

# Subpart 22.8 - Equal Employment Opportunity

**Parent topic:** [Part 22 - Application of Labor Laws to Government Acquisitions](#)

## 22.800 Scope of subpart.

This subpart prescribes policies and procedures pertaining to nondiscrimination in employment by *contractors* and *subcontractors*.

## 22.801 Definitions.

As used in this subpart-

*Affirmative action program* means a *contractor's* program that complies with Department of Labor regulations to ensure equal opportunity in employment to minorities and women.

*Compliance evaluation* means any one or combination of actions that the Office of Federal Contract Compliance Programs (OFCCP) may take to examine a Federal *contractor's* compliance with one or more of the requirements of *E.O. 11246*.

*Contractor* includes the terms "*prime contractor*" and "*subcontractor*."

*Deputy Assistant Secretary* means the *Deputy Assistant Secretary* for Federal Contract Compliance, U.S. Department of Labor, or a designee.

*Equal Opportunity clause* means the clause at [52.222-26](#), Equal Opportunity, as prescribed in [22.810\(e\)](#).

*E.O. 11246* means Parts II and IV of Executive Order 11246, September 24, 1965 (30 FR12319), and any Executive order amending or superseding this order (see [22.802](#)). This term specifically includes the *Equal Opportunity clause* at [52.222-26](#), and the rules, regulations, and orders issued pursuant to *E.O. 11246* by the Secretary of Labor or a designee.

*Gender identity* has the meaning given by the Department of Labor's Office of Federal Contract Compliance Programs, and is found at [www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html).

*Prime contractor* means any person who holds, or has held, a Government contract subject to *E.O. 11246*.

*Recruiting and training agency* means any person who refers workers to any *contractor* or provides or supervises apprenticeship or training for employment by any *contractor*.

*Sexual orientation* has the meaning given by the Department of Labor's Office of Federal Contract Compliance Programs, and is found at [www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html](http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html).

*Site of construction* means the general physical location of any building, highway, or other change or improvement to real property that is undergoing *construction*, rehabilitation, alteration, conversion,

extension, demolition, or repair; and any temporary location or facility at which a *contractor* or other participating party meets a demand or performs a function relating to a Government contract or *subcontract*.

*Subcontract* means any agreement or arrangement between a *contractor* and any person (in which the parties do not stand in the relationship of an employer and an employee)-

(1) For the purchase, sale, or use of *personal property* or nonpersonal services that, in whole or in part, are necessary to the performance of any one or more contracts; or

(2) Under which any portion of the *contractor's* obligation under any one or more contracts is performed, undertaken, or assumed.

*Subcontractor* means any person who holds, or has held, a *subcontract* subject to *E.O. 11246*. The term "first-tier *subcontractor*" means a *subcontractor* holding a *subcontract* with a *prime contractor*.

*United States* means the 50 States, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island.

## **22.802 General.**

(a) Executive Order 11246, as amended, sets forth the *Equal Opportunity clause* and requires that all agencies-

(1) Include this clause in all nonexempt contracts and *subcontracts* (see [22.807](#)); and

(2) Act to ensure compliance with the clause and the regulations of the Secretary of Labor-

(i) To promote the full realization of equal employment opportunity for all persons, regardless of race, color, religion, sex, *sexual orientation*, *gender identity*, or national origin; and

(ii) To prohibit *contractors* from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This prohibition against discrimination does not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the *contractor's* legal duty to furnish information.

(b) No contract or modification involving new *acquisition* shall be entered into, and no *subcontract* shall be approved by a *contracting officer*, with a person who has been found *ineligible* by the *Deputy Assistant Secretary* for reasons of noncompliance with the requirements of *E.O. 11246*.

(c) No *contracting officer* or *contractor* shall contract for *supplies* or services in a manner so as to avoid applicability of the requirements of *E.O. 11246*.

(d) *Contractor* disputes related to compliance with its obligation shall be handled according to the rules, regulations, and relevant orders of the Secretary of Labor (see 41 CFR60-1.1).

## 22.803 Responsibilities.

(a) The Secretary of Labor is responsible for the-

(1) Administration and enforcement of prescribed parts of *E.O. 11246*; and

(2) Adoption of rules and regulations and the issuance of orders necessary to achieve the purposes of *E.O. 11246*.

(b) The Secretary of Labor has delegated authority and assigned responsibility to the *Deputy Assistant Secretary* for carrying out the responsibilities assigned to the Secretary by *E.O. 11246*, except for the issuance of rules and regulations of a general nature.

(c) The head of each agency is responsible for ensuring that the requirements of this subpart are carried out within the agency, and for cooperating with and assisting the OFCCP in fulfilling its responsibilities.

(d) In the event the applicability of *E.O. 11246* and implementing regulations is questioned, the *contracting officer shall* forward the matter to the *Deputy Assistant Secretary*, through agency channels, for resolution.

## 22.804 Affirmative action programs.

### 22.804-1 Nonconstruction.

Except as provided in [22.807](#), each nonconstruction *prime contractor* and each *subcontractor* with 50 or more employees and either a contract or *subcontract* of \$50,000 or more, or Government bills of lading that in any 12-month period total, or can reasonably be expected to total, \$50,000 or more, is required to develop a written *affirmative action program* for each of its establishments. Each *contractor* and *subcontractor shall* develop its written *affirmative action programs* within 120 days from the commencement of its first such Government contract, *subcontract*, or Government bill of lading.

### 22.804-2 Construction.

(a) *Construction contractors* that hold a nonexempt (see [22.807](#)) Government *construction* contract are required to meet-

(1) The contract terms and conditions citing affirmative action requirements applicable to covered geographical areas or projects; and

(2) Applicable requirements of 41 CFR60-1 and 60-4.

(b) Each agency *shall* maintain a listing of covered geographical areas that are subject to affirmative action requirements that specify goals for minorities and women in covered *construction* trades. Information concerning, and additions to, this listing will be provided to the principally affected *contracting officers* in accordance with agency procedures. Any *contracting officer* contemplating a

*construction* project in excess of \$10,000 within a geographic area not known to be covered by specific affirmative action goals *shall* request instructions on the most current information from the OFCCP regional office, or as otherwise specified in agency regulations, before issuing the *solicitation*.

(c) *Contracting officers shall* give written notice to the OFCCP regional office within 10 working days of award of a *construction* contract subject to these affirmative action requirements. The notification *shall* include the name, address, and telephone number of the *contractor*; employer identification number; dollar amount of the contract; estimated starting and completion dates of the contract; the contract number; and the geographical area in which the contract is to be performed. When requested by the OFCCP regional office, the *contracting officer shall* arrange a conference among *contractor, contracting activity*, and compliance personnel to discuss the *contractor's* compliance responsibilities.

## **22.805 Procedures.**

(a) Preaward clearances for contracts and *subcontracts* of \$10 million or more (excluding *construction*).

(1) Except as provided in paragraphs (a)(4) and (a)(8) of this section, if the estimated amount of the contract or *subcontract* is \$10 million or more, the *contracting officer shall* request clearance from the appropriate OFCCP regional office before-

(i) Award of any contract, including any indefinite delivery contract or letter contract; or

(ii) Modification of an existing contract for new effort that would constitute a contract award.

(2) Preaward clearance for each proposed contract and for each proposed first-tier *subcontract* of \$10 million or more *shall* be requested by the *contracting officer* directly from the OFCCP regional office(s). Verbal requests *shall* be confirmed by letter or facsimile transmission.

(3) When the contract work is to be performed outside the *United States* with employees recruited within the *United States*, the *contracting officer shall* send the request for a preaward clearance to the OFCCP regional office serving the area where the proposed *contractor's* corporate home or branch office is located in the *United States*, or the corporate location where personnel recruiting is handled, if different from the *contractor's* corporate home or branch office. If the proposed *contractor* has no corporate office or location within the *United States*, the preaward clearance request action *should* be based on the location of the *recruiting and training agency* in the *United States*.

(4) The *contracting officer* does not need to request a preaward clearance if-

(i) The specific proposed *contractor* is listed in OFCCP's National Preaward Registry via the Internet at <https://www.dol.gov/agencies/ofccp/pre-award/registry>;

(ii) The projected award date is within 24 months of the proposed *contractor's* Notice of Compliance completion date in the Registry; and

(iii) The *contracting officer* documents the Registry review in the contract file.

(5) The *contracting officer shall* include the following information in the preaward clearance request:

(i) Name, address, and telephone number of the prospective *contractor* and of any corporate affiliate at which work is to be performed.

(ii) Name, address, and telephone number of each proposed first-tier *subcontractor* with a proposed *subcontract* estimated at \$10 million or more.

(iii) Anticipated date of award.

(iv) Information as to whether the *contractor* and first-tier *subcontractors* have previously held any Government contracts or *subcontracts*.

(v) Place or places of performance of the prime contract and first-tier *subcontracts* estimated at \$10 million or more, if known.

(vi) The estimated dollar amount of the contract and each first-tier *subcontract*, if known.

(6) The *contracting officer shall* allow as much time as feasible before award for the conduct of necessary *compliance evaluation* by OFCCP. As soon as the apparently successful *offeror* can be determined, the *contracting officer shall* process a preaward clearance request in accordance with agency procedures, assuring, if possible, that the preaward clearance request is submitted to the OFCCP regional office at least 30 days before the proposed award date.

(7) Within 15 days of the clearance request, OFCCP will inform the awarding agency of its intention to conduct a preaward *compliance evaluation*. If OFCCP does not inform the awarding agency within that period of its intention to conduct a preaward *compliance evaluation*, clearance *shall* be presumed and the awarding agency is authorized to proceed with the award. If OFCCP informs the awarding agency of its intention to conduct a preaward *compliance evaluation*, OFCCP *shall* be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance *shall* be presumed and the awarding agency is authorized to proceed with the award.

(8) If the procedures specified in paragraphs (a)(6) and (a)(7) of this section would delay award of an urgent and critical contract beyond the time necessary to make award or beyond the time specified in the *offer* or extension thereof, the *contracting officer shall* immediately inform the OFCCP regional office of the expiration date of the *offer* or the required date of award and request clearance be provided before that date. If the OFCCP regional office advises that a preaward evaluation cannot be completed by the required date, the *contracting officer shall* submit written justification for the award to the *head of the contracting activity*, who, after informing the OFCCP regional office, *may* then approve the award without the preaward clearance. If an award is made under this authority, the *contracting officer shall* immediately request a postaward evaluation from the OFCCP regional office.

(9) If, under the provisions of paragraph (a)(8) of this section, a postaward evaluation determines the *contractor* to be in noncompliance with *E.O. 11246*, the *Deputy Assistant Secretary may* authorize the use of the enforcement procedures at [22.809](#) against the noncomplying *contractor*.

(b) *Furnishing posters.* The *contracting officer shall* furnish to the *contractor* appropriate quantities of the poster entitled "Equal Employment Opportunity Is The Law." These *shall* be obtained in accordance with agency procedures.

## 22.806 Inquiries.

(a) An inquiry from a *contractor* regarding status of its compliance with *E.O. 11246*, or rights of appeal to any of the actions in 22.809, *shall* be referred to the OFCCP regional office.

(b) Labor union inquiries regarding the revision of a collective bargaining agreement in order to comply with *E.O. 11246* *shall* be referred to the *Deputy Assistant Secretary*.

## 22.807 Exemptions.

(a) Under the following exemptions, all or part of the requirements of *E.O. 11246* *may* be excluded from a contract subject to *E.O. 11246*:

(1) *National security*. The *agency head* *may* determine that a contract is essential to the national security and that the award of the contract without complying with one or more of the requirements of this subpart is necessary to the national security. Upon making such a determination, the agency *shall* notify the *Deputy Assistant Secretary* in writing within 30 days.

(2) *Specific contracts*. The *Deputy Assistant Secretary* *may* exempt an agency from requiring the inclusion of one or more of the requirements of *E.O. 11246* in any contract if the *Deputy Assistant Secretary* deems that special circumstances in the national interest so require. Groups or categories of contracts of the same type *may* also be exempted if the *Deputy Assistant Secretary* finds it impracticable to act upon each request individually or if group exemptions will contribute to convenience in the administration of *E.O. 11246*.

(b) The following exemptions apply even though a contract or *subcontract* contains the *Equal Opportunity clause*:

(1) *Transactions of \$10,000 or less*. The *Equal Opportunity clause* is required to be included in prime contracts and *subcontracts* by 22.802(a). Individual prime contracts or *subcontracts* of \$10,000 or less are exempt from application of the *Equal Opportunity clause*, unless the aggregate value of all prime contracts or *subcontracts* awarded to a *contractor* in any 12-month period exceeds, or can reasonably be expected to exceed, \$10,000. (Note: Government bills of lading, regardless of amount, are not exempt.)

(2) *Work outside the United States*. Contracts are exempt from the requirements of *E.O. 11246* for work performed outside the *United States* by employees who were not recruited within the *United States*.

(3) *Contracts with State or local governments*. The requirements of *E.O. 11246* in any contract with a State or local government (or any agency, instrumentality, or subdivision thereof) *shall* not be applicable to any agency, instrumentality, or subdivision of such government that does not participate in work on or under the contract.

(4) *Work on or near Indian reservations*. It *shall* not be a violation of *E.O. 11246* for a *contractor* to extend a publicly announced preference in employment to Indians living on or near an Indian reservation in connection with employment opportunities on or near an Indian reservation. This applies to that area where a person seeking employment could reasonably be expected to commute to and from in the course of a work day. *Contractors* extending such a preference *shall* not, however,

discriminate among Indians on the basis of religion, sex, *sexual orientation*, *gender identity*, or tribal affiliation, and the use of such preference *shall* not excuse a *contractor* from complying with E.O. 11246, rules and regulations of the Secretary of Labor, and applicable clauses in the contract.

(5) *Facilities not connected with contracts*. The *Deputy Assistant Secretary* may exempt from the requirements of E.O. 11246 any of a *contractor's* facilities that the *Deputy Assistant Secretary* finds to be in all respects separate and distinct from activities of the *contractor* related to performing the contract, provided, that the *Deputy Assistant Secretary* also finds that the exemption will not interfere with, or impede the effectiveness of, E.O. 11246.

(6) *Indefinite-quantity contracts*. With respect to indefinite-quantity contracts and *subcontracts*, the *Equal Opportunity clause* applies unless the *contracting officer* has reason to believe that the amount to be ordered in any year under the contract will not exceed \$10,000. The applicability of the *Equal Opportunity clause* shall be determined by the *contracting officer* at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the *Equal Opportunity clause* shall be applied to the contract whenever the amount of a single order exceeds \$10,000. Once the *Equal Opportunity clause* is determined to be applicable, the contract shall continue to be subject to such clause for its duration regardless of the amounts ordered, or reasonably expected to be ordered, in any year.

(7) *Contracts with religious entities*. Pursuant to E.O. 13279, Section 202 of E.O. 11246, shall not apply to a Government *contractor* or *subcontractor* that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities. Such *contractors* and *subcontractors* are not exempted or excused from complying with the other requirements contained in the order.

(c) To request an exemption under paragraph (a)(2) or (b)(5) of this section, the *contracting officer* shall submit, under agency procedures, a detailed justification for omitting all, or part of, the requirements of E.O. 11246. Requests for exemptions under paragraph (a)(2) or (b)(5) of this section shall be submitted to the *Deputy Assistant Secretary* for approval.

(d) The *Deputy Assistant Secretary* may withdraw the exemption for a specific contract, or group of contracts, if the *Deputy Assistant Secretary* deems that such action is necessary and appropriate to achieve the purposes of E.O. 11246. Such withdrawal shall not apply-

(1) To contracts awarded before the withdrawal; or

(2) To any sealed bid contract (including restricted sealed bidding), unless the withdrawal is made more than 10 days before the bid opening date.

## **22.808 Complaints.**

Complaints received by the *contracting officer* alleging violation of the requirements of E.O. 11246 shall be referred immediately to the OFCCP regional office. The complainant shall be advised in writing of the referral. The *contractor* that is the subject of a complaint shall not be advised in any manner or for any reason of the complainant's name, the nature of the complaint, or the fact that the complaint was received.

## 22.809 Enforcement.

Upon written notification to the *contracting officer*, the *Deputy Assistant Secretary* may direct one or more of the following actions, as well as administrative sanctions and penalties, be taken against *contractors* found to be in violation of *E.O. 11246*, the regulations of the Secretary of Labor, or the applicable *contract clauses*:

- (a) Publication of the names of the *contractor* or its unions.
- (b) Cancellation, termination, or *suspension* of the *contractor's* contracts or portion thereof.
- (c) *Debarment* from future Government contracts, or extensions or modifications of existing contracts, until the *contractor* has established and carried out personnel and employment policies in compliance with *E.O. 11246* and the regulations of the Secretary of Labor.
- (d) Referral by the *Deputy Assistant Secretary* of any matter arising under *E.O. 11246* to the Department of Justice or to the Equal Employment Opportunity Commission (EEOC) for the institution of appropriate civil or criminal proceedings.

## 22.810 Solicitation provisions and contract clauses.

(a) When a contract is contemplated that will include the clause at [52.222-26](#), Equal Opportunity, the *contracting officer* shall insert-

- (1) The clause at [52.222-21](#), Prohibition of Segregated Facilities, in the *solicitation* and contract; and
- (2) The provision at [52.222-22](#), Previous Contracts and Compliance Reports, in the *solicitation*.

(b) The *contracting officer* shall insert the provision at [52.222-23](#), Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity for *Construction*, in *solicitations* for *construction* when a contract is contemplated that will include the clause at [52.222-26](#), Equal Opportunity, and the amount of the contract is expected to be in excess of \$10,000.

(c) The *contracting officer* shall insert the provision at [52.222-24](#), Preaward On-Site Equal Opportunity *Compliance Evaluation*, in *solicitations* other than those for *construction* when a contract is contemplated that will include the clause at [52.222-26](#), Equal Opportunity, and the amount of the contract is expected be \$10 million or more.

(d) The *contracting officer* shall insert the provision at [52.222-25](#), Affirmative Action Compliance, in *solicitations*, other than those for *construction*, when a contract is contemplated that will include the clause at [52.222-26](#), Equal Opportunity.

(e) The *contracting officer* shall insert the clause at [52.222-26](#), Equal Opportunity, in *solicitations* and contracts (see [22.802](#)) unless the contract is exempt from all of the requirements of *E.O. 11246* (see [22.807\(a\)](#)). If the contract is exempt from one or more, but not all, of the requirements of *E.O. 11246*, the *contracting officer* shall use the clause with its *Alternate I*.

(f) The *contracting officer* shall insert the clause at [52.222-27](#), Affirmative Action Compliance Requirements for *Construction*, in *solicitations* and contracts for *construction* that will include the clause at [52.222-26](#), Equal Opportunity, when the amount of the contract is expected to be in excess

of \$10,000.

(g) The *contracting officer shall* insert the clause at [52.222-29](#), Notification of Visa Denial, in contracts that will include the clause at [52.222-26](#), Equal Opportunity, if the *contractor* is required to perform in or on behalf of a foreign country.