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DEPARTMENT OF THE TREASURY

48 CFR Parts 1022 and 1052

RIN 1505-AC40

Department of the Treasury Acquisition Regulations; Contract Clause on Minority and Women Inclusion in Contractor Workforce

AGENCY: Departmental Offices, Treasury.

ACTION: Final rule.

SUMMARY: The Department of the Treasury (the Department) is amending the Department of the Treasury Acquisition Regulation (DTAR) to include a contract clause on minority and women inclusion, as required by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (the Dodd-Frank Act).

DATES: Effective Date: [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]

FOR FURTHER INFORMATION CONTACT: Lorraine Cole, Director, Office of Minority and Women Inclusion, 202-927-8181 (this is not a toll-free number) or lorraine.cole@treasury.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Proposed Rule

Section 342 of the Dodd-Frank Act, 12 U.S.C. 5452, established an Office of Minority and Women Inclusion (OMWI) within certain agencies, including the Departmental Offices of the Department of the Treasury. Section 342(c)(2) provides that covered agencies shall require

contractors to provide a written statement that the "contractor shall ensure, to the maximum extent possible, the fair inclusion of women and minorities in the workforce of the contractor, and as applicable, subcontractors." This rule will implement the statement required by the Dodd-Frank Act through a contract clause.

The contract clause, which is similar to those adopted by other OMWI agencies, requires that a contractor make good faith efforts to include minorities and women in its workforce. This standard is derived from section 342(c)(3) of the Dodd-Frank Act, which provides for remedies, including termination, against a contractor that fails to make good faith efforts to include minorities and women in its workforce. Treasury interprets "good faith efforts" to mean efforts consistent with the Equal Protection Clause of the Constitution, Title VII of the Civil Rights Act of 1964, and Executive Order 11246, as amended, such as the identification and elimination of employment barriers, the widespread publication of employment opportunities, and other forms of outreach to minorities and women.

Section 342 applies to "all contracts . . . for services of any kind," but the section does not define the term "contract." Treasury applies the clause to all service contracts above the simplified acquisition threshold. Further, as noted above, section 342 applies to Treasury Departmental Offices (DO). DO does not currently include an office responsible for operational procurement; acquisitions in support of DO are performed primarily by the Internal Revenue Service Office of Treasury Procurement Services. The clause will be included in all service contracts in support of requirements originating from DO, regardless of the Treasury component performing the acquisition.

II. <u>This Final Rule</u>

In its August 21, 2012, proposed rule, the Department solicited public comments on all aspects of the proposal. This comment period closed on October 22, 2012, and eight comment letters were received. Comments were received from interest groups, private citizens, and law students. This section sets out significant comments raised by the commenters and the Department's response to these comments. As set forth below, the Department has considered the comments and is adopting the proposed rule with two minor changes in response to comments received, which are noted below.

Public Comments and Department Responses

One commenter suggested that the clause should apply only to subcontracts subject to reporting under FAR clause 52.204-10. The Department declines to adopt this suggestion. It is, however, the Department's intent that the clause should be required only in subcontracts that are awarded to support a covered contract. To clarify this point, Treasury has modified the language of the clause to require flow-down only to "subcontracts awarded under" the contract.

One commenter suggested inserting the language "including Title VII of the 1964 Civil Rights Act" after "To implement this commitment, the Contractor shall ensure, to the maximum extent possible consistent with applicable law, the fair inclusion of minorities and women in its workforce." The commenter contends that, without the insertion, there is a danger of discrimination against men and non-minorities.

The Department does not believe that a specific reference to Title VII is necessary. The Department believes that its contractors are aware of their obligations under that statute. Further, our contracts contain a separate clause, FAR 52.222-26, Equal Opportunity, that expressly prohibits discrimination.

Several commenters suggested that the Department require specified documentation to demonstrate a "good faith effort." These suggestions are not adopted. The clause provides Treasury with the authority to obtain employment data and other information regarding good faith efforts to the extent necessary for its review of a contractor's inclusion of minorities and women in its workforce. Treasury does not believe that requiring contractors to submit specific information absent a request or predetermining what must be included in a request would serve any useful purpose. Moreover, the focus of the clause, and of the relevant provisions of section 342, is on a contractor's overall efforts to reduce barriers to employment of minorities and women. Specific information on individual employees will rarely, if ever, be required for that purpose.

Two commenters suggested that the clause be modified to provide 60 days for contractors to provide information requested by the contracting officer. The suggestion is not adopted. Section 342 and the clause require contractors to engage in good faith efforts at all times during contract performance, not merely in the 60 days preceding a contracting officer's review. Because a good faith efforts plan should be in place at all times during contract performance, 10 days will normally be sufficient to forward a copy to the contracting officer. The other data contemplated by the clause are factual in nature, and it is reasonable for contractors to be prepared to provide them. Moreover, the clause requires that information be provided within 10 business days of a written request "or such longer time as the contracting officer determines." Contracting officers have a duty to act in good faith in administering contracts. Thus, if unusual circumstances existed or if there was a need for information not listed in the clause and not immediately available, the contracting officer would be required to provide the contractor a reasonable period of time in which to respond to the request.

One commenter suggested that the rule be modified to expressly provide that completion of the EEO-1 form and compliance with applicable Office of Federal Contract Compliance Programs (OFCCP) rules are sufficient to establish compliance with the requirements of the clause. The Department declines to adopt this suggestion. With respect to the EEO-1 form, item (1) of the clause provides that one type of information the contracting officer may request is the total number of the contractor's employees and the number of women and minority employees by race, ethnicity, and gender. The EEO-1 form contains this information; there is no need for an explicit statement that providing the form will provide the information contemplated by this element of the clause. With respect to a contractor's plan to make good faith efforts, addressed by item (4) of the clause, the clause is drafted to provide the contractor wide discretion to determine what efforts should be made to remove barriers to the employment and of women and minorities. In most instances, a contractor that establishes an affirmative action program compliant with the OFCCP regulations will not need to take any additional steps to comply with the good faith requirement. However, expressly incorporating compliance with the OFCCP regulations as a standard for meeting the good faith effort requirement would place Treasury in the position of evaluating compliance with the OFCCP regulations, something it has neither the expertise nor the authority to do. Accordingly, the Department does not adopt the suggested change. To clarify the relationship between compliance with OFCCP regulations and the good faith requirement contained in the clause, however, the Department does add language to the clause to the effect that compliance with the clause neither satisfies contractors' obligations under Executive Order 11246, as amended, nor precludes OFCCP evaluations or enforcement actions undertaken pursuant to that Order.

One commenter suggested that the clause should be modified to expressly state that it applies only to contracts with the Department of the Treasury. As the commenter acknowledges, the prescription at 48 C.F.R. 1022.7000 requires that the clause be inserted only in contracts in support of Treasury Departmental Offices. As with all FAR clauses, the clause will apply only to the contracts in which it is inserted. Language expressly providing that the clause does not form part of contracts in which it does not appear (and in which its insertion is not required by regulation) is unnecessary and would be potentially confusing.

Two commenters suggested that the proposed rule only require information from subcontractors to the extent that it is available. The Department declines to adopt this suggestion. Treasury cannot fulfill its statutory responsibilities without information concerning subcontractors. Moreover, the flow down provision of the clause establishes a required mechanism for ensuring that subcontractors are contractually bound to provide necessary information to the prime contractor.

One commenter suggested that the clause should not be limited to contracts above $150,000, and asserted that interpreting the statutory language to apply only to such contracts "could place treasury in noncompliance with the Dodd-Frank Act." Section 342 does not define the term "contract." While we are aware that the term is defined in some contexts to include any legally binding procurement instrument, we do not believe that Congress intended the good faith efforts requirement to apply regardless of contract dollar value. The burden imposed by the clause is proportionate to the size of the contractor's workforce, not to the value of the contract in which the clause is inserted. Thus, absent a contract value threshold, the clause could impose a burden that is large in relation to the contract price and make it difficult or impossible to retain contractors to perform smaller requirements. Requiring the clause only in contracts above the

Simplified Acquisition Threshold, currently $150,000 in the FAR, represents an appropriate balance between making the clause broadly applicable and not including it where doing so would create a disproportionate burden. Treasury has determined that it is appropriate to interpret the statutory language to apply only to contracts above that threshold.

One commenter suggested that there should be remedies for non-compliance with the clause other than termination for default. Because the clause will be a requirement of the contract in which it is included, standard contractual remedies will be available in the event of non-compliance. The specific remedies available will depend on the nature of the underlying contract, but may include such options as downward equitable adjustments, lowered or negative contractor performance ratings, discontinuance or curtailment of new task order awards, or non-exercise of options, withholding of progress payments, termination of contracts, and debarment from receiving future contracts. Termination for default remains the ultimate contractual sanction in the event of an uncured failure to comply with the requirements of the clause.

One commenter suggested that the definition of "minorities" in the clause should be expanded. The clause incorporates the definition set forth in section 342, from which Treasury declines to depart.

Two commenters noted that the term "fair inclusion" is not defined in the statute or proposed contract language. One commenter also noted that there appears to be no consequences "for not reporting or for poor numbers in a report." Treasury has considered providing a more specific definition of good faith efforts, but determined that doing so would not be feasible. The actions that might be appropriate to eliminate barriers to the employment of minorities and women will vary significantly depending on a particular contractor's organization and workforce. The commenter is incorrect that there are no consequences for failing to report

required information. The clause will form part of a contract, and Treasury will have available standard contract remedies, up to and including termination of the contract for default in case of an uncured failure. Under no circumstances, however, will there be consequences for reporting "poor" numbers. While the composition of a contractor's workforce may help inform a determination of what barrier-reduction efforts are appropriate, the clause does not require – and Treasury does not seek – any specific set of numbers, or any specific changes in numbers over time. A contractor that makes good faith efforts to identify and eliminate barriers to the employment of minorities and women (and that complies with applicable reporting requirements) will fully comply with the clause, regardless of the ultimate effect of those efforts on its workforce.

One commenter suggested that the clause should be revised so as to list examples of information a contractor could choose to submit in order to establish that it has engaged in good faith efforts. This suggestion is not adopted. Treasury has an obligation under section 342 to determine whether a contractor is in compliance with the applicable good faith efforts requirements. While the information necessary to demonstrate such compliance will vary significantly depending on a contractor's organization and its approach to the requirement, Treasury must have the ability to obtain the information it determines necessary under the circumstances. Permitting a contractor to unilaterally determine what information is necessary for Treasury's determination would not accomplish the purpose of the clause.

One commenter suggested that there should be a cutoff beyond the $150,000 threshold to limit the number of subcontractors to which the clause applies. The commenter asserts that there may be many tiers of subcontractors, "hundreds (and possibly thousands) of subcontracts" under a contract that exceed the threshold. We do not accept the suggestion. First, the commenter's

concern as to the number of possibly affected subcontracts appears to be overstated. In Fiscal Year 2012, only two contracts supporting Treasury Departmental Offices exceeded $10 million. Given the relatively modest value of Departmental Offices contracts, few if any will involve "hundreds" of subcontracts. More importantly, we consider it appropriate that a firm accepting $150,000 in funds to perform a subcontract be subject to the good faith effort requirement, regardless of the tier of its subcontract. While this will result in prime contractors with larger contracts and more subcontractors bearing a larger compliance burden, such a burden will be roughly proportionate to the contract value.

One commenter suggested that the regulation should include provisions concerning the protection of sensitive data provided to the government. As with all other sensitive data received in contract administration, sensitive data provided under the clause is protected by the Trade Secrets Act, 18 U.S.C. § 1905. Proprietary information received from a contractor is protected from disclosure under Exemption 4 of the FOIA. We do not see a need to promulgate special procedures for contract administration data provided under this specific clause. Further, Treasury lacks authority to issue a regulation that would restrict the availability of information under the FOIA.

One commenter asserted that the clause would expand OFCCP's jurisdiction. The regulation does no more than echo the provision of section 342 setting forth referral to OFCCP as one option in the event a contractor fails to comply with the good faith effort requirement. Any effect section 342 may have on OFCCP's jurisdiction is beyond the scope of Treasury's authority and this regulation.

One commenter asserted that the Department's Regulatory Flexibility Act analysis does not provide an adequate factual basis to support the certification in this proposal. Treasury

believes that the Regulatory Flexibility Act certification is fully supported. While application of the clause to small business subcontractors will extend its reach somewhat, the total number will remain small. Of those small businesses affected, most will already be subject to OFCCP requirements. Finally, the clause only applies to contracts above $150,000, ensuring that compliance costs will not be disproportionate to the contract value and will not have a significant economic impact on a substantial number of small entities.

The commenter expressed concern that the proposed rule does not increase contract spending by the agency with diverse owned businesses. Increasing Departmental Offices' spend with specific businesses is beyond the scope of the rulemaking, which concerns only the requirement of section 342 that firms awarded contracts make good faith efforts to include minorities and women in their workforces.

A commenter supported the $150,000 threshold as applied to contracts with small businesses, but suggested that the clause should apply to all contracts with large firms, regardless of dollar value. To minimize the burden on all contractors, Treasury will apply this requirement to service contracts over the simplified acquisition threshold, $150,000.

III. Other Matters

Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) generally requires agencies to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. It is hereby certified that this rule will not have a significant economic impact on

a substantial number of small entities and thus no initial regulatory flexibility analysis is required.

First, this rule will not affect a substantial number of small entities. While this rule will affect all contracts for services above the simplified acquisition threshold ($150,000), it will not affect a substantial number of small entities because it will only apply to those entities that actually contract with Departmental Offices. In Fiscal Year 2011, DO contracted with 370 small businesses.

Additionally, the rule's economic impact is not expected to be significant. The rule satisfies the statutory requirement that contractors affirm a commitment to the fair inclusion of minorities and women in the workforce, but does so in a way that minimizes burden on contractors. The rule provides maximum flexibility for contractors in implementing the statutory requirement because it does not impose any specific requirements on contractor hiring. Further, most contractors are already subject to and have implemented other FAR requirements that will satisfy this rule's requirements. Essentially all contracts for services to which this requirement applies are subject to FAR Clause 52.222-26, Equal Opportunity, which requires, among other things, that contractors complete the EEO Form 1 containing workforce demographic data. Thus, contractors are already required to compile and retain much of the data required by this clause. Further, contractors with supply and service contracts of $50,000 or more and over 50 employees are required by Department of Labor regulations to develop affirmative action programs; a contractor that develops and implements such a program should be able to provide documentation to demonstrate compliance with the clause.

Executive Order 12866

This rule is not a "significant regulatory action" for the purposes of Executive Order 12866.

Paperwork Reduction Act

The information collections contained in the notice of proposed rulemaking have been previously approved by the Office of Management and Budget (OMB) and assigned control number 1505-0080. Under the Paperwork Reduction Act (44 U.S.C. chapter 35), 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.

Lists of Subjects in 48 CFR Part 1022 and 48 CFR Part 1052

Government procurement.

Dated February 28, 2014

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Iris B. Cooper
Senior Procurement Executive
Department of the Treasury

For the reasons set forth in the preamble, the Department amends 48 CFR Chapter 10 to read as follows:

1. Add Subchapter D consisting of part 1022 to read as follows:

Subchapter D. Socioeconomic Programs

PART 1022—Minority and Women Inclusion

Subpart 1022.7. Fair inclusion of minorities and women in contractor's workforce

Sec.

1022.7000 Contract clause.

Authority: 12 U.S.C. 5452.

Subpart 1022.7. Fair inclusion of minorities and women

1022.7000 Contract clause.

Insert the clause at 1052.222-70, Minority and Women Inclusion, in all solicitations and contracts in support of Departmental Offices for services that exceed the simplified acquisition threshold.

2. Add subpart 1052.2 to Subchapter H to read as follows:

Subchapter H. Clauses and Forms

PART 1052 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES

Subpart 1052.2-Texts of Provisions and Clauses
Sec.

1052.222-70 Minority and Women Inclusion

Authority: 12 U.S.C. 5452(c)(2).

Subpart 1052.2-Texts of Provisions and Clauses

1052.222-70 Minority and Women Inclusion

As prescribed in 1022.7000, insert the following clause:

MINORITY AND WOMEN INCLUSION (APR 2014)

"Contractor confirms its commitment to equal opportunity in employment and contracting. To implement this commitment, the Contractor shall ensure, to the maximum extent possible consistent with applicable law, the fair inclusion of minorities and women in its

workforce. The Contractor shall insert the substance of this clause in all subcontracts awarded under this Contract whose dollar value exceeds $150,000. Within ten business days of a written request from the contracting officer, or such longer time as the contracting officer determines, and without any additional consideration required from the Agency, the Contractor shall provide documentation, satisfactory to the Agency, of the actions it (and as applicable, its subcontractors) has undertaken to demonstrate its good faith effort to comply with the aforementioned provisions. For purposes of this contract, "good faith effort" may include actions by the contractor intended to identify and, if present, remove barriers to minority and women employment or expansion of employment opportunities for minorities and women within its workforce. Efforts to remove such barriers may include, but are not limited to, recruiting minorities and women, providing job-related training, or other activity that could lead to those results.

"The documentation requested by the contracting officer to demonstrate "good faith effort" may include, but is not limited to, one or more of the following:

1. The total number of Contractor's employees, and the number of minority and women employees, by race, ethnicity, and gender (e.g., an EEO-1);

2. A list of subcontract awards under the Contract that includes: dollar amount, date of award, and subcontractor's race, ethnicity, and/or gender ownership status;

3. Information similar to that required in item 1, above, with respect to each subcontractor; and/or

4. The Contractor's plan to ensure that minorities and women have appropriate opportunities to enter and advance within its workforce, including outreach efforts.

"Consistent with Section 342(c)(3) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (P.L. 111-203) (Dodd-Frank Act), a failure to demonstrate to the Director of the Agency's Office of Minority and Women Inclusion such good faith efforts to include minorities and women in the Contractor's workforce (and as applicable, the workforce of its subcontractors), may result in termination of the Contract for default, other contractual remedies, or referral to the Office of Federal Contract Compliance Programs. Compliance with this clause does not, however, necessarily satisfy the requirements of Executive Order 11246, as amended, nor does it preclude OFCCP compliance evaluations and/or enforcement actions undertaken pursuant to that Order.

"For purposes of this clause, the terms "minority," "minority-owned business" and "women-owned business" shall have the meanings set forth in Section 342(g) of the Dodd-Frank Act."

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