

# FHWA CONTRACT COMPLIANCE PROGRAM



February 28, 2017

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## Session Outcomes

At the end of this session, participants will be able to:

- Understand the requirements of Contractor Compliance (CC) Program;
- Recognize required Contract Provisions on a federal-aid project; and
- Describe the steps of the CC Review Process.



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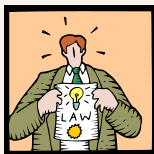
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## Contractor Compliance Program Overview



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## EO Contractor Compliance Program Objective:

To ensure that contractors and subcontractors performing work on Federal-aid highway contracts comply with the Equal Employment Opportunity (EEO) and affirmative action (AA) requirements set forth in their construction contracts.

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## Nondiscrimination

The Federal contractor's EEO and AA applies to employment; upgrading; demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training (OJT).

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## Contractor Compliance Program Authorities

- Federal Aid Highway Act of 1968 (*Section 22(a)*)
- 23 U.S.C. §140 - Nondiscrimination
- State Equal Employment Opportunity Assurances
- 23 CFR Part 230 (*Subparts A, C, and D*)
- Contract Provisions (Form FHWA 1273)



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## Federal-Aid Highway Act of 1968 Section 22(a) {23 U.S.C. 140(a)}

### Requirements of the State DOT:

- As a condition for receipt of federal funds
- Assures that employment in connection with construction projects are provided absent discrimination
- Include EEO requirements in bid specifications
- Enforce EEO contract requirements

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## FHWA Regulations 23 CFR 230 - Subparts

- Subpart A – EEO on Federal and Federal-Aid Construction Contracts (*including Supportive Services*)
- Subpart C – State DOT EEO Programs
- Subpart D – Construction Contract EEO Compliance Procedures



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## FHWA Regulations 23 CFR 230, Subpart A

### Applies to:

- EEO on Federal and Federal-Aid construction contracts and supportive services
- All contracts and subcontracts of \$10,000 or more except material supplying contracts

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## FHWA Regulations 23 CFR 230, Subpart A

### Contractor Compliance Reports: 230.121

- ✓ Federal-Aid Highway Construction Contractors Annual EEO Report (*Form 1391*)
- ✓ Summary of Employment Data (Including Minority Breakdown For All Federal-Aid Highway Projects for Month Ending July 31<sup>st</sup> (*Form 1392*))

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## Required Contract Provisions

## FHWA Regulations 23 CFR 230, Subpart A

### Requires:

- Incorporation of special contract provisions (*Appendix A and B*)
- Implementation of OJT program (*goals and approval of training programs by the FHWA Division Administrator*)

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## Contractor/Subcontractor

- Meet requirements of 23 CFR 230, Required Contract Provisions (*Form 1273*) and Training Special Provisions (*TSP*).
- Demonstrate Good Faith Efforts (GFEs) to achieve EEO in aggregate workforce.




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## 23 CFR 230



### Contract Provisions

- Training Special Provisions - (*Subpart A, Appendix B*)
- Indian Employment Preference
- Specific EEO Responsibilities - (*Form FHWA 1273*)
  - *Contractor/Subcontractor's nondiscrimination and affirmative action responsibilities*
  - *Employment Preference-Appalachian Contracts Only*
  - *Department of Labor - Davis Bacon Requirements*

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## EEO On Federal-Aid Construction Contracts Policy 23 CFR 230.107 (b)

❖ FHWA requires **full utilization** of all available training and skill improvement opportunities to assure the increased participation of minorities, women and disadvantaged groups **in all phases** of highway construction.

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## 23 CFR 230, Subpart A Training Special Provisions (Appendix B)

- As part of the contractor's equal employment opportunity affirmative action program training shall be provided.
- The contractor shall provide on-the-job training aimed at developing full journeymen in the type of trade or job classification involved.
- The number of trainees to be trained under the special provisions.

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## 23 CFR 230, Subpart A Training Special Provisions (Appendix B)

**No payment** shall be made to the contractor if either the **failure to provide the required training**, or the **failure to hire the trainee as a journeyman**, is caused by the contractor and evidences a lack of good faith on the part of the contractor in meeting the requirements of this Training Special Provision.

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## 23 U.S.C. 140 (d)

- Pursuant to 23 U.S.C. 140 (d), it is permissible for State DOTs to implement procedures or requirements which will extend preferential employment to Indians living on or near a reservation on eligible projects as defined in paragraph (e) of this Section.
- Indian preference shall be applied without regard to tribal affiliation or place of enrollment. In no instance should a contractor be compelled to layoff or terminate a permanent core-crew employee to meet a preference goal.

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## Form FHWA-1273

- Section II (*Nondiscrimination*) related to 23 CFR Part 230 are applicable to all Federal-aid construction contracts and to all related construction subcontracts of \$10,000 or more.
- The provisions of 23 CFR Part 230 are not applicable to material supply, engineering, or architectural service contracts.
- The provision (*EEO/EO*) is adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (*US DOL*) and FHWA requirements.

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## 23 CFR 230

### Form FHWA-1273

- Must be physically incorporated in each construction contract funded under Title 23 (*excluding emergency contracts solely intended for debris removal*).
- The contractor (*or subcontractor*) must insert this form in each subcontract and further require its inclusion in all lower tier subcontracts (*excluding purchase orders, rental agreements and other agreements for supplies or services*).

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## Form FHWA 1273 Appalachian Provisions

ATTACHMENT A - EMPLOYMENT AND MATERIALS PREFERENCE FOR APPALACHIAN DEVELOPMENT HIGHWAY SYSTEM OR APPALACHIAN LOCAL ACCESS ROAD CONTRACTS

This provision is applicable to all Federal-aid projects funded under the Appalachian Regional Development Act of 1965.

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## Davis-Bacon and Related Acts Provisions



- Requires that **all contractors and subcontractors** performing on federal contracts (*and contractors or subcontractors performing on federally assisted contracts under the related Acts*) in **excess of \$2,000** pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits listed in the contract's Davis-Bacon wage determination for corresponding classes of laborers and mechanics employed on similar projects in the area.
- Davis-Bacon labor standards clauses must be included in covered contracts.

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## Key Steps Contract Compliance Review

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## 23 CFR 230, Subpart D

- Provides procedures for conducting compliance reviews
- **Requires State DOT to assure compliance by contractors and cooperate with FHWA**



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## 23 CFR 230, Subpart D Compliance Review Stages

1. Review scheduling
2. Contractor notification
3. Preliminary analysis/desk audit
4. On-site verification and interviews
5. Exit conference
6. Compliance determination
7. Formal notification



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## 23 CFR 230, Subpart D Compliance Review Scheduling

- Greatest potential for employment and promotion of minorities and women
- Reasonable recruitment area with significant minority and female labor forces
- Include special training provisions
- Peak Employment

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## 23 CFR 230, Subpart D Contractor Notification

- ❖ Compliance Specialist to provide two week written notification prior to review
- ❖ Contractor to provide meeting place for on-site visit
- ❖ Contractor to supply the Compliance Specialist with review documents prior to on-site verification
- ❖ Contractor to ensure that active subcontractors are present at the meeting



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## 23 CFR 230, Subpart D Preliminary Analysis

### Desk Audit:

- ✓ Contractor's current workforce
- ✓ Contractor's relationship w/referral sources, unions, employment agencies, community
- ✓ Minority and female recruitment sources
- ✓ Pending EEOC, DOJ, or local agency cases w/regard to contractor or referral sources
- ✓ Personnel Actions (*Hires, Promotions, etc.*)

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## 23 CFR 230, Subpart D On-site Verification



- EEO posters are displayed
- Supervisory personnel oriented to contractor's EEO commitments
- Employee referral system is being implemented
- Reported employment data is accurate
- Meetings have been held to discuss EEO policy
- Employees are aware of contractor's EEO complaints procedures
- Conduct Interviews of minorities and women in each trade

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## 23 CFR 230, Subpart D Compliance Determination

### In compliance when contractor:

- ❖ Implements contract provisions and/or demonstrates Good-Faith Efforts (GFEs)

### In noncompliance when contractor:

- ❖ Discriminated
- ❖ Fails to demonstrate GFEs



The authority for making the compliance determination should have no reference to E.O. 11246. The authority of FHWA and the State DOTs are found in 23 USC 140, 23 CFR 230, and the required contract nondiscrimination EO, and EEO provisions.

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## 23 CFR 230, Subpart D Exit Conference Formal Notification

### Voluntary Corrective Action Plan (VCAP)

- Addresses preliminary findings
- Addresses problems found **before** the exit conference
- VCAP can be negotiated at the exit conference

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## Compliance Determination

- Good faith efforts
- Subcontracting
- Employment practices
- Training



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## 23 CFR 230, Subpart D Formal Notification

### Show Cause Notice

- Contractor notified within **15 days** of exit conference
- Issued based on determination of noncompliance or finding of discrimination
- Issued by State DOT (normally)
- FHWA may issue a SCN

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## 23 CFR 230, Subpart D

### Formal Notification

#### Show Cause Notice

- Contractor has 30-days to submit a Corrective Action Plan (CAP)
- **May be rescinded if contractor comes into compliance by:**
  - Correcting all deficiencies found
  - Submitting an approvable CAP

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## Follow-Up Review



- Extension of the **initial review process** to verify the contractor's performance of the corrective action
- Validate progress report information
- Initial review resulted in a finding of noncompliance and a SCN was issued

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## 23 CFR 230, Subpart D

### Compliance Determination

- ❖ **Compliance Review Report:**
- The effectiveness of the contractor's actions to provide equal opportunity and affirmative action
- Reasonable representation and utilization of minorities and women in each craft, classification or occupation
- Impartiality or fairness in the treatment of minorities and women

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## Compliance Questions

Did the contractor have an adequate representation of minorities and females in each construction trade in relation to their availability in the relevant labor pool?



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## Contractor's Workforce

- Determine the existence of reasonable representation of minorities and women in the contractor's workforce.
- Determine the availability to compare the contractor's actual workforce representation with the civilian labor force (CLF) in each job classification.
- Review hours of minorities/nonminorities and women/men to ensure employment and training hours are uniformed in each job classification.

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## Compliance Questions

If under-representation exists, review the good faith efforts exerted by the contractor. Good faith efforts are all those results oriented actions taken by the contractor designed to meet the minority/female representation.

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## GFEs Examples

- ❖ Actions to ensure nondiscrimination in employment opportunities;
- ❖ Actions taken to recruit minorities and women; and
- ❖ Actions Taken to Retain Minorities and Women.



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## Contractor/Subcontractor

- Where barriers exist, take corrective action to address underutilization of minorities and women.
- Meet requirements of 23 CFR 230, Required Contract Provisions (Form 1273) and Training Special Provisions.
- Demonstrate Good Faith Efforts (GFEs) to achieve EEO in aggregate workforce.

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## Compliance Questions

If the results of the review report indicate a finding of **noncompliance** by the contractor, address:

- ✓ Are the workforce deficiencies clearly identified?
- ✓ Does the review report include the copy of the show cause notice? If not, what other corrective action was required?
- ✓ Is there a letter requiring a conciliation conference and a corrective action plan?
- ✓ The corrective action plan should be attached to the report and should include specific actions to be taken by the contractor with time frames.
- ✓ Does the documentation submitted with the review report indicate when a follow-up review will be conducted, or reports required from the contractor?

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## Compliance and Enforcement Contractor/Subcontractor

- Voluntary Corrective Action Plan
- Show Cause Notice
- Corrective Action Plan
- Follow-Up Review
- Enforcement



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Thank You!

**Sandy Talbert-Jackson**  
**FHWA Resource Center**  
**Civil Rights Technical Service Team**

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<http://www.fhwa.dot.gov/resourcecenter/teams/civilrights/index.cfm>

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