



May 28, 2004

Joseph DuBray, Jr.
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Ave., NW.
Room C-3325
Washington, DC 20210

RE: Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes; Proposed Rule (41 CFR Part 60-1)

Dear Mr. DuBray:

This letter responds to the invitation for written comments on the Office of Federal Contract Compliance Programs' (OFCCP) proposed revisions and additions to 41 CFR Part 60-1 as published in the Federal Register on March 29, 2004.

Background - Maly Consulting LLC

Maly Consulting (originally founded as Maly & Associates in 1986) is a management consulting firm located in San Rafael, California. We specialize in the analysis and reporting of human resource data, affirmative action compliance, and OFCCP audits. The majority of our clients are federal government contractors and range in scope from large, multi-national corporations to smaller organizations of 100+ employees nationwide. We assist clients in understanding and complying with the federal regulations for affirmative action, including Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and Section 503 of the Rehabilitation Act of 1973. Our firm has analyzed data for and developed thousands of Affirmative Action Programs (AAPs) over the 18 years that we have been in business. We have assisted many clients with compiling their data for OFCCP audits, EEO-1 reports, VETS-100 reports, and EO Surveys. We are keenly aware of the high costs and organizational burdens imposed on our clients by vague and conflicting regulations.

Focus of Our Comments

The OFCCP's notice of proposed rulemaking (NPRM) invited comments on the proposed changes to 41 CFR §60-1 and specifically on the issue of the utility of a dual applicant standard — one for traditional applicants and one for Internet applicants. Accordingly, our comments will address the usefulness, necessity, and burden of the proposed regulations.

In summary, the use of a traditional applicant standard and an Internet applicant standard is more problematic than useful and creates additional contractor burdens. Furthermore, the regulation changes do not answer critical questions regarding the current regulations and traditional applicant standard. In our comments we will first look at the applicant issue in general and then examine the specific regulations.

Applicant Issue

There are actually several issues within the broader applicant issue. We suggest that answering some questions and leaving others unanswered will create additional unnecessary burdens on contractors and the OFCCP. We would also suggest that the most effective way of achieving the OFCCP's equal employment opportunity objectives and allocating its limited resources is by creating clear and practical guidance. The following is a list of questions that should be answered regarding the applicant issue and some recommendations on what guidance the OFCCP might provide.

When does an individual become an applicant?

This is the fundamental question that needs to be answered and not just for Internet applicants. We will comment on the specific attempt to answer this question for Internet applicants later but the proposed regulations make no attempt to answer this question for traditional applicants. Why should Internet applicant standards be well-defined while the standards for traditional applicants are not?

The problem for contractors is that creating an additional definition creates additional questions. Specifically, the dual standard raises questions about how the two standards differ and how individuals should be categorized. Do traditional applicants not need to meet the advertised, basic qualifications or be considered for a particular open position? How should individuals who express interest in both electronic and hard copy formats be classified and what are "related electronic data technologies"?

We recommend that the interagency task force responsible for addressing the Uniform Guidelines on Employee Selection Procedures (UGESP) come to an agreement regarding a single definition for applicants. The OFCCP regulations should then reflect this single definition. However, even if the definition of an applicant is settled, the remaining questions must be answered in order for there to be an effective and consistent collection of applicant data.

Are contractors required to solicit gender and race/ethnicity data of applicants?

The OFCCP states in its NPRM that 41 CFR §60-1.12(c)(1)(ii) "requires contractors to obtain information, where possible, on the gender, race, and ethnicity of applicants." Does this mean that contractors must make a request for gender and race/ethnicity data verbally or through a form or can they exclusively use visual identification or are they really required to obtain this data at all? We recommend that the OFCCP conclude that contractors have no obligation to solicit gender and race/ethnicity data.

We suggest that contractors should not be in the business of identifying the gender and race/ethnicity of individuals not employed by those contractors. Contractors' human resources departments, unbeknownst to the majority of citizens, have become the collectors of gender and race/ethnicity data for the United States government. Based on anecdotal evidence of job seekers' reluctance to self-identify and even offense at being requested to provide gender and race/ethnicity information, we suspect that most applicants and the majority of the general public disagree with current OFCCP policy.

We recommend that the individual should have the right to decide whether or not their gender and race/ethnicity is recorded and that the public should be aware of this policy. At the least, contractors should be required to inform applicants that the gender and race/ethnicity data is being collected for periodic inspection and analysis (through the EO Survey, Scheduling Letter and onsite audits) by the Department of Labor.

If required, for which applicants must contractors solicit gender and race/ethnicity?

The timing of the request for gender and race/ethnicity can have a dramatic impact on the amount of data collected and the burden on contractors. Are contractors required to solicit gender and race/ethnicity data at the instant that an individual becomes an applicant? Does a request need to be sent to every applicant or can the contractor narrow the pool further before sending the request? That is, if the contractor narrows its pool of applicants by using a three year experience threshold that was not advertised, can it use Census data to analyze the applicants not subsequently considered or must the contractor send a request to self-identify to every applicant? (It is arguable that individuals that fall below an objective qualification threshold are not actually *considered* at all and should not be counted as applicants.)

What if a contractor uses a procedural limit to deal with what can be an overwhelming number of expressions of interest through electronic media? For instance, if the contractor decides only to accept the first 30 of 10,000 resumes submitted by what otherwise would be applicants, have the remaining 9,970 truly been *considered* and would they need to be solicited for gender and race/ethnicity information? Would it be possible to use a random sample of the 10,000 individuals who expressed interest?

We recommend that, if soliciting applicants is required, the OFCCP allow contractors the option of soliciting applicants for gender and race/ethnicity information at any time including waiting until the interview. A disparate impact analysis could still be performed using the applicant and hiring totals and the availability percentages calculated under 41 CFR §60-2.14.

If an applicant does not voluntarily submit gender and race/ethnicity data, what are the contractors obligations?

On April 21, 2004, the OFCCP issued a Policy Directive regarding contractor data tracking responsibilities. This Directive provides insight into what methods the

OFCCP expects contractors to use to obtain gender and race/ethnicity by making clear that guessing or assuming gender or race/ethnicity is not appropriate. However, it does not make clear whether contractors are required to perform a visual identification. We would argue that a visual identification is always a form of guessing and that contractors should not be required to use this identification method. Furthermore, if an applicant indicates that they do not wish to be identified by gender or race/ethnicity by declining self-identify, it seems inappropriate for the contractor to ignore this request by visually identifying that person.

An issue that should be considered in answering all of the above questions is the burden on contractors. Smaller organizations would be especially burdened by the requirement to collect gender and race/ethnicity of applicants and may simply not have the resources and systems of large organizations.

In our consulting practice, we see a wide range of applicant self-identification and tracking systems. Large organizations typically have more sophisticated and comprehensive software solutions and the personnel to implement and maintain these systems. Even though a company may have multiple means of generating applicant pools (via the Internet, employment agencies, facsimile transmission, U.S. mail, etc.), the larger organizations are more likely to have the resources to purchase automated, electronic systems for applicant data collection. While the initial outlay for this type of system may be steep, the longer range labor and maintenance costs are less than for the manual or internally developed systems used by many smaller organizations. Additionally, smaller organizations often have multiple systems that require constant and burdensome data migration and synchronization.

Has the OFCCP examined the cost of sending a request to every applicant? What if the employer does not have the system or expertise necessary to send electronic requests? Have the costs of creating and sending hard copy forms or post cards been considered? We suggest that the cost of soliciting gender and race/ethnicity and receiving and recording the responses would be unfeasible for many employers.

Proposed Regulations

In this section, we will specifically address the Code of Federal Regulations' sections the OFCCP proposes to change.

§ 60-1.3 Definitions

Although we applaud the clarity and use of examples in the Internet Applicant definition, we suggest that the definition itself might be inappropriate. Again, we would suggest that a single definition of an applicant would be more useful. Also, the term "related electronic data technologies" should either be explained or removed. We recommend that if a single definition is not used that the term be changed to Electronic Applicant to include all potential forms of interest not in hard copy.

The OFCCP should also make clear what is meant by "considered." Some of the questions that may arise regarding this term were covered under our earlier discussion of which applicants the request for gender and race/ethnicity must be made. Elaboration and examples like those used in defining the qualification standard would help to avoid these questions.

§ 60-1.12 Record Retention

The examples given of on-line resumes or resume databases should be removed from the list of required records. The implication is that all resumes at a job bank accessed by a contractor would need to be downloaded and retained. The OFCCP should be careful to maintain the distinction between records accessed and those required to be retained under 41 CFR §60-1.12 because they were "made or kept by the contractor." We would suggest removing the examples or at least changing them to "resumes sent via email or through a job bank."

Summary and Conclusion

The collection of applicant data by contractors is an extremely burdensome requirement and the OFCCP should do everything it can to ensure that this burden is no more than necessary. Dual applicant definitions seem to serve no discernable purpose and create additional burdens on contractors. Beyond the issue of dual standards, the OFCCP should make sure to address the entire applicant issue and surrounding questions so that contractors will have clear and practical guidance.

Sincerely,



Edward Corro
Consultant

ETC/AMM/SA/GS