



**DirectEmployers  
Association**

# **DE Masterclass | OFCCP CONTRACTOR PORTAL ISSUES**

**April 20, 2023**

# Today's Presenters



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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 Contract 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

# THERE ARE TWO OFCCP CONTRACTOR PORTALS, con't

- ❑ 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 \*

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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 K or another covered federal government “subcontractor” to perform that other company's prime K or covered federal Government subcontract)