



**DirectEmployers
Association**

DE Masterclass | OFCCP CONTRACTOR PORTAL ISSUES

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THERE ARE TWO OFCCP CONTRACTOR PORTALS

OFCCP now has two “online platforms” (portals) by these current names:

- [OFCCP Contractor Portal](#)
 - Formerly initially titled “The Contractor AAP Certification Portal”
 - S&S Contractors use this portal to annually:
 - Build AAP Establishment Pages in the Portal; and
 - “Certify” that they have developed “acceptable” AAPs
- [Notification of Construction Contact Award Portal \(NCAP\)](#)
 - Construction contractors use this portal to provide a “notice” to OFCCP within ten (10) business days of an award of a federal or federally-assisted construction contract or “subcontract” > \$10,000 pursuant to [41 CFR Section-60-4.2](#)
 - This is how OFCCP identifies the construction “subcontractor” universe

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- ❑ While OFCCP has announced that it hopes to eventually use both portals to receive audit documents, budget limitations have delayed the technological readiness of the portals to accept KOR documents
- ❑ OFCCP just opened (March 31, 2023) the Contractor Portal for S&S contractors to begin to “certify” their AAPs
 - [BLOG](#): The certification process likely lacks legal authority (OFCCP did not comply with the Administrative Procedure Act)
 - 44% of prime federal KORs did not certify in 2022
- ❑ Uncertainty currently exists as to whether OFCCP will close the portal on its announced “deadline” of Thursday, June 29, 2023

Step 1 of 2: Certification Question and Declaration Statement

Certification Question

The contractor represents that:

- 1. Entity has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit. See 41 CFR Chapter 60.
- 2. Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.
- 3. Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. See 41 CFR Chapter 60.

Note: Covered contractors must develop an AAP within 120 days of entering a federal contract or subcontract. New contractors who select option three (3) will have 90 days from the development of their AAPs to access the Contractor Portal and update their certification.

AAP Coverage Period

Enter the start date of your currently maintained AAP. The calculator will generate the end date.

Start Date

End Date

Note: AAP Coverage Periods follow a 12-month cycle.

Declaration Statement

The contractor represents that:

I attest that this Affirmative Action Program (AAP) certification is true and correct to the best of my knowledge. I understand that the penalty for making false statements with respect to this certification is prescribed in 18 U.S.C.1001.

I affirm this declaration *

EXACTLY WHAT
AM I CERTIFYING?

THE TWO OFCCP “SUBCONTRACTOR” DEFINITIONS

❑ Those definitions are NOT what you think

- They are NOT the Websters' Dictionary definitions
- Very few Supply & Service companies are “subcontractors” under OFCCP's definitions

❑ See [41 CFR Section 60-1.3](#) (scroll down the alphabetical list to “Subcontract”)

“(i) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, **is necessary to the performance of any one or more contracts**”; (*emphases added*) or

- This is the definition that most companies **wrongly** assume makes them “subcontractors”
- USDOL has agreed that this definition means only that the claimed “sub” contract must be “legally necessary” [[Liberty Mut. Ins. Co. v. Friedman](#), 639 F.2d 164 (4th Cir. 1981)]

“(ii) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed...”

-This is the “subsuming” definition (i.e., the company is “stepping into the shoes” of the prime Kor or another covered federal government “subcontractor” to perform that other company’s prime K or covered federal Government subcontract)