

AFFIRMATIVE ACTION

Contractors may use “functional” plans

Federal contractors who would prefer to utilize Affirmative Action Plans (AAPs) based on functional or business units rather than business location now have some guidance on how to proceed. Directive 254 was approved by the Deputy Assistant Secretary for Federal Contract Compliance, Charles James, Sr., on March 21, 2002. It contains the procedure contractors must use for requesting an agreement to use a “Functional” AAP (FAAP) and explains how the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) will process contractor FAAP requests.

The fact that currently as many as 35 contractors from diverse industries have requested permission to utilize a FAAP is an indication that the contracting community will be taking advantage of this opportunity, Jaime Ramón, former OFCCP Director in the George H. Bush administration, suggested.

Although contractors have sought permission to develop their AAPs along functional lines for some time now, there still is no great rush to do so, Patrick Nooren, Executive Vice President of Biddle Consulting Group, a Sacramento-based firm specializing in EEO litigation support, risk management, and Affirmative Action, observed. Many are taking a wait and see stance.

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This month, **PATRICK M. NOOREN, Ph.D.**, and **JAIME RAMÓN** discuss Directive 254 regarding the use of functional affirmative action plans. Nooren is Executive Vice President of Biddle Consulting Group, a Sacramento-based firm specializing in EEO litigation support, risk management, and Affirmative Action. Ramón, former Director of the Office of Federal Contract Compliance Programs and partner in the Labor and Employment Practice Group in the Dallas, TX office of Kirkpatrick & Lockhart.

The text of the Directive and the regulations at 41 CFR Part 60-2, appears at ¶4381 and ¶4320, respectively, of CCH EMPLOYMENT PRACTICES GUIDE and ¶15,806 and ¶17,006, respectively, of CCH OFCCP FEDERAL CONTRACT COMPLIANCE MANUAL.

Background

Nonconstruction (i.e., supply and service) contractors and subcontractors that have 50 or more employees and have entered into at least one government contract for \$50,000 or more in any 12-month period with a federal executive agency are required to develop an AAP for each of their establishments (41 CFR Section 60-1.40(a)). A FAAP refers to the development and preparation of an AAP based on functional or business units within a corporate structure without regard to where the employees are physically located, as distinguished from an AAP based solely on an establishment’s location. As explained by Jeffrey Norris, President of the Equal Employment Advisory Council, in an interview with CCH in October 2000, the purpose of a FAAP is to ensure that the statistical analyses in the Plans align with the way employment decisions are actually made in a company.

The permission to use FAAPS was part of the OFCCP’s recent overhaul of the regulations governing the preparation of AAPs. The final regulations were published in the Federal Register (65 FR 68021-68047) on November 13, 2000 and took effect on December 13, 2000. Under the regulations at 41 CFR Section 60-2, contractors may negotiate with the OFCCP, subject to the approval of the Deputy Assistant Secretary for Federal Contract Compliance (DAS), for permission to use FAAPs (41 CFR Section 60-2.1(d)(4)).

Procedure

FAAPs are authorized when the contractor and OFCCP have reached an agreement that has been approved by the DAS. The criteria OFCCP will use in evaluating a request for a FAAP is whether the contractor operates with distinct functional or business units [Paragraph 7 of the Directive]. A functional or business unit is defined as “a component of a company that operates somewhat autonomously.” As further explained in the Directive, it may have its own managing official; be listed separately on an organizational chart; and/or operate under separate cost centers. It may also have personnel transactional activities (e.g., applicant flow, hires, promotion, terminations, etc.) that are distinguishable from other parts of the company [Paragraph 5].

Requesting the FAAP. At least 120 days prior to the expiration of the current corporate headquarters AAP, a contractor may submit a written request for a FAAP briefly

explaining why it believes that use of a FAAP would be most appropriate for its corporate structure. A corporate contact with the authority and resources to ensure effective implementation of a FAAP must be designated. OFCCP will provide written acknowledgement to the designated corporate contact of the request within two weeks of its receipt. If OFCCP neither approves nor disapproves the request within 120 calendar days from the date of OFCCP's confirmed receipt of the request, the request is deemed approved and may be implemented.

Negotiating the FAAP. The OFCCP may schedule an initial meeting or a conference call between OFCCP and the contractor to discuss the request. A Coordination Support Team (CST), appointed by the DAS (consisting of representatives from OFCCP's Division of Program Operations, the Division of Policy, Planning and Program Development, and the regional office in which the contractor's corporate headquarters is located) and corporate representatives will participate in the initial meeting or conference call.

The contractor's representatives should be prepared to discuss the following:

- location of the facilities (or establishments) where the employees perform their duties;
- how the company is organized within each functional or business unit (the various divisions or departments within the corporate structure)
- the reporting hierarchy within each functional or business unit;
- the total number of employees in the contractor's workforce;
- the total number of employees in each functional or business unit and the identification of the managing official of each such unit;
- the total number of employees not covered by FAAPs that are covered in establishment-based AAPs;
- a description of the personnel processes (including recruitment, hiring and promotion) as they apply to each unit; and
- any other information the contractor believes would assist OFCCP in understanding the contractor's corporate structure, procedures and need for a FAAP.

Approving the FAAP. If the CST and contractor reach an agreement, a copy of the proposed FAAP will be sent to the DAS for review and approval. If the DAS rejects the proposed agreement, the CST will work with the contractor to address and resolve any concerns about the proposed agreement, after which the proposed agreement will be re-submitted to the DAS. Until the FAAP is approved, the contractor must continue to develop and maintain AAPs for each establishment.

Who are FAAPs for?

Currently, most of the curiosity about FAAPs is coming from the larger, more stratified organizations, Nooren observed. Larger organizations that operate along functional lines can probably benefit most from using a FAAP, he said, as long as they are aware of the downside.

Contractors with a large workforce with a predominant job group at multiple facilities—a contractor with a large sales force, for example—would benefit from having a FAAP, Ramón suggested. Another example would be a contractor with multiple manufacturing facilities, or a contractor with many facilities where employees are engaged in data processing.

Nooren has a client absolutely developed along functional lines. “They have large organizational units, at the peak of which is an Executive Vice President, yet right now they are developing establishment-based plans. That's unfortunate.

“Imagine a situation where you have an establishment-based plan covering several hundred employees, 50 of which are underneath one executive vice president, 50 under another, and so on. How do you implement that plan when there are four or five individuals who oversee the employees in the plan? The company president or CEO is the only one who is over everyone.

“I describe FAAPs to my clients as allowing for the buck to stop with someone other than the CEO. The FAAP will slice through individual establishments and be much easier to implement,” Nooren observed.

Who aren't FAAPs for?

Practically speaking, if a company does not operate on functional lines, Nooren advised, it probably should not develop a FAAP. Ramón pointed out that it probably would not be advantageous to a small contractor with only two or three facilities to consolidate them into one FAAP. “But if you have three or four facilities with 4,000 or 5,000 employees each, it probably would be to your benefit to use a FAAP. Contractors that are undergoing multiple compliance reviews across the country at the same time would also benefit from having a FAAP,” he said.

Analyze data. Nooren advises clients to look at their problem areas under an establishment-based AAP and compare them with the problem areas when they develop a FAAP. “Did you make things worse? Have you identified much more significant problem areas? If so, you might want to think twice about using a FAAP.

“We always tell our clients to analyze their data before submitting it to OFCCP so that they are aware of any problem areas before OFCCP obtains the data. That advice applies equally to the decision on what type of Plan to use,” he stressed.

Advantages and disadvantages

A FAAP is an affirmative action program that goes beyond a single establishment, Ramón pointed out, but it has exactly the same components as an establishment-based AAP. Ramón and Nooren agreed that one is not necessarily any easier than

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the other to prepare. “The more people who are covered by a plan, the more complicated it is, but that doesn’t necessarily make it any more difficult—or easier—to prepare. You must still do the job group analysis and utilization analysis and all other required components of an AAP,” Ramón observed.

Manageability and efficiency. From a manageability and efficiency perspective, Ramón believes a FAAP is a plus for the contractor. A contractor may have 50 establish-

ments, 45 of which are manufacturing establishments. It is a lot easier to manage those 45 through one affirmative action program than through 45 separate programs. Or, if those 45 are divided into, say, three or four geographic regions, those three or four regional FAAPs will be easier to manage than 45 single establishment plans.

Fewer reviews. “It is also much more efficient to consolidate numerous establishments into one plan. Instead of having numerous compliance reviews going on in different establishments, there will be fewer. Although there may still be reviews taking place in more than one establishment, they will be more coordinated because only one plan is being reviewed. OFCCP is much more efficient at coordinating communication now,” he said.

Nooren described another advantage to having a FAAP. “We have some clients that have broad-based job families. At one establishment there may be ‘Managers’ in charge of clerical staff and ‘Managers’ in charge of scientists and engineers. In many such establishments, the latter may be paid more than the former.

More realistic analysis. “With an establishment-based plan, OFCCP may analyze all Managers together since they

are in the same job title at the same location. If there are more men in the engineering managerial positions and more women in the clerical managerial positions, you have a problem. But if you have functional plans, the evaluation of those positions will be separate because they will probably be in different functional plans. The analyses will probably be more realistic throughout because they will be closer to how you conduct your business,” he suggested.

Greater exposure. One of the disadvantages to using FAAPs is something called “statistical power.” “When you develop fewer AAP’s, it inherently means there are more individuals per plan,” Nooren explained. “Any time you have more employees and more transactions being evaluated, it is much easier to identify problem areas. If an employer has 10 different establishments, each with 100 employees, under the establishment-based guidelines, it would have to develop 10 plans, each covering 100 employees. But, if the organization has only four lines of business—manufacturing, maintenance, administration, and research and development—it might only have to develop 4 FAAPS, each covering 250 employees.

“There are several significant downsides to having more individuals in a plan, such as increased exposure. If a single plan is audited, OFCCP will have greater access to the data for more people. The more transactions, the better the probability of finding trends. For example, with only two hires it’s difficult to identify a disparity in rates between men and women, but with 50 hires, the disparities become much easier to locate,” Nooren suggested.

Settlement demands. Increasing the number of employees in a plan means that contractors will also have to contend with an increase in the monetary size of settlement demands from the OFCCP when it identifies problem areas, Nooren observed. “As one might imagine, settling compensation issues based on just a few employees will result in much smaller settlement numbers than if organizations were to increase the number of employees per analysis.”

Contact information

Contractors may send a written request for a FAAP Agreement to: Charles E. James, Sr., Deputy Assistant Secretary, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Contact the FAAP Help Desk at 1-800-397-6251 for more information about FAAP agreements.

FAAP requests submitted prior to the issuance of the FAAP Directive will be considered received by OFCCP on March 21, 2002, the date on which the directive was signed. OFCCP will send a written acknowledgement to contractors confirming the receipt of their FAAP request,

and advising them that an OFCCP representative will contact them within 10 business days to begin the FAAP approval process.

Contractors who have previously submitted a FAAP request should contact OFCCP at 1-800-397-6251 if they have not been contacted either by letter or telephone within 30 calendar days from the date the FAAP Directive was issued.

The FAAP Directive is available on OFCCP’s web site at: <http://www.dol.gov/dol/esa/public/media/reports/ofccp/directive/02aapdir.htm>.

Approving FAAP requests

Criteria. The criteria OFCCP will use in evaluating a request for an FAAP will be whether the contractor operates with distinct functional or business units. Does the criteria contained in the definition in the Directive clearly indicate what a functional or business unit is?

The key will be how the guidelines are implemented, Nooren believes. “Theoretically, if the organization meets the listed criteria, it should not be difficult to negotiate the FAAP agreement with the CST. In my opinion, the CST’s job will primarily be to evaluate the viability of FAAPs and to determine if moving to FAAPs will hide potential problem areas. Although it hasn’t been explicitly stated, I can’t imagine OFCCP not being concerned about that possibility.”

Managing compliance. A major consideration for the OFCCP in deciding whether to grant a request for a FAAP will be how to manage compliance effectively, Ramón suggested. “For example, it may be easier for a contractor to hide behind the numbers when there are more employees covered by a plan. Let’s say there are 50 units in a FAAP. Two of those units may not have significant minorities or women in them. It will be easier to hide those in the mix of the other 48. So, the larger the number, the more difficult it will be to spot a problem in the individual component.” Ramón also expects a contractor’s history of compliance activities to be examined when determining whether to grant a request.

Nooren does not think that using a FAAP will make it any easier for a contractors to evade their responsibilities. “If an organization was trying to hide problems from the OFCCP, the organization wouldn’t elect to go through the FAAP agreement process. Besides, for most organizations FAAPS will increase the sample size in each plan, which, as we’ve discussed, means increased exposure and FAAPS may end up exposing more employee records to the OFCCP,” he cautioned.

Compliance reviews

The Directive states very clearly that while OFCCP will enter into an agreement allowing a contractor to use FAAPs, it will not negotiate how compliance reviews will be conducted. Currently compliance evaluations are by site, Nooren explained. “If functional plans slice through sites—in other words, an individual site may actually include components encompassed by several different functional plans—does an audit of that site mean OFCCP has access to all functional plans containing employees at the audited site? This is a huge issue because if so, it dramatically increases the organization’s exposure.”

According to Ramón, the OFCCP has not developed any guidance on this yet. Currently, every contractor establishment feeds into the same system—the Equal Employment Data System (EEDS), which is derived from the EEO-1 report, he explained. “The question for OFCCP will be how to target FAAPs. Will there be separate EEO-1 requirements for them?

Will they be consolidated for contractors with FAAPs? Will those contractors be fed into a separate data base?

“Because the FAAP includes the same information as a regular AAP—utilization and availability, comparing utilization to availability and goals, personnel activity reports—the OFCCP will generally get an idea of where the problem areas are and may decide to focus only on those issues for that FAAP,” he said. He expects it to be a much more focused type of review.

Benefits. “The benefit for the OFCCP is that it will be reviewing a lot more with fewer people.

The OFCCP has been downsized in recent years, both in terms of employees and in terms of budget. Being able to see a bigger slice of a corporation is a benefit to OFCCP,” Ramón suggested. “A FAAP should give the OFCCP a better picture of the corporation from which the agency will be better able to identify core issues. It will require more coordination not only from the contractor but also from the OFCCP, which will benefit both sides. The contractor, of course, benefits from not having to maintain affirmative action programs for every establishment it has and directing all compliance activities through one FAAP.”

Structural changes

What constitutes a “significant change in structure” that will trigger the obligation to notify OFCCP? Until some organizations have gone through the process and are evaluated based on their changes, Nooren said, we won’t know where the lines will be drawn. “Obviously large mergers, acquisitions, large reductions in force that result in the elimination of an entire line of business will no doubt meet the criteria. But we don’t know about smaller mergers that add an insignificant number of people to a business or maybe a reorganization that keeps the same number of employees but shifts them around somewhat,” he observed.

The answer probably varies from contractor to contractor, Ramón said. He suggested that a reorganization that only shifts employees around probably is not a significant change if it doesn’t change the job groups or classification of employees, whereas changing job titles may be.

Advice for employers

“Beware of being the first” is Nooren’s motto. “We usually do not recommend that our clients be the ones to test the waters. If you are, you must realize that you will be the trend-setter. While that’s great in some industries and at some times, when it comes to compliance, are you sure you want to be in that position?” ■