

Response to Comments Received During the 30-day Comment Period

On January 8, 2016, the Department of Labor submitted OFCCP's *FAAP Agreement Approval Process* for use of FAAPs to OMB for approval. Two employer organizations, Equal Employment Advisory Council (EEAC) and the National Industry Liaison Group (NILG) submitted comments during the 30-day OMB comment period that were transmitted by OMB to OFCCP for a response. The commenters' concerns are listed below with OFCCP's responses.

One of the two commenters, EEAC, originally submitted comments to OFCCP during the initial 60-day comment period. In considering that initial comment, OFCCP made changes to its proposed revised directive. Later, EEAC raised three concerns during the 30-day OMB comment period, two of which were also in EEAC's 60-day comment submission to OFCCP.

Submission of information regarding Federal contracts when applying for a FAAP agreement. EEAC raised this comment initially during the 60-day comment period and OFCCP modified its request by removing the requirement that the contract must submit an actual copy of a contract. Thus, OFCCP reduced the contractor's burden while maintaining its ability to effectively carry out its mission. In the 30-day comment submission, EEAC asserts that it is also burdensome, time-consuming and redundant for contractors to be required to submit information concerning a Federal contract and OFCCP should accept their application as evidence that they are a covered Federal contractor. EEAC further asserts that the human resources and compliance personnel assigned responsibility for working with OFCCP do not have access to contract information.

OFCCP's regulatory authority is limited to Federal contractors that have a Federal contract or subcontract that meet specific jurisdictional thresholds. Not every employer with a Federal contract meets these jurisdictional thresholds. Additionally, there is no single list or source of Federal contractors, Federal contracts, or Federal subcontracts. In response to the EEAC's concern, OFCCP believes that it is necessary that a contractor requesting a FAAP agreement provide information concerning a qualifying Federal contract. OFCCP stresses that its enforcement authority rests with covered Federal contractors and subcontractors and the submission of information pertaining to a Federal contract or subcontract substantiates the agency's regulatory authority to negotiate a FAAP agreement. In addition, developing a FAAP agreement is voluntary for Federal contractors and it is the agency's position that a contractor requesting to enter into an agreement with OFCCP should submit information to confirm that they are a covered Federal contractor. Thus, information giving OFCCP some credible indication that the employer is a Federal contractor is a critical component of the application approval process. Should the contract submitted to OFCCP initially establishing eligibility for a FAAP agreement end before the contractor's three-year FAAP agreement expires or before the annual update requirement, and the contractor wishes to remain in the program, proof of new contract coverage would be required and would be submitted as a FAAP agreement modification request. This is not a redundancy, instead, this measure ensures that only eligible contractors participate in the program and also ensures that employers that are no longer contractors and not scheduled for compliance evaluations.

Copies of personnel policies and procedures.

EEAC questioned the requirement that contractors submit copies of personnel policies and practices when applying for a FAAP agreement. EEAC explained that the personnel policies may not shed significant light on the extent to which the contractor's functions or business units operate independently. EEAC also raised this concern during the 60-day comment period and OFCCP responded to that comment.

As stated previously, operating autonomously and demonstrating the ability to efficiently manage and monitor all personnel actions is among the basic criteria and principals of OFCCP's FAAP agreements. The review and analysis of a contractor's personnel policies is a component of determining whether a contractor can operate under a FAAP agreement. Having this information during the initial review of the FAAP agreement request helps OFCCP understand the contractor's policies, and improves and expedites the FAAP negotiation process. Without this documentation, OFCCP would spend a portion of the negotiation process requesting this documentation, and reviewing it before discussion could begin. Therefore, the personnel policies must be submitted with the contractor's application for FAAP agreement.

Information on subsidiaries.

EEAC contends that the requirement to provide information on all subsidiaries is burdensome because human resource personnel may not have access to this information, and the information is unnecessary. EEAC further explains that corporate structures can be complex and fluid making it difficult to provide a comprehensive list of subsidiaries. Unlike the previous two concerns raised, this one was not raised during the 60-day comment period.

OFCCP has considered this requirement and its use of the information. Based on OFCCP's experience, organizational functions may cross "related companies" such as subsidiaries. In fact, many companies include these related companies in a functional unit. During the process of reaching a determination on a contractor's FAAP agreement request, OFCCP must be able to identify the names of the related companies and subsidiaries covered by a functional or business unit. While this information is still necessary, OFCCP is modifying its request to provide contractor subsidiary information by tailoring it to those subsidiaries that will be included in the FAAP. Therefore, in place of the requirement to provide information on all subsidiaries, OFCCP is requesting that the contractor provide for each proposed functional or business unit, the company or subsidiary name, street address, total number of employees and name and address of the managing official (see item 5 in Attachment B).

The NILG also raised concerns with providing information related to subsidiaries. As discussed above, OFCCP has revised its requirement to provide information for subsidiaries by eliminating item number 6 from Attachment B and revising item number 5.

The NILG raised three other concerns that focused on OFCCP's proposed process for certification; the burden estimate; and requested clarification regarding provision of information on equal employment opportunity violations and the FAAP Branch's review of documentation provided. These additional concerns are addressed below.

Certifying a FAAP agreement.

NILG asserts that the proposed certification process will mandate the submission of additional information every three years in order to renew an existing agreement. It also asserts that this process is unduly burdensome.

Over the three year term of a FAAP agreement, a contractor's circumstance as it relates to structure, employee numbers and Federal contract status changes. These types of changes may impact whether a FAAP is appropriate. Both the current and revised FAAP directives require contractors to submit a written request for renewal to OFCCP that confirms that they are still eligible to participate in OFCCP's FAAP program. When considering a renewal request, OFCCP requires a contractor to provide updated information regarding employee counts, facility names and addresses, as well as information on changes that may have occurred. Additionally, contractors are asked to provide information on a Federal contract or subcontract to show that they are a covered contractor. This information is either provided in the written request to renew the agreement or OFCCP follows up with the contractor after receiving the request. Contrary to NILG's assertion, this was not an "as-needed" submission. Contract information is requested to establish a contractor's eligibility to continue in the FAAP program. Without this information, OFCCP would not be able to approve a contractor's request to renew a FAAP agreement.

NILG estimates the burden associated with the process OFCCP proposes in the revised directive to renew a FAAP agreement by focusing on the time and costs associated with all contractors required to renew their FAAP agreement in a given year. OFCCP assesses this burden estimate differently focusing on the time and costs for an individual contractor. The actual per contractor burden of the renewal certification is approximately 3.7 hours which OFCCP monetizes as \$150 compared to NILG's assertion of 300 hours and \$12,137. As proposed, OFCCP believes the revised directive clarifies the process by which contractors renew their FAAP agreements. Therefore, the proposed renewal certification process remains unchanged.

Burden estimate.

NILG asserts that OFCCP underestimates the burden related to the FAAP agreement and that the estimate does not account for the time and cost imposed by mandatory compliance reviews.

As explained above in the justification statement, the collection of information associated with the development of AAPs and compliance evaluations are addressed in a separate approved ICR (see OMB Number 1250-0003). Thus, the burden would not be accounted for in this ICR. Additionally, OFCCP based its estimates of burden related to requesting a FAAP agreement on its experience with contractors over the past several years. These estimates reflect the average experience of contractors that develop FAAP agreements and as such include the types of contractors described by NILG. While NILG asserts that the burden estimate is low, no alternative calculations are provided. Therefore, OFCCP makes no adjustment to its estimate of burden based on this comment.

Clarification regarding the provision of specific information.

NILG asserts that the revised directive includes an open ended request for information regarding the structure of a contractor's organization (proposed directive paragraph 7.E.1(e)). This assertion does not take into consideration the clarifying footnote that explains the FAAP Branch will determine if a conference to discuss the documents provided is needed. To clarify and

reduce possible confusion, OFCCP modified the relevant paragraph in the revised directive. NILG also asserts that no burden was assessed for information regarding equal employment opportunity violations included in Attachment B. Attachment B does not ask that the contractor provide equal employment opportunity violations. That item is included in Attachment C and burden is and was assessed in section 12 below.