

Equal Opportunity (EO) Contractor Compliance Program



U.S. Department of Transportation
Federal Highway Administration



2021 MoDOT Civil Rights Compliance/DBE Virtual Training Symposium

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LEARNING OUTCOMES

❖ At the end of this training, you will be able to:

- ❑ Discuss the authorities for FHWA's Equal Opportunity (EO) Contractor Compliance Program.
- ❑ Clarify the roles and responsibilities of the FHWA, State DOT, and Contractors.
- ❑ Identify the key steps to conduct an equal opportunity contract compliance review.

FHWA EO CONTRACTOR COMPLIANCE PROGRAM OBJECTIVE

❑ 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.

NONDISCRIMINATION

Discrimination is prohibited based on:

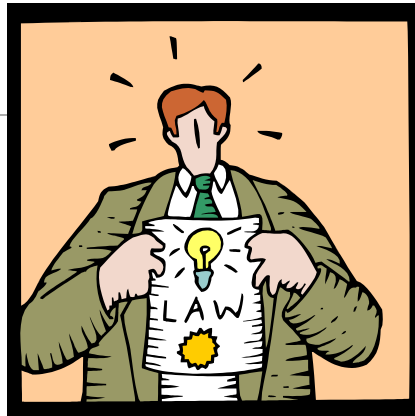
- Race,
- Color,
- Religion,
- Sex, or
- National origin.

NONDISCRIMINATION

The Federal Contractor's EEO and AA apply to:

- Employment,
- Upgrading,
- Demotion,
- Transfer,
- Recruitment/Recruitment Advertising,
- Layoff/Termination,
- Rates of pay/Other forms of compensation,
- Training (apprenticeship, pre-apprenticeship, (OJT)).

AUTHORITIES



FHWA CONTRACTOR COMPLIANCE PROGRAM AUTHORITIES

- ❑ 23 United States Code (USC) 140
- ❑ State EEO Assurances
- ❑ 23 CFR 230 Subpart A, C and D
- ❑ FHWA Order 4710.8
- Contract Provisions (FHWA Form 1273)



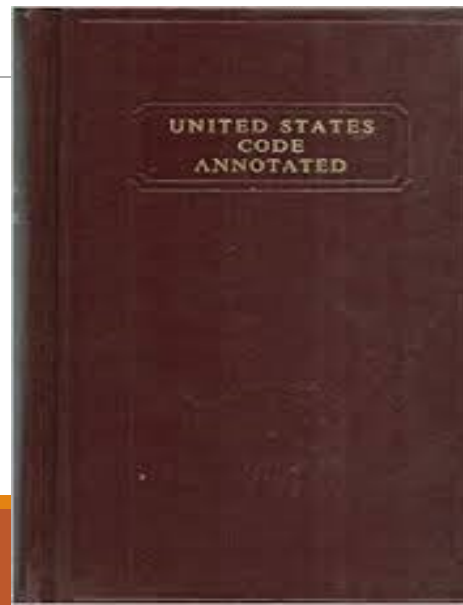
PROGRAM AUTHORITIES

- Title VI of the Civil Rights Act of 1964
- Civil Rights Restoration Act of 1987
- The Federal Aid Highway Act of 1973 (23 U.S.C. 324)
- Appalachian Regional Development Act of 1965

RELATED STATUTES

- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- Equal Pay Act of 1963
- Davis Bacon Act

23 UNITED STATES CODE (USC) 140



FEDERAL AID HIGHWAY ACT OF 1968

23 USC 140(a)

- **Requires** State Transportation Agencies (STAs) to provide **written assurance** as a condition for receipt of federal funds, that employment in connection with proposed projects will be provided without regard to race, color, creed [religion], national origin, or **sex**.
- Federal Aid Highway Act of 1973 added **sex** {23 USC 324}.

STATE EEO ASSURANCES



STATE EEO ASSURANCES

- **Required by Federal Aid Highway Act of 1968, Section 22(a).**
- **STA assures that as a condition for receipt of FFA, employment on projects will be provided without regard to race, color, creed, national origin or sex.**

REQUIRED STATE EEO ASSURANCES

- Establish Equal Opportunity Program --(Contract Compliance and Internal EEO).
- Furnish required information and reports.
- Written equal employment opportunity (EEO) assurances
- Notification in advertised contract
- Appoint EO Coordinator with EO Program as primary duty.

REQUIRED STATE EEO ASSURANCES

- **Enforce EEO contract requirements.**
- **Liaison with agencies and organizations involved in Equal Opportunity.**
- **Include EEO Requirements in bid specifications.**
- **Provide policies and procedures.**

FHWA REGULATIONS

23 CFR 230 - SUBPARTS

REGULATIONS



FHWA REGULATIONS

23 CFR 230 - SUBPARTS

- Subpart A – EEO on Federal and Federal-Aid Construction Contracts and Supportive Services
- **Subpart C – State DOT EEO Programs**
- Subpart D – Construction Contract EEO Compliance Procedures
- *Subpart B – Supportive Services for Minority, Disadvantaged, and Women Business Enterprises*



23 CFR 230 SUBPART A



23 CFR 230, SUBPART A

Applies to:

- EEO on Construction Contracts and Supportive Services.
- Federal-aid highway construction projects.
- Direct Federal highway projects.
- **All subcontracts of \$10,000 or more** *excluding material supply.*

23 CFR 230, SUBPART A

Requires:

- Incorporation of Special Contract Provisions in Appendix A & B.
- Implementation of OJT Program
- Exemption of trainees under OJT program from minimum wage rates

23 CFR 230, SUBPART A

- Training programs to be submitted to Division Administrator for approval.
- STA required to establish OJT/Supportive Services (SS) procedures subject to fund availability {23 CFR 230.113}
- OJT/SS proposals to be submitted to FHWA for approval.

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 31st (*Form 1392*))

23 CFR 230 SUBPART C



23 CFR 230, SUBPART C

- **Establishes FHWA requirements for a Contractor Compliance Program and State Internal EEO Program (Part I and Part II)**
- **Establishes AA as a federal EEO bid condition**
- **Requires the State DOT to develop a contractor compliance program plan**

23 CFR 230, SUBPART C APPENDIX A, PART I

■ **Contractor Compliance Program Contents:**

● **Accomplishments**

- ❖ Number of compliance reviews conducted
- ❖ Number of contractors reviewed
- ❖ Number of contractors found in compliance/non-compliance
- ❖ Number of Show Cause notices issued/rescinded
- ❖ Number of Show Cause actions still under conciliation and unresolved

23 CFR 230, SUBPART C APPENDIX A, PART I

■ **Contractor Compliance Program Contents:**

- ❖ Number of follow-up reviews conducted
- ❖ Major problems encountered
- ❖ Major breakthroughs
- ❖ Contract sanctions

EXECUTIVE ORDER 11246



EXECUTIVE ORDER 11246

- Prohibits discrimination on the basis of race, religion, color, or national origin in the employment practices of federal and federally assisted contractors
- Requires contracting agencies to include Equal Opportunity clause in all federal and federally assisted contracts and subcontracts in excess of \$10,000 {Sec. 202 of E.O. 11246}



FHWA ORDER 4710.8



FHWA ORDER 4710.8

Clarifies OFCCP and FHWA Roles

- FHWA and States enforce Title 23.
- FHWA and State insert appropriate EO clauses in contracts.
- **FHWA and State do not independently have authority to enforce EO 11246 requirements including minority/female goals.**

FHWA ORDER 4710.8

- FHWA/States may refer violations to OFCCP.
- FHWA Form 86, Compliance Data Report canceled.

ROLES AND RESPONSIBILITIES



FHWA DIVISION OFFICE

- Ensure the State meets its Contractor Compliance Program requirements;
- Provide guidance & direction to State DOT;
- Monitor compliance efforts and evaluate State's programs; and
- Approve Contractor Compliance Plan Program documents, and compliance review reports.

STATE DEPARTMENT OF TRANSPORTATION (STATE DOT)

- Ensure contractors comply with contractual requirements, including EEO provisions;
- Assist and cooperate with FHWA and OFCCP to ensure EEO;
- Initiate voluntary efforts to ensure compliance or use sanctions; and
- Inform FHWA/OFCCP of any actions taken against a contractor.

CONTRACTOR/SUBCONTRACTOR

- **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**

CONTRACT PROVISIONS





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.



FHWA-1273

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.



FHWA - 1273

SECTION II – NONDISCRIMINATION PROVISIONS

- EEO Policy Statement
- EEO Officer
- Dissemination of Policy
- Recruitment
- Personnel Actions
- Training and Promotion
- Unions
- Selection of Subcontractors, Procurement of Materials, and Leasing of Equipment
- Records and Reports



What Are the Nondiscrimination Provisions?

EQUAL EMPLOYMENT OPPORTUNITY & EQUAL OPPORTUNITY

The provisions (*EEO/EO*) are adopted from 23 CFR 230, Appendix A, with appropriate revisions to conform to the U.S. Department of Labor (US DOL) and FHWA requirements.



U.S. Department
of Transportation
**Federal Highway
Administration**



DEMONSTRATE GOOD FAITH EFFORTS (GFES) TO ACHIEVE EEO

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



CONTRACT COMPLIANCE REVIEW PROCESS

23 CFR 230, SUBPART D



23 CFR 230, SUBPART D

GENERAL

- Provides procedures for conducting;
 - Compliance reviews.
 - Consolidated compliance reviews.
- Establish FHWA and STA responsibilities.
 - FHWA to provide guidance and direction.
 - STA to assure compliance by contractors and cooperate with FHWA.
 - STA to take action under its contract administration procedures to ensure compliance.



23 CFR 230, SUBPART D

Compliance Review Stages

- ✓ Review Scheduling
- ✓ Contractor Notice
- ✓ Desk Audit/Preliminary Analysis
- ✓ On-site Verification and Interviews
- ✓ Exit Conference
- ✓ Compliance Determination
- ✓ Formal Notice



Review Scheduling

- Projects with most opportunities
- In areas with significant minority/female labor force
- Before or at peak employment
- Questionable compliance



Review Scheduling

■ **Defining Area for Area Wide Reviews**

- Union boundaries
- Contractor recruitment area
- Standard Metropolitan Statistical Area (SMSA) or Economic Area (EA)
- County project(s) located



Contractor Notification

- At least 2 weeks prior
- Describe review and purpose
- Dates
- Request meeting site
- Attendance by all active subcontractors



Contractor Notification

■ **Information required {23 CFR 230.409(c)(3)}.**

- *1391 and annotated payroll.*
- *Current bargaining agreements.*
- *Purchase orders and subcontracts.*
- *List of recruitment sources.*
- *Status of EEOC, OFCCP or other actions.*
- *List of promotions for past 6 months.*
- *Minority/women businesses contacted.*



Desk Audit Preliminary Analysis

- Involves the review and analysis of all data submitted by contractor.



On-Site

■ Initial meeting:

- State the objective of review.
- Material submitted and discrepancies.
- Arrangements for site tour and interviews.



On-Site

■ Physical Tour:

- EEO Posters.
- Nonsegregated facilities.
- Knowledge of supervisory personnel.
- Employee awareness.
- Implementation of referral sources.
- Verify employment data.



On-Site

- Interview 1 minority/1 female per trade and the superintendent.
- Verify how employees were hired.



Exit Conference

- Preliminary findings.
- Time to final determination (15 days).
- **Voluntary Correction Action Plans (VCAP-15 days after exit conference).**



Compliance Determination

■ In compliance when contractor has:

- Implemented contract provisions or exerted good faith efforts to do so.

■ In non-compliance when contractor has:

- Discriminated
- Failed to provide evidence of GFE.



Show Cause Procedures

- **Contractor to be notified of compliance determination** within 15 calendar days of exit conference.
- **Show Cause issued when noncompliance or finding of discrimination is made** and no VCAP submitted and approved.
- Issued normally by STA.
- FHWA may issue.





Show Cause

(Sample notice in Appendix A to 23 CFR 230, Subpart D)

- Notify contractor of determination and basis.
- Notify contractor of requirement to respond within 30 calendar days.
- Schedule compliance conference within 15 days of receipt of notice.
- Advise contractor of STA's availability to conciliate.
- Be issued via certified mail.

Show Cause

- May be rescinded if contractor comes into compliance by:
 - Correcting all deficiencies found.
 - Submitting an approvable corrective action plan.

- Finding of non compliance with approved corrective action plan will result in imposition of sanctions without another Show Cause Notice.



COMPLIANCE & ENFORCEMENT



COMPLIANCE & ENFORCEMENT EFFORTS

FHWA Authorities:

- **23 USC 140(a)**
- **23 CFR 230, Subparts A, C and D.**
- **23 CFR 1.9 and 1.36***
- **State EEO Assurance**
- **Contract Provisions**



COMPLIANCE & ENFORCEMENT

Contractor/Subcontractor

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



COMPLIANCE & ENFORCEMENT

State DOT

Non-compliance by the State may result in project specific or program wide sanction by FHWA:

- **Cancel, terminate, or suspend agreement**
- **Withhold further federal aid**
- **Refer matter to DOJ**





SUMMARY

- The Equal Opportunity Contractor Compliance Program requires nondiscrimination, equal opportunity and affirmative action.
- Executive Order 11246 and 23 USC 140 programs co-exist.
- Both programs have same objective.

SUMMARY

- ✓ STAs have more expedient means for enforcement.
- ✓ Program enforceable in law and contract.



Questions ??



Thank You!

**FHWA Resource Center
Civil Rights Technical Service Team**

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