

OFCCP's FAAP Rule Revision Places More Burdensome Requirements on Contractors

September 19, 2011 by [Nick Schnermann](#) and [Ryan Roberts](#)

On July 14, 2011, the Office of Federal Contract Compliance Programs' ("OFCCP") proposed rule implementing Executive Order 11246 became final. See 41 C.F.R. 60-2.1(d)(4). The new rule updates the procedures whereby a contractor submits both initial and renewal applications to obtain OFCCP approval for its Functional Affirmative Action Program ("FAAP"). These revisions are the product of a year-long review of the OFCCP approval process. "The FAAP is back and is better than before" claims OFCCP director, Patricia Shiu. Contractors, however, may beg to differ.

Generally, non-construction contractors with more than 50 employees and \$50,000 in contracts are required to implement an affirmative action program ("AAP"). The default organizational unit of these programs is based on the physical location where employees are based; however, many contractors, particularly those with multiple establishments, find it more efficient to group their AAPs based on functional or business units. For example, a contractor with an engineering group and a sales group that are each distributed throughout 10 locations nationwide could implement one AAP for the engineers and another for the salesmen, instead of 10 separate programs to provide one for each location. These are referred to as a FAAPs.

In 2002, the OFCCP issued a directive outlining the process whereby a contractor may apply for approval of its FAAP. Directive No. 254, Functional Affirmative Action Program, Mar. 21, 2002. According to OFCCP statistics, 130 FAAP agreements covering more than 1800 functional or business units and approximately 2 million employees were approved under these procedures. In 2010, however, OFCCP suspended all reviews pending revisions to the approval process.

The updated approval procedures place far more burdensome requirements on contractors, including:

- Written Approval – Under the old procedures, a contractor’s request was deemed automatically approved if the agency had neither approved nor denied the plan within 120 days. Under the revised procedures, a contractor *must* receive written approval and the regulations do not give any timeline for issuance of a decision.
- Ongoing Requirements – Contractors now have significant ongoing responsibilities after initial approval of their FAAPs. All major modifications to corporate structure must be disclosed within 30 days and approved by OFCCP. Contractors are also required to submit annual reports that detail any minor changes. Failure to meet either requirement may constitute a compliance violation.
- Renewal Frequency – New approvals now expire 3 years from the date of issuance, down from the previous 5 year term. Consequently, contractors must have their FAAPs approved more frequently. Additionally, all renewal requests must be submitted 120 days before the expiration of the prior program, and a failure to meet this deadline will result in an automatic denial of the application.

These changes represent the latest manifestation of an empowered and increasingly demanding OFCCP. As discussed previously in this space [here](#) and [here](#), the Government has been increasing its oversight efforts in the area of contractor compliance. Contractors must be more vigilant under the new procedures in submitting, updating, and pursuing affirmative approvals for their FAAPs.

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