



May 21, 2004

Hazel M. Bell
U.S. Department of Labor
200 Constitution Ave., NW.
Room S-3201
Washington, DC 20210

RE: OFCCP Recordkeeping and Reporting Requirements, Supply and Service—Scheduling Letter

Dear Ms. Bell:

This letter responds to the invitation for written comments on the request for a three-year extension to the approval of the Office of Federal Contract Compliance Programs' (OFCCP) Supply and Service Scheduling Letter (Scheduling Letter).

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 unnecessary requests for data.

Focus of Our Comments

The Employment Standards Administration's (ESA) notice identified four specific areas in which it is interested in receiving comments. Our letter will number and address each of these four areas below. In summary, we believe the ESA should rewrite the Scheduling Letter to reflect actual OFCCP information needs and to make clear the information that is being requested.

1. Is the Scheduling Letter useful and necessary to the performance of ESA functions?

As stated in the Federal Register, the Scheduling Letter has two functions: 1) to provide the contractor with notice of its selection for a compliance evaluation, and 2) to request submission of the contractor's Affirmative Action Programs (AAP) and supporting documentation.

- 1) Regarding the notice function, the Scheduling Letter is a useful tool for alerting contractors of a compliance evaluation. However, we have two recommendations for improving its utility.

First, revise the Scheduling Letter to be more precise in describing when the requested materials must be submitted. Currently the Scheduling Letter requests that data be submitted "no later than 30 days of your receipt of this letter." Even assuming that the OFCCP's estimate of 28.35 hours per response is sufficient, contractors may still need the full 30 days and should not have to guess when that might be. Most contractors will not be able to devote 28 consecutive hours and may need input from several different departments and systems. The Scheduling Letter should, therefore, clearly state that the 30 days are calendar days and not business days and that they do not include federal government holidays.

Also, the Scheduling Letter should indicate that the date of receipt is the date on which the Certified Mail Return Receipt is signed. Because the Scheduling Letter may be delayed (in mail rooms or unopened in an executive's inbox), the individual within the organization responsible for affirmative action compliance may not physically receive the letter for several days to over a week. It is important that contractors recognize what constitutes "receipt" so that they are aware of the actual time constraints. The OFCCP may want to incorporate much of its answer to the related question published in the Frequently Asked Questions section of its website. We commend the OFCCP on its efforts to provide compliance assistance but we recommend having answers provided in the document that raises the question. It will save both the contractor and OFCCP time if the question is answered before it is asked.

Second, and related to the matter of when the individual receives the letter, the OFCCP should devise a better system for delivering the Scheduling Letter to the appropriate individual within the organization. This recommendation may be outside the scope of this comment request but a system that identified the appropriate individual for delivery might help to reduce the burden on contractors and allow them more time to submit the requested materials. The OFCCP might consider sending an email (acquired from the EEO-1 Report) or making a phone call at the same time that the Scheduling Letter is sent.

- 2) Regarding the second function (requesting contractor's AAP materials), we question the necessity of much of the data requested in the Scheduling Letter. Admittedly, the submission of AAPs prepared according to 41 CFR Parts 60-2, 60-250, and 60-741 are vital to assessing a contractor's compliance. We will address the remaining data requests as they are presented in the Scheduling Letter's Itemized Listing.

Items 1-6 (Executive Order AAP): Items one through six of the Scheduling Letter's Itemized Listing simply include required elements of the 41 CFR 60-2 AAP document. We would, therefore, agree that items one through six are necessary for performing the OFCCP's function.

Item 7: A copy of your Employer Information Report EEO-1 (Standard Form 100 Rev., see 41 CFR 60-1.7) for the last three years.

Item seven is an unnecessary request for data. The Employer Information Report EEO-1 (EEO-1 Report) is submitted every year by contractors to the Joint Reporting Committee of which the OFCCP is a member. Why is the OFCCP requesting reports that it already has? This request seems especially unnecessary in light of the online reporting system that the Joint Reporting Committee has used in the last two years.

Item 8: A copy of your collective bargaining agreement(s), if applicable. Please also include any other information you have already prepared that would assist us in understanding your employee mobility (promotion, etc.) system(s).

We agree that the submission of collective bargaining agreement(s) is useful in understanding the contractor's pay and employment activity. As to the "other information" request, it might be helpful to both the OFCCP and the contractor if the Scheduling Letter provided a list of examples of such documents. The examples should represent information that the OFCCP has found helpful in the past.

Item 9: Information on your affirmative action goals for the preceding AAP year and, where applicable, progress on your goals for the current AAP year. See 41 CFR 60-1.12 (b), -2.1 (c) and -2.16.

Assessing equal employment opportunity through the use of placement goals is an integral part of any Executive Order AAP and is certainly necessary for the desk audit analysis. However, we would suggest that the requirement that some contractors report an additional six to eleven months of data creates an unnecessary additional burden. Preparing the additional six to eleven months of information almost always requires the added burden of compiling and analyzing additional data.

We would suggest that this additional data request be eliminated since AAPs are developed on a yearly basis and any assessment before the end of that period will not reflect the full implementation of the program. At the least, contractors with this additional burden should be given more than the standard 30 days.

There is also some question as to the expanded use of the data collected by the OFCCP in response to this item. Specifically, it has been our experience that OFCCP compliance officers have used the job group representation as a pool from which to evaluate for disparities in promotions and terminations. The data collected in response to this item is not appropriate for use as pool data.

A snapshot of employees taken at the beginning of an AAP year may bear no resemblance to the pool of employees actually considered for promotion or a reduction in force or even employed at the time the employment decision was made. Mergers, acquisitions, prior employment activity, and corrections to job group formations are examples of valid reasons that the pool of employees would change between the time the snapshot was taken and the time the selection decision occurred.

The Scheduling Letter should either request information on the employees actually considered for each employment decision or make clear that the data will be used as pool data. If contractors understand how the OFCCP is using the data submitted they can prepare and submit additional information to assist the OFCCP in better understanding employee selections and processes.

Furthermore, item 9 appears to request information on only those job groups with placement goals. If the job group information is used for evaluating disparities in employment activity, the Scheduling Letter should make clear that the information is requested for all job groups. Specifically, the language in item 9 (a) should indicate that the job group representation should be from both the job groups that required placement goals and those that did not.

Item 10: Data on your employment activity (applicants, hires, promotions, and terminations) for the preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, for the current AAP. These data must be presented either by job group (as defined in your AAP) or by job title (see 41 CFR 60-3.4 and 3.15).

We reiterate our argument that the collection of the additional six to eleven months of data is an unnecessary additional burden. AAPs are required to be updated on an annual basis (41 CFR 60-2.1 (c)) and a request for data before the completion of the program creates an additional burden on contractors.

Our earlier comments regarding the appropriate pool used in assessing disparate impact in promotions and terminations also applies here. The job group representation at the start of the AAP year is not an appropriate pool of persons

considered. Item 10 should either be altered to request more accurate data or to describe the use of job group information in order to help contractors understand what assistance the OFCCP may need.

Another question that should be answered in the Scheduling Letter concerns which employees are reported under item 10. That is, should employees from establishments of less than 50 employees or who otherwise fall under inclusion exceptions defined in 41 CFR 60-2.1 (d) be included? Should full time, part time, and temporary employees be included together? Obviously, the answers to these questions can have dramatic effects on the data submitted.

Item 11: Please provide annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender.

As stated in the March 24, 2004 Federal Register, the information received in response to item 11 is used "purely to determine whether OFCCP should investigate a contractor's compensation practices further." However, the OFCCP admits (in the same Federal Register announcement) that compliance officers asked for additional compensation data in over 50% of desk audits. We are curious as to how many of the remaining desk audits did not require additional compensation data because the contractor gave the OFCCP more information than the Scheduling Letter requests. That is, how many contractors submitted compensation data by employee rather than as requested by salary range, rate, grade, or level. In our experience, when compensation data is submitted to the OFCCP in the manner prescribed by the Scheduling Letter the rate of requests for additional data is close to 100%.

Whether the OFCCP asks for additional compensation data in 50% of the cases or 100% of the cases, the implication is that the data requested in the Scheduling Letter is insufficient to perform the desk audit analysis. One problem is that the data necessary for an even basic analysis is highly confidential. A thorough examination and discussion of the implications of the release of confidential data offsite should take place before the Scheduling Letter is approved for extended use.

Also, as is true with all of the information collected in response to the Scheduling Letter, the analysis of incomplete or inadequate data may conceal actual systemic discrimination and indicate systemic discrimination when none exists. We wonder how effective the desk audit compensation analysis is at determining which contractor's compensation requires the use of the extremely burdensome collection of data for multiple regression analyses.

2. Does the information collection requirement pose an unreasonable burden?

In our previous comments we have discussed specific items that create unreasonable burdens but the Scheduling Letter also creates an additional unnecessary burden when considered in relationship to the Equal Opportunity Survey (EO Survey). It appears from the regulations at 41 CFR 60-2.18 that the Scheduling Letter and EO Survey fill similar functions. The language of 41 CFR 60-2.18 specifically states that the purpose of the EO Survey is to provide "compliance data early in the compliance evaluation process." There appears to be no reason for the requirement for compiling information in a contradictory and redundant manner by requiring both data requests.

Contradictory Reporting Requirements: The EO Survey currently approved for use until April 2005 uses different data definitions than those used on the Scheduling Letter. For instance, the EO Survey requests compensation data (and all other data) on full time employees only while the Scheduling Letter requests data on all employees included in the organizational profile that, according to the OFCCP in the Federal Register of November 13, 2000, encompasses full time, part time, and temporary employees.

Redundant Reporting Requirements: Why are contractors expected to report employment activity data in the Scheduling Letter and the EO Survey? We would argue that both forms request data used for initial evaluations and that information collected by either method is equally insufficient and inaccurate. Can the agency really say that one method is significantly more effective than the other in determining when to investigate further?

The use of data collection forms and letters should be considered together and not without consideration of other OFCCP requests. We think it plain and incontrovertible that the consolidation of information collected from the EEO-1 Report, EO Survey, VETS-100, and Scheduling Letter would reduce contractor (and OFCCP) burden. At the very least, the data definitions should be synchronized between the surveys. That is, the definition of employee, applicant, compensation, promotion, and termination should be the same in every information collection document.

3. How can the Scheduling Letter be enhanced to improve the quality, utility, and clarity of the information to be collected?

Much of our previous comments have included suggestions on how the Scheduling Letter could be improved. One other important additional suggestion is that the Scheduling Letter should incorporate the format of the EO Survey. That is, create a form for contractors to complete that includes instructions and data definitions.

There is no reason that the contractor should have to speculate as to the intent of the Scheduling Letter.

The use of data entry tables or fields would create a more consistent format that would also make the OFCCP review of contractor information more efficient. Of course, some allowance for variation in company practices and size would have to be made and the OFCCP should continue to allow additional supporting documents to be submitted.

4. How can the burden of collection of information be minimized?

Another lesson that can be learned from the administration of the EO Survey (and the EEO-1 Report) is how the collection process can be automated. The data entry fields can be well defined and error-checking can be built into the system. By allowing contractors to report information online, the agency will be more likely to get the information they need and have more efficient and centralized access to that information. Even the AAP documents could be submitted electronically using various file formats (e.g., PDF, DOC, WPD).

The most effective methods of minimizing the burden would be to make the requirements clear and remove unnecessary and redundant reporting. Our suggestions for accomplishing these ends are spelled out above.

Summary and Conclusion

As the instrument for initiating a compliance evaluation, the Scheduling Letter's role in determining compliance should not be diminished. Nor should the burden on contractors be downplayed especially considering the increase in OFCCP audits over the last year. We hope that the ESA will take the time to address the issues discussed in this letter. A revision to the current Scheduling Letter would benefit both the OFCCP and contractors.

Sincerely,



Edward Corrao
Consultant

ETC/AMM/SA/GS