

BirdDog

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The Truth about OFCCP Compliance November, 2010

*"What you need to know to demonstrate
your good faith effort and streamline
your documentation...for your inevitable
audit"*

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Ranger
Your BirdDog



Introduction & Background

This document was built through collaboration by our team and many other 3rd party resources who are actual “boots on the ground” and “feet on the street.” **This isn’t a legal document and nothing we present here should be construed as legal advice.**

BirdDog runs a business just like you. To that end, we won’t slow you down with regurgitated facts and statistics. We will share with you what we hear from real companies like yours, what we’re hearing from our numerous partnerships across North America, and from various state and federal resources like the DOT (Department of Transportation), FHWA (Federal Highway Administration) , US DOL (US Department of Labor) and other diversity groups, when we call and ask clarifying questions.

There is mass confusion surrounding Affirmative Action Planning, Recruitment, and Recruitment Advertising. We believe this white paper to be an excellent source of *clarity* and we encourage you to point your friends and colleagues to this page (fill in link when I finalize it) to get their own copy of this white paper and get in the loop as we distribute more information on the topic as it evolves.



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What Are These OFCCP Regulations?

FHWA 1273 governs contract specifications for *all federal aide projects and apply to all work performed by Federal Contractors, i.e. Subcontractors, Engineering Firms & Suppliers.* Normally, contract compliance audits are performed by the State DOT Compliance officer and disputes are handled by the US DOL.

Even if you're a subcontractor doing work on a state project...funded by federal stimulus dollars...you must abide by OFCCP (Office of Federal Contract Compliance Programs) regulations. Shocking? Read on.

The OFCCP's mission is to administer and enforce these three legal authorities:

- Executive Order 11246
- Section 503 of the rehabilitation act of 1973
- The Vietnam Veterans Readjustment Assistance Act of 1974.

These laws ban discrimination and require Federal Contractors, subcontractors & Suppliers to take affirmative action to ensure all individuals have an equal opportunity for employment without regards to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran.

“More Audits Are Imminent”

A contractor client of ours called up the other day and asked, “Why have we experienced more audits the last two years?” He went on, “Heck prior to 2008, I had no idea who the OFCCP is or what they do”.



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We shared with him that comes as no surprise to the BirdDog team. Though the OFCCP's employee numbers have been down since 2001, the availability of stimulus dollars means they are ramping up their efforts.

According to a report released by the AGC of America earlier this year.

For fiscal year 2010, OFCCP received a \$103 million budget, for which it plans to hire 213 new employees, restoring its staff to pre-2001 levels.

As a result, federal contractors can expect more on-site reviews, including more thorough reviews of affirmative action plans. Other areas likely for review are contractors' job advertisements, recruitment practices, hiring decisions and pay.

According to HudsonMann, a leader in Affirmative Action Outsourcing Services, the OFCCP is calling for "full-scale, aggressive enforcement efforts". So, we can expect even more compliance audits and reviews in FY 2011.

How Do I Know If the Rules Apply to My Company?

Do you hold a contract with the DOT? It doesn't matter if you are a Prime Contractor, a subcontractor, or engineering firm. *If you can answer yes to that question, then you must comply with FHWA 1273.*

As for the DOL or the OFCCP, \$10,000 is the magic number. If you hold a contract as a Prime or subcontractor, and its valued at \$10,000 or more, the OFCCP can dig into your information (or expose the lack thereof).

Suppliers - \$50,000 is the magic number. *If you sell rent or lease goods or services to a federal contractor and those goods or services are used in performance of those contracts, then yes, these rules*



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apply to you. This fact is one of the biggest trouble makers of all! "But we didn't know" isn't an acceptable tact with your OFCCP Audit team.

Common Misconceptions

For the most part, if you work for the state, you won't need to worry about the OFCCP unless you are working an ARRA project or some other project financed wholly or partially by federal financial assistance. If that's the case, there is a clause in the contract or during the bidding process that notified you that the project is covered by executive order 11246.

In these cases, you are considered a Federally assisted contractor. The only difference between a Federal Contractor and a Federally Assisted Contractor is with regards to Section 503 and Vevraa. These requirements do not apply to federally assisted construction contracts. Section 503 and Vevraa revolve around affirmative action to people with disabilities and Vietnam Veterans.

"How about Union contractors? I'm union, this stuff doesn't apply to me. We get all our people through the hiring hall." We hear this constantly in the market place.

If anything, union contractors have an even more difficult task. The FHWA 1273 and Executive Order 11246 are very clear on their stance here. Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the contractor has an agreement, shall excuse the Contractor's obligations to seek out minorities or women.

Now these rules do excuse a union contractor from conducting "systematic and direct recruitment" when their collective bargaining agreement might preclude that. We've seen situations where the hiring hall was not referring enough minorities and women to a contractor and that contractor had to start seeking out women and minorities on their own as part of their conciliation agreement with the state or Fed. So whether you work for the state, you're a federal



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contractor or considered federally assisted contractor, the information we will discuss next applies to everyone.

Requirements - Step 1

The first step is to identify community organizations, religious groups, training organizations that are likely to yield a reasonable flow of underutilized individuals. The state and fed want you to work closely with these groups and notify them anytime you have an employment or training opportunity.

Be sure to keep records of your communication with these groups and their responses. There are no official standards for your record keeping, no demands for electronic systems, etc. Conversely, the lack of a key post-it note with your comments from an interview you scheduled after receiving a missing paper application don't bode well.

Some examples of referral resources are:

- State workforce offices
- Urban league
- National Association of Women in Construction
- Coalition of Black Churches
- Training schools
- Internet job posting websites, etc.

Many state DOT's will provide you a list of these referral resources sometimes numbering over 50. Without automation, you may have to call, email, or mail your job openings to these referral resources manually.

Requirements - Step 2

Now that you have communicated your job postings and notified your referral resources, applications and referrals start to flow into the company. You need to track these responses along with all the



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contact information, actions taken and the reasons for those actions. If you are receiving referrals from the union, *you must still track them.*

For Union contractors: If you sent a referral to the union hall, and that candidate was not referred back to you, this needs to be documented as well, along with whatever other actions are being taken.

In addition, you should provide immediate written notification to the Director at the US DOL when:

- The union has not referred to you any women or minorities
- The union has not referred any minority candidates back to you once you have sent them to the hall
- You determine that the current collective bargaining agreement is impeding your efforts to meet your obligations under the executive order.

Requirements - Step 3

We recommend voluntary survey information should be collected early in the process and separated from the application form.

You need to keep voluntary survey data out of sight from anyone that is making hiring decisions.

Your voluntary survey tracking is an early indication to alert you when additional referral resources are necessary to uncover a reasonable flow of underutilized individuals.

Whenever you recognize you are deficient in one job class or another, you should document your discovery and the additional steps you've taken to improve your reasonable flow of minorities and women.

Why Would I Be Audited?

Based on language coming from the OFCCP itself, if you're a federal contractor, the better question is "When will I be audited?"



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OFCCP investigates for violations of the Executive Order either through compliance evaluations or in response to complaints. If a violation is found, OFCCP may ask the contractor or subcontractor to enter into conciliation negotiations. If conciliation efforts fail, OFCCP may (1) initiate an administrative enforcement proceeding by filing an administrative complaint against the contractor, or (2) refer the matter to the Department of Justice for action by the Attorney General.

Penalties & Sanctions

If OFCCP files an administrative complaint, the federal contractor has 20 days to request a review by an Administrative Law Judge (ALJ), who hears the case and recommends a decision. If the contractor or subcontractor is dissatisfied with the ALJ's decision, it may appeal the decision to the Department of Labor's Administrative Review Board. The Board issues the final decision, whether or not there is an appeal.

If the Board finds that the federal contractor has violated the Executive Order, it may order the contractor or subcontractor to provide appropriate relief, which may include restoration of back pay and employment status and benefits for the victim(s) of discrimination. Depending on the circumstances, violations also may result in cancellation, suspension, or termination of contracts, withholding of progress payments, and debarment.

If the contractor or subcontractor is dissatisfied with the Board's decision, it may appeal that decision to the federal courts.

So if you don't have solid records and can't disprove the OFCCP's claims, this process can take hours and \$1000's of dollars to remedy.

What Should I Do Now?

Working in the federal contracting sector is rewarding, but it also comes with risks and responsibilities. Contractors need to implement a system that helps them get the word out to the marketplace about their opportunities.



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You must have your applications tracked in a log that helps you track the steps of the recruiting process and justifies why those actions were taken.

Always go through these steps before you make any hiring decisions. In the end, hire the most qualified person without regard to race, gender, religion, disability or veterans status.

In our home state of Iowa, the DOT and the AGC of Iowa have done a tremendous job at working with BirdDog to create the "AGC of Iowa Career Center." This is a direct quote from the Iowa DOT:

The Iowa DOT has determined that contractors who use the career board will be considered in compliance with Article 1102.19 Section 3 (Affirmative Action Recruitment Plan) and Section 4 (Identification of Recruitment Methods).

That's it.

We don't have such arrangements in every state. But through our relationships with associations and DOT's across the United States, BirdDog is building a complete picture of what it means to truly provide contractors and engineering firms with the best chances of success in Affirmative Action Planning, documentation, and demonstrating a good faith effort to attract underutilized individuals.

If you'd like to continue the conversation on this topic, please give Bryan May our EVP of Business Development a call at 515.473.9212 or email him at bryan@birddogjobs.com. Bryan works closely with our partners and governmental agencies and can either answer your questions or find the answers for you. We're here to help.

Thanks for your time and we hope you've found this content valuable.



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