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May 4, 2020

The Honorable Craig Leen
Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Ave., NW
Washington, D.C. 20210

Dear Director Leen:

We write seeking clarification and the justification for the Office of Federal Contract Compliance Programs' (OFCCP) issuance of the National Interest Exemption (NIE) that allows new service, supply, and construction contracts entered into during the period from March 17, 2020, to June 17, 2020 in response to COVID-19 to avoid certain affirmative action requirements.¹

In issuing the NIE, the OFCCP did not present any compelling evidence that qualified contractors needed for the coronavirus response have been deterred from bidding due to OFCCP's requirements for affirmative action plans. Arguably, efforts to ensure that contractors performing services and providing supplies for the federal government are committed to fair and equitable hiring and employment practices should never be put on hold. Indeed, affirmative action efforts are more important than ever in an environment in which a large number of government contracts will be awarded in the coming months for coronavirus relief. It is not only important for all Americans to have equal access to federal opportunities; it is equally important for the federal government to benefit from the contributions of a diverse group of people in this critical effort to address the largest public health crisis of our time.

Although this NIE is based on a standard fill-in-the-blank exemption document—and mirrors those issued after regional emergencies such as Hurricane Katrina and the California wildfires—the COVID-19 pandemic is both nationwide and unprecedented in scope. Accordingly, federal contracts to address this crisis will be magnitudes greater in cost and likely far longer in duration than those of previous emergencies. As such, the impact of this NIE raises many questions, including how many contracts it

¹ National Interest Exemption Memorandum, Office of Federal Contract Compliance Programs (March 17, 2020).

will impact, how many qualified candidates will lose opportunities for employment, and how the ripple effects of the NIE will weaken enforcement of our civil rights laws.

In addition, OFCCP has consistently faced challenges in its compliance review program. In 2016, the Government Accountability Office found that OFCCP's compliance review process selection process was flawed, and as a result OFCCP was not focusing its compliance efforts on those contractors with the greatest risk of noncompliance.² In March 2020, DOL's Inspector General found that "OFCCP did not adequately enforce EEO requirements on federal construction contracts."³ These failures in ensuring compliance, coupled with carve outs under this new NIE, raise serious concerns that that OFCCP is diluting its duty to ensure that the federal contractors are diverse and reflect the composition of our nation. Therefore, we request that OFCCP provide us with the following information:

1. Did OFCCP receive any requests from outside entities to implement a NIE for coronavirus relief? If so, how many did it receive, from whom and related to what service or supply?
2. Has OFCCP estimated the number of contracts that could be implicated, given the magnitude of expenditures on the federal response to coronavirus?
3. Who are the winners and who are the losers from the implementation of this NIE? In short, how many qualified candidates will lose employment opportunities with federal contractors under the NIE?
4. Does OFCCP have any plans to extend the time period of the NIE beyond March 17, 2020 – June 17, 2020? What criteria will OFCCP consider in determining the need to extend the NIE?
5. Under the NIE, contractors who have between 50-100 employees will no longer be required to file an EEO-1 survey under the NIE. How will OFCCP monitor these contractors for potential discrimination in employment?
6. What is OFCCP's plan to oversee this NIE to ensure that only the appropriate contracts receive the exemption? Is OFCCP tracking procurements to ensure compliance? Please detail what guidance OFCCP will provide compliance officers so that they will be able to evaluate compliance with the NIE, as well as how the oversight plan for this NIE fits into OFCCP's broader oversight and compliance efforts for all federal contracts.

In addition to these questions, it is important that clear parameters for this NIE are in place for contracting officers so that they can apply them consistently and ensure that the need for an expeditious emergency response does not undermine civil rights protections in federal contracting any more than the absolutely minimum. As such, we request that OFCCP provide the following clarifications to all contracting officers:

1. The March, 17, 2020, NIE memorandum states that the exemption would apply for contracts that are "specifically to provide coronavirus relief" and the accompanying Frequently Asked Questions (FAQ) document states that contracting officers are in the best position to determine

² U.S. Gov't Accountability Office, GAO-16-750, Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance 1-2 (2016).

³ OFCCP Did Not Show It Adequately Enforced EEO Requirements on Federal Construction Contracts, Office of Audit, Inspector General, US Department of Labor, March, 2020. <https://www.oig.dol.gov/public/reports/oa/viewpdf.php?r=04-20-001-14-001&y=2020>

whether a contract is specifically for coronavirus relief. Please provide additional guidance in the FAQ to contracting officers clarifying that contracts must be exclusively to provide coronavirus relief and that support for other activities would disqualify a contract from the NIE.

2. The memorandum and FAQ are also silent as to how contracting officers should treat multi-year contracts under this NIE. Please provide additional guidance in the FAQ clarifying that for multi-year contracts, the services and/or supplies must be specifically and exclusively for coronavirus relief for every year of the contract and not just for a partial period of the contract.
3. Please also provide guidance on how contract renewals are to be treated under this NIE. For example, when a contract that qualifies for this NIE is up for renewal after a year, will the renewal be considered eligible for the NIE if it meets all other requirements even though its issuance does not fall in the relevant three-month window set forth in this memo?
4. The FAQ states that the NIE will flow down to subcontractors as well. In the instance where a subcontractor is a subcontractor to multiple prime contracts issued by the federal government, some of which have been exempted under the NIE memorandum and some of which have not been exempted, please provide additional guidance whether that subcontractor would be subject to affirmative action requirements.

Please provide the requested clarifications as soon as possible, but no later than May 18, 2020. If you have any questions, please contact Cathy Yu at Cathy.Yu@mail.house.gov. Please direct all official correspondence to the Committee's Chief Clerk at Tylease.Alli@mail.house.gov. Thank you for your attention to this matter, and we look forward to your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chair



SUZANNE BONAMICI
Chair
Subcommittee on Civil Rights and Human
Services



ADAM SMITH
Member of Congress



BONNIE WATSON COLEMAN
Member of Congress