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41 CFR Ch. 60 (7-1-23 Edition)

regulation, or contract; neither do the regulations limit the exercise by the Secretary or Government agencies of powers not herein specifically set forth, but granted to them by the order.

[79 FR 72993, Dec. 9, 2014]

§ 60-1.2 Administrative responsibility.

The Director has been delegated authority and assigned responsibility for carrying out the responsibilities assigned to the Secretary under the Executive order. All correspondence regarding the order should be directed to the Director, Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210.

[43 FR 49240, Oct. 20, 1978, as amended at 62 FR 66971, Dec. 22, 1997]

§ 60-1.3 Definitions.

Administering agency means any department, agency and establishment in the executive branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

Administrative law judge means an administrative law judge appointed as provided in 5 U.S.C. 3105 and subpart B of part 930 of Title 5 of the Code of Federal Regulations (see 37 FR 16787) and qualified to preside at hearings under 5 U.S.C. 557.

Agency means any contracting or any administering agency of the Government.

Applicant means an applicant for Federal assistance involving a construction contract, or other participant in a program involving a construction contract as determined by regulation of an administering agency. The term also includes such persons after they become recipients of such Federal assistance.

Compensation means any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits,

stock options and awards, profit sharing, and retirement.

Compensation information means the amount and type of compensation provided to employees or offered to applicants, including, but not limited to, the desire of the contractor to attract and retain a particular employee for the value the employee is perceived to add to the contractor's profit or productivity; the availability of employees with like skills in the marketplace; market research about the worth of similar jobs in the relevant marketplace; job analysis, descriptions, and evaluations; salary and pay structures; salary surveys; labor union agreements; and contractor decisions, statements and policies related to setting or altering employee compensation.

Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor or subcontractor's compliance with one or more of the requirements of Executive Order 11246.

Construction work means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

Contract means any Government contract or subcontract or any federally assisted construction contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, which enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Director means the Director, Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor, or his or her designee.

Equal opportunity clause means the contract provisions set forth in § 60-1.4 (a) or (b), as appropriate.

Essential job functions—(1) *In general.* The term *essential job functions* means

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the fundamental job duties of the employment position an individual holds.

(2) A job function may be considered essential if:

(i) The access to compensation information is necessary in order to perform that function or another routinely assigned business task; or

(ii) The function or duties of the position include protecting and maintaining the privacy of employee personnel records, including compensation information.

(3) The application or interpretation of the “essential job functions” definition in this part is limited to the discrimination claims governed by Executive Order 13665 and its implementing regulations.

Federally assisted construction contract means any agreement or modification thereof between any applicant and a person for construction work which is paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Government for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

Government means the government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term “personal property,” as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term “nonpersonal services” as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term *Government contract* does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federally assisted construction contracts.

Internet Applicant. (1) Internet Applicant means any individual as to whom the following four criteria are satisfied:

(i) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

(ii) The contractor considers the individual for employment in a particular position;

(iii) The individual’s expression of interest indicates the individual possesses the basic qualifications for the position; and,

(iv) The individual at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

(2) For purposes of paragraph (1)(i) of this definition, “submits an expression of interest in employment through the Internet or related electronic data technologies,” includes all expressions of interest, regardless of the means or manner in which the expression of interest is made, if the contractor considers expressions of interest made through the Internet or related electronic data technologies in the recruiting or selection processes for that particular position.

(i) Example A: Contractor A posts on its web site an opening for a Mechanical Engineer position and encourages potential applicants to complete an online profile if they are interested in being considered for that position. The web site also advises potential applicants that they can send a hard copy resume to the HR Manager with a cover letter identifying the position for which they would like to be considered. Because Contractor A considers both Internet and traditional expressions of interest for the Mechanical Engineer position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to

Contractor A meet this part of the definition of Internet Applicant for this position.

(ii) Example B: Contractor B posts on its web site an opening for the Accountant II position and encourages potential applicants to complete an on-line profile if they are interested in being considered for that position. Contractor B also receives a large number of unsolicited paper resumes in the mail each year. Contractor B scans these paper resumes into an internal resume database that also includes all the on-line profiles that individuals completed for various jobs (including possibly for the Accountant II position) throughout the year. To find potential applicants for the Accountant II position, Contractor B searches the internal resume database for individuals who have the basic qualifications for the Accountant II position. Because Contractor B considers both Internet and traditional expressions of interest for the Accountant II position, both the individuals who completed a personal profile and those who sent a paper resume and cover letter to the employer meet this part of the definition of Internet Applicant for this position.

(iii) Example C: Contractor C advertises for Mechanics in a local newspaper and instructs interested candidates to mail their resumes to the employer's address. Walk-in applications also are permitted. Contractor C considers only paper resumes and application forms for the Mechanic position, therefore no individual meets this part of the definition of an Internet Applicant for this position.

(3) For purposes of paragraph (1)(ii) of this definition, "considers the individual for employment in a particular position," means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. A contractor may establish a protocol under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes. Likewise, a contractor may establish a protocol under which it refrains from considering expressions of

interest, such as unsolicited resumes, that are not submitted with respect to a particular position. If there are a large number of expressions of interest, the contractor does not "consider the individual for employment in a particular position" by using data management techniques that do not depend on assessment of qualifications, such as random sampling or absolute numerical limits, to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest.

(4) For purposes of paragraph (1)(iii) of this definition, "basic qualifications" means qualifications—

(i)(A) That the contractor advertises (e.g., posts on its web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or

(B) For which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (e.g., through an external resume database), and

(ii) That meet all of the following three conditions:

(A) The qualifications must be non-comparative features of a job seeker. For example, a qualification of three years' experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years' experience among a pool of job seekers is a comparative qualification.

(B) The qualifications must be objective; they do not depend on the contractor's subjective judgment. For example, "a Bachelor's degree in Accounting" is objective, while "a technical degree from a good school" is not. A basic qualification is objective if a third-party, with the contractor's technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor's judgment.

(C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

(5) For purposes of paragraph (1)(iv) of this definition, a contractor may conclude that an individual has removed himself or herself from further consideration, or has otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual, based on the individual's express statement that he or she is no longer interested in the position, or on the individual's passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about interest in the position. A contractor also may determine that an individual has removed himself or herself from further consideration or otherwise indicated that he or she is no longer interested in the position for which the contractor has considered the individual based on information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers. If a large number of individuals meet the basic qualifications for the position, a contractor may also use data management techniques, such as random sampling or absolute numerical limits, to limit the number of individuals who must be contacted to determine their interest in the position, provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.

Minority group as used herein shall include, where appropriate, female employees and prospective female employees.

Modification means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

Order, Executive order, or Executive Order 11246 means parts II, III, and IV of the Executive Order 11246 dated September 24, 1965 (30 FR 12319), any Executive order amending such order, and any other Executive order superseding such order.

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract and, for the purposes of subpart B of this part, any person who has held a contract subject to the order.

Qualitative evidence includes but is not limited to testimony, interview statements, and documents about biased statements, remarks, attitudes, or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation; testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic; testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations. Qualitative evidence may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions. The Office of Federal Contract Compliance Programs (OFCCP) may also consider qualitative evidence in the form of a contractor's efforts to advance equal employment opportunity beyond mere compliance with legal obligations in determining whether intentional discrimination has occurred.

Quantitative evidence includes hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor (including, as appropriate, preferred qualifications, other demographic variables, test

scores, geographic variables, performance evaluations, years of experience, quality of experience, years of service, quality and reputation of previous employers, years of education, years of training, quality and reputation of credentialing institutions, *etc.*), related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant by reference to any one of these statements:

(1) The disparity is two or more times larger than its standard error (*i.e.*, a standard deviation of two or more);

(2) The Z statistic has a value greater than two; or

(3) The probability value is less than 0.05. It also includes numerical analysis of similarly situated individuals, small groups, or other characteristics, demographics or outcomes where hypothesis-testing techniques are not used.

Recruiting and training agency means any person who refers workers to any contractor or subcontractor or who provides for employment by any contractor or subcontractor.

Rules, regulations, and relevant orders of the Secretary of Labor used in paragraph (4) of the equal opportunity clause means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the order.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Site of construction means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

Subcontract. (1) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed; and

(2) Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(i) An agreement means a relationship between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE.

(ii) A health care provider is a physician, hospital, or other individual or entity that furnishes health care services or supplies.

(iii) A health organization is a voluntary association, corporation, partnership, managed care support contractor, or other nongovernmental organization that is lawfully engaged in providing, paying for, insuring, or reimbursing the cost of health care services or supplies under group insurance policies or contracts, medical or hospital service agreements, membership or subscription contracts, network agreements, health benefits plans duly sponsored or underwritten by an employee organization or association of organizations and health maintenance organizations, or other similar arrangements, in consideration of premiums or other periodic charges or payments payable to the health organization.

Subcontractor means any person holding a subcontract and, for the purposes of subpart B of this part, any person who has held a subcontract subject to the order. The term "first-tier subcontractor" refers to a subcontractor holding a subcontract with a prime contractor.

United States as used herein shall include the several States, the District of

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Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

[43 FR 49240, Oct. 20, 1978, as amended at 61 FR 19988, May 3, 1996; 62 FR 44188, Aug. 19, 1997; 62 FR 66971, Dec. 22, 1997; 70 FR 58961, Oct. 7, 2005; 80 FR 54974, Sept. 11, 2015; 85 FR 39846, July 2, 2020; 85 FR 71570, Nov. 10, 2020; 85 FR 79371, Dec. 9, 2020; 88 FR 12861, Mar. 1, 2023]

§ 60-1.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its Government contracts (and modifications thereof if not included in the original contract):

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

(3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the

compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.

(4) The contractor will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under section 202 of Executive Order 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(5) The contractor will comply with all provisions of Executive Order 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(6) The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(7) In the event of the contractor's non-compliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(8) The contractor will include the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action