

## § 60-2.2

## 41 CFR Ch. 60 (7-1-07 Edition)

fewer than 50 employees, may be included under any of the following three options: In an affirmative action program which covers just that establishment; in the affirmative action program which covers the location of the personnel function which supports the establishment; or, in the affirmative action program which covers the location of the official to whom they report.

(3) Employees for whom selection decisions are made at a higher level establishment within the organization must be included in the affirmative action program of the establishment where the selection decision is made.

(4) If a contractor wishes to establish an affirmative action program other than by establishment, the contractor may reach agreement with OFCCP on the development and use of affirmative action programs based on functional or business units. The Deputy Assistant Secretary, or his or her designee, must approve such agreements. Agreements allowing the use of functional or business unit affirmative action programs cannot be construed to limit or restrict how the OFCCP structures its compliance evaluations.

(e) *How to identify employees included in affirmative action programs other than where they are located.* If pursuant to paragraphs (d)(1) through (3) of this section employees are included in an affirmative action program for an establishment other than the one in which the employees are located, the organizational profile and job group analysis of the affirmative action program in which the employees are included must be annotated to identify the actual location of such employees. If the establishment at which the employees actually are located maintains an affirmative action program, the organizational profile and job group analysis of that program must be annotated to identify the program in which the employees are included.

### § 60-2.2 Agency action.

(a) Any contractor required by § 60-2.1 to develop and maintain a written affirmative action program for each of its establishments that has not complied with that section is not in full compliance with Executive Order 11246,

as amended. When a contractor is required to submit its affirmative action program to OFCCP (e.g., for a compliance evaluation), the affirmative action program will be deemed to have been accepted by the Government at the time OFCCP notifies the contractor of completion of the compliance evaluation or other action, unless within 45 days thereafter the Deputy Assistant Secretary has disapproved such program.

(b) If, in determining such contractor's responsibility for an award of a contract it comes to the contracting officer's attention, through sources within his/her agency or through the OFCCP or other Government agencies, that the contractor does not have an affirmative action program at each of its establishments, or has substantially deviated from such an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the regulations in this chapter, the contracting officer must declare the contractor/bidder nonresponsible and so notify the contractor and the Deputy Assistant Secretary, unless the contracting officer otherwise affirmatively determines that the contractor is able to comply with the equal employment obligations. Any contractor/bidder which has been declared nonresponsible in accordance with the provisions of this section may request the Deputy Assistant Secretary to determine that the responsibility of the contractor/bidder raises substantial issues of law or fact to the extent that a hearing is required. Such request must set forth the basis upon which the contractor/bidder seeks such a determination. If the Deputy Assistant Secretary, in his/her sole discretion, determines that substantial issues of law or fact exist, an administrative or judicial proceeding may be commenced in accordance with the regulations contained in § 60-1.26; or the Deputy Assistant Secretary may require the investigation or compliance evaluation be developed further or additional conciliation be conducted: Provided, That during any pre-award conferences, every effort will be made through the processes of conciliation, mediation,

and persuasion to develop an acceptable affirmative action program meeting the standards and guidelines set forth in this part so that, in the performance of the contract, the contractor is able to meet its equal employment obligations in accordance with the equal opportunity clause and applicable rules, regulations, and orders: Provided further, That a contractor/bidder may not be declared nonresponsible more than twice due to past noncompliance with the equal opportunity clause at a particular establishment or facility without receiving prior notice and an opportunity for a hearing.

(c)(1) Immediately upon finding that a contractor has no affirmative action program, or has deviated substantially from an approved affirmative action program, or has failed to develop or implement an affirmative action program which complies with the requirements of the regulations in this chapter, that fact shall be recorded in the investigation file. Except as provided in §60-1.26(b)(1), whenever administrative enforcement is contemplated, the notice to the contractor shall be issued giving the contractor 30 days to show cause why enforcement proceedings under section 209(a) of Executive Order 11246, as amended, should not be instituted. The notice to show cause should contain:

(i) An itemization of the sections of the Executive Order and of the regulations with which the contractor has been found in apparent violation, and a summary of the conditions, practices, facts, or circumstances which give rise to each apparent violation;

(ii) The corrective actions necessary to achieve compliance or, as may be appropriate, the concepts and principles of an acceptable remedy and/or the corrective action results anticipated;

(iii) A request for a written response to the findings, including commitments to corrective action or the presentation of opposing facts and evidence; and

(iv) A suggested date for the conciliation conference.

(2) If the contractor fails to show good cause for its failure or fails to remedy that failure by developing and

implementing an acceptable affirmative action program within 30 days, the case file shall be processed for enforcement proceedings pursuant to §60-1.26 of this chapter. If an administrative complaint is filed, the contractor shall have 20 days to request a hearing. If a request for hearing has not been received within 20 days from the filing of the administrative complaint, the matter shall proceed in accordance with part 60-30 of this chapter.

(3) During the “show cause” period of 30 days, every effort will be made through conciliation, mediation, and persuasion to resolve the deficiencies which led to the determination of non-responsibility. If satisfactory adjustments designed to bring the contractor into compliance are not concluded, the case shall be processed for enforcement proceedings pursuant to §60-1.26 of this chapter.

(d) During the “show cause” period and formal proceedings, each contracting agency must continue to determine the contractor’s responsibility in considering whether or not to award a new or additional contract.

### **Subpart B—Purpose and Contents of Affirmative Action Programs**

#### **§60-2.10 General purpose and contents of affirmative action programs.**

(a) *Purpose.* (1) An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor’s workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action-oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in