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Who me, a federal contractor?

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TABLE OF CONTENTS

| | Page |
|---|-------------|
| I. Background..... | 1 |
| II. Who is a Federal Contractor and Basic Obligations..... | 2 |
| A. Executive Order (EO) 11246 – Affirmative Action Based on Gender and Race..... | 2 |
| B. The Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (VEVRAA) -- Affirmative Action for Covered Veterans..... | 6 |
| C. Section 503 of the Rehabilitation Act of 1973, as amended – Affirmative Action for Individuals with Disabilities..... | 8 |
| III. New Developments..... | 10 |
| A. Executive Order 13665 | 10 |
| B. Executive Order 13672 | 11 |
| C. Proposed EEO-1 Fair Pay Data Report..... | 12 |
| D. Executive Order 13706 | 13 |
| E. Other Initiatives Impacting Federal Contractors..... | 14 |

Who Me, a Federal Contractor?

Federal (Sub)Contractor Jurisdiction, Obligations and New Developments

I. Background

Affirmative action obligations may be imposed upon an employer under three laws: Executive Order 11246 (which prohibits discrimination against and imposes affirmative action obligations that apply to females and minorities), Section 503 of the Rehabilitation Act of 1973, as amended (which prohibits discrimination against and imposes affirmative action obligations that apply to individuals with disabilities), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) (which prohibits discrimination against and imposes affirmative action obligations that apply to certain covered veterans). The Office of Federal Contract Compliance Programs (OFCCP), within the Department of Labor, administers and enforces the affirmative action requirements of these laws.

Government contracts and subcontracts are covered by all three of the laws administered and enforced by OFCCP. Under the regulations implementing the affirmative action provisions of Executive Order 11246, Section 503 of the Rehabilitation Act, and VEVRAA, a "government contract" is defined as "any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction)." 41 C.F.R. §60-1.3 (Executive Order 11246)¹; 60-250.2 (VEVRAA); 60-741.2 (Rehabilitation Act).²

A "subcontract" is defined in the regulations as "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 (including construction) which, in whole or in part, is necessary to the performance of any one or more government contracts; or (2) under which any portion of the contractor's obligation under any one or more government contracts is performed, undertaken or assumed." 41 C.F.R. §60-1.3 (Executive Order 11246)³; 60-250.2 (VEVRAA); 60-741.2 (Rehabilitation Act).

¹ The parenthetical (including construction) is specifically included within the quoted language for both VEVRAA and the Rehabilitation Act, but not Executive Order 11246. Under Executive Order 11246, the definition of "non-personal services" as the term is used in the definition of "government contract", specifically includes "construction."

² Contracts that are specifically excluded from the definition of "government contracts" are (1) agreements in which the parties stand in the relationship of employer and employee; and (2) federally assisted construction contracts (discussed in the Construction Contractor section at p. 7 below). See 41 C.F.R. §60-1.3.

³ Under the Executive Order 11246 regulations, the (including construction) parenthetical is deleted from the definition.

II. Who is a Federal Contractor and Basic Obligations

A. Executive Order (EO) 11246 – Affirmative Action Based on Gender and Race

1. Which Employers are Covered for Basic Obligations under EO 11246?

A contractor or subcontractor is covered by Executive Order 11246 if it has a single executive branch federal contract or subcontract of at least \$10,000. The contractor⁴ will also be covered by the Executive Order if it has government contracts or subcontracts in any 12-month period with an aggregate total value (or that can reasonably be expected to have an aggregate total value) of \$10,000 or more, regardless of whether any single contract exceeds \$10,000. *See* 41 C.F.R. § 60-1.5(a)(1). If the contract or subcontract is for an indefinite quantity⁵, the contract is covered by the Executive Order unless the purchaser has reason to believe that the amount to be ordered in any year will not exceed \$10,000. *See* 41 C.F.R. § 60-1.5 (a)(2).

2. What are the Basic Obligations under EO 11246?

If a contractor meets the Executive Order 11246 basic threshold, the contractor is prohibited from discriminating against employees or applicants on the basis of race, color, religion, sex, or national origin. *See* 41 C.F.R. § 60-1.4(a)(1). Once the basic threshold is met, OFCCP has jurisdiction to conduct compliance evaluations and complaint investigations. *See* 41 C.F.R. § 60-1.43. In addition, OFCCP may inspect the contractor's books and records to ensure compliance with the Executive Order. *Id.* Furthermore, the contractor will have obligations to:

- a. Include the Equal Opportunity Clause in subcontracts covered by the Executive Order (or incorporate it by reference to 41 C.F.R. 60-1.4(a)). 41 C.F.R. 60-1.4(c) & (d).
- b. Post the "Equal Opportunity is the Law" poster in places visible to both applicants and employees. 41 C.F.R. 60-1.42.
- c. Include in advertisements, using a clearly distinguishable type, the phrase "an equal opportunity employer." 41 C.F.R. 60-1.41.
- d. Send to each union with which the contractor has a collective bargaining agreement, if applicable, a notice advising the union of the contractor's commitments under Executive Order 11246 and post copies of the notice in conspicuous places available to employees and applicants. 41 C.F.R. 60-1.4(a)(3).

⁴ The term "contractor" includes "subcontractors" throughout this paper. The term "contract" includes the term "subcontract". When used herein, word "(sub)contract" shall mean "contract or subcontract". The word "(sub)contractor" shall mean "contractor or subcontractor."

⁵ Contracts for indefinite quantities include, but are not limited to open end contracts, requirement type contracts, Federal Supply Schedule contracts, "call-type" contracts, and purchase notice agreements. *See* 41 C.F.R. § 60-1.5(a)(2).

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