the granting of waivers would be continued. 61 FR 5903. One commenter thought that the OFCCP position might be contrary to the intent of Congress as expressed in the Waiver Amendment. (Com. 2.) However, both the plain language of the amendment and its legislative history militate against this conclusion.

As is noted above, the Waiver Amendment adopted the pre-existing Section 503 separate facility waiver regulation, implicitly approving of the narrow manner in which OFCCP had administered the regulation. In addition,

the Waiver Amendment is narrow on its face. The statute makes the granting of separate facility waivers discretionary; the waiver "may" be granted if it is determined that the facility is qualified to receive a waiver. Moreover, the legislative history of the 1992 Amendments indicates that the scope of coverage under Section 503 was being clarified to parallel coverage under Executive Order 11246. S. Rep. No. 357, 102d Cong., 2d Sess. 72, *reprinted in* 1992 U.S. Code Cong. & Admin. News 3783. OFCCP traditionally has jealously guarded separate facility waivers under the Executive Order as well. Finally, a narrow construction of the waiver provision comports with the well established rule of statutory interpretation that exceptions to remedial statutes, such as the Rehabilitation Act, are strictly and narrowly construed. Accordingly, OFCCP will continue its long-standing practice of jealously guarding the granting of separate facility waivers.

One commenter expressed general support for the proposed rule, noting that it contained a "number of safeguards which will help ensure fair application of Section 503's very important mandate—to foster equal employment opportunity for qualified individuals with disabilities." (Com. 3.) This commenter supported, for example, the concept of broad discretion in the agency to evaluate waiver requests.

Two commenters, however, felt that the proposal gave OFCCP too much discretion in determining whether to grant or deny a waiver. (Coms. 1 & 2.) These commenters noted that the proposal's list of factors was non-exhaustive and that other, unspecified, factors might be considered by OFCCP. One commenter recognized that "[i]t is acceptable to have tough requirements for a waiver" but thought that all standards should be listed and that if the standards are satisfied "then a waiver should be granted as the rule and not as an exception." (Com. 1.)

The rule adopted today modifies the proposed rule to address the suggestions of greater certainty as to the factors that will be considered by the agency. The final rule replaces the word "may" in the introductory language in paragraphs (b)(3)(ii) and (iii) with the word "shall" to obligate the Deputy Assistant Secretary to consider the factors listed under those two provisions.

However, deciding whether to grant a separate facility waiver requires an individual, fact-based analysis, and this weighs against adopting the rigid approach suggested by two of the commenters. Federal contractors

covered by Section 503 present a wide variety of organizational structures and staffing patterns. Accordingly, a wide range of possible relationships between a contractor's facilities also exists. The relationships between facilities may take many forms, for instance, two or more facilities might do exactly the same work, or one facility may be a supplier of materials, a distributor of goods, a provider of administrative support or management direction, or a source of capital or equipment. Facilities also may be related due to staffing patterns used by the contractor, such as, temporary reassignment or detailing of employees from one facility to another, rotating workers among facilities, and using one facility as a training ground for eventual assignment at another facility.

Because of the wide range of relationships that might exist among contractors' facilities, the rule must be flexible to enable the Deputy Assistant Secretary to consider any additional, relevant facts in determining whether a particular facility is separate and distinct in "all" respects and that a waiver will not interfere with or impede effectuation of the Act. Consequently, the final rule adopts proposed paragraphs (b)(3)(ii)(F) and (b)(3)(iii)(D), which authorize the Deputy Assistant Secretary to consider additional factors when he or she deems it necessary or appropriate.

#### *Paragraph (b)(3)(i)*

Proposed paragraph (b)(3)(i) listed the general standards that would be required to obtain separate facility waivers. Subparagraphs (b)(3)(i)(A) and (B) recited the two threshold requirements codified in the statutory waiver amendment and present in the old regulation. Paragraph (b)(3)(i) also specified that waivers only will be considered by the Deputy Assistant Secretary upon the written request of a prime contractor or subcontractor, and that the contractor or subcontractor bears the burden of demonstrating that a waiver is appropriate.

No objections were raised regarding the language proposed in paragraph (b)(3)(i) and one commenter expressed its approval of the requirement that Federal contractors demonstrate their eligibility for the waiver. (Com. 3.) The final rule adopts unchanged proposed paragraph (b)(3)(i).

One commenter recommended that the rule also list the type of documentation the contractor should submit with the request. (Com. 3.) Given the variety of contractors subject to Section 503, however, OFCCP neither wants to overly dictate the content of

requests nor unnecessarily constrain contractors in the manner in which they choose to make their case that a waiver is appropriate. The waiver rule clearly informs contractors that they have the burden of demonstrating that a waiver is appropriate and sets forth the standards OFCCP will use to evaluate their request. If contractors do not factually support their requests, OFCCP may ask for additional details or deny the requests. The final rule, therefore, does not specify the documents needed to be submitted with waiver requests.

One commenter suggested that a provision be added to the rule to require that OFCCP respond to a waiver request within a set period of time. (Com. 2.) OFCCP considers setting an across-the-board regulatory time limit in which to respond to waiver requests as inappropriately restrictive given the individual nature of waiver determinations and the multitude of organizational structures and staffing patterns that may be involved. Before making a decision, the Deputy Assistant Secretary may need to get more information from the contractor or conduct an on-site investigation to verify that the facility is separate and distinct in all respects. The fact-based nature of these inquiries, and the possibility that more information may need to be gathered, militates against setting a rigid deadline for responding to waiver requests. Of course, OFCCP will respond as quickly as is possible to requests for separate facility waivers.

#### *Paragraph (b)(3)(ii)*

Proposed paragraph (b)(3)(ii) listed factors to be considered to determine whether the facility is separate and distinct in all respects from activities related to the performance of a covered contract. The factors focused on the activities and employees at the facility for which the waiver is requested. No criticisms of these factors were expressed in the comments. Indeed, the organization representing Government contractors stated that it was in general agreement that the factors listed in proposed paragraph (b)(3)(ii) were reasonable for purposes of making a waiver determination. (Com. 2.)<sup>1</sup> The final rule adopts these factors.

<sup>1</sup> This commenter also expressed its belief that OFCCP previously made decisions about whether to grant a separate facility waiver using standards articulated in *Ernst-Theodore Arndt*, 52 Comp. Gen. 145 (1972). That Comptroller General opinion, however, addresses whether a parent company and its subsidiary are to be considered a single entity for purposes of being covered by Executive Order 11246. OFCCP has not previously used the parent-subsidiary criteria to determine whether to grant separate facility waivers because these inquiries

Another commenter suggested adding to the rule two factors pertaining to the "separate and distinct" determination: (1) Whether employees at facilities at which Government contract work is performed are typically recruited for higher level positions at facilities unrelated to the performance of a Government contract; and (2) whether employees at facilities at which Government contract work is performed are interchangeable with employees at facilities at which no such work is performed. (Com. 3.) This commenter reasoned that:

Many employers' operations are organized in such a way that similar jobs are performed at multiple facilities (only some of which happen to perform Government contract work). Such employers may be tempted to relegate (either through transfer or original placement) employees with disabilities to exempted facilities. Similarly, employers may seek to avoid affirmative action obligations by promoting employees with disabilities into jobs stationed at these facilities.

The commenter believed that adoption of these factors into the final rule could help to minimize these practices. OFCCP agrees with this commenter and believes that these factors should be incorporated into the final rule. It is important to note that limiting or segregating qualified employees with disabilities to particular facilities or jobs because of their disabilities would constitute discrimination prohibited by Section 503. *See, e.g.,* 41 CFR 60-741.21(b).

OFCCP considers these suggested factors to be corollaries of the proposed factors in (b)(3)(ii)(D) and (E), respectively, involving the contractor's employee staffing patterns. The suggested factor concerning recruitment into a facility unrelated to the performance of a Government contract encompasses the example contained in the NPRM preamble regarding subparagraph (D):

[I]f employees who work on a Federal contract at one facility must, at some future time, work at another facility for which a waiver is sought in order for them to advance in employment, the facility for which a waiver is sought may be inexorably linked to the employees working on the contract and, therefore, not "separate and distinct."

61 FR 5904. To clarify the factor expressed in subparagraph (D), the final rule incorporates the recommended element into the rule. Thus, paragraph

examine different aspects of business relationships for different purposes. The question of whether a waiver is appropriate for facilities not connected to the performance of Government contracts only arises if the facility is a component of a covered entity.

(b)(3)(ii)(D) of the final rule states that the Deputy Assistant Secretary will consider whether working at the facility for which a waiver is sought is a prerequisite for advancement in job responsibility or pay and the extent to which employees at facilities connected to a Government contract are recruited for positions at the facility for which a waiver is sought. In determining whether a waiver is appropriate given the totality of circumstances, the Deputy Assistant Secretary will weigh the extent to which any recruitment among the facilities occurs, including recruitment for details, transfers or promotions.

OFCCP considers the suggested factor regarding the interchangeable nature of employees as being within the scope of proposed subparagraph (E), which addressed whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility. To clarify subparagraph (E), the final rule incorporates the recommended element into this subparagraph. Accordingly, the final rule at paragraph (b)(3)(ii)(E) specifies that the Deputy Assistant Secretary will consider whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility and the extent to which employees at the facility are interchangeable with employees at facilities connected to a Government contract.

*Paragraph (b)(3)(iii)*

Proposed paragraph (b)(3)(iii)(A) indicated that OFCCP would consider, when determining if granting a waiver will interfere with or impede the effectuation of the Act, whether the waiver was being used as a subterfuge to circumvent the contractor's obligations under the Act or implementing regulations. The NPRM stated that OFCCP may consider, for example, whether the contractor sought a waiver only after learning that the facility at issue was being scheduled for a Section 503 compliance review. 61 FR 5904. One commenter believed that a waiver request made after a Section 503 complaint investigation or compliance review is scheduled should not be considered as an attempt at subterfuge, and claimed that the question of whether the facility is separate and distinct is a jurisdictional issue that may be raised at any time. (Com. 2.) OFCCP disagrees.

As is noted above, the statute provides that granting separate facility waivers is discretionary. As long as an entity holds a covered contract all its

establishments are subject to Section 503, absent a waiver being granted. A request for a waiver does not stay application of the Section 503 obligations and does not have a retroactive effect.

The same commenter also asserted that it would be burdensome to require contractors to request waivers for all facilities that genuinely appear separate and distinct just to anticipate the possibility that an OFCCP review might be scheduled. This argument ignores the express intent of the 1992 Amendments; that all establishments of a covered contractor are subject to Section 503 absent a waiver. Under Section 503, a Federal contractor's compliance obligations begin when the contractor gains a covered contract, not when it gets notice of an OFCCP review.

Compliance with Section 503, as it is with any law, cannot be dependent upon the presence of a Government official at the entity's doorstep. OFCCP relies in good measure upon the law-abiding nature of Government contractors to comply with the Act and its implementing regulations, and to provide equal employment opportunity for qualified individuals with disabilities. To condone the filing of an application for a separate facility waiver only after a complaint investigation or compliance review has been scheduled may encourage contractors to disregard their Section 503 obligations until OFCCP decides to investigate compliance. The view of the agency, therefore, is that whether the contractor requested a separate facility waiver only after a Section 503 complaint investigation or compliance review has been scheduled is a relevant factor to consider in determining if a waiver should be granted.

It should also be noted that OFCCP's jurisdiction to investigate Section 503 complaints that have been filed against a contractor prior to its requesting a waiver is not dependent on the Deputy Assistant Secretary's decision, favorable or unfavorable, to grant a waiver. A waiver does not have a retroactive effect (*i.e.*, a waiver does not relieve a contractor from liability for a violation pre-dating the granting of the waiver). A waiver is in effect only from the time it is issued until the time it terminates. Accordingly, there is no basis for suspending a complaint investigation pending a decision of whether to grant a separate facility waiver.

Under factor (B), the NPRM explained that the results of any past Section 503 complaint investigations or compliance reviews of the facility at issue, or of other facilities of the contractor, may be considered. 61 FR 5904. One commenter

believed that complaints filed against facilities for which waivers were not requested should be irrelevant. (Com. 2.) OFCCP disagrees.

Section 503 requires covered contractors to review their corporate-wide employment policies and practices to ensure that there is no discrimination and that affirmative action is taken to employ and advance in employment qualified individuals with disabilities. If, for example, corporate-wide policies have been found to discriminate against qualified individuals with disabilities at other facilities, such may also be the case at the facility for which the waiver is requested. Significant compliance problems at other facilities of the contractor may also indicate corporate-level disregard for the Section 503 nondiscrimination and affirmative action obligations. Granting a separate facility waiver to a contractor with significant compliance problems at other facilities may further impede effectuation of the Act at the remaining covered facilities.

One commenter recommended that factor (B) be broadened expressly to include consideration of the contractor's compliance with Titles I, II, and III of the Americans with Disabilities Act of 1990 (ADA), which prohibit discrimination on the basis of disability in employment, public services and public accommodations, and with state and local laws prohibiting disability discrimination in these areas. (Com. 3.) The commenter considered this expansion necessary because OFCCP investigates a relatively small percentage of covered contractors each year. A contractor's compliance with other Federal, state or local laws requiring equal opportunity for disabled persons may indicate whether the general environment or atmosphere in the contractor's workplace embraces equal employment opportunity for individuals with disabilities.

It is current OFCCP practice during compliance reviews to ask the Equal Employment Opportunity Commission (EEOC) and the state and local Fair Employment Practices (FEP) agencies whether complaints have been filed against the contractor and for any other information that may be pertinent in assessing the contractor's equal employment opportunity posture. *See, e.g.*, OFCCP Federal Contract Compliance Manual, at 2B05. Existing regulations provide for coordination with EEOC and any state or local FEP agencies in the processing and resolution of complaints/charges filed against Federal contractors that fall within the scope of both Section 503 and the ADA. In certain instances,

OFCCP acts as EEOC's agent. *See, e.g.*, 41 CFR 60-742.2(a) and (c), 60-742.5(a). *See also* 41 CFR 60-741.1(c)(1) and (2) (describing the relationship of the rules implementing Section 503 to other Federal, state or local laws providing protections for the rights of individuals with disabilities).

Consequently, today's final rule broadens the types of laws that might be considered under factor (B) to include any other Federal, state or local law requiring equal opportunity for disabled persons. The new language mirrors language in the Section 503 anti-retaliation rule published at 41 CFR 60-741.69(a)(2) and (3). That rule prohibits contractors, among other things, from retaliating against an individual who has assisted or participated in any activity related to the administration of, or opposed any practice made unlawful by, Section 503 or of "any other Federal, State or local law requiring equal opportunity for disabled persons." *See also* 41 CFR 60-741.44(a)(2)-(3). The objective of this change to factor (B) is not to enforce the other Federal, state or local laws, but to specify that, in determining whether a waiver might interfere with or impede the effectuation of Section 503, OFCCP will consider information regarding a contractor's compliance with other disability-related laws.

Paragraph (b)(3)(iii)(C) focuses on the impact of granting a waiver on OFCCP enforcement efforts. A number of examples were provided in the NPRM preamble of the types of facts that might be considered under this factor. 61 FR 5904. One commenter stated that two of those preamble examples were irrelevant to a determination of whether a particular facility is separate from another facility with a contract: (1) Whether the waiver would simplify or complicate OFCCP's compliance review activity; and (2) whether the contractor is a large employer in a small town. (Com. 2.)

Considering whether granting a waiver would have an impact on compliance review activity is necessary because the Act mandates that waivers must not interfere with or impede the effectuation of the Act. An adverse impact on OFCCP enforcement activity would impede OFCCP administration of the Act. On the other hand, OFCCP acknowledges that whether the facility for which the waiver is sought is the largest employer in a small town would probably not be relevant to a separate facility waiver determination. Accordingly, this latter criterion is not codified in the final rule.

Another commenter suggested that the extent to which the facility at issue

employs, and is physically accessible to, persons with disabilities is another factor relevant to the question of whether a waiver might preclude effective enforcement of the Act. (Com. 3.) OFCCP declines including this suggestion in the rule, but notes that the rule does not prohibit contractors from including such information with their waiver request as evidence, for example, that the waiver request is not a subterfuge to avoid Section 503 obligations. Further, a contractor's hiring of individuals with disabilities and maintaining an accessible facility would not be a defense to an instance of unlawful disability-based employment discrimination (*e.g.*, in promotions or job assignments, or in establishing rates of pay or fringe benefits). *See* 41 CFR 60-741.20. Consequently, OFCCP does not believe it is necessary to include this suggested factor in the rule.

#### *Paragraph (b)(3)(iv)*

Proposed paragraph (b)(3)(iv) provided that waivers granted in accordance with paragraph (b)(3) may be withdrawn by the Deputy Assistant Secretary at any time when, in his or her judgment, such action is necessary or appropriate to achieve the purposes of the Act. Two commenters agreed that withdrawing a waiver would be appropriate if circumstances changed and the contractor no longer satisfied the requirements for a waiver. (Coms. 2 & 3.) One commenter opposed the broadness of the discretion to withdraw a waiver. (Com. 2.) This commenter was concerned, for instance, that such broad discretion would make it difficult to determine when a waiver would remain in force. Another commenter recommended that a waiver be effective for a specific period, suggesting one or two years as suitable. (Com. 3.) This commenter, however, also recommended that the contractor should have to demonstrate its continuing eligibility throughout the period.

OFCCP agrees with the general thrust of the comments that the regulation should describe more clearly the period a waiver will remain in force. A number of the commenters' recommendations regarding the duration and termination of separate facility waivers are reflected in the final rule under new paragraph (b)(3)(v), which is described below.

The final rule replaces proposed paragraph (b)(3)(iv) to address the comments that the rule assure that contractors granted separate facility waivers satisfy the rule's requirements during the duration of the waiver. Under paragraph (b)(3)(iv)(A),

contractors granted separate facility waivers must promptly inform OFCCP of any changed circumstances that were not reflected in the waiver requests. Changed circumstances include, for instance, the award of additional Government contracts and changes in the allocation of personnel to perform the Government contracts. To retain the waiver, the contractor must demonstrate that despite any changed circumstances, the facility remains in all respects separate and distinct and that continuing the waiver will not interfere with or impede the effectuation of the Act.

As one commenter recognized, the duty to demonstrate that the contractor continues to be eligible for the waiver once the waiver has been granted contemplates that OFCCP could investigate this issue during the waiver period. (See Com. 3.) Accordingly, paragraph (b)(3)(iv)(B) of the final rule clarifies that a contractor that has been granted a separate facility waiver must permit OFCCP access to the contractor's records and places of business (including the facility granted a waiver and other facilities) for the purpose of investigating whether the facility granted a waiver meets the standards and requirements of the paragraph (b)(3). If an investigation reveals that a waiver is inappropriate, the waiver will be terminated and the facility must comply with Section 503 and the implementing regulations as described in paragraph (b)(3)(v) below.

#### *Paragraph (b)(3)(v)*

In accordance with the comments described directly above (Coms. 2 & 3), new paragraph (b)(3)(v) provides contractors who have been granted separate facility waivers with greater certainty as to the period the waiver will remain in effect. Under paragraph (b)(3)(v)(A), a separate facility waiver will terminate on one of three dates, as is described in paragraphs (b)(3)(v)(A)(1) through (3), whichever is earliest.

Under paragraph (b)(3)(v)(A)(1), the waiver will end two years after the date the waiver was granted. OFCCP believes that waivers for a two-year period will meet contractors' needs to have greater certainty as to the period of a waiver's effectiveness, as well as to provide the agency with a reasonable time period in which to check the appropriateness of continuing a waiver. (See Coms. 2 & 3.) Under the rule, if a Government contractor wants a separate facility waiver to continue beyond two years, the contractor would have to apply for another waiver before the end of the initial two-year period even if circumstances did not change. The

request for another waiver must meet the same standards as the original waiver request, including demonstrating that the facility satisfies the rule.

Applying for another separate facility waiver before the end of the initial two-year period will not stay the termination of a waiver. If the Deputy Assistant Secretary does not act on a waiver renewal request before the two-year termination date, the original waiver terminates at the end of the two-year period. Absent a valid separate facility waiver, the facility must comply with Section 503 and the implementing regulations as described in paragraph (b)(3)(v)(B) below. If another waiver is granted it will be subject to the same termination provisions as the original waiver, including termination at least two years from the date of approval. OFCCP intends to process separate facility waiver renewal requests in a timely manner upon receipt.

Paragraph (b)(3)(v)(A)(2) provides that the waiver will terminate before the two-year period when the facility performs any work that directly supports or contributes to the satisfaction of the work performed on a Government contract. Therefore, the waiver is automatically terminated by operation of the regulation when the facility gets a Government contract or performs work to satisfy a Government contract. A facility that gets a Government contract or to which Government contract work has been shifted by the contractor is the ultimate "changed circumstance." Such direct Government contract performance by a facility so clearly defeats its eligibility for a separate facility waiver that it is reasonable to terminate the waiver without need for the contractor to first submit a report or for the Deputy Assistant Secretary to issue a determination that ending the waiver is appropriate. Direct Government contract performance requires the contractor to comply with Section 503.

New paragraph (b)(3)(v)(A)(3) adopts a modified version of the provision OFCCP originally proposed for paragraph (b)(3)(iv). Proposed paragraph (b)(3)(iv) provided that waivers could be withdrawn by the Deputy Assistant Secretary at any time when, in his or her judgment, such action was necessary or appropriate to achieve the purposes of the Act. The final rule addresses comments that the proposed rule gave OFCCP too much discretion in withdrawing waivers. The language is revised to indicate that a waiver may be terminated by the Deputy Assistant Secretary before the two-year waiver period only when it is determined that the separate facility waiver

requirements are not being met. Termination may be based on information from the contractor regarding changed circumstances or contained in a request for another waiver. Termination also may be based on any other relevant information including, but not limited to, information from contracting agencies, employees and job applicants, or from the results of an OFCCP investigation.

To further clarify when a terminated waiver triggers compliance obligations, the final rule adopts new paragraph (b)(3)(v)(B). This provision specifies that contractors must meet the Section 503 obligations on the date of termination. The rule provides one exception to this compliance deadline. If the written affirmative action program (AAP) requirements published at 41 CFR 60-741.40 through 60-741.45 are applicable to the facility the contractor must comply with these requirements within 120 days of the termination of the waiver.

OFCCP believes that these compliance deadlines are reasonable. Contractors whose separate facility waivers terminate under the rule are on notice of their impending compliance responsibilities. These contractors also are familiar with their Section 503 obligations because they are required to comply at all their other facilities. The 120-day compliance deadline for preparing and maintaining an AAP at the facility, if applicable, is the same time period allowed a newly covered contractor to develop an AAP. See 41 CFR 60-741.40(b).

#### *Paragraph (b)(3)(vi)*

One commenter suggested that the rule specify that OFCCP will impose sanctions against contractors that make fraudulent or misleading waiver requests. (Com. 3.) OFCCP agrees. The NPRM stated that waivers would be withdrawn if OFCCP discovered that the facts upon which it relied in granting the waiver did not accurately or fully describe the relationship between the facility and the contractor's activities related to the performance of a contract. 61 FR 5904. Many Federal programs explicitly prohibit fraudulent and false statements and representations; indeed, the Federal Acquisition Regulations provide that contractors may be debarred or suspended for such activity, see 48 CFR 9.406-2(a)(1), (a)(3); 9.407-2(a)(1), (a)(3). Certainly OFCCP cannot countenance fraudulent and misleading waiver requests. Otherwise, Government resources will be wasted, the ability of OFCCP to consider legitimate requests from contractors will be hampered, and

the benefits of the program will be reduced.

Therefore, new paragraph (b)(3)(vi) expressly prohibits false or fraudulent statements and representations under § 60-741.4(b)(3). This prohibition applies to all statements and representations made under the separate facility waiver rule including, but not limited to, waiver requests, reports of changed circumstances, and requests to extend previously-granted waivers. False or fraudulent statements or representations may subject a contractor to sanctions and penalties under this part, as well as criminal prosecution under 18 U.S.C. 1001, which makes it a crime for anyone to make such misrepresentations to any department or agency of the U.S. Government. Of course, should OFCCP discover that false or fraudulent statements or representations were made in conjunction with a waiver request the request will also be denied (or if previously granted, the waiver will be withdrawn).

### III. Regulatory Analyses and Procedures

#### *Executive Order 12866*

The Secretary of Labor has determined that this final rule is not a significant regulatory action as defined in Executive Order 12866, and therefore a regulatory impact analysis is unnecessary.

#### *Regulatory Flexibility Act*

This final rule will not change existing equal employment obligations for Federal contractors but will only clarify the standards OFCCP uses for determining whether to grant separate facility waivers. Consequently, under the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the Secretary of Labor certifies that this rule will not have a significant economic impact on a substantial number of small entities.

#### *Unfunded Mandates Reform*

Executive Order 12875—This final rule does not create an unfunded Federal mandate upon any State, local or tribal government.

Unfunded Mandates Reform Act of 1995—This final rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

#### *Executive Order 13132*

These regulations have been reviewed in accordance with Executive Order 13132 regarding Federalism. The order

requires that agencies, to the extent practicable and permitted by law: (1) Not promulgate any regulation that has federalism implications, that imposes substantial direct compliance costs on State and local governments, and that is not required by statute; and (2) not promulgate any regulation that has federalism implications and that preempts State law, unless specified preconditions are met. Since this rule does not have federalism implications, does not impose substantial direct costs on State and local governments and does not preempt State law, it complies with the principles of federalism and with Executive Order 13132.

#### *Paperwork Reduction Act*

This final rule does not contain substantive or material modifications to previously approved information collection requirements, but will only clarify existing standards for the granting of separate facility waivers. In view of this fact, and because the final rule does not change existing obligations for Federal contractors, the rule creates no additional information collection requirements above those in the current information collection requests approved by the Office of Management and Budget under control numbers 1215-0072 (Supply and Service) and 1215-1063 (Construction).

#### **List of Subjects in 41 CFR Part 60-741**

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements.

Signed at Washington, D.C. this 12th day of July 2000.

**Alexis M. Herman,**  
*Secretary of Labor.*

**Bernard E. Anderson,**  
*Assistant Secretary for Employment Standards.*

**Shirley J. Wilcher,**  
*Deputy Assistant Secretary for Federal Contract Compliance.*

For the reasons set out in the preamble, 41 CFR part 60-741 is amended as set forth below:

#### **PART 60-741—AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING INDIVIDUALS WITH DISABILITIES**

1. The authority citation for part 60-741 continues to read as follows:

**Authority:** 29 U.S.C. 706 and 793; and E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

2. In § 60-741.4, paragraph (b)(3) is revised to read as follows:

#### **§ 60-741.4 Coverage and waivers.**

\* \* \* \* \*

(b) \* \* \*

(3) *Facilities not connected with contracts.* (i) Upon the written request of the contractor, the Deputy Assistant Secretary may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities if the Deputy Assistant Secretary finds that the contractor has demonstrated that:

(A) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(B) Such a waiver will not interfere with or impede the effectuation of the act.

(ii) The Deputy Assistant Secretary's findings as to whether the facility is separate and distinct in all respects from activities of the contractor related to the performance of a contract shall include consideration of the following factors:

(A) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

(B) The extent to which the facility benefits, directly or indirectly, from a Government contract;

(C) Whether any costs associated with operating the facility are charged to a Government contract;

(D) Whether working at the facility is a prerequisite for advancement in job responsibility or pay, and the extent to which employees at facilities connected to a Government contract are recruited for positions at the facility;

(E) Whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility, and the extent to which employees at the facility are interchangeable with employees at facilities connected to a Government contract; and

(F) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

(iii) The Deputy Assistant Secretary's findings as to whether granting a waiver will interfere with or impede the effectuation of the act shall include consideration of the following factors:

(A) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under the act;

(B) The contractor's compliance with the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

(C) The impact of granting the waiver on OFCCP enforcement efforts; and

(D) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the granting of the waiver would interfere with or impede the effectuation of the act.

(iv) A contractor granted a waiver under paragraph (b)(3) of this section shall:

(A) Promptly inform the Deputy Assistant Secretary of any changed circumstances not reflected in the contractor's waiver request; and

(B) Permit the Deputy Assistant Secretary access during normal business hours to the contractor's places of business for the purpose of investigating

whether the facility granted a waiver meets the standards and requirements of paragraph (b)(3) of this section, and for inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation.

(v)(A) A waiver granted under paragraph (b)(3) of this section shall terminate on one of the following dates, whichever is earliest:

(1) Two years after the date the waiver was granted.

(2) When the facility performs any work that directly supports or contributes to the satisfaction of the work performed on a Government contract.

(3) When the Deputy Assistant Secretary determines, based on information provided by the contractor under this section or upon any other

relevant information, that the facility does not meet the requirements of paragraph (b)(3) of this section.

(B) When a waiver terminates in accordance with paragraph (b)(3)(v)(A) of this section the contractor shall ensure that the facility complies with this part on the date of termination, except that compliance with §§ 60-741.40 through 60-741.45, if applicable, must be attained within 120 days of such termination.

(vi) False or fraudulent statements or representations made by a contractor under paragraph (b)(3) of this section are prohibited and may subject the contractor to sanctions and penalties under this part and criminal prosecution under 18 U.S.C. 1001.

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