

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 18 October 2010

In the Matter of

OFFICE OF FEDERAL CONTRACT COMPLIANCE
PROGRAMS, UNITED STATES DEPARTMENT
OF LABOR,

Plaintiff

v.

FLORIDA HOSPITAL OF ORLANDO

Defendant

Case No. 2009-OFC-00002

Melanie L. Paul, Esq.
Atlanta, Georgia
For the Plaintiff

Leslie Selig Byrd, Esq.
San Antonio, Texas
For the Defendant

Before: JEFFREY TURECK
Administrative Law Judge

SUMMARY DECISION AND ORDER

This case arises under §§208 and 209 of Executive Order 11246, as amended by Executive Orders 11375 and 12086 (“Executive Order”); §503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (“§503”); §4212 of the Vietnam Era Veterans’ Readjustment Assistance Act (“Veterans’ Act”) (jointly “the statutes”); and the applicable regulations at 41 C.F.R. Parts 60-30, 250 and 741. An administrative complaint was issued on December 18, 2008 alleging that Defendant violated its obligations under these statutes, and the case was docketed in this Office. Defendant denied the allegations in an answer to the complaint filed on January 9, 2009. The case was assigned to me for hearing and decision on January 29, 2010. On February 3, 2010, I held a conference call with counsel for the parties in order to set a hearing schedule. The parties indicated that it is likely that this case could be resolved summarily, and accordingly filed cross-motions for summary judgment. They also filed responses to each other’s briefs. The final response brief was received in this Office on June 18.

It is the Plaintiff's position that the Defendant is a subcontractor to a government contractor under each of the statutes, and is therefore subject to the affirmative action and non-discrimination requirements imposed by the statutes. Defendant denies these contentions. I find for the Plaintiff.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The Defendant is an acute care, not-for-profit hospital located in Orlando, Florida. Stipulated Fact ("SF") 1. It has 50 or more employees. SF 3. TRICARE Management Activity ("TRICARE" or "TMA") is a Department of Defense ("DOD") Field Activity tasked with administering TRICARE, the DOD's worldwide health care program for active duty and retired military and their families. SF 5. Humana Military Healthcare Services, Inc. ("HMHS"), is a wholly-owned subsidiary of Humana, Inc., one of the largest health insurance companies in the country. SF 4. HMHS is not a health maintenance organization ("HMO") or an insurer. *Defendant's Motion for Summary Judgment and Supporting Brief* ("Defendant's Brief") at Ex. 13. To assist with the administration of this Government paid health care entitlement, referred to as the "TRICARE program," TMA contracts for managed care support. The managed care support contractors' responsibilities include enrollment, referral management, medical management, claims processing and customer service. Additionally, these contractors underwrite healthcare costs and establish networks of providers who agree to follow rules and procedures of the TRICARE program when treating TRICARE patients but who remain independent and do not operate under the direction of the DOD. SF 7.

Since August 27, 2003, HMHS has contracted with TRICARE to provide networks of health care providers to active duty and retired United States military service members, their survivors, and their families. SF 9. The TRICARE-HMHS contract provides that HMHS "shall provide a managed, stable high-quality network or networks of individual and institutional health care providers. SF 10. Pursuant to the HMHS-TRICARE contract, HMHS must "establish provider networks through contractual arrangements." SF 11. The TRICARE-HMHS contract requires HMHS to establish a provider network that includes 49,000 physicians and behavioral health professionals "in the categories of primary care, medical specialists, surgical [*sic*]" and shall include a sufficient number, mix and geographical distribution of providers to provide the full scope of benefits to enrollees. SF 15. Defendant has had a "Hospital Agreement" with HMHS since at least April, 2005, whereby it agreed to become a Participating Hospital of HMHS under the terms and conditions of that agreement and to provide health care services for beneficiaries designated as eligible to receive benefits under the agreement between HMHS and TRICARE in accordance with the TRICARE rules, regulations, policies and procedures. SF 16. From January 1, 2006 onward,¹ pursuant to Contract No. MDA906-C-0010 between HMHS and TRICARE, HMHS has paid Defendant \$100,000 or more annually for medical services that Defendant provided directly to individuals who were beneficiaries of TRICARE. SF 17. The Hospital Agreement applies to all services provided by Defendant for all persons designated by HMHS as eligible members, including active duty military personnel, to receive benefits under

¹ The *Stipulated Facts* was signed by the parties on May 14, 2010.

an agreement between HMHS and TMA. SF 22. To be a health care provider under TRICARE, a hospital must be a Medicare provider. SF 23. The term of the Hospital agreement between Defendant and Humana is for one year, automatically renewing for one year terms at the agreement of the parties. SF 27. DOD has designated TRICARE as a federal financial assistance program. SF 28.

The TRICARE Operations Manual states: “Hospitals, skilled nursing facilities, residential treatment centers and special treatment facilities determined to be authorized providers under TRICARE are subject to the provisions of Title VI [of the Civil Rights Act of 1964].” SF 29. The “Hospital Agreement” between HMHS and Defendant does not contain a written provision obligating Defendant to comply with the equal opportunity clauses under the Executive Order, §503 or the Veterans’ Act. SF 30. TMA does not consider healthcare providers under network agreements with HMHS to be subcontractors and does not, therefore, require flow down of Federal Acquisition Regulation (“FAR”) clauses to these providers. SF 31. TRICARE’s position to the OFCCP is that “it would be impossible to achieve the TRICARE mission of providing affordable health care for our nation’s active duty and retired military members and their families if onerous federal contracting rules were applied to the more than 500,000 TRICARE providers in the United States”; and that “it was never the agency’s intent to do so.” SF 32.

On August 14, 2007, OFCCP initiated compliance reviews of Defendant by mailing a letter to its facility. In the letter, the OFCCP informed Defendant that it was performing a desk audit, and requested: (1) a copy of Defendant’s Executive Order Affirmative Action Program (“AAP”); (2) a copy of Defendant’s §503 (38 U.S. C. §4212) AAP(s) prepared according to 41 CFR parts 60-741 and 60-250; and (3) support data specified in an enclosed itemized listing. SF 33. Defendant received the letter, and responded that the OFCCP lacked jurisdiction over Defendant, and for that reason did not provide any of the information requested in the letter. SF 34. On September 26, 2007, OFCCP wrote to Defendant’s counsel requesting that Defendant provide OFCCP the information necessary to conduct the desk audit. SF 35. Defendant received the letter, reasserted its position that the OFCCP lacked jurisdiction over it, and did not provide OFCCP with the requested audit information. SF 36. On December 3, 2007, OFCCP issued a *Notice to Show Cause* why OFCCP should not initiate enforcement proceedings against Defendant. SF 37. Defendant received the *Notice to Show Cause*, and responded by reasserting that the OFCCP lacks jurisdiction over it. SF 38. On January 2, 2008, OFCCP wrote to Defendant’s counsel requesting that Defendant provide OFCCP information necessary to conduct the desk audit. SF 39. Defendant received the letter, re-asserted its position that OFCCP lacks jurisdiction over it, and on that basis, did not provide OFCCP the requested audit information. SF 40. Prior to filing the Complaint, counsel for the Secretary of Labor contacted Defendant’s in-house counsel in attempt to resolve the issues, but was unsuccessful. SF 41.

Discussion

Under 29 C.F.R. §18.40(d), “the administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” Here, the parties have submitted a list of stipulated facts

and exhibits, leaving only the legal consequences of those facts in issue. Accordingly, this case is appropriate for summary decision.

Defendant primarily raises two contentions in support of its position that it is not a covered subcontractor under the statutes. First, Defendant argues that it has not entered into a subcontract, as that term is defined in 41 C.F.R. §§60-1.3, 250.2 and 741.2. Second, it is Defendant's position that its participation in the TRICARE program constitutes the receipt of federal financial assistance, and OFCCP does not have jurisdiction over businesses which are recipients of federal financial assistance. Neither contention has merit.

Defendant is a covered contractor

Under the Executive Order, "subcontract" is defined as:

Any agreement or arrangement between a contractor and any person . . . : (1) 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; or (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

41 C.F.R. §60-1.3; *see also* §§60-250.2 and 741.2. Defendant's basis for contending that it is not a subcontractor under the statutes is that it is not providing personal property or nonpersonal services to HMHS under the Hospital Agreement, and it is not performing any of the contractor's obligations under HMHS's contract with TRICARE. I will not address the former, since I find that Defendant has undertaken to perform a portion of HMHS's obligations under the TRICARE contract, specifically the provision of medical services to TRICARE's beneficiaries.

Defendant admits that HMHS provides medical services to TRICARE's beneficiaries under its contract with TRICARE. SF 9, 10; Defendant's Brief at 2. Under the Hospital Agreement, Defendant agrees to provide medical services to TRICARE's beneficiaries under the agreement between HMHS and TRICARE. SF 16. Despite Defendant's protestations to the contrary, it could not be clearer that Defendant is a subcontractor under HMHS's contract with TRICARE. For Defendant performs "a portion of the contractor's obligations" by providing some of the medical services to TRICARE's beneficiaries which HMHS has contracted to provide.

Defendant seeks to escape from its affirmative action obligations under the statutes by arguing that the Administrative Review's Board's decision in *OFCCP v. Bridgeport Hospital*, ARB No. 00-034, 2003 WL 244810 (Jan. 31, 2003), governs this case. But it is the ARB's decision in *OFCCP v. UPMC Braddock*, ARB Case No. 08-048 (May 29, 2009), *aff'g* 2007-OFC- 1, 2 and 3 (ALJ Jan. 16, 2008), which controls. In *Bridgeport Hospital*, a contract between the Office of Personnel Management ("OPM") and Blue Cross/Blue Shield ("Blue Cross") obligated Blue Cross to provide its federal employee policy holders with health care insurance; it did not contract with OPM to provide medical services. Bridgeport Hospital contracted with Blue Cross to provide medical services to Blue Cross's policy holders. The

ARB concluded that Bridgeport Hospital, a medical services provider, had not subcontracted to assume any of Blue Cross's obligations to OPM, and it was not a subcontractor under the statutes.

In contrast to *Bridgeport Hospital*, in *UPMC Braddock*, UPMC Health Plan, a health maintenance organization ("HMO"), had contracted with OPM to provide medical services to federal employees. The defendants were hospitals which had subcontracted with UPMC to provide medical products and services to the federal employees covered by the UPMC Health Plan. The ARB noted that UPMC, as an HMO, is responsible for providing medical services for its members. Since the defendant hospitals subcontracted with UPMC to provide some of these medical services, they were performing a portion of the contractor's obligations under its contract with OPM, and therefore they were subcontractors under the statutes and were required to comply with the affirmative action requirements of the statutes.

It is apparent that the Defendant's case is analogous to *UPMC Braddock*, not *Bridgeport Hospital*. Unlike *Bridgeport Hospital*, under which the contractor provided only medical insurance, HMHS contracted to provide medical services, as did UPMC Health Plan, and in both cases their subcontractors – Defendant and UPMC Braddock respectively - performed some of the medical services the contractor agreed to provide.² Therefore, the ARB's decision in *UPMC Braddock* rather than *Bridgeport Hospital* controls. I conclude that the Defendant is a subcontractor under the statutes and is required to comply with their affirmative action provisions.

Federal Financial Assistance

The Plaintiff does not disagree with the Defendant that OFCCP lacks jurisdiction over businesses if their only relationship with the federal government is as a recipient of federal financial assistance, be it from Medicare or other federal programs. Thus, if Defendant's only receipt of federal funds was through Medicare or other federal financial assistance programs, Plaintiff does not contend that the statutes would be applicable to the Defendant. However, this case does not concern a program of federal financial assistance.

Employer's argument that TRICARE and Medicare are "essentially indistinguishable" (Defendant's Brief at 18) is simply wrong. As OFCCP contends, Medicare is an insurance program. *See* Defendant's Brief, at Ex. 5. Medicare does not provide medical services to its beneficiaries – it simply pays for such services. On the other hand:

TRICARE is the uniformed services health care program for active duty service members and their families TRICARE's primary objectives are to optimize the delivery of health care services in the direct care system for all Military Health System (MHS) beneficiaries and attain the highest level of patient satisfaction through the delivery of world-class health care benefits.

² That UPMC Health Plan is an HMO and HMHS is irrelevant. What matters is that both contracted to perform medical services for Federal agencies, UPMC Health Plan for OPM, and HMHS for TRICARE.

TRICARE brings together the health care resources of the uniformed services and supplements them with networks of civilian health care professionals, institutions, pharmacies, and suppliers to provide timely access and high-quality health care services

Joint Exhibit C, at 5. That Medicare may be considered federal financial assistance has no relevance to TRICARE. They are totally different programs.

Defendant argues that Plaintiff has stipulated that TRICARE is a federal financial assistance program, and cites Stipulated Fact 28 to support this statement. But Stipulated Fact 28 does not state that TRICARE is a federal financial assistance program. Rather, it states that “[t]he Department of Defense has designated TRICARE as a federal financial assistance program” This is a significant difference. As the ARB stated in *UPMC Braddock*, the Secretary’s regulations implementing the Executive Order take precedence over contrary regulations and contractual provisions from other agencies. *UMPC Braddock, supra*, slip op. at 7-9. In fact, Exhibit 4 to *Defendant’s* Brief, an excerpt from DOL’s website regarding jurisdiction under OFCCP, contains the following:

The provider agreements, pursuant to which hospitals and other health care providers receive reimbursement for services covered under Medicare Parts A and B . . . are not covered Government contracts under the laws enforced by OFCCP. . . . Please note that a hospital or other health care provider may be a covered contractor because of other contractual arrangements, such as providing health care to active or retired military under a contract with the Department of Veterans’ Affairs or the Department of Defense.

The cases cited by Defendant in support of its position that “TRICARE is like Medicare and constitutes federal financial assistance” are not apposite. The only appellate court decision it cites, *Barnett v. Weinberger*, 818 F.2d 953 (D.C. Cir. 1987), is focused on the definition of a single term under CHAMPUS,³ “custodial care”, and has no relevance whatever to this case. The other two cases cited by defendant on this point, *Nafwari v. Hendrick Medical Center*, 676 F. Supp. 770 (N.D. Tex. 1987), and *Trauma Service Group, LTD. V. United States*, 33 Fed. Cl. 426 (1995), *aff’d on other grounds*, 104 F.3d 1321 (Fed. Cir. 1997), are just as inapposite, and demonstrate the weakness of Defendant’s position.⁴ I conclude that TRICARE, unlike Medicare, is not a federal financial assistance program.

³ CHAMPUS was the forerunner of TRICARE.

⁴ In *Nafwari*, the court, in an abbreviated discussion of State action in which it did not reach any conclusions, off-handedly lumped Medicare, Medicaid and CHAMPUS together in mentioning federal financial assistance. The case concerned whether the revocation of a physician’s hospital privileges violated the 14th Amendment’s due process clause. The issue in *Trauma Service Group* was the jurisdiction of the Court of Claims over CHAMPUS’s liability for the payment of the salary of an x-ray technician under a Memorandum of Agreement between CHAMPUS and a medical provider. Since the court’s reasoning in denying the claim was rejected by the Federal Circuit, the Defendant’s purpose in citing this decision, even if it was on point, is obscure at best.

Defendant's Other Contentions

Defendant also argues that it is not a subcontractor subject to the three statutes because: TMA does not consider health care providers under network agreements with HMHS to be subcontractors; that the contract between HMHS and defendant does not provide that defendant is a federal subcontractor; and that DOD has issued regulations providing that TRICARE is federal financial assistance. These arguments have already been refuted by the ARB in *UPMC Braddock*, and there is no reason to address them further in this decision.

Accordingly, I conclude that the Defendant is subject to the affirmative action provisions of the three statutes. Therefore, the Plaintiff's motion for summary judgment is granted, and the Defendant's motion for summary judgment is denied.

ORDER

IT IS ORDERED that:

1. Defendant's motion for summary judgment is denied.
2. Plaintiff's motion for summary judgment is granted.
3. Florida Hospital is subject to the contractual obligations imposed on Government contractors and subcontractors by the Executive Order, §503, and the Veterans' Act.
4. Florida Hospital shall grant OFCCP access to its facilities and otherwise permit OFCCP to conduct and complete its compliance reviews.

A

JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions (“Exception”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s recommended decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Any request for an extension of time to file the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the Exception is due. *See* 41 C.F.R. § 60-30.28.

On the same date you file the Exception with the Board, a copy of the Exception must be served on each party to the proceeding. Within fourteen (14) days of the date of receipt of the Exception by a party, the party may submit a response to the Exception with the Board. Any request for an extension of time to file a response to the Exception must be filed with the Board, and copies served simultaneously on all other parties, no later than three (3) days before the response is due. *See* 41 C.F.R. § 60-30.28.

Even if no Exception is timely filed, the administrative law judge’s recommended decision, along with the record, is automatically forwarded to the Board for a final administrative order. *See* 41 C.F.R. § 60-30.27.