

TRANSMITTAL

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Federal Contract
Compliance Programs

Number: 254 Date: March 21, 2002 ADM Notice/Functional AAP

1. **SUBJECT:** Functional Affirmative Action Programs (AAPs)

2. **PURPOSE:** To establish the procedures for processing contractor requests for agreements to use AAPs that are based on functional or business units.

3. **FILING INSTRUCTIONS:** Holders of ADM and LEG Binders only: Insert a new tab, "Functional AAP," immediately after the "FORMS" tab in your Administrative Practices Binder, and file this Notice behind that tab.

District and Area Office EOSs and EOAs only: File this Notice with the attachment behind the Tab for ADM Directives in your FCCM Binder.

4. **OBSOLETE DATA:** None

5. **DISTRIBUTION:** A, B, C

CHARLES E. JAMES, SR.
Deputy Assistant Secretary for
Federal Contract Compliance

DATE

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U.S. DEPARTMENT OF LABOR
EMPLOYMENT STANDARDS ADMINISTRATION
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS
WASHINGTON, DC 20210

1. **SUBJECT:** Functional Affirmative Action Programs (AAPs)
2. **PURPOSE:** To establish the procedures for processing contractor requests for agreements to use AAPs that are based on functional or business units.
3. **ORIGINATOR:** Division of Policy, Planning, and Program Development
4. **BACKGROUND:** The Final Rule published on November 13, 2000, (65 Fed. Reg. 68022), added a new provision to permit contractors to develop an AAP that is organized around a business function or line of business, that need not take into account the geographic locations of the establishments and employees. The new regulation at 41 CFR 60-2.1(d)(4) provides:

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.

Under the new regulation, "functional AAPs", as they are sometimes called, are authorized when the contractor has reached an agreement with OFCCP and the Deputy Assistant Secretary has approved the functional AAP agreement.

The new regulation also makes it clear that while OFCCP may enter into an agreement allowing a contractor to use functional AAPs, the agency will not negotiate how compliance evaluations will be conducted.

In the absence of an approved agreement required under 41 CFR 60-2.1(d)(4), the regulations require contractors to

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develop and maintain AAPs for each of their establishments, i.e., a separate AAP for each physical location.

Some multi-establishment contractors may find it appropriate to develop AAPs based on functional or business units. Other contractors, however, will continue to develop and maintain establishment-based AAPs.

Any multi-establishment supply and service contractor subject to AAP requirements may request an agreement that would allow for the development and use of AAPs based on functional or business units.

The functional AAP agreements that are permitted under 41 CFR 60-2.1(d)(4) are to be distinguished from agreements for Standard Affirmative Action Formats (SAAFS). The regulation at 41 CFR 60-1.20(e) provides that contractors may reach agreement with OFCCP on a standardized AAP format that would be used by the contractor in all establishments. A contractor that has a SAAF agreement still develops an AAP for each establishment, but OFCCP and the contractor have agreed upon the AAP format that will be used for each AAP component such as job groups, availability analyses, and goal establishment.

5. **DEFINITION:** The term "functional AAP" as used throughout this Administrative Notice refers to the development and preparation of an AAP based on clearly distinct functional or business units within a corporate structure as opposed to an AAP based solely on physical location.

A functional or business unit is a component of a company that operates somewhat autonomously. For instance, a functional or business unit may have its own managing official; it may be listed separately on a company's organizational chart; and/or it may operate under separate cost centers. A functional or business unit may also have personnel transactional activities (e.g., applicant flow, hires, promotion, terminations, etc.) that are distinguishable from other parts of the company.

6. **POLICY:** This Administrative Notice transmits the procedures for processing and approving a contractor request for a functional AAP agreement. This Notice will remain in effect until a further Notice is issued.

- a) A functional AAP agreement may be implemented after the contractor has received the written approval of the Deputy Assistant Secretary for Federal Contract Compliance (DAS), or his or her designee.

After 120 calendar days from OFCCP's confirmed receipt of the contractor's request, if OFCCP has neither approved

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nor disapproved the contractor's request for a functional AAP agreement, the request will be deemed approved by the DAS and may be implemented 120 calendar days after the date OFCCP received the written request.

- b) A functional AAP agreement must cover the contractor's entire workforce. However this does not mean that the entire workforce must be covered by functional AAP(s). In some cases it may be appropriate for a contractor to use both functional AAP(s) and establishment-based AAP(s).

For example, a contractor with three establishments submits a request for a functional AAP agreement. The establishments are located in different States, and each location has both a Marketing and a Research function. The contractor requests permission to develop two functional AAPs, one for the Marketing employees and one for Research employees. The functional AAP agreement would permit the contractor to develop and to implement two functional AAPs (Marketing and Research) regardless of their geographic location, and separate establishment-based AAPs covering all other employees at the different locations.

- c) Each functional AAP of a contractor must be based on an actual functional or business unit.
- d) When a contractor with an approved functional AAP agreement so significantly changes its structure so as to alter the functions upon which the original functional AAP agreement was based (e.g., a merger, acquisition, downsizing or reorganization that would result either in the elimination of certain functions that were included in the original functional AAP agreement or the addition of new functions), the contractor will immediately notify the DAS of the change(s) in writing. The contractor should also include sufficient information to determine whether the agreement should be modified or amended based upon the changed circumstances. The DAS will then determine whether it is necessary to amend or modify the functional AAP agreement. Failure to provide notification of significant changed circumstances may result in termination of the functional AAP agreement.
- e) Either party may terminate the functional AAP agreement upon 90 calendar days written notice. The notice will provide a brief explanation of the reason(s) for the termination, and the effective date of the termination.
- f) Notwithstanding the notice of termination provided in 6(e) above, functional AAP agreements will expire five years after the date of approval.

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The contractor may request that the agreement be renewed for another five-year term. The renewal request is to be submitted to the DAS at least 120 calendar days prior to the expiration of the functional AAP agreement. The request from the contractor that the agreement be renewed for another five-year term will be deemed accepted by OFCCP unless rejected in writing within 60 calendar days of receipt.

- g) A functional AAP agreement will not relieve a contractor of its obligation to comply with OFCCP's regulations, policies and procedures. OFCCP will not negotiate its procedures for determining compliance with its regulations. A functional AAP agreement may not contain provisions limiting access or the manner and means by which compliance evaluations will be initiated or conducted. Such issues are not negotiable.
 - h) OFCCP will use the information that the contractor provides in support of its request for a functional AAP agreement solely for the purpose of evaluating the request.
 - i) OFCCP will treat the information the contractor provides in support of a request for a functional AAP agreement as sensitive and confidential to the maximum extent possible under the Freedom of Information Act (FOIA), with the same disclosure safeguards that are applied to Affirmative Action Program data that are of a sensitive or confidential nature.
 - j) A request for permission to use functional AAPs that was submitted prior to the issuance of this directive will be considered received by OFCCP on the date this directive is issued. OFCCP will provide written acknowledgement of a request. If a contractor had requested permission to use functional AAPs prior to the issuance of this directive and has not received a written acknowledgement from OFCCP within 30 calendar days from the date this directive is issued, the contractor should contact OFCCP.
7. **CONTRACTOR CRITERIA:** The criteria the OFCCP will use in evaluating a request for a functional AAP will be whether the contractor operates with distinct functional or business units.
8. **MANDATORY COMPONENTS OF A FUNCTIONAL AAP:** A functional AAP must include the components that are prescribed in the regulations in 41 CFR Part 60-2 and as enumerated in items a-i, below. All AAP components, however, will be based on functional or business units rather than an establishment.

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- a) An organizational profile, as required under 41 CFR 60-2.11.
 - b) A job group analysis and the placement of incumbents in job groups, as required under 41 CFR 60-2.12 and 60-2.13, respectively.
 - c) The availability determinations required under 41 CFR 60-2.14, along with a description of the methodology used to determine availability for the job groups covered by the proposed functional AAP(s).
 - d) A comparison of incumbency to availability in an acceptable format, as required under 41 CFR 60-2.15.
 - e) Placement goals, if applicable, and a description of the contractor's methodology for goal setting as required under 41 CFR 60-2.16.
 - f) Designation of the responsibility for implementing the functional AAP(s) as required under 41 CFR 60-2.17(a).
 - g) A description of the in-depth analyses of the employment process that were conducted to determine whether impediments to equal employment opportunity exist, and a list of the problem areas identified, as required under 41 CFR 60-2.17(b).
 - h) A description of the action-oriented programs that will be implemented to correct any problem areas identified and to establish goals and objectives, as required under 41 CFR 60-2.17(c).
 - i) A description of the internal audit and reporting systems that are used to measure the effectiveness of the AAP, as required under 41 CFR 60-2.17(d).
9. **PROCEDURE:** OFCCP desires that the process for approval of a functional AAP agreement be simple and fluid - a collaborative effort in which OFCCP and the contractor work together to process the functional AAP request in an expeditious manner consistent with OFCCP policies and procedures.
- a) A contractor desiring a functional AAP agreement must submit a written request to the DAS briefly explaining why it believes that use of a functional AAP would be most appropriate for its particular corporate structure. The contractor will also designate a corporate contact person with telephone number in this correspondence. This person must have the authority, resources, and support of top management to ensure the effective implementation of the functional AAP.

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- b) The request for a functional AAP agreement must be submitted at least 120 calendar days prior to the expiration of the current corporate headquarters AAP.
- c) After receipt of the written request, OFCCP will provide written acknowledgement of the request within two weeks to the designated corporate contact person.
- d) If needed, OFCCP will schedule an initial meeting or a conference call between OFCCP and the contractor to discuss the functional AAP request. Members of an OFCCP Coordination Support Team (CST), discussed below, and corporate representatives will attend the initial meeting or participate in the conference call.
- e) Prior to the initial meeting or conference call, the contractor will advise OFCCP (through its CST contact person) of the names and positions of the persons representing the contractor during the discussions.
- f) In order to aid OFCCP in determining whether a contractor operates with distinct functional or business units, the contractor's representatives attending the initial meeting or participating in the conference call should be prepared to discuss the following areas:
 - i) location of the facilities (or establishments) where the employees perform their duties;
 - ii) how the company is organized within each functional or business unit (e.g., a discussion of the various divisions or departments within the corporate structure);
 - iii) the reporting hierarchy within each such functional or business unit;
 - iv) the total number of employees within the contractor's workforce;
 - v) the total number of employees within each functional or business unit and the identification of the managing official of each functional or business unit;
 - vi) the total number of employees not covered by functional AAP(s) that are covered in establishment-based AAP(s);
 - vii) a description of the personnel processes (including recruitment, hiring and promotion) as they apply to each unit; and

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- viii) any other information the contractor believes would further assist OFCCP in understanding its corporate structure, procedures and need for a functional AAP(s).
- g) During the initial meeting or conference call between CST and the contractor's representatives, a discussion regarding the preparation of the mandatory components, e.g., job group construction and the appropriate methodology for determining availability, will also take place.
- h) Every effort will be made during the initial meeting or conference call to gather sufficient information regarding the contractor's corporate structure and need for a functional AAP agreement. However, additional information may be necessary after the initial meeting or conference call for OFCCP to make a final determination on the contractor's request.

National and Regional Office Responsibilities:

Coordination Support Team: The DAS will appoint a Coordination Support Team (CST) to work with the contractor's designated representatives to coordinate the development of an acceptable functional AAP agreement.

The CST may include representatives from OFCCP's Division of Program Operations, the Division of Policy, Planning and Program Development, and the Regional Office in which the contractor's corporate headquarters is located.

The relationship between the contractor and CST will be a cooperative effort between the two to develop an instrument reflective of the contractor's actual corporate structure and conducive to OFCCP's compliance evaluation processes.

DAS Approval: If the contractor and CST reach an agreement, a copy of the proposed functional AAP agreement will be sent to the DAS for review and approval. The DAS may submit questions and comments to the CST, and/or consult with the relevant Regional Director. If final approval is granted by the DAS, a copy of the signed agreement will be sent to the contractor. In addition, copies of the signed agreement materials will be sent to each Regional Office for distribution to its district offices as appropriate. If the DAS rejects the proposed agreement, it will be returned to the CST who will work with the contractor to address and resolve any concerns about the proposed agreement. After the issues are resolved, the proposed agreement will be resubmitted to the DAS.

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10. **IMPLEMENTATION**: Until the functional AAP agreement is approved, the contractor must continue to develop and maintain AAPs for each establishment.
11. **OBSOLETE DATA**: None
12. **DISTRIBUTION**: A, B, C

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