

DEPARTMENT OF LABOR**Office of Federal Contract Compliance Programs****41 CFR Part 60-741**

RIN 1215-AA84

Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities**AGENCY:** Office of Federal Contract Compliance Programs, Labor.**ACTION:** Proposed rule.

SUMMARY: The proposal published today would establish regulatory standards for granting "separate facility" waivers from the requirements of section 503 of the Rehabilitation Act of 1973. Section 503 requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. The Rehabilitation Act Amendments of 1992, among other things, amended section 503 to permit contractors and subcontractors to seek a waiver from the requirements of the regulations implementing section 503 for their facilities that are not connected with the performance of a Government contract or subcontract (i.e., "separate facilities"). The 1992 amendments also required the issuance of regulations that set forth the standards to be used for granting such a waiver. The Office of Federal Contract Compliance Programs proposes amending its regulations implementing Section 503 to list those factors that OFCCP will consider when determining whether a "separate facility" waiver might be granted.

DATES: To be assured of consideration, comments must be in writing and must be received on or before April 15, 1996.

ADDRESSES: Comments should be sent to Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue NW., Washington, D.C. 20210.

As a convenience to commenters, OFCCP will accept public comments transmitted by facsimile (FAX) machine. The telephone number of the FAX receiver is (202)219-6195. To assure access to the FAX equipment, only public comments of six or fewer pages will be accepted via FAX transmittal. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at (202)219-9430 (voice), 1(800)326-2577 (TDD).

Comments received in response to this proposed rule will be available for

public inspection in OFCCP, Room C-3325, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment, call (202)219-9430 (voice) or 1(800)326-2577 (TDD).

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue NW., Washington, DC 20210. Telephone: (202) 219-9475 (voice), 1(800)326-2577 (TDD). Copies of this notice of proposed rulemaking, including copies in alternate formats, may be obtained by calling OFCCP at (202)219-9430 (voice) or 1(800)326-2577 (TDD). The alternate formats available are large print, electronic file on computer disk and audio-tape.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 502 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793) (section 503 or the Act), requires parties holding Government contracts and subcontracts in excess of \$10,000 to take affirmative action to employ and advance in employment qualified individuals with disabilities. The Department of Labor's Office of Federal Contract Compliance Programs enforces section 503 and has published implementing regulations at 41 CFR part 60-741.

Prior to a recent amendment, section 503(a) provided that Government contracts and subcontracts "shall contain a provision requiring that, *in employing persons to carry out such contract*, the party contracting with the United States shall take affirmative action to employ and advance in employment" qualified individuals with disabilities. (Emphasis added.) OFCCP implemented this provision by applying section 503 requirements to all of the contractor's work force unless the contractor sought, and was granted, a waiver. To clarify the scope of section 503 coverage, including the phrase "to carry out such contract," OFCCP issued a regulation in 1974 that authorized OFCCP to waive the applicability of section 503 for those facilities that were not connected to Government contracts. 39 FR 20566, 20568 (June 11, 1974) (originally codified at 20 CFR 741.25(a)(5)). Such waivers required an advance contractor request and findings by OFCCP that the activities in question were in fact unrelated to Federal contracts. Specifically, the waiver regulation provided as follows:

Facilities not connected with contracts. The Director may waive the requirements of the affirmative action clause with respect to any of a prime contractor's or subcontractor's facilities which he or she finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waiver shall be considered only upon the request of the contractor or subcontractor.

41 CFR 60-741.3(a)(5).

Applying section 503 requirements in this manner has been consistent with the scope of coverage under the other two Government contract-based civil rights laws administered by OFCCP. The section 503 separate facility waiver regulation mirrored the waiver provision in section 204 of Executive Order 11246, which imposes nondiscrimination and affirmative action obligations on Federal contractors with regard to race, color, religion, sex, and national origin. 30 FR 12319, 12321 (Sept. 28, 1965). *See also* 41 CFR 60-1.5(b)(2). In addition, the OFCCP regulations implementing the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, 38 U.S.C. 4212, which imposes nondiscrimination and affirmative action obligations on Federal contractors with regard to qualified special disabled veterans and Vietnam era veterans, contain an identical separate facility waiver at 41 CFR 60-250.3(a)(5).

The section 503 separate facility waiver regulation was invalidated, however, by a Federal district court in *Washington Metropolitan Area Transit Authority (WMATA) v. DeArment*, 55 EPD ¶ 40,507 (D.D.C. 1991). The court ruled that because the waiver regulation brings all contractor employees within the scope of the Act absent a waiver, the waiver provision was inconsistent with the express language of section 503 that only those employees who "carry out" Federal contracts are covered by the Act. *Contra E.E. Black, Ltd. v. Marshall* 497 F. Supp. 1088, 1092 (D. Haw. 1980).

In response to the WMATA decision, Congress enacted section 505(a)(2) of the Rehabilitation Act Amendments of 1992, Pub. L. 102-569, 106 Stat. 4344 (the 1992 amendments), to strike the limiting phrase "in employing persons to carry out such contract," from section 503. This amendment expanded section 503 coverage to all of a contractor's work force at all of its facilities. As indicated in the legislative history of the enactment, the coverage amendment "clarifies that the scope of the obligation under section 503 is parallel to the scope under Executive Order 11246." S.

Rep. No. 357, 102d Cong., 2d Sess. 72, *reprinted in* 1992 U.S. Code Cong. & Admin. News 3783.

In addition, "in order to avoid any confusion" regarding the effect of the coverage amendment on the waiver authority set forth in the OFCCP regulations at 41 CFR 60-741.3(a)(5), the 1992 amendments specifically included waiver authority in the legislation. S. Rep. No. 357, at 72 *reprinted in* 1992 U.S. Code Cong. & Admin. News 3783. Section 505(b) of the 1992 amendments codified the separate facility waiver regulation by expressly incorporating it (with minor editorial changes) into section 503. The full text of the waiver amendment, as it appears at section 503(c)(2) (A)-(B), 29 U.S.C. 793(c)(2) (A)-(B), reads as follows:

(A) The Secretary of Labor may waive the requirements of the affirmative action clause required by the regulations promulgated under [section 503(a)] with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impeded the effectuation of this Act.

(B) Such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

The affirmative action clause referenced in subsection (c)(2)(A) above appears at 41 CFR 60-741.4 and must be incorporated into all contracts and subcontracts covered by section 503. The clause sets out contractors' basic obligations under the Act, including the obligation to comply with the Act's implementing regulations. Accordingly, a waiver of the requirements of the affirmative action clause is effectively a waiver from the requirements of section 503 and its implementing regulations.

The waiver amendment requires OFCCP to make two separate findings in order to justify granting a waiver. First, as a threshold requirement, OFCCP must find that the facility for which the waiver is sought is in all respects separate and distinct from activities related to the performance of the contractor's Government contract. Second, if the facility is found to satisfy this "separate and distinct" prong, OFCCP must additionally find that the waiver will not interfere with or impede the effectuation of the Act.

II. Summary and Explanation of the Proposed Regulatory Standards

Section 505(b) of the 1992 amendments requires OFCCP to issue regulations that set forth the standards

to be used for granting separate facility waivers under section 503. It should be noted that, historically, OFCCP has narrowly construed section 503 waiver provisions and similar waiver provisions under Executive Order 11246 (41 CFR 60-1.5(b)(2)) and VEVRAA (41 CFR 60-250.3(a)(5)). It is OFCCP's intent to continue its longstanding practice of interpreting the regulation narrowly so as to "jealously guard" the granting of waivers. Narrow interpretation of this exemption would be appropriate in light of the remedial nature of the Act and would be in accordance with the Act's purpose to improve employment opportunities for qualified individuals with disabilities. Moreover, such an approach is supported by the discretionary language of the 1992 statutory amendment. The 1992 amendment states that OFCCP "may" grant a waiver when a facility is in all respects separate and distinct and when the waiver would not interfere with or impede the effectuation of the Act, therefore, OFCCP is not compelled to grant a waiver in such circumstances.

OFCCP proposes to delete the current separate facility waiver regulation in 41 CFR 60-741.3(a)(5) and add the proposed separate facility waiver standards in new 41 CFR 60-741.3(b)(3). This reorganization would more logically group the separate facility waiver regulation with the other two waiver provisions under paragraph (b), i.e., waivers when there exist special circumstances in the national interest and waivers essential for national security reasons.

Proposed new paragraph (b)(3)(i) sets forth the general requirements for the granting of separate facility waivers.

Proposed subparagraphs (b)(3)(i) (A) and (B) recite the two threshold requirements codified in the 1992 amendments and present in the current regulation: (a) the facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and (B) such a waiver will not interfere with or impede the effectuation of the Act. In compliance with the 1992 amendments, proposed paragraph (b)(3)(i) also indicates that waivers would only be considered by the "Secretary's designee (i.e., the Deputy Assistant Secretary) upon written request by a prime contractor or subcontractor.

Proposed paragraph (b)(3)(i) also specifies that the contractor bears the burden of demonstrating that the granting of a waiver is appropriate. OFCCP believes that this is reasonable because only the contractor knows how it will deploy its resources to perform its Federal contracts. The requesting

contractor would have the necessary factual information to support a waiver application, such as information on how the contract will be performed, the contractor's employment practices, and the structure and relationship between the contractor's facilities. Under the proposed rule, the requesting contractor would have the burden of supplying OFCC with relevant supporting material.

Proposed paragraphs (b)(3) (ii) and (iii) contain non-exhaustive lists of factors that may be considered by the Deputy Assistant Secretary in making a decision about whether the contractor has made a sufficient demonstration that the facility meets these standards. As noted above, because the statutory amendment permits OFCCP discretion to deny a waiver even where it finds both criteria are met, it permits OFCCP to consider other factors in determining whether the waiver should be granted.

Proposed paragraph (b)(3)(ii) lists factors that are associated with the question of whether the facility is in all respects separate and distinct from the activities of the contractor or subcontractor related to the performance of a contract. The proposed factors focus on the activities and employees at the facility for which the waiver is requested. The factors listed include: (A) whether any work at the facility supports or contributes to the satisfaction of the work performed on a Government contract or subcontract; (B) whether the facility benefits from a Government contract or subcontract; (C) whether any costs associated with operating the facility are charged to a Government contract or subcontract; (D) whether working at the facility is a prerequisite for advancement in job responsibility or pay; and (E) whether employees or applicants for employment at the facility may perform work related to a Government contract or subcontract or another facility.

The proposal specifies that the factors relating to whether the work performed at the facility supports, contributes to, or benefits from the performance of a contract (subparagraphs (A)-(B)), would include activities directly related to the performance of a contract and indirectly related activities that are necessary to, or facilitate performance of, a contract. Consideration of activities which are necessary to, or facilitate performance of, a contract would reflect the practical reality that the performance of a contract generally requires the cooperation of a variety of individuals engaged in auxiliary and related functions beyond the direct production of the goods or the provision of the services that are the object of a contract.

These indirectly related activities may include, for example: (1) The services of the personnel office responsible for the employees directly performing a Government contract where the personnel services are not carried out at the same facility at which these employees are located; (2) corporate headquarters' management activities relating to a facility directly performing a Government contract; and (3) maintenance of equipment and buildings used in performing a contract where the workers who perform the maintenance are not stationed at the same facility at which the equipment and buildings are located.

Regarding proposed subparagraph (C) relating to whether any costs associated with operating the facility are charged to a Government contract or subcontract, these costs might involve "indirect" costs as well as "direct" costs. OFCCP may consider, for example, whether the cost of positions located at a facility is allocable as either a direct or an indirect cost of a contract under the cost principles set forth in the Federal Acquisition Regulations (FAR) (48 CFR chapter 1). Under the cost allocation principle set forth in FAR 31.201-4, a cost is allocable to a particular Government contract if it: (1) Is incurred specifically for the contract; (2) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or (3) is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown. A "direct cost" is any cost that is identified specifically with a particular final cost objective (such as a particular contract) and may be charged directly against that contract. FAR 31.202(a). An "indirect cost" is any cost not directly identified with a single final cost objective, but is identified with two or more final cost objectives, or an intermediate cost objective. Indirect costs are accumulated by logical cost groupings, and are then allocated among the final cost objectives included in the groupings on the basis of the benefits accruing to the objectives. FAR 31.203. OFCCP believes that if a contractor or subcontractor is receiving reimbursement from the Government for the costs of a position, then it is reasonable to conclude that the facility at which the position is located is contributing to the performance of the contract, and thus may not be "separate and distinct."

Proposed factors listed in (D) and (E) focus on the relationship between the employees at the facility for which the waiver is sought and facilities performing work on Government

contracts. For example, under (D), if employees who work on a Federal contract at one facility must, at some future time, work at another facility for which a waiver is sought in order for them to advance in employment, the facility for which a waiver is sought may be inexorably linked to the employees working on the contract and, therefore, not "separate and distinct." Under (E), OFCCP may consider, for example, whether employees at the facility for which a waiver is sought travel to another site or facility to engage in work related to a Government contract.

As noted above, because the 1992 statutory amendment permits OFCCP discretion to deny a waiver even where it finds both criteria are met, it permits OFCCP to consider other factors in determining whether the waiver should be granted. Proposed subparagraph (b)(3)(ii)(F) notes that the Deputy Assistant Secretary may consider factors not explicitly listed in the regulations when he or she believes such additional factors are necessary or appropriate in determining whether a facility is in all respects separate and distinct.

Proposed paragraph (b)(3)(iii) lists factors that the Deputy Assistant Secretary may consider when determining whether granting a waiver will interfere with or impede the effectuation of the Act. The factors listed include: (A) whether the waiver will be used as a subterfuge to circumvent the contractor's or subcontractor's obligations under the Act or implementing regulations; (B) the extent that the contractor or subcontractor is in compliance with the Act or implementing regulations; and (C) the impact of granting the waiver on OFCCP enforcement efforts.

In determining whether a waiver will be used as a subterfuge to circumvent the contractor's section 503 obligations, the Deputy Assistant Secretary may consider under factor (A), for example, whether the contractor restructured its operations to concentrate its Government contract work in certain facilities, or whether the contractor sought a waiver only after learning that the facility at issue was being scheduled for a section 503 compliance review. Under factor (B), consideration may be given, for example, to the results of any past section 503 complaint investigations or compliance reviews of the facility at issue, or of other facilities of the contractor.

Factor (C) focuses on the impact of granting a waiver on OFCCP enforcement efforts. Under this factor OFCCP might examine, for example, whether granting a waiver would

simplify OFCCP's compliance review activity, or would complicate such compliance reviews. Consideration may be given to the expected duration of the contractor's Government contract(s) or subcontract(s), or to whether the contractor or subcontractor is covered by the written affirmative action program requirement under the section 503 regulations (see 41 CFR 60-741.5(a)). OFCCP might also consider under factor (C) that the facility for which the waiver is sought is the largest employer in a small town, or that the number of employees which would be removed from section 503 protection by the issuance of a waiver would be small.

Proposed subparagraph (iii) (D) specifies that the Deputy Assistant Secretary may deem other factors to be necessary and appropriate for considering whether granting a waiver would interfere with or impede the effectuation of the Act.

Proposed paragraph (b)(3)(iv) provides that waivers granted in accordance with paragraph (b)(3) may be withdrawn by the Deputy Assistant Secretary at any time when, in his or her judgment, such action is necessary or appropriate to achieve the purposes of the Act. A similar regulation providing for withdrawals of waivers is contained in current 41 CFR 60-741.3(c). Withdrawals of waivers would be appropriate when, for example, the contractor's operations has changed since the granting of the waiver and the facility is no longer in all respects separate and distinct from activities related to the performance of a contract. In addition, withdrawal of a waiver would be appropriate if OFCCP subsequently determines that the relevant facts upon which it relied in granting the waiver did not accurately or fully describe the relationship between the facility and the contractor's activities related to the performance of a contract. OFCCP may also determine that the waiver, in fact, interferes with or impedes the effectuation of the Act, as described above.

III. Regulatory Analyses

Executive Order 12866

The Secretary of Labor has determined that this proposed rule is not a significant regulatory action as defined in Executive Order 12866, and therefore a regulatory impact analysis is not required.

Regulatory Flexibility Act

The proposed rule, if promulgated, will not change existing obligations for Federal contractors and will only permit waivers to be sought by contractors large

enough to have facilities which are in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

Consequently, we certify that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, in accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

Paperwork Reduction Act

This proposed rule does not contain substantive or material modifications to previously approved information collection requirements, but will only clarify existing requirements for Federal contractors who request "separate facility" waivers. In view of this fact, and because the proposed rule does not change existing obligations for Federal contractors, the proposed rule creates no additional paperwork requirements above those contained in the current Information Collection Report (1215-0072), which has been approved by the Office of Management and Budget.

List of Subjects in 41 CFR Part 60-741

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Handicapped, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements.

Signed at Washington, D.C. this 8th day of February 1996.

Robert B. Reich,
Secretary of Labor.

Bernard E. Anderson,
Assistant Secretary for Employment Standards.

Shirley J. Wilcher,
Deputy Assistant Secretary for Federal Contract Compliance.

Accordingly, Title 41 of the Code of Federal Regulations, Part 60-741 is proposed to be amended as follows:

PART 60-741—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR HANDICAPPED WORKERS

1. The authority citation for part 60-741 is revised to read as follows:

Authority: Sec. 503, Pub. L. 93-112, 87 Stat. 393 (29 U.S.C. 793), as amended by sec. 111, Pub. L. 93-516, 88 Stat. 1619 (29 U.S.C. 706); sec. 103(d)(2)(B), Pub. L. 99-506, 100 Stat. 1810, 1843, 1844 (29 U.S.C. 706); sec. 9, Pub. L. 100-259, 102 Stat. 31-32 (29 U.S.C. 706); sec. 512, Pub. L. 101-336, 104 Stat. 377 (29 U.S.C. 706); sec. 505, Pub. L. 102-569, 106 Stat. 4427-28 (29 U.S.C. 793); and E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

§ 60.741.3 [Amended]

2. In § 60-741.3, paragraph (a)(5) is removed.

3. A new paragraph (b)(3) is added to § 60-741.3 to read as follows:

§ 60-741.3 Coverage and waivers.

* * * * *

(b) * * *

(3) *Facilities not connected with contracts.*

(i) Upon the written request of the contractor, the Deputy Assistant Secretary may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities if the Deputy Assistant Secretary finds that the contractor has demonstrated that:

(A) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(B) Such a waiver will not interfere with or impede the effectuation of the Act.

(ii) The Deputy Assistant Secretary's findings as to whether the facility is separate and distinct in all respects from activities of the contractor related to the performance of a contract may include consideration of the following factors:

(A) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

(B) The extent to which the facility benefits, directly or indirectly, from a Government contract;

(C) Whether any costs associated with operating the facility are charged to a Government contract;

(D) Whether working at the facility is a prerequisite for advancement in job responsibility or pay;

(E) Whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility; and

(F) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

(iii) The Deputy Assistant Secretary's findings as to whether granting a waiver will interfere with or impede the effectuation of the Act may include consideration of the following factors:

(A) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under the Act;

(B) The section 503 compliance status of the contractor;

(C) The impact of granting the waiver on OFCCP enforcement efforts; and

(D) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the granting of the waiver would interfere with or impede the effectuation of the Act.

(iv) When a waiver has been granted for facilities not connected to a Government contract in accordance with paragraph (b)(3) of this section, the Deputy Assistant Secretary may at any time withdraw the waiver when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act.

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