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Federal Contractor Threatened With Suspension and Debarment for Not Submitting Affirmative Action Plans



The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) recently reminded federal contractors that the government has broad authority to audit and investigate contractors' equal employment practices and policies. It is critical that contractors take note of such authority because failure to comply with OFCCP rules and regulations can result in significant sanctions.

On December 30, 2021, a DOL administrative law judge ordered a federal contractor, Convergys Customer Management Group, Inc., to provide all information requested by the OFCCP upon penalty of debarment and cancellation of contract. The long-standing dispute arose in 2014 after the OFCCP's selection process chose 16 different Convergys establishments for affirmative action audits. The contractor refused to submit its affirmative action programs and other supporting documents to OFCCP, relying on several bases, including a challenge to OFCCP's constitutional authority to conduct the review and a contention that OFCCP's process was not neutral.

The administrative law judge rejected the contractor's arguments. The judge determined that, because the OFCCP did not seek nonconsensual entry onto Convergys' property and the requests were limited to the off-site review of documents, the less stringent *Lone Steer* standard applied. Under this standard, an inspection must be limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome. In determining that the OFCCP's document requests did not violate the Fourth Amendment, the judge concluded that the requests satisfied the *Lone Steer* standard because they were limited to Convergys' affirmative action plans and supporting data and directly related and relevant to the OFCCP's compliance responsibilities and authority under 41 C.F.R. Chapter 60.

In addition, the judge determined that Convergys' arguments regarding the OFCCP's selection process were without merit because the neutrality of the initial selection process was not relevant. Rather, the judge looked to the agency's authority and determined that the *Lone Steer* standard "focuses on the breadth of the subpoena rather than the motivation for its issuance." Therefore, Convergys was not excused from providing the requested documents based on any alleged lack of neutrality in the OFCCP's selection criteria. As a result, the judge

ordered Convergys to provide the requested documentation and threatened termination of all existing contracts and debarment if Convergys fails to comply.

This dispute harkens back to several decisions that challenged OFCCP's authority to conduct off-site and on-site review of documents. *See United Space All., LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011) (upholding OFCCP's authority to obtain records for desk audit). The decisions squarely cemented OFCCP's authority to utilize its selection process to select and review federal contractors for compliance audits. While Convergys argued that contractors should have more information on how OFCCP selects contractors, the judge followed established precedent that OFCCP's process satisfied the Fourth Amendment.

The clear win for OFCCP and the timing of the decision is a crucial reminder for federal contractors and subcontractors of the government's broad audit authority with regard to affirmative action plans. As we recently [reported](#), OFCCP is actively enforcing affirmative action compliance by requiring contractors to verify through the System for Award Management (SAM) database that they have developed and maintain their affirmative action plans.

The system will include a SAM declarations page where contractors will affirm that they have "developed and maintained affirmative action programs at each establishment, as applicable." On December 2, 2021, OFCCP announced registration for the Affirmative Action Program (AAP) verification portal. Beginning March 31, 2022, contractors will be able to access the portal to certify their AAP compliance and, by June 30, 2022, contractors must certify whether they have developed and maintained an affirmative action program for each establishment and/or functional unit, as applicable.

If OFCCP selects a contractor for audit through its neutral selection process, contractors will submit their AAPs through the portal. Two user guides govern the process ([Admin Guide](#); [Federal Contractor User Guide](#)). Notably, it remains the case that the government is not requiring federal contractors to submit AAPs unless OFCCP selects the contractor for audit.

The OFCCP is becoming more aggressive in ensuring that contractors meet their affirmative action compliance obligations. In addition, once selected for review, the agency has plans to step up its evaluation of nondiscrimination practices such as compensation discrimination and the use of artificial intelligence in hiring. Deep evaluation of a contractor's pay practices and hiring systems by experienced counsel are central to knowing where contractors stand and prepare for any potential compliance audits. Indeed, as seen in the *Convergys* decision, the DOL is willing to recommend suspension and debarment of contractors for noncompliance. Contractors who are unclear about their coverage, compliance requirements should consult with experienced counsel.

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