

Client Alert

Current Issues Relevant to Our Clients

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U.S. Department of Labor's Office of Federal Contract Compliance Programs Announces New Flexibility For Federal Contractors Regarding Equal Opportunity Clauses Required To Be Included In Contracts

As providers of utility service to federal government offices, most investor owned utility companies ("IOUs") are "federal contractors" subject to the Equal Opportunity ("EO") rules established and enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP"). Included among such rules is the requirement for a federal contractor to include certain EO requirements in its contracts with companies ("Federal Subcontractors") who perform work for the federal contractor that is related to and necessary for the federal contractor's performance of work for the federal government. Consequently many IOUs take the prudent approach of including EO requirements in most or all of their procurement agreements (as often goods and services supplied to an IOU will be considered "related to and necessary" for the IOUs provision of utility service to the federal government). The purpose of this article is to summarize recent changes in the rules governing contractual language that federal contractors must use in their agreements with Federal Subcontractors. As further detailed herein, in many cases, the long and rather cumbersome EO rule references previously required in such agreements may now be replaced with a single incorporation by reference clause.

Background

On August 27, 2013, the OFCCP promulgated a Final Rule that makes sweeping changes to the regulations implementing Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503") at 41 C.F.R. Part 60-741.¹ The final rule became effective 180 days later on² March 24, 2014, and is currently in full force and effect. The OFCCP issued the new rule to "update and strengthen contractors' affirmative action and nondiscrimination responsibilities."³ The changes to Section 503 were very extensive and include a number of revised affirmative action and nondiscrimination rules for

federal contractors; however, of the many changes, there was one significant simplification made in regard to required contractual language in federal contracts and subcontracts. This article will summarize the rules applicable to such contractual language, and how changes to those rules can simplify contracting for federal contractors, including IOUs. Please note that this article does not discuss or give advice on general compliance under Section 503, and furthermore, each IOU should discuss its specific factual situation with legal counsel, as each IOU may have different compliance requirements.

OFCCP Allows Incorporation by Reference

(A) General Incorporation. During the public comment period for the Notice of Proposed Rulemaking ("NPRM") for the new Section 503 rules, the OFCCP received over 400 comments on the proposed rules, and as a result the OFCCP added greater flexibility for federal contractors than the NPRM originally contemplated. Prior to this new rule, federal contractors had to wholly incorporate the required EO clauses into their contracts from multiple sources required by 41 C.F.R. § 60-1.4(a), -4.3(a), -300.5(a), and -741.5(a).⁴ As noted in the Introduction to this article, EO clauses often involved lengthy,

¹ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Final Rule: Section 503 of the Rehabilitation Act*, available at: <http://www.dol.gov/ofccp/regs/compliance/section503.htm> (last visited April 1, 2014).

² Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682, 58,685 (September 24, 2013) (to be codified as amended at 41 C.F.R. pt. 60-741).

³ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Frequently Asked Question: Section 503 Final Rule*, available at: http://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm (last visited April 1, 2014).

⁴ 41 C.F.R. § 60-1.4(a), -4.3(a), -300.5(a), and -741.5(a).

cumbersome compliance sections in contracts that IOUs enter into with Federal Subcontractors. Under the final rule, as clarified by the FAQs issued by the OFCCP, Section 503 allows federal contractors to “incorporate by reference” required EO clauses into a single contract clause, subject to certain restrictions.⁵

(B) Specified Incorporation Language. The final rule for Section 503 added “incorporation by reference” sections to 41 C.F.R. § 60-300.5 and -741.5⁶ mandating certain specific language in lieu of the previous requirement for wholly incorporated sections under the old rules. The rule states that the contractual language must:

(1) include a citation reference to 41 C.F.R. 60-300.5(a) and/or -741.5(a); and

(2) include the following prescriptive language in bold text after the citation:

(i) -300.5(d): “This contractor and subcontractor shall abide by the requirements of 41 C.F.R. 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.”⁷; or

(ii) -741.5(d): “This contractor and subcontractor shall abide by the requirements of 41 C.F.R. 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.”⁸

(C) *Combination of Specified Incorporation by Reference Clauses Allowed*. The OFCCP has clarified in its frequently asked questions about Section 503 that federal contractors can combine the EO incorporation by reference clauses⁹ as long as the citations remain, the text

⁵ See, *Id.* (requirement of EO clauses in federal contracts); OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *supra* note 3 at Equal Opportunity Clause Questions 1 & 2 (clarification that the EO clauses in all four sections referenced may be combined and incorporated by reference).

⁶ See, 41 C.F.R. § 60-300.5(d) & -741.5(d).

⁷ 41 C.F.R. § 60-300.5(d).

⁸ 41 C.F.R. § 60-741.5(d).

⁹ It should be noted that the most recent FAQs issued by the OFCCP differ on this point from the original guidance given by OFCCP in its August 30, 2013 webinar where it stated that the

is set off in bold text, and the prescribed content of both clauses is preserved.¹⁰ For example, if a federal contractor wanted to combine the two outlined statements in 40 C.F.R. § 60-300.5(d) and -741.5(d), the combination could be:

This contractor and subcontractor shall abide by the requirements of 41 C.F.R. §§ 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals on the basis of protected veteran status or disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities.¹¹

Additionally, the OFCCP has further clarified that federal contractors are permitted to combine *all* of the EO clauses required by 41 C.F.R. § 60-1.4(a), -4.3(a), -300.5(a), & -741.5(a).¹² When combining all of the applicable EO clauses under Section 503, as opposed to only the specifically outlined clauses, (1) a federal contractor must include the citations to the C.F.R. section required for that

Disability and Veteran EO clause text could not be merged into a single paragraph. See OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *Frequently Asked Question: Section 503 Final Rule*, available at: http://www.dol.gov/ofccp/regs/compliance/faqs/503_fa.htm (last visited April 1, 2014).

¹⁰ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *supra* note 3 at Equal Opportunity Clause Question 1 (clarification that the EO clauses required by 41 C.F.R. § 60-300.5(a) and -741.5(a) may be combined and incorporated by reference). It should be noted that while OFCCP has allowed some latitude in the exact phrasing of the combination of the EO clauses, the OFCCP has warned federal contractors that the all language must be commonly understood. For example, abbreviating “disability” and “protected veteran status” as simply “D” and “V” respectively, is inadequate. As applicable to this particular example, the OFCCP has stated that the minimum allowable abbreviation would be “disability” and “vet” respectively.

¹¹ OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *supra* note 3 at Equal Opportunity Clause Question 1 (clarification that the EO clauses required by 41 C.F.R. § 60-300.5(a) and -741.5(a) may be combined and incorporated by reference).

¹² OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, *supra* note 3 at Equal Opportunity Clause Question 2 (clarification that the EO clauses in all four sections referenced may be combined and incorporated by reference).

particular contract, (2) the entire combined clause must be in bold text, and (3) the prescribed content of 40 C.F.R. § 60-300.5(d) and -741.5(d) must be preserved.¹³ Although the OFCCP FAQs include some examples for combining all applicable EO clauses, the precise language applicable to IOU contracts with Federal Subcontractors may vary depending on the nature of the Federal Subcontractor's business and the size of the contract in question. Furthermore, these consolidations may not be advantageous in all contracting situations, as different minimum dollar value thresholds apply to each clause.¹⁴ Finally, IOUs should consult with legal counsel to ensure that all covered contracts include any other applicable language not covered under the incorporation by referenced clauses addressed herein.

Conclusion

The final rule issued by the OFCCP made substantial and sweeping changes to EO compliance for federal contractors. These changes present numerous compliance issues that should be addressed by all federal contractors, including IOUs.

As noted in this article, the changes also included an opportunity for IOUs to simplify EO clauses in their agreements with Federal Subcontractors, but these changes must be considered in connection with other compliance requirements and applicable dollar value thresholds. While the ability to combine all required EO clauses into one incorporation by reference paragraph should help streamline OFCCP compliance, each IOU should engage its legal counsel to determine the best way to update any template EO clauses and evaluate any substantive changes to contracts going forward.

For More Information

For more information, please contact William Libit (312.845.2981) or Michael Reed (312.845.3427).

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¹³ *Id.*

¹⁴ Generally, the applicable threshold for the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (as applicable in 41 C.F.R. § 60-300.5(a)) is \$100,000; however, the applicable threshold for Section 503/Executive Order 11246 is, generally, \$10,000.