



Office of Federal Contract Compliance Programs (OFCCP)

TRANSMITTAL
U.S. DEPARTMENT OF LABOR
Office of Federal Contract Compliance Programs
OMB NO.: 1250-0006
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Number: 305 Date: December 17, 2012 Functional Affirmative Action Programs

1. **SUBJECT:** Functional Affirmative Action Programs (FAAPs).
2. **PURPOSE:** To outline the application and approval procedures for Functional Affirmative Action Program (FAAP) Agreements provided for in 41 CFR 60-2.1(d)(4).
3. **POLICY:** Effective December 17, 2012, federal contractors and subcontractors seeking an agreement to develop, implement, and maintain functional AAPs must follow the procedures outlined in this Directive. Approval of an agreement allowing the use of functional AAPs is not automatic; an agreement will be approved only if the OFCCP Director determines that the contractor's overall operational structure, compliance history, and proposed functional AAPs meet the criteria set forth in this Directive.
4. **FILING INSTRUCTIONS:**

Holders of ADM and LEG Binders only: Insert a new tab, "Functional AAP," immediately after the "FORMS" tab in your Administrative Practices Binder, and file this Notice behind that tab.

District and Area Office EOSs and EOAs only: File this Notice with the attachment behind the Tab for ADM Directives in your FCCM Binder.

5. **OBSOLETE DATA:** ADM Notice/Functional AAP, issued June 14, 2011, under Transmittal Number 296, Subject: Functional Affirmative Action Programs (FAAPs).
6. **BACKGROUND:** The regulations implementing Executive Order 11246 permit federal supply and service contractors to develop affirmative action programs (AAPs) that are based on a business function or business unit rather than AAPs based on contractor establishments. Specifically, the regulation at 41 CFR 60 2.1(d)(4) provides:

If a contractor wishes to establish an affirmative action program other than by establishment, the contractor may reach agreement with OFCCP on the development and use of affirmative action programs based on functional or business units. The Deputy Assistant Secretary, or his or her designee, must approve such agreements. Agreements allowing the use of functional or business unit affirmative action programs cannot be construed to limit or restrict how the OFCCP structures its compliance evaluations.

Under the regulation, federal contractors must have an agreement approved by the Director, OFCCP [formerly the Deputy Assistant Secretary] to develop and operate under a functional AAP or "FAAP," as they are sometimes called. See example in Attachment A.

On March 21, 2002, OFCCP issued a Directive establishing the procedures for approving contractor requests for agreements to use functional AAPs. Since that time, more than 130 FAAP agreements covering more than 1800 functional or business units and approximately 2 million employees have been approved. The 2002 Directive was replaced with a Directive issued on June 14, 2011, under Transmittal Number 296, Subject: Functional Affirmative Action Programs (FAAPs). This Directive supersedes the 2011 Directive. ¹.

In the absence of an approved agreement under 41 CFR 60-2.1(d)(4), the regulations require contractors to develop, implement, and maintain a separate AAP for each physical location of an establishment with 50 or more employees.

Any multi-establishment supply and service contractor subject to AAP requirements may request a FAAP agreement that permits the development and use of AAPs based on functional or business units. Most contractors will continue to develop and maintain establishment-based AAPs. Some multi-establishment contractors may find it appropriate to develop AAPs based solely on functional or business units, while others may elect to use a combination of both functional units and establishment-based AAPs.

7. **DEFINITIONS:** To ensure clarity and consistency in the implementation of the FAAP Program, definitions for commonly used terms in OFCCP programs are provided below:

Compliance Evaluation – means any one or any combination of four investigative procedures – “compliance review, off-site review of records, compliance check, or focused review - used to examine a federal contractor's compliance with the requirements under the laws and regulations administered and enforced by OFCCP. See 41 CFR 60 1.3, and 60-1.20(a), 60-250.60(a), 60 300.60(a), and 60 741.60(a).

Compliance Review – means a comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis. See 41 CFR 60 1.20(a)(1), 60-250.60(a)(1), 60-300.60(a)(1), and 60 741.60(a)(1).

Establishment - refers to a facility or unit which produces goods or services, such as a factory, office, store, or mine. In most instances, the unit is a physically separate facility at a single location. In appropriate circumstances, OFCCP may consider as an establishment several facilities located at two or more sites when the facilities are in the same labor market or recruiting area. The determination as to whether it is appropriate to group facilities as a single establishment will be made by OFCCP on a case-by-case basis.

Functional or Business Unit - refers to a component within an organization that operates autonomously in the ordinary course of the organization's business. A functional or business unit should also have identifiable personnel practices or transactional activities specific to the functional or business unit (e.g., applicant flow, hires, promotions, compensation determinations, terminations, etc.) that are distinguishable from other parts of the contractor. Functions

or business units should be identified and defined based on the organization's existing business operations, personnel practices and management structures.

8. **CRITERIA FOR A FUNCTIONAL AAP:** To be considered suitable for a functional AAP, the functional or business unit must:
 - a. Currently exist and operate autonomously.
 - b. Include at least 50 employees.
 - c. Have its own managing official.
 - d. Have the ability to track and maintain its own personnel activity.

9. **REQUIRED ELEMENTS OF A FUNCTIONAL AAP:** The following are elements that must be included in a Functional AAP:
 - a. All employees assigned to a functional or business unit must be included in its functional AAP.
 - b. A designated corporate official that has the authority, resources, and support of top management to ensure the effective implementation of the functional AAP.
 - c. An organizational profile as required by 41 CFR 60-2.11.
 - d. A job group analysis and the placement of incumbents in job groups, as required by 41 CFR 60-2.12 and 60-2.13, respectively.
 - e. The availability determinations as required by 41 CFR 60-2.14, along with a description of the methodology used to determine availability for the job groups covered by the functional AAP.
 - f. A comparison of incumbency to availability in an acceptable format, as required by 41 CFR 60 2.15.
 - g. Placement goals and a description of the contractor's methodology for goal setting as required by 41 CFR 60-2.16.
 - h. Designation of the responsibility for implementing the functional AAP as required under 41 CFR 60-2.17(a).
 - i. A description of the in-depth analyses of the employment processes that were conducted to determine whether impediments to equal employment opportunity exist, and a

list of the problem areas identified, as required under 41 CFR 60-2.17(b). This includes, but is not limited to, personnel activity, compensation systems, and any other areas that might impact the success of the functional AAP.

- j. A description of the action-oriented programs that will be implemented to correct any problem areas identified and to attain established goals and objectives, as required under 41 CFR 60-2.17(c).
- k. A description of the internal audit and reporting systems that are used to measure the effectiveness of the AAP, as required under 41 CFR 60-2.17(d).

10. **BASIC PRINCIPLES OF FUNCTIONAL AAP AGREEMENTS:**

- a. A functional AAP agreement will be implemented only after the contractor has received the written approval from the OFCCP Director, or his or her designee.
- b. Any application, modifications, or renewals are not automatic and must be approved by the OFCCP Director, or his or her designee.
- c. OFCCP will consider whether a contractor is currently reporting its compliance under the requirements of a conciliation agreement when determining whether to approve a FAAP Agreement.
- d. Notification from OFCCP of receipt of the contractor's request for a functional AAP agreement does not constitute approval of the request. The requirement to develop, implement and maintain establishment-based AAPs continues in effect until the contractor receives notice that the functional AAP agreement has been approved by the OFCCP Director.
- e. OFCCP will consider EEO violations of the requesting contractor for the past three years from the date of the application, including EEO violations from other local, state and federal government agencies. These findings may impact the approval of the contractor's functional AAP agreement request.
- f. A functional AAP agreement must cover all employees within the contractor's workforce. However, this does not mean that the entire workforce must be covered by functional AAP(s). In some cases, it may be appropriate for a contractor to use both functional AAP(s) and establishment-based AAP(s). For example, a contractor has establishments that are located in Seattle, Denver, and Washington, DC. Each of these establishments includes a

Marketing unit, and Research functions. The functional AAP agreement might permit the contractor to develop and implement two functional AAPs: one for Marketing and one for Research. The remaining employees in each establishment would be covered in separate establishment-based AAPs and reflected in the functional AAP agreement appendices. See Attachment A.

- g. The contractor must demonstrate the ability to efficiently manage and monitor all personnel actions, including recordkeeping and affirmative action responsibilities for all functional or business units regardless of size.
 - h. A functional AAP agreement will not relieve a contractor of its obligation to comply with OFCCP's regulations at 41 CFR Chapter 60, and OFCCP will not negotiate its procedures for determining compliance with its regulations.
 - i. A functional AAP agreement will not contain provisions limiting access or the manner and means by which compliance evaluations will be initiated or conducted. Such matters are not negotiable.
 - j. OFCCP will use the information that the contractor provides in support of its request for a functional AAP agreement solely for the purpose of evaluating the request.
 - k. As part of the functional AAP agreement, the federal contractor agrees to submit, at a minimum, its personnel activity, i.e., applicant flow, hire, promotion, and termination, and compensation data in a readable and usable electronic format, when so requested during a compliance evaluation. Acceptable formats include MS Excel or MS Access.
 - l. All functional AAP agreements will expire three years after the date of approval.
 - m. Only functional units identified in the approved FAAP agreement are covered.
 - n. Functional AAP units that have undergone a compliance evaluation will be exempt from another evaluation for 24 months from the date of closure of the previous compliance evaluation.
11. **PROCEDURES FOR REQUESTING, MODIFYING, UPDATING, OR RENEWING A FUNCTIONAL AAP AGREEMENT:** OFCCP desires that the process for approval of a functional AAP agreement be simple and fluid. It should be a collaborative effort in which OFCCP and the contractor work together to process the functional AAP request in an

expeditious manner consistent with OFCCP policies and procedures as noted below.

A. Requesting a Functional AAP Agreement:

1. A contractor requesting a functional AAP agreement must submit a written request to the OFCCP Director explaining why it believes that use of a functional AAP(s) would be most appropriate. This explanation should also describe in detail how the proposed functions correlate to the contractor's specific organizational structure and include a transition plan describing the process and timeframes in which the organization will move from an establishment-based AAP to a functional AAP. The request must include the name and contact information for the corporate representative responsible for overseeing the contractor's request for the FAAP agreement.
2. The request for a functional AAP agreement must be received by the OFCCP Director no later than 120 calendar days prior to the expiration of the current corporate headquarters AAP, or within 120 days from the award of the Federal contract if this is a first-time contractor. If this timeframe is not met, the request will be denied. The contractor may resubmit its request prior to its next AAP year.
3. Requests for a functional AAP agreement must be made prior to the notice of commencement of any compliance evaluation. Contractor establishments scheduled for a compliance evaluation during the application process for a functional agreement will be completed as an establishment-based evaluation, if the scheduling letter was received by the contractor prior to the functional agreement's effective date.
4. Within 10 days of receiving the written request, OFCCP will provide written acknowledgement of the request to the designated corporate representative. This acknowledgement does not constitute approval of the functional agreement request..
5. Within 30 days of receiving the request, OFCCP's FAAP Unit will send a letter requesting a conference with the contractor's corporate representative to discuss the request for a functional AAP agreement.¹
6. Prior to the conference, the contractor will advise the FAAP Unit of the names and positions of the persons representing the contractor during these discussions and submit the documents outlined in Attachment B. These items may be included in the functional AAP agreement between the contractor and OFCCP and therefore should be provided prior to the conference.

7. During the conference, the contractor's representatives must be prepared to discuss the rationale behind the proposed functional AAPs and present background information to the FAAP Unit. Attachment C lists topics for discussion that the contractor should be prepared to address during the conference.
8. OFCCP will also review records of past compliance evaluations of the contractor's establishment(s) and consider whether any past violations have been corrected or continue to be identified as recurring violations during reviews.
9. Once the federal contractor and OFCCP's FAAP Unit reach an agreement, a copy of the proposed functional AAP agreement will be presented to the OFCCP Director for review and approval. Prior to approval, the OFCCP Director may submit questions and comments to the FAAP Unit. If final approval is granted by the OFCCP Director, a copy of the approved agreement will be forwarded to the contractor. If the OFCCP Director rejects the proposed agreement, it will be returned to the FAAP Unit to work with the contractor's representative to address and resolve any concerns about the proposed agreement. After the issues are resolved, the proposed agreement will be resubmitted to the OFCCP Director for re-consideration and approval.
10. Until the functional AAP agreement is approved by the OFCCP Director, the contractor must continue to develop, implement and maintain AAPs for each establishment. Furthermore, OFCCP may continue to schedule establishment-based compliance evaluations during this interim period.
11. Every effort will be made during the conference to gather sufficient information regarding the contractor's corporate structure to process the functional AAP agreement request. This information enables OFCCP to make informed decisions when evaluating requests for functional AAP agreements. Nonetheless, additional information may be necessary after the initial meeting or conference call for OFCCP to make a final determination on the contractor's request.

B. Modifying an Approved Functional AAP Agreement:

1. When a contractor with an approved functional AAP agreement significantly changes its corporate structure so as to alter the functions upon which the original functional AAP agreement was based, e.g., a merger, acquisition, downsizing or reorganization, etc., that would result either in the elimination of certain functions that were included in the original functional AAP agreement or the addition of new functions, the contractor must notify the OFCCP Director and

the FAAP Director within 60 calendar days of the change(s) in writing.

2. In this notification, the contractor will provide sufficient information to determine whether the approved agreement should be modified or amended as a result of the corporate changes. The contractor will include an explanation of how the modified functions or new functions, if any, meet the criteria outlined in Section 7 of this Directive and are suitable for functional AAPs. The OFCCP Director will then determine whether it is necessary to modify the existing functional AAP agreement.
3. Should the contractor fail to notify OFCCP of any change(s) to its corporate structure that alter the functional or business units covered in its functional AAP agreement, OFCCP may terminate the FAAP agreement. If the OFCCP terminates the agreement, written notification shall be provided to the contractor. See Section 11 – Termination of a Functional AAP Agreement.
4. Any modifications will not extend the three year term of the FAAP Agreement.

C. Updating a Functional AAP Agreement:

1. Contractors are required to report at least annually, within 30 days after the anniversary of its functional AAP agreement, any changes to the agreement such as change of managing official or contact information, and update Federal contract information.
2. Should the contractor fail to submit an annual update, OFCCP may schedule the contractor for a compliance evaluation.

D. Renewing a Functional AAP Agreement:

1. A contractor may renew an existing functional AAP agreement for another three year term by submitting a renewal request to the OFCCP Director no later than 120 calendar days prior to the expiration of the current functional AAP agreement. OFCCP's FAAP Unit will work closely with the contractor's designated representative to ensure timely and proper processing of the renewal request.² However, in the event, OFCCP is unable to complete the renewal request before the expiration date, the contractor will continue to operate under the existing functional AAP Agreement until the request has been approved or denied.
2. Functional agreements that are approved for renewal will be re-issued for another three year term after execution of the agreement by the contractor's representative and the OFCCP

Director. If OFCCP determines that it will not renew the agreement, OFCCP will provide the contractor with at least 90 calendar days written notification. See Section 11 – Termination of a Functional AAP Agreement.

3. During an open compliance evaluation of a functional unit, OFCCP may extend the term of an existing functional AAP agreement until the evaluation has been completed, if necessary.
 4. If the contractor fails to request a renewal at least 120 days prior to the expiration of the functional AAP agreement, said agreement will expire at the end of the three-year term. The contractor will be required to develop establishment-based AAPs and may be scheduled for compliance evaluations under the Federal Contractor Selection System (FCSS). The renewal of an existing FAAP agreement will only be deemed accepted upon the approval and signature of the OFCCP Director.
 5. A contractor with an approved functional AAP agreement must, at a minimum, have had two functional units undergo a compliance evaluation during the three-year term of the agreement to be eligible for a renewal.³ OFCCP will use administratively neutral selection criteria to select the contractor's functional or business units for compliance evaluation. In the event that OFCCP fails to review at least two of a contractor's functional units during the three-year term of the functional AAP agreement, OFCCP may extend the term of the existing agreement until the contractor has had two functional units undergo a compliance evaluation.
12. **TERMINATION OF A FUNCTIONAL AAP AGREEMENT:**
- a. Either party may terminate the functional AAP agreement upon 90 calendar days written notice. The notice will provide a brief explanation of the reason(s) for the termination and the effective date of the termination.
 - b. If a functional AAP agreement has been terminated by OFCCP, the contractor may not reapply for a functional AAP agreement for a period of three years.
 - c. Upon termination of a functional AAP agreement, all employees are required to be covered by establishment-based AAPs. The establishment-based AAPs shall be in place no later than 120 days from either OFCCP's or the contractor's notification that the functional AAP agreement has been terminated.
 - d. OFCCP may terminate a functional AAP agreement where the contractor or any of its establishments or functional units has been found in violation of the laws and regulations enforced by OFCCP, including violations such as

employment discrimination, failure to develop and maintain an AAP, failure to maintain accurate records, failure to permit OFCCP access, or failure to make good faith efforts.

- e. OFCCP may also terminate a functional AAP agreement where the contractor failed to account for all employees in either a functional or establishment AAP, or notify OFCCP of any modification of its functional units.
13. **DISTRIBUTION**: A, B, (both hard copy and electronically).
 14. **ATTACHMENTS**: A, B, C.
 15. **EXPIRATION DATE**: This directive remains in effect as long as there is a valid Office of Management Budget control number.

PATRICIA A. SHIU **DATE**

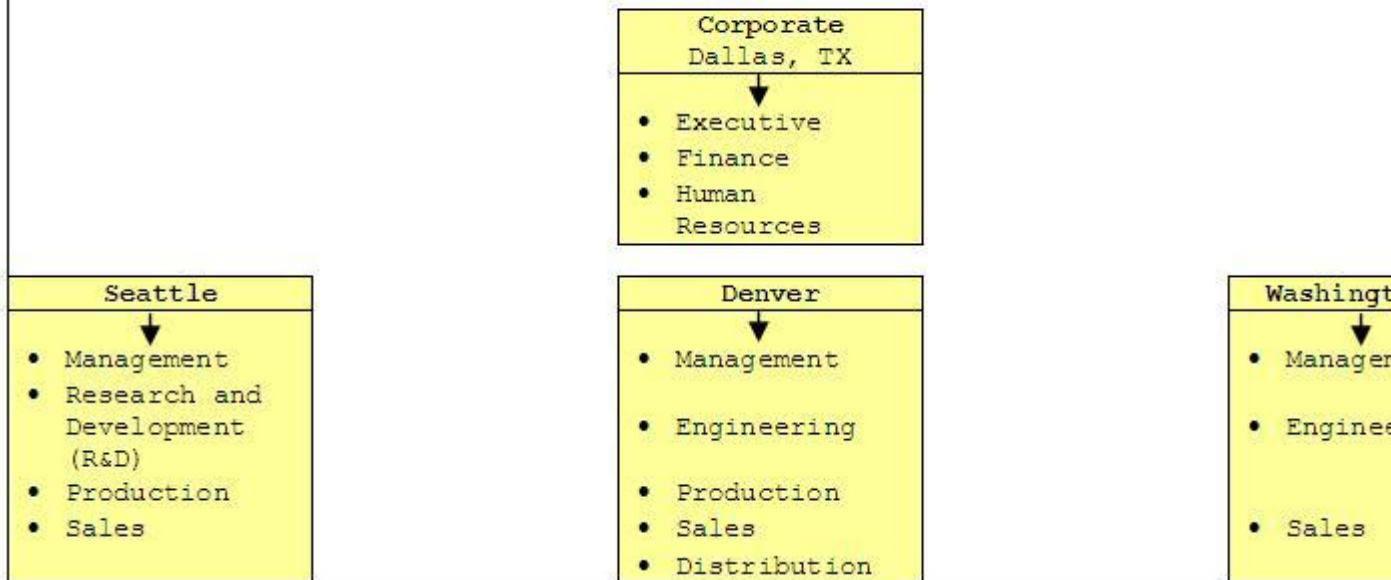
Director

Office of Federal Contract Compliance Programs

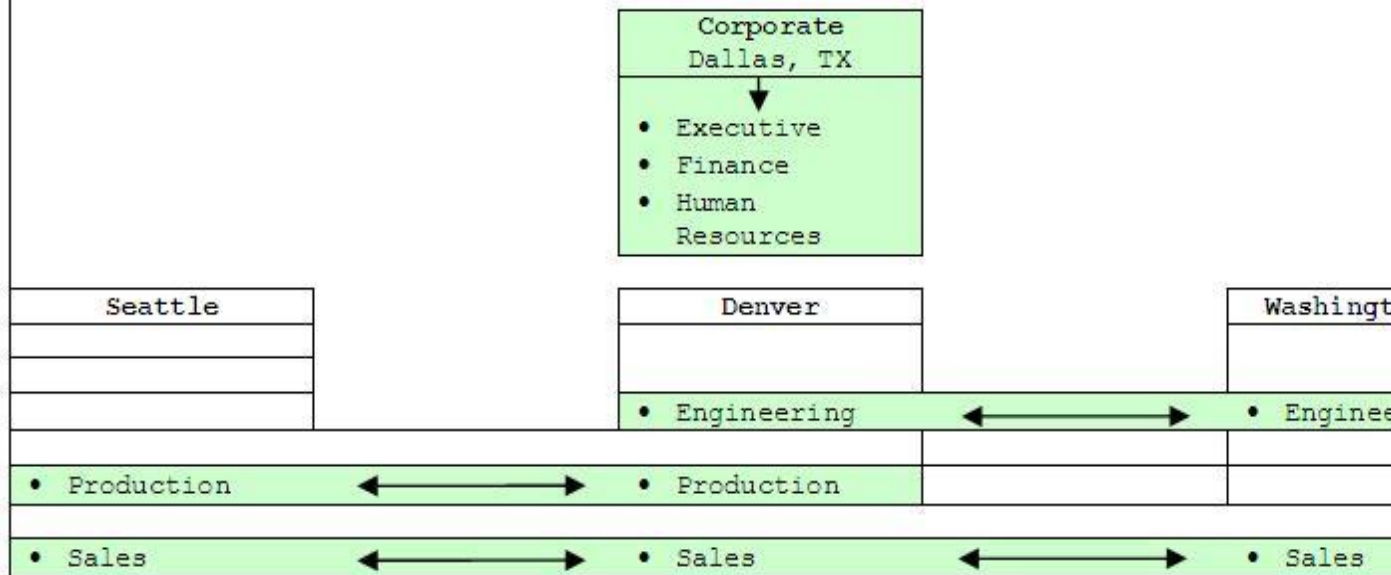
Attachment A

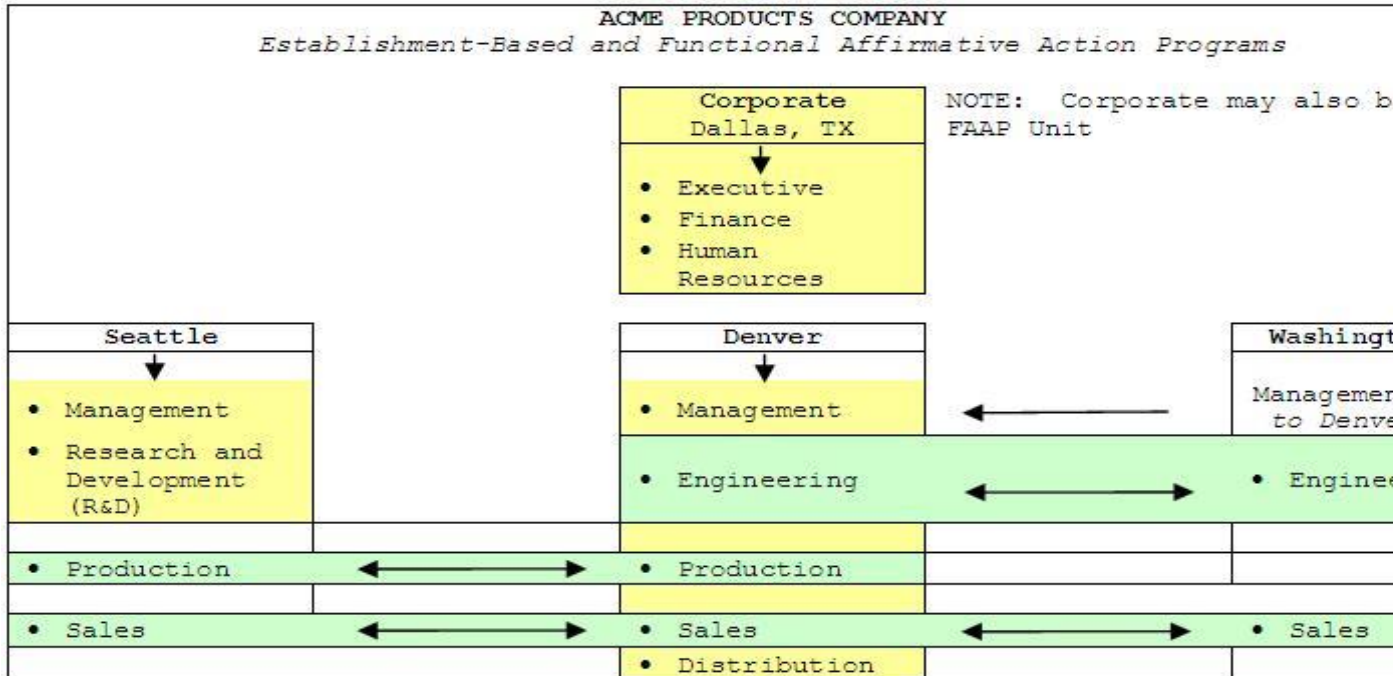
Below are examples of how an establishment-based and functional AAP could be developed. However, developing an AAP is unique and contractors must still provide rationale for forming their AAPs.

ACME PRODUCTS COMPANY
Establishment-Based Affirmative Action Program



ACME PRODUCTS COMPANY
Functional Affirmative Action Program





Attachment B

Documentation to be Submitted Prior to FAAP Conference:

___ A statement of how the contractor is a covered federal contractor or subcontractor including specific information regarding at least one federal contract or subcontract of \$50,000 or more, identifying the name of the federal contracting agency, the contract number, the contract period, and the name of the prime contractor if the contractor is a subcontractor;

___ A copy of the qualifying federal contract or subcontract of \$50,000 or more;

___ A copy of the contractor's most recent Consolidated EEO-1 Report;

___ An organizational chart that clearly identifies all of the proposed functional or business units and how they are related to each other within the corporation's overall structure.

___ A narrative description of the "business or function" of each proposed FAAP unit and how it meets the definition of a functional or business unit set forth above;

___ The total number of employees by location (city and state) within each proposed functional or business unit, including the identification of the managing official of each functional or business unit;

___ A statement addressing the location, to include city and state, where each proposed FAAP unit will maintain its employee personnel records and applicant processing activities;

___ If the contractor proposes to maintain some establishment-based AAPs, provide: a list of the locations including the physical address, number of employees, and the phone number of the establishment's managing official, AAP contact and the EEO-1 unit number for each establishment;

___ The dates of the proposed AAP year for the functional programs; and

___ Copies of personnel policies relevant to evaluating the proposed functions or business units, including organizational and unit-specific policies related to recruitment; hiring; promotion; compensation; and termination.

Attachment C

Items To Be Discussed and Furnished during the FAAP Conference:

___ The reporting hierarchy of the functional or business units;

___ Personnel procedures including recruitment; hiring; promotion; compensation; termination; record retention and data analysis as they apply to each functional or business unit, including identification of units that have differing personnel or compensation practices;

___ How each functional unit manages its human resources and equal employment opportunity responsibilities;

___ How the contractor plans to transition from establishment-based AAPs to FAAPs, and timeframes for completion;

___ Any ongoing or past EEO violations from local, state and federal agencies (over the last three years); and

___ How the contractor anticipates complying with the requirements of Section 503 of the Rehabilitation Act of 1973 and the affirmative action requirements of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 within its functional or business units.

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1. The FAAP Unit will discuss with the contractor the most appropriate format for conducting the FAAP conference. In addition to face-to-face meetings, alternative formats for conducting the conference include teleconference or web-based conferencing.
 2. During the renewal process, the FAAP Unit will confirm information regarding the structure of the functional units and may request updated information where changes have been made.
 3. Contractors with only one functional unit must have that unit undergo a compliance evaluation to be eligible for a renewal of the functional AAP agreement, and OFCCP will conduct a compliance evaluation of the unit during the agreement's three-year term.

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