

The VDOT Civil Rights Division's Contract Compliance Program

VDOT and its Civil Rights Division have an obligation to ensure that all federal aid construction firms comply with a set of important contractual civil rights requirements related to employment and training. To achieve compliance with those requirements, contractors and subcontractors must engage in specific practices that ensure nondiscrimination, equal employment opportunity and affirmative action. Equal employment opportunity (EEO) is treating all persons the same and providing the same opportunities to everyone, and affirmative action (AA) is the series of steps taken to prevent and correct discrimination.

Federal law requires that no recipient or beneficiary of federal aid shall discriminate against anyone because of race, color, religion, sex, national origin, age, or disability. When a construction contractor signs a federal aid contract, it agrees to specific nondiscrimination, EEO and AA provisions that extend to all of its employment practices.

Employment and training requirements for federal aid contractors have been established in the United States by a number of executive orders, laws, regulations and agency orders. Those requirements are organized and specified in a contract document titled "Form FHWA-1273." Form FHWA-1273 is incorporated into all VDOT federal aid construction contracts of \$10,000 or more and prime contractors must include it in every related subcontract of at least \$10,000. In addition, VDOT federal aid contracts of \$10,000 or more must contain the US Department of Labor's Equal Opportunity Clause and Standard Federal Equal Employment Opportunity Contract Specifications.

EEO/AA is the Law

VDOT and federal aid construction contractors and subcontractors must implement and monitor programs that ensure EEO/AA in all nonexempt construction activities. FHWA regulations in 23 CFR § 230 provide the basis for these contractual obligations and VDOT's contract compliance and monitoring program. VDOT enforces all applicable EEO/AA requirements and is committed to a collaborative and supportive program of compliance through mutual cooperation by FHWA, VDOT, the Civil Rights Division, all contractors, subcontractors and participants. Compliance with federal EEO/AA provisions is also enforceable by referral to appropriate agencies, including FHWA, the Office of Federal Contract Compliance Programs (OFCCP), and the Department of Justice (DOJ).

Please note that while this overview focuses on federal aid contract compliance, Virginia state government contractors are also required to comply with nondiscrimination directives of the Virginia Public Procurement Act in contracts and subcontracts exceeding \$10,000 in state funds. Virginia Executive Order Number Forty One (2015) also encourages state government contractors to "ban the box" on their employment applications.

Prime contractors are responsible for not only the EEO/AA compliance of their own companies, but the compliance of their subcontractors. This overview is designed to help construction contractors better understand and comply with their legal EEO/AA obligations and with the provisions of their VDOT contracts. The following is a basic framework upon which contractors can build their EEO/AA compliance programs. VDOT stresses that the information here is not exclusive and that all compliance determinations are made on a case-by-case basis. If you have questions or require assistance, please do not hesitate to contact the VDOT Civil Rights Division.

Fundamentals of a Compliant EEO Program

Form FHWA-1273: All contractors and subcontractors receiving \$10,000 or more in a federal aid contract are bound to the provisions of this document and are responsible for maintaining compliance with its specifications. Reading and understanding Form FHWA-1273 is the first step in a contractor's federally compliant EEO program.

EEO Officer: Contractors must have a designated EEO officer with the authority to implement an EEO/AA program, monitor compliance with it and promptly investigate any complaints. The EEO officer must have access to top management, all personnel and all information related to company employment practices so that compliance can be assured. The contractor's chief executive is expected to fully support the program and the EEO officer.

EEO Policies and Procedures: Contracting firms are to clearly state their commitment to implementing employment and overall business practices that ensure nondiscrimination and equal opportunity. Contractors must fully document their EEO/AA program activities in recruitment efforts, advertisements, job postings, job applications, training materials, supervisory and employee handbooks, and subcontracting and purchasing agreements.

Communication/Dissemination of Policies: Federal aid construction contractors are expected to hold regular meetings with employees and supervisors, and post jobsite bulletin boards in order to clearly communicate EEO/AA policies. All employees must be informed about these policies and procedures, including how to report complaints.

Recruitment Efforts and Affirmative Action: Full compliance involves making a good faith effort to recruit a diverse workforce and encourage women and minorities to apply for positions. A clear record of recruitment efforts is important, as well as all steps taken to promote and advance women and minority employees after they are hired. Recruitment should be both systematic and direct. Systematic recruitment is targeted to organizations that are women or minority focused, while direct recruitment is done through person-to-person outreach or employee referrals. If a contractor's workforce is not as diverse as the locally available job-seeker population, the contractor remains in compliance with affirmative action requirements as long as the efforts to diversify are continuous, done in good faith, and documented.

On-the-Job Training (OJT) Programs: It is a contractor's responsibility to maintain a continuous training program designed to develop the skills of women, minorities and disadvantaged persons. A program must be in place even if the contractor doesn't have a contract with a specific OJT goal assigned by VDOT. As stated in regulations, FHWA has a policy "to require full utilization of all available training and skill-improvement opportunities to assure the increased participation of minority groups and disadvantaged persons and women in all phases of the highway construction industry." When OJT contract goals are set on projects, FHWA provides contractors with funding assistance for their training programs. And if necessary, VDOT has the authority to withhold payment to contractors that fail make a good faith effort to fulfill their specific OJT contract placement goals.

Monitoring and Review of Personnel Actions: Contractors must schedule a review of their personnel and business practices on a regular basis to ensure nondiscrimination and EEO. The job of the EEO officer is to analyze company personnel actions and monitor the day-to-day compliance of

his or her firm and of all subcontractors. The EEO officer will routinely review the availability of qualified women and minorities in his or her recruitment area and compare the contractor's own workforce with that data. An audit should include an analysis of both representation, or a "snap shot" of the workforce, as well as utilization, the number of hours worked by all employees on a particular project. Although an up-to-date Affirmative Action Plan (AAP) is not required of federal aid contractors, it can be an important way to ensure and fully document compliance.

Employment Data Tracking: Federal aid contractors are responsible for collecting EEO data about applicants and employees in order to show that their personnel decisions, including wage rates, are nondiscriminatory. EEO data must be gathered for purposes of review by both the contractor and applicable government agencies. To maintain compliance, human resource professionals should refer to the Uniform Guidelines on Employee Selection Procedures issued by the Equal Employment Opportunity Commission (EEOC) and be aware of any other guidance from EEOC.

Investigating Adverse Impact and Complaints: The EEO officer must investigate employment patterns that suggest adverse impact and take action to correct them. Adverse impact occurs when employment decisions seem to have less to do with qualifications and performance and more to do with race, color, religion, sex, national origin, age, or disability. The EEO officer will also make clear to all employees that they are protected by EEO laws and can complain to him or her directly about any discrimination or harassment that may occur on the job, without fear of retaliation. The contractor is required to have procedures to receive complaints, conduct fair investigations and take immediate, appropriate action to correct any unlawful discrimination or harassment that may have taken place.

Disadvantaged Business Enterprises: Contractors are expected to adhere to Disadvantaged Business Enterprise (DBE) provisions in their federal aid contracts. It is the responsibility of VDOT and its contractors to ensure full compliance with the DBE program as it is applied to individual contracts. To the best of their ability, contractors must conduct continuous outreach to woman and minority owned businesses to increase the share of federal contracting dollars going to such firms. When VDOT sets a DBE participation goal for a construction contract, the contractor must meet the goal or provide detailed evidence that it made a good faith effort to achieve it. Contractors must also ensure that all of their DBE subcontractors, haulers, suppliers and manufacturers perform a commercially useful function (CUF).

Record-Keeping: Form FHWA-1273 states that contractors shall maintain all EEO-related records for a minimum of three years following final payment for any federal aid contract. Key items to retain are all payroll records with EEO data, and documentation of recruitment and training activities. Contractors must also submit an annual 1391 workforce report to VDOT that is compiled and sent to FHWA.

Documenting EEO/AA Compliance - FHWA

A contractor is in compliance when it has implemented an EEO/AA program that fulfills the all of the requirements specified by FHWA in Form FHWA-1273. With FHWA approval, VDOT's Civil Rights Division has the authority to make determinations about a contractor's compliance with these requirements in their contracts.

Contractors must have in place practices to ensure nondiscrimination, equal opportunity and affirmative action. As stated in the introduction, FHWA regulations in 23 CFR § 230 provide the basis for VDOT's contract compliance and monitoring program. The VDOT Civil Rights Division carries out regular EEO compliance reviews of contractors to determine their compliance status according to the regulations. Not all compliant programs look the same and a variety of steps can be used to build a strong EEO/AA program. However, the regulations do emphasize certain key program features. For example, under 23 CFR 230.409 (e) (6), determinations about compliance should be based on the factors listed below:

1. Is there reasonable representation and utilization of minorities and women in each craft, classification or occupation? If not, what has the contractor done to increase recruitment, hiring, upgrading, and training of minorities and women?
2. What action is the contractor taking to meet the contractual requirement to provide equal employment opportunity?
3. Are the actions taken by the contractor acceptable? Could they reasonably be expected to result in increased utilization of minorities and women?
4. Is there impartiality in treatment of minorities and women?
5. Are affirmative action measures of an isolated nature or are they continuing?
6. Have the contractor's efforts produced results?

Regulations at 23 CFR 230.409 (g) (3) state that the compliance status of the contractor will usually be reflected by positive efforts in the following areas:

1. The contractor's equal employment opportunity (EEO) policy
2. Dissemination of the policy and education of supervisory employees concerning their responsibilities in implementing the EEO policy
3. The authority and responsibilities of the EEO officer
4. The contractor's recruitment activities, especially establishing minority and female recruitment and referral procedures
5. The extent of participation and minority and female utilization in FHWA training programs

6. The contractor's review of personnel actions to ensure equal opportunities
7. The contractor's participation in apprenticeship or other training
8. The contractor's relationship (if any) with unions and minority and female union membership
9. Effective measures to assure nonsegregated facilities, as required by contract provisions
10. The contractor's procedures for monitoring subcontractors and utilization of minority and female subcontractors and/or subcontractors with substantial minority and female employment
11. The adequacy of the contractor's records and reports.

Documenting EEO/AA Compliance – US Department of Labor

VDOT's Civil Rights Division has the authority to monitor contractors' compliance with Executive Order 11246 and implementing regulations as administered by the US Department of Labor (DOL) at 41 CFR 60-1 and 60-4. The Civil Rights Division reviews contractors' compliance with these specifications and is required to refer any suspected violations of the regulations to the DOL Office of Contract Compliance Programs (OFCCP) for determination. The DOL regulations are referred to as the "Equal Opportunity Clause" and "Standard Federal Equal Opportunity Construction Contract Specifications."

The Equal Opportunity Clause includes reference to workforce participation goals for women and minorities on covered projects at specified geographic locations. Contractors' good faith efforts to implement an affirmative action program should make it possible for them to employ women and minorities at the percentages indicated for each locality.

For the US Department of Labor, OFCCP, the following abbreviated action steps are indicators of a contractor's compliance:

1. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites and in all facilities at which the Contractor's employees are assigned to work
2. Establish and maintain a current list of minority and female recruitment sources
3. Maintain a current file of the names, addresses and telephone numbers of each minority and female off the street applicant
4. Report instances where a labor union refuses to enroll newly hired minorities and women

5. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women
6. Disseminate the Contractor's EEO policy
7. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions
8. Disseminate the Contractor's EEO policy externally by including in any news media advertisement that the Contractor is "An Equal Opportunity Employer"
9. Directs its recruitment efforts, both oral and written, to minority, female and community organizations
10. Encourage present minority and female employees to recruit other minority persons and women
11. Validate all tests and other selection requirements where there is an obligation to do so
12. Conduct, at least annually, an inventory and evaluation of all minority and female personnel for promotional opportunities
13. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations under these specifications are being carried out
14. Ensure that all facilities and company activities are nonsegregated
15. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers
16. Conduct a review, at least annually, of all supervisors' adherence to and performance under the contractor's EEO policies and affirmative action obligations