Subpart 22.8 - Equal Employment Opportunity

Parent topic: Part 22 - Application of Labor Laws to Government Acquisitions

22.800 Scope of subpart.

This subpart prescribes policies and procedures pertaining to nondiscrimination in employment by contractors and subcontractors.

22.801 Definitions.

As used in this subpart-

Affirmative action program means a contractor’s program that complies with Department of Labor regulations to ensure equal opportunity in employment to minorities and women.

Compliance evaluation means any one or combination of actions that the Office of Federal Contract Compliance Programs (OFCCP) may take to examine a Federal contractor’s compliance with one or more of the requirements of E.O.11246.

Contractor includes the terms "prime contractor" and "subcontractor."

Deputy Assistant Secretary means the Deputy Assistant Secretary for Federal Contract Compliance, U.S. Department of Labor, or a designee.

Equal Opportunity clause means the clause at 52.222-26, Equal Opportunity, as prescribed in 22.810(e).

E.O.11246 means Parts II and IV of Executive Order 11246, September 24, 1965 (30 FR 12319), and any Executive order amending or superseding this order (see 22.802). This term specifically includes the Equal Opportunity clause at 52.222-26, and the rules, regulations, and orders issued pursuant to E.O.11246 by the Secretary of Labor or a designee.

Gender identity has the meaning given by the Department of Labor’s Office of Federal Contract Compliance Programs, and is found at www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

Prime contractor means any person who holds, or has held, a Government contract subject to E.O.11246.

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

Sexual orientation has the meaning given by the Department of Labor’s Office of Federal Contract Compliance Programs, and is found at www.dol.gov/ofccp/LGBT/LGBT_FAQs.html.

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

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)-

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

(2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken, or assumed.

Subcontractor means any person who holds, or has held, a subcontract subject to E.O.11246. The term “first-tier subcontractor” means a subcontractor holding a subcontract with a prime contractor.

United States means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

22.802 General.

(a) Executive Order 11246, as amended, sets forth the Equal Opportunity clause and requires that all agencies-

(1) Include this clause in all nonexempt contracts and subcontracts (see 22.807); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor-

(i) To promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin; and

(ii) To prohibit contractors from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does 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.

(b) No contract or modification involving new acquisition shall be entered into, and no subcontract shall be approved by a contracting officer, with a person who has been found ineligible by the Deputy Assistant Secretary for reasons of noncompliance with the requirements of E.O.11246.

(c) No contracting officer or contractor shall contract for supplies or services in a manner so as to avoid applicability of the requirements of E.O.11246.

(d) Contractor disputes related to compliance with its obligation shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor (see 41 CFR60-1.1).
22.803 Responsibilities.

(a) The Secretary of Labor is responsible for the-

(1) Administration and enforcement of prescribed parts of E.O.11246; and

(2) Adoption of rules and regulations and the issuance of orders necessary to achieve the purposes of E.O.11246.

(b) The Secretary of Labor has delegated authority and assigned responsibility to the Deputy Assistant Secretary for carrying out the responsibilities assigned to the Secretary by E.O.11246, except for the issuance of rules and regulations of a general nature.

(c) The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting the OFCCP in fulfilling its responsibilities.

(d) In the event the applicability of E.O.11246 and implementing regulations is questioned, the contracting officer shall forward the matter to the Deputy Assistant Secretary, through agency channels, for resolution.

22.804 Affirmative action programs.

22.804-1 Nonconstruction.

Except as provided in 22.807, each nonconstruction prime contractor and each subcontractor with 50 or more employees and either a contract or subcontract of $50,000 or more, or Government bills of lading that in any 12-month period total, or can reasonably be expected to total, $50,000 or more, is required to develop a written affirmative action program for each of its establishments. Each contractor and subcontractor shall develop its written affirmative action programs within 120 days from the commencement of its first such Government contract, subcontract, or Government bill of lading.

22.804-2 Construction.

(a) Construction contractors that hold a nonexempt (see 22.807) Government construction contract are required to meet-

(1) The contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects; and

(2) Applicable requirements of 41 CFR60-1 and 60-4.

(b) Each agency shall maintain a listing of covered geographical areas that are subject to affirmative action requirements that specify goals for minorities and women in covered construction trades. Information concerning, and additions to, this listing will be provided to the principally affected contracting officers in accordance with agency procedures. Any contracting officer contemplating a
construction project in excess of $10,000 within a geographic area not known to be covered by specific affirmative action goals shall request instructions on the most current information from the OFCCP regional office, or as otherwise specified in agency regulations, before issuing the solicitation.

(c) Contracting officers shall give written notice to the OFCCP regional office within 10 working days of award of a construction contract subject to these affirmative action requirements. The notification shall include the name, address, and telephone number of the contractor; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. When requested by the OFCCP regional office, the contracting officer shall arrange a conference among contractor, contracting activity, and compliance personnel to discuss the contractor’s compliance responsibilities.

22.805 Procedures.

(a) Preaward clearances for contracts and subcontracts of $10 million or more (excluding construction).

(1) Except as provided in paragraphs (a)(4) and (a)(8) of this section, if the estimated amount of the contract or subcontract is $10 million or more, the contracting officer shall request clearance from the appropriate OFCCP regional office before-

(i) Award of any contract, including any indefinite delivery contract or letter contract; or

(ii) Modification of an existing contract for new effort that would constitute a contract award.

(2) Preaward clearance for each proposed contract and for each proposed first-tier subcontract of $10 million or more shall be requested by the contracting officer directly from the OFCCP regional office(s). Verbal requests shall be confirmed by letter or facsimile transmission.

(3) When the contract work is to be performed outside the United States with employees recruited within the United States, the contracting officer shall send the request for a preaward clearance to the OFCCP regional office serving the area where the proposed contractor’s corporate home or branch office is located in the United States, or the corporate location where personnel recruiting is handled, if different from the contractor’s corporate home or branch office. If the proposed contractor has no corporate office or location within the United States, the preaward clearance request action should be based on the location of the recruiting and training agency in the United States.

(4) The contracting officer does not need to request a preaward clearance if-

(i) The specific proposed contractor is listed in OFCCP’s National Preaward Registry via the Internet at https://www.dol.gov/agencies/ofccp/pre-award/registry;

(ii) The projected award date is within 24 months of the proposed contractor’s Notice of Compliance completion date in the Registry; and

(iii) The contracting officer documents the Registry review in the contract file.
(5) The *contracting officer shall* include the following information in the preaward clearance request:

(i) Name, address, and telephone number of the prospective *contractor* and of any corporate affiliate at which work is to be performed.

(ii) Name, address, and telephone number of each proposed first-tier *subcontractor* with a proposed *subcontract* estimated at $10 million or more.

(iii) Anticipated date of award.

(iv) Information as to whether the *contractor* and first-tier *subcontractors* have previously held any Government contracts or *subcontracts*.

(v) Place or places of performance of the prime contract and first-tier *subcontracts* estimated at $10 million or more, if known.

(vi) The estimated dollar amount of the contract and each first-tier *subcontract*, if known.

(6) The *contracting officer shall* allow as much time as feasible before award for the conduct of necessary *compliance evaluation* by OFCCP. As soon as the apparently successful *offeror* can be determined, the *contracting officer shall* process a preaward clearance request in accordance with agency procedures, assuring, if possible, that the preaward clearance request is submitted to the OFCCP regional office at least 30 days before the proposed award date.

(7) Within 15 days of the clearance request, OFCCP will inform the awarding agency of its intention to conduct a preaward *compliance evaluation*. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward *compliance evaluation*, clearance shall be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward *compliance evaluation*, OFCCP shall be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance shall be presumed and the awarding agency is authorized to proceed with the award.

(8) If the procedures specified in paragraphs (a)(6) and (a)(7) of this section would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the *offer* or extension thereof, the *contracting officer shall* immediately inform the OFCCP regional office of the expiration date of the *offer* or the required date of award and request clearance be provided before that date. If the OFCCP regional office advises that a preaward evaluation cannot be completed by the required date, the *contracting officer shall* submit written justification for the award to the *head of the contracting activity*, who, after informing the OFCCP regional office, *may* then approve the award without the preaward clearance. If an award is made under this authority, the *contracting officer shall* immediately request a postaward evaluation from the OFCCP regional office.

(9) If, under the provisions of paragraph (a)(8) of this section, a postaward evaluation determines the *contractor* to be in noncompliance with *E.O.11246*, the *Deputy Assistant Secretary may authorize* the use of the enforcement procedures at 22.809 against the noncomplying *contractor*.

(b) *Furnishing posters*. The *contracting officer shall* furnish to the *contractor* appropriate quantities of the poster entitled "Equal Employment Opportunity Is The Law." These shall be obtained in accordance with agency procedures.
22.806 Inquiries.

(a) An inquiry from a contractor regarding status of its compliance with E.O.11246, or rights of appeal to any of the actions in 22.809, shall be referred to the OFCCP regional office.

(b) Labor union inquiries regarding the revision of a collective bargaining agreement in order to comply with E.O.11246 shall be referred to the Deputy Assistant Secretary.

22.807 Exemptions.

(a) Under the following exemptions, all or part of the requirements of E.O.11246 may be excluded from a contract subject to E.O.11246:

(1) National security. The agency head may determine that a contract is essential to the national security and that the award of the contract without complying with one or more of the requirements of this subpart is necessary to the national security. Upon making such a determination, the agency shall notify the Deputy Assistant Secretary in writing within 30 days.

(2) Specific contracts. The Deputy Assistant Secretary may exempt an agency from requiring the inclusion of one or more of the requirements of E.O.11246 in any contract if the Deputy Assistant Secretary deems that special circumstances in the national interest so require. Groups or categories of contracts of the same type may also be exempted if the Deputy Assistant Secretary finds it impracticable to act upon each request individually or if group exemptions will contribute to convenience in the administration of E.O.11246.

(b) The following exemptions apply even though a contract or subcontract contains the Equal Opportunity clause:

(1) Transactions of $10,000 or less. The Equal Opportunity clause is required to be included in prime contracts and subcontracts by 22.802(a). Individual prime contracts or subcontracts of $10,000 or less are exempt from application of the Equal Opportunity clause, unless the aggregate value of all prime contracts or subcontracts awarded to a contractor in any 12-month period exceeds, or can reasonably be expected to exceed, $10,000. (Note: Government bills of lading, regardless of amount, are not exempt.)

(2) Work outside the United States. Contracts are exempt from the requirements of E.O.11246 for work performed outside the United States by employees who were not recruited within the United States.

(3) Contracts with State or local governments. The requirements of E.O.11246 in any contract with a State or local government (or any agency, instrumentality, or subdivision thereof) shall not be applicable to any agency, instrumentality, or subdivision of such government that does not participate in work on or under the contract.

(4) Work on or near Indian reservations. It shall not be a violation of E.O.11246 for a contractor to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. This applies to that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. Contractors extending such a preference shall not, however,
discriminate among Indians on the basis of religion, sex, sexual orientation, gender identity, or tribal affiliation, and the use of such preference shall not excuse a contractor from complying with E.O.11246, rules and regulations of the Secretary of Labor, and applicable clauses in the contract.

(5) Facilities not connected with contracts. The Deputy Assistant Secretary may exempt from the requirements of E.O.11246 any of a contractor’s facilities that the Deputy Assistant Secretary finds to be in all respects separate and distinct from activities of the contractor related to performing the contract, provided, that the Deputy Assistant Secretary also finds that the exemption will not interfere with, or impede the effectiveness of, E.O.11246.

(6) Indefinite-quantity contracts. With respect to indefinite-quantity contracts and subcontracts, the Equal Opportunity clause applies unless the contracting officer has reason to believe that the amount to be ordered in any year under the contract will not exceed $10,000. The applicability of the Equal Opportunity clause shall be determined by the contracting officer at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the Equal Opportunity clause shall be applied to the contract whenever the amount of a single order exceeds $10,000. Once the Equal Opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration regardless of the amounts ordered, or reasonably expected to be ordered, in any year.

(7) Contracts with religious entities. Pursuant to E.O. 13279, Section 202 of E.O. 11246, shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such contractors and subcontractors are not exempted or excused from complying with the other requirements contained in the order.

(c) To request an exemption under paragraph (a)(2) or (b)(5) of this section, the contracting officer shall submit, under agency procedures, a detailed justification for omitting all, or part of, the requirements of E.O.11246. Requests for exemptions under paragraph (a)(2) or (b)(5) of this section shall be submitted to the Deputy Assistant Secretary for approval.

(d) The Deputy Assistant Secretary may withdraw the exemption for a specific contract, or group of contracts, if the Deputy Assistant Secretary deems that such action is necessary and appropriate to achieve the purposes of E.O.11246. Such withdrawal shall not apply:

(1) To contracts awarded before the withdrawal; or

(2) To any sealed bid contract (including restricted sealed bidding), unless the withdrawal is made more than 10 days before the bid opening date.

22.808 Complaints.

Complaints received by the contracting officer alleging violation of the requirements of E.O.11246 shall be referred immediately to the OFCCP regional office. The complainant shall be advised in writing of the referral. The contractor that is the subject of a complaint shall not be advised in any manner or for any reason of the complainant’s name, the nature of the complaint, or the fact that the complaint was received.
22.809 Enforcement.

Upon written notification to the contracting officer, the Deputy Assistant Secretary may direct one or more of the following actions, as well as administrative sanctions and penalties, be taken against contractors found to be in violation of E.O. 11246, the regulations of the Secretary of Labor, or the applicable contract clauses:

(a) Publication of the names of the contractor or its unions.

(b) Cancellation, termination, or suspension of the contractor's contracts or portion thereof.

(c) Debarment from future Government contracts, or extensions or modifications of existing contracts, until the contractor has established and carried out personnel and employment policies in compliance with E.O.11246 and the regulations of the Secretary of Labor.

(d) Referral by the Deputy Assistant Secretary of any matter arising under E.O.11246 to the Department of Justice or to the Equal Employment Opportunity Commission (EEOC) for the institution of appropriate civil or criminal proceedings.

22.810 Solicitation provisions and contract clauses.

(a) When a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, the contracting officer shall insert-

(1) The clause at 52.222-21, Prohibition of Segregated Facilities, in the solicitation and contract; and

(2) The provision at 52.222-22, Previous Contracts and Compliance Reports, in the solicitation.

(b) The contracting officer shall insert the provision at 52.222-23, Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for Construction, in solicitations for construction when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected to be in excess of $10,000.

(c) The contracting officer shall insert the provision at 52.222-24, Preaward On-Site Equal Opportunity Compliance Evaluation, in solicitations other than those for construction when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity, and the amount of the contract is expected be $10 million or more.

(d) The contracting officer shall insert the provision at 52.222-25, Affirmative Action Compliance, in solicitations, other than those for construction, when a contract is contemplated that will include the clause at 52.222-26, Equal Opportunity.

(e) The contracting officer shall insert the clause at 52.222-26, Equal Opportunity, in solicitations and contracts (see 22.802) unless the contract is exempt from all of the requirements of E.O.11246 (see 22.807(a)). If the contract is exempt from one or more, but not all, of the requirements of E.O.11246, the contracting officer shall use the clause with its Alternate I.

(f) The contracting officer shall insert the clause at 52.222-27, Affirmative Action Compliance Requirements for Construction, in solicitations and contracts for construction that will include the clause at 52.222-26, Equal Opportunity, when the amount of the contract is expected to be in excess
of $10,000.

(g) The contracting officer shall insert the clause at 52.222-29, Notification of Visa Denial, in contracts that will include the clause at 52.222-26, Equal Opportunity, if the contractor is required to perform in or on behalf of a foreign country.