

Podcast

# Biden's Infrastructure Bill: Construction Industry's Affirmative Action Obligations

By Lisa B. Marsh

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## Meet the Authors



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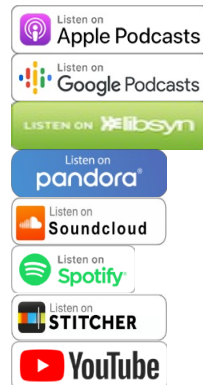
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## Details

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## Transcript

Alitia (00:06):

Welcome to Jackson Lewis' podcast, We get work™, focused solely on workplace issues everywhere and under any circumstances. It is our job to help employers develop proactive strategies, strong policies, and business oriented solutions, to cultivate a workforce that is engaged, stable, and diverse. Our podcast identifies the issues dominating the workplace and its continuing evolution, and helps answer the question on every employer's mind. How will my business be impacted?

Construction companies bidding on IIJA projects hope to get a piece of the billions of dollars allocated to infrastructure projects. However, with the government funding comes more requirements and obligations. On this episode of We get work™, we discuss the affirmative action obligations companies receiving federal dollars are required to meet and how affirmative action obligations differ for construction contractors.

Our host today are Chris Chrisbens of counsel and Lisa Marsh, associate in the Denver office of Jackson Lewis. Chris and Lisa, when it comes to OFCCP matters, being in the Mile High City provides you with an elevated view of the regulatory landscape. The question on everyone's mind today is, how do contractors and subcontractors ensure compliance with their affirmative action obligations after

receiving federal funding for projects related to the Infrastructure, Investment and Jobs Act and how does that impact my business?

Lisa Marsh (01:39):

Yeah. So the first question here that I want to talk through, Chris, is what is the burden of being a federal contractor? Is it worth it?

Chris Chrisbens (01:48):

That's a really good question, Lisa and I think bottom line, part of what we want to accomplish today is helping construction contractors go into this with eyes wide open. Now certainly, affirmative action planning compliance can be time consuming and expensive, but there are \$1.2 trillion out there that I think many construction contractors will want to take advantage of. And I think getting up to speed is the hardest part. Once you have all the processes and procedures in place, things get considerably easier. And we at Jackson Lewis certainly are available to help construction contractors get up to speed, come into compliance with affirmative action obligations.

And likewise, the Office of Federal Contract Compliance Programs that enforces all things affirmative action, has a lot of very useful compliance materials on its website. So, I think it's important to keep in mind that the federal government views doing business with it as a privilege and along with that privilege come obligations. But I think it's well worth considering, bottom line.

Lisa Marsh (03:00):

Yeah, absolutely.

Chris Chrisbens (03:02):

That kind of leads us into the next question, getting into the substance, Lisa, is how do construction contractors become subject to affirmative action requirements? What are the coverage issues?

Lisa Marsh (03:15):

Yeah, thinking through, are we going to be subject to these affirmative action obligations? How do we know that? Well, we want to think about our contracts. What kind of business are we doing and how is the government involved? So of course, direct contracts with the federal government, providing construction work for a federal agency, the federal government triggers those affirmative action obligations, if that contract is valued at a certain monetary threshold, so that's \$10,000 or more. So that's direct contracts, but a lot of folks don't realize that this applies down the line as well, subcontracting can get companies these affirmative action obligations. So a subcontractor, a company who is providing construction work that's necessary for the performance of that federal prime contract, they also are subject to those affirmative action requirements, if that subcontract is \$10,000 or more.

So it really goes on down the line of subcontracting there. And then also course, thinking more broadly, federally assisted construction projects. If the company is working on a project, a construction project, and there is federal monetary assistance

around that project, that's very broad, but that construction contractor will most likely under a federally funded project, also have those affirmative action obligations.

So it's important to know that these obligations are very broad. If a construction contractor is working on a project, any of those projects that the construction contractor is working on, will also be subject to these affirmative action requirements. So it's not like a company can just take one project and have that be the only project where government work is involved, and those are the only employees that need to be covered under this affirmative action plan. If we've got one project, everybody really is covered.

Chris Chrisbens (05:15):

Interesting.

Lisa Marsh (05:18):

So that's really how we determine if we are subject to these affirmative action obligations. So let's say a company determines they're covered, they get the work. What does that mean? What is it that they need to do?

Chris Chrisbens (05:31):

Sure. So, that really gets into the substance of affirmative action obligations. And at root, federal affirmative action has as its objective, that federal contractors take steps to foster diversity in their workforce. So that essentially their workforce, in terms of race, gender, ethnic composition, composition of individuals with disabilities and protected veterans, comes to look like the labor markets from which it draws. And if that construction company's workforce doesn't look like the labor markets from which it draws, then that suggests that there may be EEO barriers, Equal Employment Opportunity barriers, that we need to identify and address, or that we're not doing sufficient outreach to try to attract members of those four groups, women, minorities, vets, and individuals with disabilities.

So there are really three separate affirmative action laws that apply to all federal contractors, not just construction contractors. The first is known as executive order 11246, which we sometimes refer to as the affirmative action law for women and minorities, because as we'll discuss, we set goals for women and minorities. We also have Section 503 of the Vocational Rehabilitation Act, which of course covers individuals with disabilities. And then finally something known as the Vietnam Era Veterans Readjustment Assistance Act, VEVRAA for short, which covers our protected veterans.

But really, you can kind of put all of our affirmative action obligations for construction contractors, into really sort of four general buckets. What are those obligations? Number one, we do a lot of data analysis and analysis of our personnel processes and procedures. And again, that is to identify those potential barriers for any of those four groups and fix them. The easy way to think of it is, if we're not keeping an eye out for those potential barriers, we may not know they exist and they may be unfairly screening out members of those four groups.

I've already mentioned, outreach. Outreach is huge. It is a central part of what we do

in affirmative action. We have to actively go out and seek out qualified individuals from those four groups and attract them to our open positions and document all of that work we do.

We have a slew of technical obligations, all kinds of things. We have many checklists that cover all those technical obligations. And then of course we have a lot of record keeping and documentation obligations. Data is everything when it comes to affirmative action planning. And that makes sense, right? Because we can't analyze our personnel activity for those EEO barriers, unless we're doing a good job of completely and accurately tracking that data.

So under the executive order for construction contractors, it's a little bit different. Construction contractors are unique in the sense that affirmative action planning requirements are listed in what's known as the 16 specifications, 16 particular requirements the construction contractors have to follow. And of course we don't have time to go through all 16 specifications. But again, those 16 specifications really fall into one of those four buckets. And we're really focused on our hiring and promotion and training activities to make sure that we don't have again, any barriers for those four groups, including veterans and individuals with disabilities.

Lisa Marsh (09:31):

So, Chris, I think that what I haven't heard you say yet as the one of the 16 requirements is quotas. So, this might be on everybody's mind, we've got affirmative action plans now. So now we have to go out and hire six minorities or six females. Is that one of them?

Chris Chrisbens (09:52):

And you know this is near and dear to our hearts and affirmative action planning in the federal contracts, federal construction contract arena. And the answer is no, these laws actually specifically prohibit us from making any employment selection decision based on race, gender, ethnicity, veteran, or disability status. So quotas and preferences are explicitly excluded and that's different than affirmative action in other contexts. So, great question, because we always want to keep in mind what affirmative action is, but also what affirmative action isn't.

So let's talk a little bit more about the analyses the construction contractors have to do. The first and sort of central piece of analysis for construction contractors, is what we refer to as participation goals. So for each and every project, and again, as you pointed out, Lisa, if you're a federal construction contractor, we're talking about all of your projects, not just the federally funded projects, we are trying to reach a participation goal for women and minorities.

Now, what does that mean? For women, the participation goal is 6.9%, meaning we are going to strive to make 6.9% of the total hours worked on each and every project, be performed by women. For minorities, we have a different goal, percentage goal, it may be 7%, even up to 23% or more, and that's based on each individual geographic region in which you're performing the project. So if we're performing a project in Dallas, Texas OFCCP has the minority participation goal for that particular geographic region. And again, same thing as women. Let's say the goal is 15% for

minorities, we're striving to make 15% of the hours worked on each of our projects in that geographic area worked by minorities. So it's a little bit different than utilization goals when we're looking at the percentage of women and minorities in your workforce.

But obviously they're closely related because if we have low numbers of minorities and women in our workforce, those participation rates are also going to be much lower. For our individuals with disabilities, it is a utilization goal under that Section 503 of the Rehabilitation Act, we're trying to hit 7% of our workforce in each trade, identify as having a disability. And that number isn't pulled out of thin air. It really is an estimate of the population of the United States that identifies as having a disability. For veterans, it's even different. We have a veteran hiring benchmark. So we're going to try to make 5.6% of our annual hires be protected veterans. And again, that 5.6% is not pulled out of thin air. It's the government's estimation of the percentage of the unemployed population who identify as protected veterans.

So that's really sort of the sum total, at a high level, of what affirmative action is, but I would encourage all of you to go to either the OSCCP website, look at those 16 specifications, so you have an idea of what you're getting into before you might bid on a federal construction project. So, one of the other questions that's certainly on everybody's mind, Lisa, is how does the federal government check for compliance for affirmative action obligations?

Lisa Marsh (13:45):

Right. So of course we know this is somewhat a contractual obligation. So companies that are contracting with the government, they are contracting to fulfill these obligations. But how does the government know that, that that's happening? And that primarily happens through audits. So OFCCP, the Office of Federal Contract Compliance Programs, the part of the Department of Labor, that's making sure that government contractors are doing what they need to be doing. They conduct audits of federal contractors, and those audits are pretty much randomized. It's not a completely random system, but OFCCP is not targeting certain companies and electing to audit certain companies or contracts. It's a randomized type of process. But once a contractor is selected for audit, then contractors are basically sending in documentation of compliance with those 16 specifications. OFCCP is looking for compliance with those regulations.

It's very document driven thinking about those 16 specifications. OFCCP is also looking for not just documentation and compliance, but they are looking for generally statistical evidence of potential discrimination. And they're looking to see whether or not there are any races or genders that are being unfairly treated in the process. So that's what they're looking for as part of the audit.

Some other ways to get audited are for companies that have really big projects, so \$10 million or more, we call them mega projects. These are going to be on OFCCPs radar, certainly. And then we also have a pre-award audit type of process, some very large projects OFCCP might actually audit the compliance before the contract is actually awarded, so that's certainly a possibility.

Chris Chrisbens (15:41):

So the other question then is, what are the consequences of getting into this, having your affirmative action obligations, but not getting it all right? What are the downsides?

Lisa Marsh (15:53):

Right. So you mentioned before, contracting with the government is a privilege. And with that privilege comes potentially great reward in business and also some potential risk. So some of the risks include for not getting all of the technical requirements, all of those specifications completely perfect, there won't be necessarily a monetary fine or penalty there. Really monetary fines and penalties are more connected with an actual finding of discrimination, in hiring, compensation, promotions, terminations. If the myriad of technical obligations that we've kind of touched on briefly, if those aren't met in of OFCCP, and an audit finds that there was some deficiency there, most likely the consequences that the company would enter into an agreement with OFCCP to do some reporting over a period of time, one year to two years, to show OFCCP that they're in compliance with that obligation, that technical obligation.

And so, that's time required, and of course, work to be able to do that, but not necessarily monetary fines. But of course, a company could be subject to monetary damages if OFCCP fines, and the company can't prove otherwise, that one race or gender was being discriminated against in the hiring process, the promotions, terminations, compensation process. All of that could end in a finding of discrimination by OFCCP. An agreement between the company and OFCCP to be able to provide back pay for whether its unsuccessful applicants or individuals that weren't paid, what they should have been paid, according to OFCCP's findings. So there's certainly monetary potential to getting audited, to getting the work and getting audited, and then not having all of our ducks in a row, so to speak.

Chris Chrisbens (17:52):

And what would you say is the biggest priority or the greatest thing that you can do to avoid monetary damages for discrimination?

Lisa Marsh (18:03):

Yeah, what we certainly don't want folks to do is get the work and then wait to get audited and then discover that there might be potential issues when OFCCP looks into your data. And so the best thing to do would be to keep up with the data analysis, preparing the affirmative action plans that are required every year annually with counsel involved, whether that's internal counsel, external counsel, so that companies are looking under the hood, so to speak, and being able to identify any potential hidden barriers, any issues that might come up and be able to proactively address those, before OFCCP comes knocking on the door and asking for your data and auditing and looking at your personnel processes.

Chris Chrisbens (18:50):

So keeping good records, keeping good data and analyzing that data in the way that OFCCP would.

Lisa Marsh (18:58):



Right. Exactly. Yes. So really that's everything we wanted to talk through today. Certainly contractors have a lot to think about, in order to think about whether or not they want to move forward bidding on these contracts. A lot to think about. Certainly some potential risk, also a lot of reward. So we certainly encourage all of our listeners out there, Chris and I love to talk about these kinds of issues and talk through these kinds of things. So please feel free to reach out to us if you have any questions or want to talk through any this.

Chris Chrisbens (19:31):

Great. Thanks, Lisa.

Alitia (19:35):

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