



Ten Thousand Shades of Gray - The Impact of Workforce Regulations on Federal Contractors

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Introduction

With nearly 20 years of construction business savvy under his belt, Projects Engineer Mark Freier had never heard of a federal agency auditing a highway contractor – until the day his company received a letter from the Chicago office of the U.S. Department of Labor.

Requesting what Freier calls a “litany of information” on his employer’s hiring practices, the correspondence appeared to be nothing more than a form letter. And, because Freier believed that only the state Department of Transportation administered equal opportunity (EEO) and affirmative action (AA) plans, he ignored the request.

Then came the certified letter. After a bit of research, Freier began to understand that his company – a 50-year-old road and bridge contractor new to federal stimulus-funded projects – was indeed responsible for reporting to the U.S. Department of Labor.

“You may be good with the DOT,” says Freier, “but the Feds trump.”

What followed was a time-intensive collection of data and documentation, as well as an in-person visit from a Chicago-based Office of Federal Contract Compliance Programs (OFCCP) auditor who spent a full day examining paperwork and employee files and a second full day on the job site interviewing employees.

A few weeks after the audit, Freier received a letter that included notification of seven violations and a conciliation agreement awaiting a signature. Freier was shocked, having always achieved compliance with workforce regulations throughout his years with the company. The problem, he says, was in the interpretation of the rules.

“The rules are written in ‘federal chapter speak,’” says Freier. “Contractors have to know how to read between the lines.”

In addition to rectifying the violations, the company is now required to submit two different reports annually, showing that the changes have been made and that the company is continuing to comply with the terms of its federal contracts.

Summing it up, Freier says, “It’s been an ordeal.”

In Hot Pursuit

So, who is the OFCCP and what exactly are they in charge of? Here's what they have to say about it:

The OFCCP administers and enforces three legal authorities that require equal employment opportunity:

- *Executive Order 11246, as amended*
- *Section 503 of the Rehabilitation Act of 1973, as amended*
- *Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.*

Taken together, these laws prohibit discrimination and require federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam-era or special disabled veteran.

Simply put, the agency works to ensure that the federal contractor community – companies (and their subs) that have been provided government contracts – is following EEO- and AA-mandated laws and regulations.

If the OFCCP keeps its promise, Freier won't be the only contractor to face down an expensive audit – not by a long shot. Announcing in 2010 that it would increase enforcement efforts, the OFCCP appears to be in hot pursuit of compliance among federal contractors and their subs.¹

The OFCCP's Full Scale, Aggressive Posture

An examination of the funding received by the OFCCP over the past several years hints at the increased value the federal government has placed on workforce compliance. Between 2003 and 2010, OFCCP appropriations increased 35 percent to more than \$105 million in 2010.² For fiscal year 2012, the agency has requested just above \$109 million.³

¹ ["All that money, all those woes."](#) *Des Moines Business Record*, March 4, 2011

² [FY 2011 Congressional Budget Justification](#), OFCCP

³ [FY 2012 Congressional Budget Justification](#), OFCCP

Some believe the stepped-up enforcement comes from pressure to prove the return on investment of federal stimulus dollars. Voters are becoming increasingly vocal with their curiosity about the results. Has stimulus money really put Americans back to work? And if so, how many? To accurately report these figures, the U.S. Department of Labor must really dig in, putting federal contractors and their subs in the hot seat.

The OFCCP, taking what it calls a "new enforcement posture," committed to "full scale, aggressive enforcement efforts" in its FY 2011 Congressional Budget Justification, stating that its future plans represent "a significant shift from the enforcement strategy utilized during the past several years."

The document went on to outline how the OFCCP would broaden its efforts to target what it believes to be individual and systemic discrimination suffered by two specific groups.

"We are renewing our commitment to strengthening affirmative action, combating discrimination against veterans and individuals with disabilities..." the FY 2011 Congressional Budget Justification reads.

Just released, the FY 2012 Congressional Budget Justification summarized the previous year by listing the OFCCP's accomplishments, namely that it "initiated more onsite investigations" and hired more than 200 compliance officers to conduct "more comprehensive compliance evaluations and increase enforcement efforts."

The document names pay equity as a top priority for fiscal year 2012, citing specifically the inequality of pay among men and women. Federal contractors should also note that the agency is taking aim at job classifications in the coming year. In particular, it has committed to expanding investigations into the potential misclassification of workers as independent contractors.

Black & White, Yet Gray All Over

Like many contractors in Mark Freier's position, 99 percent of their day is spent managing business operations, leaving minimal time to follow the ebbs and flows of workforce regulations. The ability to lean on compliance consultants can be the key to surviving what may be considered the inevitable OFCCP audit.

Beyond simply keeping up on the laws, experts like those at HudsonMann, an affirmative action planning and OFCCP audit support firm, have experience interpreting them.

"The regulations themselves are very clear, written in black and white," says Neil Dickinson, managing partner of HudsonMann. "Where the gray area comes in is during enforcement."

According to Dickinson, enforcement in one region of the country may be very different from that in another, simply because of special areas of focus. This can be particularly challenging for federal contractors who do business in different states. Just when they begin to understand how to satisfy a compliance officer in one region, they learn that a colleague on the other side of the country must meet an entirely different set of documentation requirements.

It's the job of folks like Dickinson to be on top of these inconsistencies, as well as the special areas of focus among the regions. "What may have been a focus two years ago may not be today," says Dickinson. For instance, Dickinson explains, compensation recently became a priority for the OFCCP, which created an entire division to look at salaries and wages and to run an analysis to look for internal discrimination. This opens federal contractors up to potential monetary liability in the form of back pay penalties.

What's more, Dickinson's team has observed efforts to ensure that non-protected employee classes, namely male and non-minority workers, are not also being discriminated against. While this does, of course, create a more fair system, it could potentially double the amount of compliance documentation an enforcement officer may request.

Beyond working directly with consultants like those found at HudsonMann, federal contractors can keep up on these unique characteristics and focus points by becoming involved in local industry liaison groups (ILGs). These groups work to educate federal contractors on EEO and AA developments, as well as any relevant regulatory changes.

Costs Go Beyond Hours

Of course an audit is time-consuming and potentially expensive if fines, back pay – or worse yet, disbarment from the federal jobs bid process – are mandated. But a company must also consider reputation management consequences.

In the summer of 2010, the U.S. Department of Labor launched a public-facing website allowing anyone to see which companies have landed on the OFCCP's radar.⁴

If a business is sent a compliance notice, a financial agreement or a conciliation agreement, it is named on the site, raising questions about the contractor's ability to follow federal contract guidelines. Not exactly the kind of background information a contractor will want new clients digging up on the Internet.

⁴ ["New DOL Website Shows OFCCP Enforcement Statistics."](#) *Affirmative Action News*, May 4, 2010

The Key Word is 'Action'

"Affirmative action" has become such a buzz term that many people have lost sight of its original purpose, which was to ensure that companies make a proactive effort (i.e. take affirmative action) to include minority populations in all employment opportunities. And that is precisely what today's federal (and state) compliance officers want to see – a proactive and good faith effort to attract and retain a diverse workforce. What this does is prevent a company executive from shrugging off his responsibilities by saying simply, "I couldn't hire a woman for the position because no female applicants came forward."

Compliance Officer Jim Kelly of the Iowa Department of Transportation explains. "Often a contractor will explain a lack of recruitment effort by saying they don't have a problem finding laborers. The problem with this may be that only males are applying. That's when I have to remind them that they are required to *create* a flow of diverse applicants. And, you have to show this through a fully documented good-faith recruitment effort."

A company's compliance effort only counts if it is defensible. In other words, a contractor can be following the rules to a tee, but if he can't prove it, the company is at risk.

Take for instance, a federal contractor that received several applications from veteran jobseekers for one open position. Because none of the applicants was qualified, the company filled the spot with a qualified, non-veteran jobseeker.

In this particular case, the OFCCP would not require the federal contractor to add an unqualified worker to its crew. What its compliance officers would require, however, is evidence to support that the decision to bypass the veteran applicants was based on a lack of qualifications, not on discrimination.

Programs like BirdDog's Candidate Acquisition and Management System (CAMS) are built for logging and archiving this evidence for busy contractors. The system allows hiring managers to document precisely why a candidate was not a good fit for an open position. It then archives this proof so that it can be called up during an audit literally with the click of a button.

"We learned that if a candidate is not qualified, you don't have to hire them," said Freier. "But you'd better be able to explain why and have that explanation well-documented. That's where BirdDog's CAMS really helps."

The OFCCP has promised a renewed vigor to collecting this supporting documentation. "Since federal contractors are obligated to self-audit and correct identified problems, OFCCP will dedicate additional resources to increase monitoring of this element of compliance," reads the FY 2011 Congressional Budget Justification.

How CAMS Can Help

According to HudsonMann's Dickinson, OFCCP auditors are consistent in their demand for rationale. "A contractor must be able to defend every single personnel action," he says. "Documentation is key."

In fact, as recently as February 2011, the OFCCP named "recordkeeping deficiencies" as an indicator of discrimination for officers conducting AA-plan audits.⁵

"Good record-keeping is the closest thing to bulletproofing yourself," says Dickinson. "It's no longer those who discriminate that get into trouble. It's those who look like they are discriminating simply because they don't have proof to the contrary."

HudsonMann consultants recommend that contractors run their own reports frequently, as if they were being audited, to see if they can identify applicant groups that may be underrepresented in their hiring efforts. The next step, of course, is to correct those missteps – and to document the findings, the intention to correct and the steps taken to get closer to compliance.

BirdDog's CAMS was built specifically for this purpose.

CAMS gives federal contractors access to a suite of tools from one simple online dashboard. Hiring managers login to the web portal to post jobs to a family of niche job boards. In order to meet the OFCCP's requirement to "demonstrate a good faith effort to attract a diverse workforce," CAMS allows the job poster to select from a list of diversity workforce resources already integrated for immediate cross-posting and notification.

The OFCCP demands that federal contractors actively reach out to diversity audiences with job openings. Many state DOTs will provide a diversity list as a starting point for contractors, but this is only the beginning. CAMS has a "Diversity Outreach List" function that enables contractors to develop and maintain its own list of diversity resources.

It is the contractor's responsibility to ensure that these lists are updated and that notices of job openings are reaching the target audience and actually being opened. To help in this effort, CAMS confirms automatically when a job posting has been opened by the authority at the targeted diversity resource.

Of course, BirdDog understands that a job description and advertising of an open position is only half the compliance battle. The OFCCP and others that may be evaluating a company's performance will want to see documentation of the

⁵ [Active Case Enforcement FAQs](#), OFCCP

applications received, how they were scored, what happened next and how the final candidate was chosen. CAMS allows for all of this.

Users manage submitted applications by scoring them, assigning next activities and reporting on the candidate pool. What's more, the system keeps track of how many of these candidates came from diversity resources, how many of them were deemed qualified (and the reasons why or why not), as well as how many were hired. Ultimately, CAMS makes the hiring "paper trail" completely paperless.

Even the Feds are Going Digital

Per the OFCCP's budget justification, the agency is developing an electronic delivery system that will require federal contractors to submit EEO, hiring and promotion activities and compensation information online via a secure website.⁶ Called the Federal Contractor Compliance System (FCCS), the web portal's development seems to forecast what many believe to be an inevitable digital documentation mandate.

In Closing...

Even compliance officers understand that following the rules is inherently difficult for many federal contractors who need to turn a profit to remain in business. Says the Iowa DOT's Jim Kelly, "It doesn't matter if they're citizen of the year. If they don't make a profit, they don't stay in business. So [reading the contract paperwork] isn't a priority."

Understanding, however, does not mean a compliance officer will look the other way. At the end of the day, it is the job of the OFCCP and state regulators to ensure federal contractors are contributing to a fair workplace.

Among contractors, there is a misconception that OFCCP audits are few and far between or that only those named in complaints must undergo a compliance evaluation. Neither of these urban myths should be a comfort to any federal contractor. Or, to a federal contractor's subs for that matter.

The simple fact is that OFCCP audits are increasing. Pressure from American voters, new OFCCP leadership and a renewed, countrywide attention to employment issues of all kinds have combined to make following the rules – and documenting every step along the way – more important than ever.

Compliance requires the immediate and focused attention of federal contractors, but it doesn't have to be costly or time-consuming. With the right set of tools and

⁶ [FY 2012 Congressional Budget Justification](#), OFCCP

the right team of trusted advisors, contractors can focus less on the type of worker they employ and more on the type of work they produce.

About the Author

Doug Mitchell joined BirdDog as Vice President of Marketing in 2010. Prior to joining BirdDog, Doug spent 13 years in various marketing roles. He has also been heavily involved in start-up and early-stage business development, including the growth of his own virtual multimedia agency, which he sold upon joining BirdDog. In February 2011, Doug released his first book, "The MultiThread Marketer."