



## DIRECTIVE (DIR) 2013-01 Revision 2

A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.

**Effective Date:** June 20, 2019

1. **SUBJECT:** Functional Affirmative Action Programs (FAAPs).
2. **PURPOSE:** To establish policies and procedures for requesting and maintaining FAAP Agreements.
3. **REFERENCES:** None
4. **AFFECTED POLICY:** This directive revises and supersedes the guidance listed below.
  - a. Directive (DIR) 2013-01 Revision 1, *Functional Affirmative Action Programs* (April 28, 2016).
  - b. Federal Contract Compliance Manual (FCCM), § 5, Functional Affirmative Action Program Compliance Evaluations (October 2014).
5. **BACKGROUND:** OFCCP is encouraging the use of functional or business unit based affirmative action programs (AAPs). A functional AAP agreement can be an attractive alternative to having an establishment-based AAP for several reasons. OFCCP's FAAP program allows a company that is a covered federal contractor or subcontractor to organize its AAP to reflect how the company operates functionally and not where its facilities and people are physically located.<sup>1</sup> A company with a FAAP may find that it is easier to organize and analyze data, identify issues, establish clear lines of responsibility for implementing its AAP, and monitor progress. There is also the benefit of having the flexibility to combine the use of FAAPs and establishment-based AAPs.

This Directive establishes a FAAP request process that is simple, fluid, and collaborative. OFCCP and the contractor work together to reach decisions related to the request and how it might be implemented once approved. This supports the prompt, transparent, and consistent application of OFCCP's policies and procedures. Moreover, OFCCP can provide compliance assistance before, during, and after the FAAP agreement request process.

OFCCP's Executive Order 11246 regulations permit federal supply and service contractors to develop AAPs based on a business function or business unit. Generally, to be suitable for a

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<sup>1</sup> Hereinafter, the term "contractor" is used to refer to covered federal contractors and subcontractors unless otherwise expressly stated.

FAAP, the functional or business unit must exist and operate autonomously. In addition, it must:

- Have at least 50 employees;
- Have its own managing official; and
- Have the ability to track and maintain its own personnel activity.

This approach is different from the most commonly used approach of creating AAPs based on the contractor's establishments or locations.<sup>2</sup> Specifically, the regulation at 41 CFR 60-2.1(d)(4) provides:<sup>3</sup>

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.

Any supply and service contractor subject to OFCCP's AAP requirements may request a FAAP agreement that permits the development and use of AAPs based on functional or business units. Some contractors may find it appropriate to develop AAPs based solely on functional or business units, while others may elect to use a combination of both functional units and establishment-based AAPs. In the absence of an approved FAAP agreement, the regulations require contractors to develop, implement, and maintain separate AAPs for each physical location or establishment with 50 or more employees.

## **6. ROLES AND RESPONSIBILITIES:**

- a. The **Contractor** is responsible for:
  - i. Submitting a complete and timely request for a FAAP agreement.
  - ii. Implementing the FAAP agreement after receiving a copy of the agreement signed by the Director of OFCCP.

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<sup>2</sup> The establishment-based AAP provisions are found at 41 CFR 60-1.40 and 41 CFR 60-2.1 through 60-2.17; 60-300.40 through 60-300.45; and 60-741.40 through 60-741.47.

<sup>3</sup> The reference to the Deputy Assistant Secretary in the FAAP approval process is obsolete. The Director of OFCCP performs this role following the abolishment of the Employment Standards Administration (ESA) on November 8, 2009. When ESA was abolished, its four major program components, OFCCP, the Office of Labor Management Standards, the Office of Workers' Compensation Programs, and the Wage and Hour Division, all became stand-alone programs reporting directly to the Secretary of Labor.

- iii. Certifying in writing, as a part of the FAAP agreement certification process, that there are no changes in the contractor's functional or business units, structure or organization, or other circumstances that would affect the FAAP.
- iv. Managing and monitoring all personnel actions, including recordkeeping and affirmative action responsibilities for all functional or business units regardless of size.
- v. Complying with the affirmative action requirements of EO 11246, as well as Section 503 of the Rehabilitation Act of 1973, as amended (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) if the contractor meets the written AAP thresholds for these laws.<sup>4</sup>
- vi. Identifying and providing information about the forms and formats (e.g., Excel, Word, Access, the use of third party vendors for payroll and human resources data reporting, etc.) in which the contractor maintains information requested by OFCCP. The contractor will provide information in one or more of the available forms and formats, as requested by OFCCP.
- vii. Submitting all requested information, including applicant flow, hire, promotion, and termination, and compensation data, electronically (e.g., email or uploaded to site) to OFCCP. If electronic submission is not possible or feasible, the contractor and OFCCP should agree to an acceptable alternative.

b. **OFCCP** is responsible for:

- i. Notifying the contractor upon receiving its request for a FAAP agreement.
- ii. Reviewing and recommending action on a contractor's request to develop, modify, and certify a FAAP agreement.
- iii. Approving or otherwise disposing of requests related to FAAP agreements.
- iv. Notifying the contractor within 60 days of receiving a complete FAAP package regarding its decision on the agreement.
- v. Using the information that a contractor provides in support of its request for a FAAP agreement solely to evaluate that request.

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<sup>4</sup> The contractor can comply with its Section 503 and VEVRAA written AAP obligations by either creating and maintaining Section 503 and VEVRAA FAAPs for the same functional or business units that are covered by its EO 11246 FAAPs or creating and maintaining establishment-based Section 503 and VEVRAA AAPs for each of its establishments. The contractor must inform OFCCP which method it will use to comply with its Section 503 and VEVRAA obligations during the FAAP negotiation or certification process. Under either approach, the contractor must make its AAPs and FAAPs available for review at each of its establishments.

- vi. Determining whether a contractor is currently reporting its compliance under the requirements of a conciliation agreement when determining whether to approve a FAAP agreement.
- vii. Providing compliance assistance and conducting compliance evaluations.

## 7. **DEFINITIONS:**

To ensure clarity and consistency in the implementation of the FAAP program, definitions for commonly used terms in OFCCP programs are provided below.

*Certification* – A written notice from the contractor to OFCCP confirming that the contractor will continue to operate under a functional or business unit structure. OFCCP will review the notice and determine whether to issue a new FAAP agreement for a new five-year term.

*Compliance Evaluation* – The investigation and review process used by OFCCP to determine if a federal contractor is complying with the nondiscriminatory and affirmative action employment obligations outlined in 41 CFR Chapter 60. A compliance evaluation consists of any one or any combination of the following investigative procedures: compliance review, off-site review of records, compliance check, or focused review.<sup>5</sup>

*Compliance Review* – A comprehensive analysis of the hiring and employment practices of the contractor, including the contractor’s written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis.<sup>6</sup>

*Establishment* – A facility or unit that produces goods or services, such as a factory, office, store, or mine. In most instances, the unit is a physically separate facility at a single location. In appropriate circumstances, OFCCP may consider as an establishment several facilities located at two or more sites when the facilities are in the same labor market or recruiting area. OFCCP will determine whether it is appropriate to group facilities into a single establishment on a case-by-case basis.<sup>7</sup>

*Functional or Business Unit* – A component within an organization that operates autonomously in the ordinary course of the organization’s business. A functional or business unit should also have identifiable personnel practices or transactional activities specific to the functional or business unit (e.g., applicant flow, hires, promotions, compensation determinations, terminations, etc.) that are distinguishable from other parts of the contractor. Functions or business units should be identified and defined based on the organization’s existing business operations, personnel practices and management structures.

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<sup>5</sup> See 41 CFR 60-1.20(a), 60-300.60(a), and 60-741.60(a).

<sup>6</sup> See 41 CFR 60-1.20(a)(1), 60-300.60(a)(1) and 60-741.60(a)(1).

<sup>7</sup> See FCCM, Key Words and Phrases.

*Modification* – A modification to a FAAP agreement is necessary when a contractor makes a change to its functional units or structure that creates, eliminates, or changes one or more functional units. This change could be the result of a reorganization, merger, acquisition, or divestiture.

8. **POLICY**: A contractor’s Executive Order 11246 FAAP must include the required AAP elements described in 41 CFR 60-2. If a contractor is also required to have an AAP under Section 503, VEVRAA, or both, the contractor must develop FAAPs that meet the requirements in Subpart C of 41 CFR 60-300 and Subpart C of 41 CFR 60-741, as applicable.

A contractor must follow the policies and procedures established in this Directive to obtain an agreement to establish a FAAP. Certain basic principles apply to the FAAP process.

- The approval of FAAP agreement requests, modifications, and certifications by OFCCP is not automatic. The Director of OFCCP, or his or her designee, must affirmatively approve these submissions within 60 days of receiving a complete package. The denial of a request does not prohibit a contractor from seeking a FAAP agreement for a subsequent AAP year.
- A FAAP agreement must cover all employees in the contractor’s workforce that are in the identified functional or business units. However, this does not mean that the entire workforce must be covered by FAAPs. In some cases, it may be appropriate for a contractor to use both FAAPs and establishment-based AAPs.
- Only functional or business units identified in the approved FAAP agreement are covered by that agreement.
- A contractor must continue to develop, implement, and maintain AAPs for each establishment until the FAAP agreements become effective (i.e., when signed by OFCCP’s Director).
- A FAAP agreement expires five years after its effective date, unless certified by the end of that period.
- A FAAP agreement does not relieve a contractor of its obligation to comply with the regulations at 41 CFR Chapter 60. OFCCP does not negotiate its procedures for determining compliance with its regulations.
- A FAAP agreement cannot contain provisions that limit OFCCP’s access or the manner and means by which it initiates and conducts compliance evaluations. These matters are non-negotiable.

- FAAP units that have undergone a compliance evaluation will be exempt from another evaluation for 36 months from the date OFCCP closed the previous evaluation. This exemption does not prohibit OFCCP from conducting complaint investigations and compliance evaluations based on credible third party evidence.
9. **PROCEDURES:** Contractors requesting, modifying, certifying, or terminating a functional AAP agreement must follow the procedures outlined in this Directive.

**a. Procedures for Requesting a Functional AAP Agreement:**

- i. The contractor requesting a FAAP agreement must submit a written request to the Director of OFCCP. The request must include proof of contract coverage and the name and contact information for the corporate representative responsible for overseeing the contractor's request for the FAAP agreement. The contractor must address the written request to the Director of OFCCP and submit it by email to [OFCCP\\_FAAP-UNIT@dol.gov](mailto:OFCCP_FAAP-UNIT@dol.gov).
- ii. The contractor's request must describe in detail how the proposed functions correlate to the contractor's specific organizational structure. In addition, the request must include an organizational chart, specific information about the functional or business units, functional unit locations and addresses, the number of employees, a transition plan describing the process and timeframes in which the organization will move from establishment-based AAPs to FAAPs. Attachment A, *Documentation to Submit with a FAAP Request*, lists specific items for submitting with the request. OFCCP may, if it is necessary, request additional information before making a final determination on the contractor's request.<sup>8</sup>
- iii. OFCCP must receive the request for a FAAP agreement no later than 120 calendar days prior to the expiration of the contractor's current corporate headquarters AAP. If the contractor making the request is a first-time contractor, OFCCP must receive the request within 120 calendar days from the award of the Federal contract. OFCCP will deny a request that is not timely submitted.
- iv. OFCCP will send written notification to the contractor when the requested FAAP agreement is approved; the actual agreement will be attached to this notice. OFCCP has 60 calendar days from the time the complete FAAP request package is received to notify the contractor of its decision to grant or deny the request. The contractor must sign the FAAP agreement and return it to OFCCP for signature by the agency's Director. The agency will provide a copy of the agreement, with all of the required signatures, to the contractor. The FAAP agreement is effective on the date it is signed by OFCCP's Director. The contractor has 120 calendar

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<sup>8</sup> The FAAP Branch will determine whether it is necessary to conduct a FAAP conference to discuss the materials in the FAAP request. If the FAAP Branch determines that a conference is necessary, the FAAP Branch will discuss with the contractor the most appropriate format for conducting the conference. In addition to face-to-face meetings, alternative formats for conducting the conference include teleconference or web-based conferencing.

days from the effective date to implement its FAAP. The contractor must notify OFCCP when its FAAP is implemented.

- v. OFCCP will continue to schedule and conduct establishment-based compliance evaluations during the review and approval stage of a FAAP agreement request, and the 120 calendar day FAAP implementation period. Should a scheduling letter be received during the review and approval stages (i.e., after submission of the FAAP request but before the effective date of the agreement) the evaluation will be completed as establishment-based evaluation. A contractor receiving a scheduling letter during the 120 calendar day FAAP implementation period may have its scheduled establishment-based compliance evaluation administratively closed.
- vi. The denial of a contractor's request does not prohibit the contractor from seeking a FAAP agreement for a subsequent AAP year.

**b. Modifying a Functional AAP Agreement:**

- i. A change in the functional or business units, or structure or organization of a contractor that affects an existing FAAP agreement requires a modified agreement. A contractor is required to notify OFCCP, in writing, within 60 days of the effective date of the change. The FAAP agreement will be modified to reflect the changes.
- ii. The modification notice must include a description of and the reason for the change. If functional units were changed, added, and/or removed, the contractor's notice must state when the new FAAPs will be in place. If functional units were removed, the contractor must identify where those employees will be covered in the new FAAP structure. If there was a merger, acquisition, and/or downsizing, the contractor must provide OFCCP the name of the newly merged or acquired company and the contractor's plan to incorporate the former company's employees into its AAP structure. Any resulting functional or business unit name change, and changes in managing officials, employee counts, and addresses should be included in the modification notice.
- iii. Modifications to the FAAP agreement do not extend the five-year term of a FAAP agreement.
- iv. OFCCP could schedule a contractor for a compliance evaluation should the contractor fail to submit a modification notice. Should there be repeated failures to inform OFCCP of a modification, the agency could terminate the contractor's FAAP agreement.

**c. Certifying a Functional AAP Agreement:**

- i. The contractor must certify in writing, and submit electronically via email to OFCCP, that there were no changes made to its functional or business structure, structure or organization, or other circumstances that affect the existing FAAP agreement. The certification must also state that the contractor wishes to continue to operate under a functional AAP structure.
- ii. If there were changes that resulted in the modification, addition or elimination of functional units or establishment-based AAPs, the contractor is required to submit a written statement providing the rationale for the changes. The certification must include updated information regarding employee counts, facility names, and facility addresses included in each functional unit. OFCCP will review the information and confirm that the changes meet the criteria outlined in Section 9 of this Directive. OFCCP will work closely with the contractor's designated representative to ensure timely and proper processing of the certification request.
- iii. The contractor must provide updated information concerning at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor.
- iv. The contractor must submit the certification at least 120 calendar days prior to the expiration of the existing FAAP agreement. The failure to make a timely certification will cause the FAAP agreement to expire at the end of its five-year term. The contractor is then required to develop establishment-based AAPs and may be scheduled for compliance evaluations under the Federal Contractor Selection System (FCSS). In the event OFCCP is unable to make a decision on a timely submitted certification before the agreement expiration date, the contractor will continue to operate under the existing FAAP agreement until its request is approved or denied.
- v. Should OFCCP not certify the agreement, it will provide the contractor with at least 90 calendar days written notification.
- vi. An existing FAAP agreement is certified only after it is signed by the contractor and OFCCP's Director. The effective date is the date it is signed by OFCCP's Director. Once certified, the existing FAAP agreement is authorized for another five-year term.
- vii. During an open compliance evaluation of a functional unit, OFCCP may extend the term of an existing FAAP agreement until the evaluation has been completed, if necessary.



**d. Termination of a functional AAP agreement:**

- i. Either party may terminate a FAAP agreement with 90 calendar days written notice submitted by email. The notice must provide a brief explanation of the reason for the termination and the effective date of the termination.
- ii. OFCCP may terminate a FAAP agreement when the contractor fails to account for all of its employees in a functional or establishment AAP. OFCCP may also terminate an agreement when a contractor repeatedly fails to notify OFCCP of a modification to its functional or business units, or structure or organization that affects a FAAP agreement. Two or more such instances during the term of the agreement could constitute a repeated failure to inform OFCCP of modifications.
- iii. Upon termination of a FAAP agreement, all of the contractor's employees are required to be covered by establishment-based AAPs. The establishment-based AAPs shall be in place no later than 120 calendar days from either OFCCP's or the contractor's notification that the FAAP agreement has been terminated.

**10. ATTACHMENTS: A and B**



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**CRAIG E. LEEN**

Director

Office of Federal Contract Compliance Programs

## Attachment A

### *All Documents Below Must be Submitted with the FAAP Request*

1. The contractor must provide a statement that it is a covered federal contractor or subcontractor under 41 CFR 60-1, 60-2, 60-300, 60-741 or some combination of these laws as enforced by OFCCP. The statement must include specific information on at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor.
2. A copy of the contractor's most recent Consolidated EEO-1 Report.
3. An organizational chart that clearly identifies all of the proposed functional or business units to be covered by the requested FAAP and how they are related to each other within the corporation's overall structure.
4. A narrative description of the "business or function" of each proposed FAAP unit and how it meets the definition of a functional or business unit set forth above.
5. For each proposed functional or business unit, provide the company or subsidiary name, street address, and total number of employees at each location covered in the functional unit, and name and address of the managing official.<sup>9</sup>
6. A statement identifying the location, including the city and state, where each proposed FAAP unit will maintain its employee personnel records and applicant processing activities.
7. If the contractor proposes to maintain some establishment-based AAPs, provide a list of the locations with establishment-based AAPs. This includes the physical address, number of employees, phone number of the establishment's managing official and AAP contact, and the EEO-1 unit number for each establishment.
8. A statement addressing how the contractor plans to transition from establishment-based AAPs to functional AAPs, including its timeline for completion.
9. The dates of the proposed AAP year for the functional programs.
10. Copies of unit-specific personnel policies relevant to evaluating the proposed functions or business units, including policies related to recruitment, hiring, promotion, compensation, and termination where different from the corporate policies.

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<sup>9</sup> Information for each proposed functional unit including the description, addresses, and names of managing officials and contact persons should be provided as a flat file or database. Employees based remotely should be included in the facility to which they report.

## **Attachment B**

### *Discussion Items for the FAAP Negotiation Process*

1. The reporting hierarchy of the functional or business units.
2. Personnel procedures including recruitment; hiring; promotion; compensation; termination; record retention and data analysis as they apply to each functional or business unit, including identification of units that have differing personnel or compensation practices.
3. How the contractor anticipates complying with the affirmative action requirements of Section 503 and VEVRAA.
4. How each functional unit manages its human resources and equal employment opportunity responsibilities.