

pursuant to the Rehabilitation Act.

ABC further argued that the obligations to collect and analyze data were arbitrary and capricious on the basis that they were unjustified departures from past practice and not tailored to qualified individuals with disabilities. The court rejected these arguments, finding that (a) prior regulations already required contractors to collect data from newly hired employees; (b) collection of data from job applicants provides valuable information regarding the number of individuals with a disability that apply for work with the individual contractor as well as the construction industry as a whole; and (c) prior regulations already required contractors to gather and analyze data, and despite prior exemption of construction contractors to certain rules, OFCCP had a reasoned explanation to include construction contractors in the new rules.

ABC also unsuccessfully challenged the utilization goal as arbitrary and capricious. The court found that the failure of past regulations demonstrated a need for a utilization goal. Despite ABC's argument that construction contractors posed a unique circumstance where work is typically project-based, transitory, and seasonal, OFCCP found that the construction industry was not uniquely unable to comply with the utilization goal.

With regard to the utilization goal itself, the court found that although there was no data available reflecting the number of individuals with disabilities who wish to find construction work, OFCCP's determination using available data and estimations was reasonable and that the utilization goal represented only a benchmark figure toward which government contractors should strive—not a hard and fast quota.

Finally the court rejected the argument that the new rules violated the Regulatory Flexibility Act,²⁹ which requires agencies to analyze the impact of their regulations on small businesses. In complying with the Regulatory Flexibility Act, OFCCP estimated that to comply with the new Rehabilitation Act regulations, contractors with 50 to 100 employees would expend \$3,318 per year, or .02 percent of their average receipts, while contractors with 100 to 500 employees would spend \$5,197 per year, or .01 percent of their average receipts. Despite ABC's protestations that OFCCP's analysis incorrectly assumed contractors already had systems in place under Executive Order 11246 to perform the newly required tasks, the court found that contractors did in fact already have an obligation to group employees to meet benchmarks for workforce diversity and therefore should have already had systems in place to categorize its workforce. As a result, the court found that it was reasonable for OFCCP to assume that compliance with the new rules would not require the creation of a much more costly new system. 🏗️

Endnotes

1. 41 C.F.R. § 60-300.
2. 41 C.F.R. § 60-741.
3. 38 U.S.C. § 4212.
4. 29 U.S.C. § 701.
5. 41 C.F.R. § 60-741.1(b).
6. 41 C.F.R. § 60-741.40(b).

7. 41 C.F.R. § 60-300.1(b).

8. 41 C.F.R. § 60-741.40(b)(2); 41 C.F.R. § 60-300.40(b).

9. 41 C.F.R. § 60-741.44; 41 C.F.R. § 60-300.44.

10. 41 C.F.R. § 60-741.44(f)(2); 41 C.F.R. § 60-300.44(f)(2).

11. 41 C.F.R. § 60-741.44(f); 41 C.F.R. § 60-300.44(f).

12. See Office of Fed. Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58,614, 58,640, 58,708, 58,785 (Sept. 24, 2013).

13. 41 C.F.R. § 60-741.45.

14. *Id.*; 41 C.F.R. § 60-300.45.

15. 41 C.F.R. § 60-741.45(g); 41 C.F.R. § 60-300.45(g).

16. Job groups are established under Executive Order 11246, in accordance with either 41 C.F.R. part 60-2 or 41 C.F.R. part 60-4, as appropriate.

17. See *Associated Builders & Contractors, Inc. v. Shiu*, CV 13-1806, 2014 WL 1100779 (D.D.C. Mar. 21, 2014).

18. 41 C.F.R. § 60-300.45. The data and factors to be taken into account by a contractor to determine the applicable benchmark are as follows:

(i) The average percentage of veterans in the civilian labor force in the State(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP Web site;

(ii) The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the State where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP Web site;

(iii) The applicant ratio and hiring ratio for the previous year, based on the data collected pursuant to § 60-300.44(k);

(iv) The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts, as set forth in § 60-300.44(f)(3); and

(v) Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.

19. Office of Fed. Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58,614, 58,639 (Sept. 24, 2013).

20. *Id.* at 58,708, 58,785.

21. See 41 C.F.R. § 60-741.44(k)(1); 41 C.F.R. § 60-300.44(k)(1).

22. Prior regulations required only two years. See 41 C.F.R. § 60-741.80; 41 C.F.R. § 60-300.80.

23. 41 C.F.R. § 60-741.42; 41 C.F.R. § 60-300.42.

24. 41 C.F.R. § 60-300.42(c).

25. 41 C.F.R. § 60-741.60(c); 41 C.F.R. § 60-300.60(d).

26. *Associated Builders & Contractors, Inc. v. Shiu*, CV 13-1806, 2014 WL 1100779 (D.D.C. Mar. 21, 2014).

27. 5 U.S.C. §§ 601–612.

28. Memorandum Opinion, Docket No. 29, *Associated Builders & Contractors, Inc. v. Shiu*, CV 13-1806, 2014 WL 1100779 (D.D.C. Mar. 21, 2014).

29. 5 U.S.C. §§ 603, 604.