



DIRECTIVE (DIR) 2013-01 Revision 1

A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.

Effective Date: April 28, 2016

1. **SUBJECT**: Functional Affirmative Action Programs (FAAPs).
2. **PURPOSE**: To outline the guidelines for applying for and maintaining Functional Affirmative Action Program (FAAP) Agreements.
3. **REFERENCES**: None
4. **AFFECTED POLICY**: Effective April 28, 2016, Federal contractors and subcontractors seeking an agreement to develop, implement, and maintain FAAPs must follow the procedures outlined in this Directive. Approval of an agreement allowing the use of FAAPs is not automatic; an agreement will be approved only if the OFCCP Director determines that the contractor's overall operational structure, compliance history, and proposed FAAPs meet the criteria set forth in this Directive.
5. **BACKGROUND**: The regulations implementing Executive Order 11246 permit federal supply and service contractors to develop affirmative action programs (AAPs) that are based on a business function or business unit rather than AAPs based on contractor establishments. Specifically, the 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 regulation, Federal contractors must have an agreement approved by the OFCCP Director [formerly the Deputy Assistant Secretary] to develop and operate under a FAAP. See example in Attachment A.

On March 21, 2002, OFCCP issued a Directive establishing the procedures for approving contractor requests for agreements to use FAAPs. The 2002 Directive was replaced with Directive 2013-1 issued on December 12, 2012, Subject: Functional Affirmative Action Programs (FAAPs). This Directive supersedes the 2012 Directive.

In the absence of an approved agreement, the regulations require contractors to develop, implement, and maintain a separate AAP for each physical location of an establishment with 50 or more employees.

Any multi-establishment supply and service contractor subject to AAP requirements may request a FAAP agreement that permits the development and use of AAPs based on functional or business units. Some multi-establishment contractors may find it appropriate to develop AAPs based solely on functional or business units, while others may elect to use a combination of both functional units and establishment-based AAPs.

6. **ROLES AND RESPONSIBILITIES:** It is the responsibility of the Division of Program Operations (DPO) to review and recommend approval of contractor requests to develop, implement and maintain FAAPs.
7. **PROCEDURE:** Federal contractors and subcontractors seeking an agreement to develop, implement, and maintain FAAPs must follow the procedures outlined in this Directive.
 - a. **DEFINITIONS:** To ensure clarity and consistency in the implementation of the FAAP Program, definitions for commonly used terms in OFCCP programs are provided below:

Compliance Evaluation – The investigation and review process used by OFCCP to determine if a federal contractor is complying with the nondiscriminatory and affirmative action employment obligations outlined in 41 CFR Chapter 60. A compliance evaluation consists of any one or any combination of the following investigative procedures: compliance review, off-site review of records, compliance check, or focused review. See 41 CFR 60-1.20(a), 60-300.60(a), and 60-741.60(a).

Compliance Review – A comprehensive analysis of the hiring and employment practices of the contractor, including the contractor’s written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis. See 41 CFR 60-1.20(a)(1), 60-300.60(a)(1) and 60-741.60(a)(1).

Establishment - A facility or unit which produces goods or services, such as a factory, office, store, or mine. In most instances, the unit is a physically separate facility at a single location. In appropriate circumstances, OFCCP may consider as an establishment several facilities located at two or more sites when the facilities are in the same labor market or recruiting area. The determination as to whether it is appropriate to group facilities as a single establishment will be made by OFCCP on a case-by-case basis.

Functional or Business Unit - refers to a component within an organization that operates autonomously in the ordinary course of the organization's business. A functional or business unit should also have identifiable personnel practices or transactional activities specific to the functional or business unit (e.g., applicant flow, hires, promotions, compensation determinations, terminations, etc.) that are distinguishable from other parts of the contractor. Functions or business units should be identified and defined based on the organization's existing business operations, personnel practices and management structures.

b. CRITERIA FOR A FUNCTIONAL AAP: To be considered suitable for a FAAP, the functional or business unit must:

- i. Currently exist and operate autonomously.
- ii. Include at least 50 employees.
- iii. Have its own managing official.
- iv. Have the ability to track and maintain its own personnel activity.

c. REQUIRED ELEMENTS OF A FUNCTIONAL AAP: All FAAPs must include the required AAP elements outlined in 41 CFR 60-2, Subpart C of 41 CFR 60-300, and Subpart C of 41 CFR 60-741.

d. BASIC PRINCIPLES OF FUNCTIONAL AAP AGREEMENTS:

- i. A FAAP agreement will be implemented only after the contractor has received the written approval from the OFCCP Director, or his or her designee.
- ii. Applications, modifications, and certifications are not automatic and must be approved by the OFCCP Director, or his or her designee.
- iii. OFCCP will consider whether a contractor is currently reporting its compliance under the requirements of a conciliation agreement when determining whether to approve a FAAP agreement.
- iv. Notification from OFCCP of receipt of the contractor's request for a FAAP agreement does not constitute approval of the request. The requirement to develop, implement and maintain establishment-based AAPs continues in effect until the contractor receives notice that the FAAP agreement has been approved by the OFCCP Director and the contractor has notified OFCCP that its FAAPs have been implemented.
- v. OFCCP will consider EEO violations of the requesting contractor for the past three years from the date of the application, including EEO violations from other local, state and federal government agencies. These findings may impact the

approval of the contractor's FAAP agreement request.

- vi. A FAAP agreement must cover all employees within the contractor's workforce. However, this does not mean that the entire workforce must be covered by FAAP(s). In some cases, it may be appropriate for a contractor to use both FAAPs and establishment-based AAP(s). For example, a contractor has establishments that are located in Seattle, Denver, and Washington, DC. Each of these establishments includes a Marketing unit and Research functions. The functional AAP agreement might permit the contractor to develop and implement two functional AAPs: one for Marketing and one for Research. The remaining employees in each establishment would be covered in separate establishment-based AAPs and reflected in the FAAP agreement addenda. See Attachment A.
- vii. Contractors with approved FAAP agreements must also comply with the affirmative action requirements of Section 503 of the Rehabilitation Act of 1973, as amended (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA). Contractors must comply with their Section 503 and VEVRAA written affirmative action obligations either by: (a) creating and maintaining Section 503 and VEVRAA FAAPs for the same functional or business units that are covered by their Executive Order 11246 FAAPs; or (b) creating and maintaining establishment-based Section 503 and VEVRAA AAPs for each of its establishments. Contractors must inform OFCCP which method they will use to comply with its Section 503 and VEVRAA affirmative action obligations during the FAAP negotiation or certification process. Under either arrangement, contractors must make their AAPs and/or FAAPs available for review at each of their establishments.
- viii. The contractor must demonstrate the ability to efficiently manage and monitor all personnel actions, including recordkeeping and affirmative action responsibilities for all functional or business units regardless of size.
- ix. A FAAP agreement will not relieve a contractor of its obligation to comply with OFCCP's regulations at 41 CFR Chapter 60, and OFCCP will not negotiate its procedures for determining compliance with its regulations.
- x. A FAAP agreement will not contain provisions limiting access or the manner and means by which compliance evaluations will be initiated or conducted. Such matters are not negotiable.
- xi. OFCCP will use the information that the contractor provides in support of its request for a FAAP agreement solely for the purpose of evaluating the request.
- xii. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which the contractor maintains its records and other information. The contractor agrees to provide all documents relating to the FAAP agreement, including modifications, updates, and

certifications, in any of the formats in which they are maintained, as selected by OFCCP.

- xiii. The federal contractor agrees to submit, at a minimum, its personnel activity, *i.e.*, applicant flow, hire, promotion, and termination, and compensation data in a readable and usable electronic format, when so requested during a compliance evaluation. Acceptable formats include MS Excel or MS Access.
- xiv. All FAAP agreements will expire three years after the date of approval.
- xv. Contractors with approved FAAP agreements will undergo at least one compliance evaluation during the term of their FAAP agreement.
- xvi. Only functional units identified in the approved FAAP agreement are covered.
- xvii. FAAP units that have undergone a compliance evaluation will be exempt from another evaluation for 24 months from the date of closure of the previous compliance evaluation.

e. PROCEDURES FOR REQUESTING, UPDATING, MODIFYING OR CERTIFYING A FUNCTIONAL AAP AGREEMENT: OFCCP desires that the process for approval of a FAAP agreement be simple and fluid. It should be a collaborative effort in which OFCCP and the contractor work together to process the FAAP request in an expeditious manner consistent with OFCCP policies and procedures as noted below.

i. Requesting a Functional AAP Agreement:

- (1) A contractor requesting a FAAP agreement must submit a written request to the OFCCP Director explaining why it believes that use of FAAP(s) would be most appropriate. This explanation should also describe in detail how the proposed functions correlate to the contractor's specific organizational structure and include a transition plan describing the process and timeframes in which the organization will move from establishment-based AAPs to FAAPs. The request must include the name and contact information for the corporate representative responsible for overseeing the contractor's request for the FAAP agreement.
- (2) The request for a FAAP agreement must be received by the OFCCP Director no later than 120 calendar days prior to the expiration of the current corporate headquarters AAP, or within 120 days from the award of the Federal contract if this is a first-time contractor. If this timeframe is not met, the request will be denied. The contractor may resubmit its request prior to its next AAP year.
- (3) The contractor must continue to develop, implement and maintain AAPs for each establishment until the FAAP agreement is approved by the OFCCP Director. OFCCP may continue to schedule and conduct establishment-based

compliance evaluations during the approval process.

- (4) Contractor establishments scheduled for a compliance evaluation during the FAAP agreement application process, or prior to the implementation of its FAAPs following the approval of a FAAP agreement, will be completed as establishment-based evaluations if the scheduling letter was received by the contractor prior to the FAAP agreement's effective date.¹
- (5) The FAAP Branch will review the application submission and the contractor's rationale for moving from an establishment-based AAP structure to a FAAP structure. Every effort will be made to gather sufficient information regarding the contractor's corporate structure to process the FAAP agreement request. This information enables OFCCP to make informed decisions when evaluating requests for FAAP agreements. Nonetheless, it may be necessary for OFCCP to meet with the contractor to make a final determination on the contractor's request.²
- (6) OFCCP will also review records of past compliance evaluations of the contractor's establishment(s) and consider whether any past violations have been corrected or continue to be identified as recurring violations during reviews.
- (7) Once the federal contractor and OFCCP's FAAP Branch reach an agreement, a copy of the proposed FAAP agreement will be presented to the OFCCP Director for review and approval. Prior to approval, the OFCCP Director may submit questions and comments to the FAAP Branch. If final approval is granted by the OFCCP Director, a copy of the approved agreement will be forwarded to the contractor for signature. If the OFCCP Director rejects the proposed agreement, it will be returned to the FAAP Branch to work with the contractor's representative to address and resolve any concerns about the proposed agreement. After the issues are resolved, the proposed agreement will be resubmitted to the OFCCP Director for re-consideration and approval.

ii. Updating a Functional AAP Agreement:

- (1) Contractors are required to report at least annually, 30 calendar days prior to the effective date of its AAP year, any changes to the agreement, including but not limited to change of names of functional units, changes of managing officials or

¹ The FAAP agreement becomes effective on the date of the OFCCP Director's final signature. Contractors will have up to 120 days following the effective date of its FAAP agreement to have its FAAPs implemented. The contractor must notify OFCCP when its FAAPs are implemented. Until the contractor has notified OFCCP that its FAAPs have been implemented, compliance evaluations of the contractor will be conducted as establishment-based evaluations.

² The FAAP Branch will determine whether it is necessary to conduct a FAAP conference to discuss the application materials. If the FAAP Branch determines that a conference is necessary, the FAAP Branch will discuss with the contractor the most appropriate format for conducting the conference. In addition to face-to-face meetings, alternative formats for conducting the conference include teleconference or web-based conferencing.

contact information, and updated Federal contract information.³ The employee counts, facility names, and facility addresses included in each functional unit must also be updated. If the contractor is adding new functional units or removing existing functional units, OFCCP will modify the agreement accordingly.

- (2) Should the contractor fail to submit an annual update, OFCCP may schedule the contractor for a compliance evaluation.

iii. Modifying an Approved Functional AAP Agreement:

- (1) When a contractor with an approved FAAP agreement significantly changes its corporate structure so as to alter the functions upon which the original FAAP agreement was based, including but not limited to a merger, acquisition, downsizing or reorganization, the contractor will provide a written explanation of the changes that occurred within 60 calendar days of the effective date of the change(s). This notification will detail how the modified functions or new functions, if any, meet the criteria outlined in Section 7 of this Directive and how the company selected units that would be removed. This explanation should also include the date when the changes will be incorporated into the existing AAP structure. OFCCP will then modify the existing agreement accordingly. In the event of a merger or acquisition, the contractor is required to notify the OFCCP of the name of the newly merged or acquired company. The contractor must also notify OFCCP regarding its plan to incorporate the former company's employees into its AAP structure.
- (2) Should the contractor fail to notify OFCCP of any change(s) to its corporate structure that alter the functional or business units covered in its FAAP agreement, OFCCP may terminate the FAAP agreement. If OFCCP terminates the agreement, written notification shall be provided to the contractor. See Section 11 – Termination of a FAAP Agreement.
- (3) Any modifications will not extend the three-year term of the FAAP Agreement.

iv. Certifying a Functional AAP Agreement:

- (1) The contractor must certify in writing every three years (at least 120 calendar days prior to the expiration of the existing agreement) that there have been no changed circumstances in its business structure affecting the existing FAAP agreement. The certification must include updated information regarding employee counts, facility names, and facility addresses included in each functional unit. If the contractor has undergone changes resulting in the addition or elimination of functional units or establishment-based AAPs, they will be required to submit a written rationale explaining the changes. OFCCP's

³ Updated contract information is only necessary if the previously provided contract has expired or is no longer applicable.

FAAP Branch will review the information and confirm that the changes meet the criteria outlined in Section 7 of this Directive. OFCCP's FAAP Branch will work closely with the contractor's designated representative to ensure timely and proper processing of the certification request. However, in the event OFCCP is unable to certify the request before the expiration date, the contractor will continue to operate under the existing FAAP agreement until the request has been approved or denied.

- (2) The contractor must provide updated information concerning at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor.
- (3) FAAP agreements that are certified will be re-issued for another three year term after execution of the agreement by the contractor's representative and the OFCCP Director. If OFCCP determines that it will not certify the agreement, OFCCP will provide the contractor with at least 90 calendar days written notification. See Section 11 – Termination of a FAAP Agreement.
- (4) During an open compliance evaluation of a functional unit, OFCCP may extend the term of an existing FAAP agreement until the evaluation has been completed, if necessary.
- (5) If the contractor fails to certify in writing at least 120 calendar days prior to the expiration of the FAAP agreement that it continues to operate under a functional structure, the said FAAP agreement will expire at the end of the three-year term. The contractor will be required to develop establishment-based AAPs and may be scheduled for compliance evaluations under the Federal Contractor Selection System (FCSS). The certification of an existing FAAP agreement will only be deemed accepted upon the approval and signature of the OFCCP Director.

f. TERMINATION OF A FUNCTIONAL AAP AGREEMENT:

- i. Either party may terminate the FAAP 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.
- ii. If a FAAP agreement has been terminated by OFCCP, the contractor may not reapply for a FAAP agreement for a period of three years.
- iii. Upon termination of a FAAP agreement, all employees are required to be covered by establishment-based AAPs. The establishment-based AAPs shall be in place no later than 120 days from either OFCCP's or the contractor's notification that the FAAP agreement has been terminated.
- iv. OFCCP may terminate a FAAP agreement where the contractor or any of its

establishments or functional units has been found in violation of the laws and regulations enforced by OFCCP.

- v. OFCCP may also terminate a FAAP agreement where the contractor failed to account for all employees in either a functional or establishment AAP, or notify OFCCP of any modification of its functional units.

8. ATTACHMENTS: A, B, and C.



PATRICIA A. SHIU

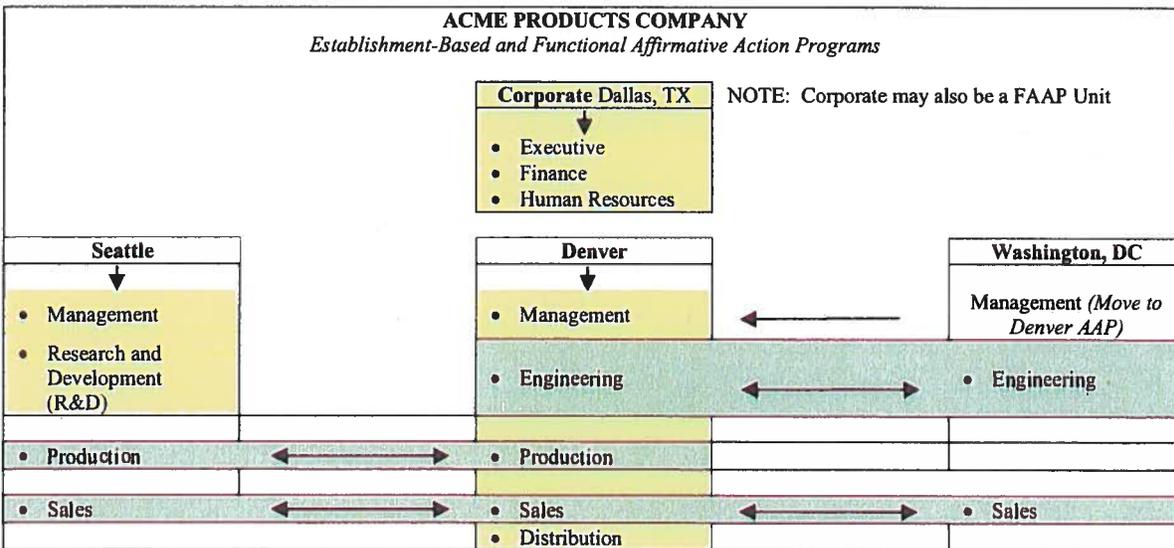
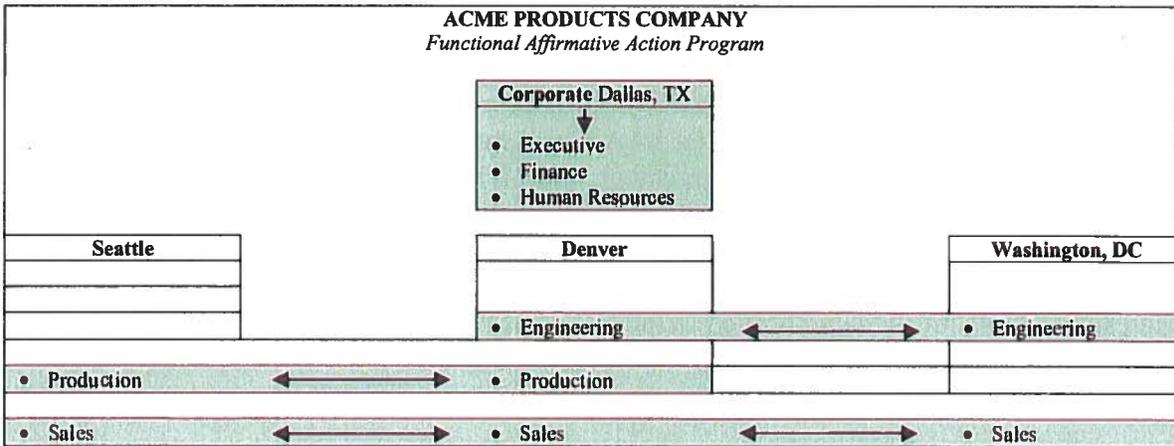
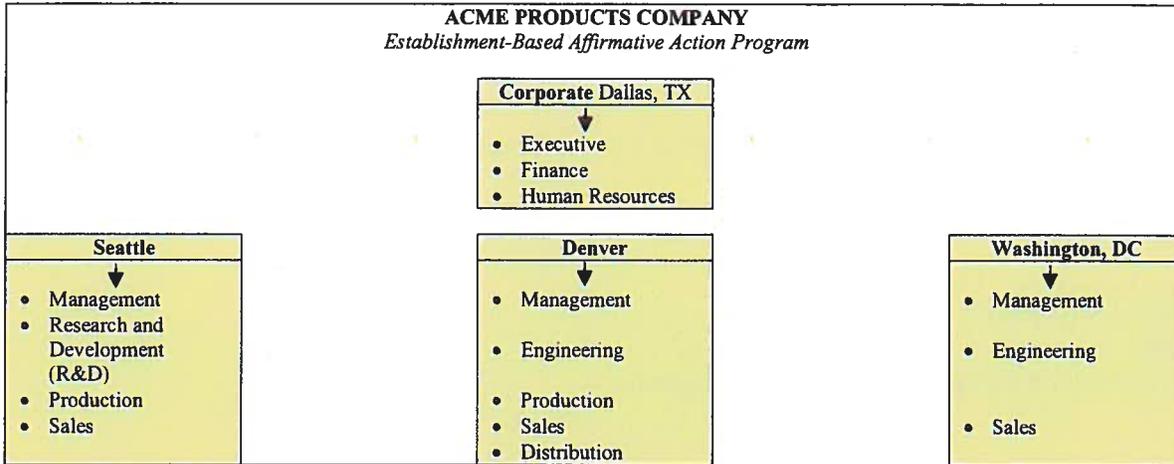
Director

Office of Federal Contract Compliance Programs

Note: According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1250-0006. The time required to complete this information collection is estimated to average 38 hours per response for the initial request of a FAAP agreement, 5.3 hours to modify a FAAP agreement, 5.9 hours to update a FAAP agreement, and 11.1 hours to certify a FAAP agreement. This includes the time for reviewing instructions, searching existing data sources, gathering and maintaining data needed, and completing and reviewing the collection of information. Send any comments concerning this burden estimate or any other aspect of this collection of information, including suggestions for reducing burden to the Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Attachment A

Below are examples of how an establishment-based and functional AAP could be developed. However, developing an AAP is unique and contractors must still provide rationale for forming their AAPs.



Attachment B

Documentation to Submit with the FAAP Request:

1. A statement that the contractor is a covered federal contractor or subcontractor under 41 CFR 60-1, 60-2, 60-300, and or 60-741, including specific information regarding at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor;
2. A copy of the contractor's most recent Consolidated EEO-1 Report;
3. An organizational chart that clearly identifies all of the proposed functional or business units to be covered by the requested FAAP and how they are related to each other within the corporation's overall structure.
4. A narrative description of the "business or function" of each proposed FAAP unit and how it meets the definition of a functional or business unit set forth above;
5. For each proposed functional or business unit provide the company and subsidiary name covered by the FAAP agreement and the street address, total number of employees, and name and address of the managing official;⁴
6. A statement addressing the location, to include city and state, where each proposed FAAP unit will maintain its employee personnel records and applicant processing activities;
7. If the contractor proposes to maintain some establishment-based AAPs, provide a list of the locations with establishment-based AAPs, including for each: the physical address, number of employees, and the phone number of the establishment's managing official, AAP contact and the EEO-1 unit number for each establishment;
8. A statement addressing how the contractor plans to transition from establishment-based AAPs to functional AAPs, including its timeline for completion;
9. The dates of the proposed AAP year for the functional programs; and
10. Copies of personnel policies relevant to evaluating the proposed functions or business units, including organizational and unit-specific policies related to recruitment, hiring, promotion, compensation, and discipline.

⁴ Employees who are based remotely should be included in the facility to which they report.

Attachment C

Items to Discuss During the FAAP Negotiation Process:

1. The reporting hierarchy of the functional or business units;
2. Personnel procedures including recruitment; hiring; promotion; compensation; termination; record retention and data analysis as they apply to each functional or business unit, including identification of units that have differing personnel or compensation practices;
3. How the contractor anticipates complying with the affirmative action requirements of Section 503 and VEVRAA, as discussed in Section 7.D.7 of the FAAP Directive;
4. How each functional unit manages its human resources and equal employment opportunity responsibilities; and
5. Any ongoing or past EEO violations from local, state and federal agencies (over the last three years).