



**DATE: JANUARY 21, 2000**

**CASE NO: 97-OFC-1**

In the Matter of

**OFFICE OF FEDERAL CONTRACT COMPLIANCE  
PROGRAMS, U.S. DEPARTMENT OF LABOR,**

Plaintiff,

v.

**BRIDGEPORT HOSPITAL,**

Defendant.

**RECOMMENDED DECISION AND ORDER ON MOTIONS  
FOR SUMMARY JUDGMENT**

This proceeding arises under Executive Order No. 11246 (30 Fed. Reg. 12319), as amended by Executive Order No. 11375 (32 Fed. Reg. 14303), and Executive Order No. 12086 (43 Fed. Reg. 46501) (the Executive Order), Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (Section 503), Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (VEVRAA), as well as the regulations at 41 C.F.R. §§ 60-30.23, 60250.29 and 60-741.65. Together, these require that government contractors and subcontractors (1) treat their employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran; and (2) take "affirmative action" to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran.

The Office of Federal Contract Compliance Programs (OFCCP or Plaintiff) filed a complaint against Defendant, Bridgeport Hospital (Bridgeport) on October 22, 1996, alleging that it had violated Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of VEVRAA. In its Answer to the complaint, dated October 29, 1996, Bridgeport maintains that the OFCCP lacks jurisdiction over the complaint because Bridgeport is not a government contractor or subcontractor within the meaning of Executive Order 11246, VEVRAA, or Section 503, and the implementing regulations. On December 19, 1997, Bridgeport and OFCCP filed a Joint Motion to File CrossMotions for Summary Judgment and for the Court to set April 1, 1998 as the date for filing. The parties represented that there were no material facts in dispute and that the

only matter at issue is one of law. The motion was granted, as were succeeding motions granting extensions of time. On May 1, 1998, OFCCP filed a Memorandum in support of Motion for Summary Judgment. Bridgeport filed a Memorandum in support of Summary Judgment on April 29, 1998. On May 5, 1998, the Connecticut Hospital Association (Amicus) submitted an amicus curiae brief in support of Bridgeport Hospital's Motion for Summary Judgment.

### **Summary Judgment Standard**

Pursuant to 29 C.F.R. § 18.40(d) and 41 C.F.R. § 60-30.23, an administrative law judge may enter summary judgment for either party if the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noted show there is no genuine issue of material fact that remains to be resolved and that a party is entitled to a judgment as a matter of law. In moving for a summary decision (or summary judgment), it is not sufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must consider all the materials submitted by both parties, drawing all reasonable inferences in a manner most favorable to the non-moving party. See Fed. R. Civ. P. 56(c); *Adickes v. SH. Kress & Co.*, 398 U.S. 144 (1970). If, however, the responding party produces information contradicting that of the moving party or otherwise showing that a factual dispute exists, summary judgment must be denied; the matter is then for the trier of fact after a trial on the merits.

In the case at bar, the undersigned Administrative Law Judge agrees with the representation of the parties that there are no material facts in dispute and the only matter at issue is one of law.

### **Statement of the Case**

Bridgeport is an acute care hospital created over 100 years ago. It is a non-profit entity and is organized as a Connecticut non-stock corporation. Bridgeport was a party to an agreement with Blue Cross/Blue Shield of Connecticut, Inc. (Blue) from July 1, 1994 to June 30, 1995. The agreement governed the terms of payment from Blue to Bridgeport for covered services furnished to persons eligible to receive health care benefits under any Blue Cross Plan or member contract. During the applicable period, the U.S. Office of Personnel Management (OPM), maintained a contract with Blue for furnishing health insurance to government employees, under the Federal Employees Health Benefits Program (FEHBP). See Exhibit F, Contract CS 1039 between OPM and Blue. This contract provided, among other things, for reimbursement by the insurance carrier (*i.e.*, Blue Cross/Blue Shield) to service providers (*i.e.*, hospitals) for medical services utilized by members of the insurance plan (*i.e.*, federal employee enrollees and qualified dependents). See *id.* at Section 2.3.

During the applicable period, Bridgeport employed approximately 2,618 employees and received \$361,340 from Blue as reimbursement for medical services and supplies Bridgeport provided to federal employees and their qualified dependents under the FEHBP.

OFCCP argues that the reimbursement agreement between Bridgeport and Blue was a

subcontract of the Federal Blue Cross contract and therefore Bridgeport should be found to be a covered subcontractor under Executive Order 11246, VEVRAA, and Section 503 of the Rehabilitation Act. It is on this basis that OFCCP requests summary judgment in its favor for Bridgeport's failure to comply with the affirmative action requirements and its failure to submit to compliance review pursuant to the regulations.<sup>1</sup>

Conversely, Bridgeport and Amicus contend that the reimbursement contract does not constitute a subcontract within the meaning of Executive Order 11246 and its implementing regulations. Rather, the hospital merely supplies and continues to supply, hospitalization and medical services directly to individuals, some of whom are government employees or dependents of government employees. Accordingly, Bridgeport maintains that they are entitled to summary judgment.

**Statement of Uncontested Facts**

1. The applicable period at issue is July 1, 1994 to June 30, 1995.
2. Defendant Bridgeport is a Connecticut corporation; it is not part of a multi-establishment corporation.
3. Defendant Bridgeport employed approximately 2,618 employees during the applicable period.
4. Blue paid Defendant Bridgeport \$361,340.00 as reimbursement for medical services and supplies provided by Bridgeport to federal employees and their dependents under the Federal Employees Health Benefits Program (FEHBP) during the applicable period.
5. The contract during the applicable period between OPM and Blue is CS 1039. See Exhibit F.
6. The reimbursement agreement during the applicable period between Bridgeport Hospital and Blue is the Hospital Agreement of October 1, 1989. See Exhibit G, and addendum of March 9, 1995, Exhibit H.
7. Plaintiff OFCCP filed proceedings to enforce provisions of contractual obligations imposed by Executive Order No. 11246, Section 503 and VEVRAA.
8. By letter dated August 24, 1995, OFCCP notified Bridgeport that it had been selected for compliance review under E.O. 11246, Section 503 and VEVRAA, and requested that Bridgeport provide its affirmative action program and certain supporting documentation.
9. Prior to the notice described in Paragraph 8, herein, Bridgeport had never received

---

<sup>1</sup>Bridgeport Hospital has expressed its willingness to create and implement an affirmative action program, and to subject that program to compliance review, upon adjudication that the Blue Cross and Blue Shield reimbursement system creates the status of government subcontractor.

notification of any kind from any Blue Cross/Blue Shield entity that it was a subcontractor, that it was deemed a party to a subcontract governed by E.O. 1 1246, or that it had any obligations to comply with the affirmative action plan requirement of E.O. 11246, or of any related statutory or regulatory requirements for affirmative action plans.

10. As of August 24, 1995, Bridgeport did not have an affirmative action plan.

11. All new patients at Bridgeport are asked to identify their insurer, and insurance is then verified by calls to telephone numbers provided by the various plans, which are available 24 hours per day.

12. Charges are entered into the Bridgeport accounting system during the patient stay, and when the patient is discharged, and after a clearing period, a bill is generated.

13. Each day Bridgeport transmits all patient bills directly to ProMed, a business operated by Blue which acts as a clearing house for all insurance and other medical plans.

14. ProMed sends non-Blue Cross bills to other plans and carriers, and processes bills for Blue members directly.

15. The patient is considered to be in paid status as soon as his coverage is verified by telephone, whereupon the patient is removed from the accounts receivable category and placed in a category of due from Blue.

16. Blue has calculated a standard payment amount, which is paid weekly to Bridgeport. At year end, there is a settlement of all accounts and a reconciliation payment.

17. Deductibles and non-covered charges are billed separately and are collected directly by Bridgeport from the patient.

18. Regardless of whether the patient is insured by Blue-Connecticut or by another Blue Cross entity from another part of the country, the payment of the patient bill is part of the standard payment amount, made through the Blue remittance procedure.

19. Verification data received from Blue indicates from which plan a patient receives coverage, including Blue's plans for federal employees. Based upon these verifications, Bridgeport stipulates that bills for services rendered to patients who are federal employees or dependents, and who have insurance coverage furnished by the federal government, total more than \$50,000 annually.

20. The Blue Cross and Blue Shield Service Benefit Plan provides for three payment plans depending on agreements, or lack thereof, that Blue has entered into with hospitals: (1) Preferred Hospital where the plan pays in full for unlimited days and has no admission deductible; (2) Member Hospital where the standard option plan also pays in full for unlimited days but has a \$250.00 admission deductible; and (3) Non-member Hospital where the plan pays 70% of "non-member" rates after a \$250.00 deductible.

21. Bridgeport is either a Preferred or a Member hospital depending on its agreement with Blue. A consequence of the agreement between Blue and Bridgeport is lower cost of medical treatment to Blue members and less cost to Blue.

22. The absence of a reimbursement agreement between Bridgeport and Blue would not preclude Blue from being able to offer medical benefit insurance to its federal employee members, and would not preclude Blue from paying insurance benefits to those treated at Bridgeport.

### **Discussion**

The Executive Order and its implementing regulations prohibit Federal contractors and subcontractors with contracts of \$10,000 or more from discriminating against employees and applicants for employment on the basis of race, color, sex, religion, or national origin. Section 503 of the Rehabilitation Act of 1973 requires all federal contractors and subcontractors with contracts of \$10,000 or more to take affirmative action to employ and advance in employment qualified individuals with disabilities. 29 U.S.C. § 793(a) (Supp. 1997). Section 4212 of VEVRAA requires all federal contractors and subcontractors holding contracts of \$10,000 or more to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. 38 U.S.C. § 4212. Under the Executive Order, the contractor and/or subcontractor is required to furnish required information and reports, and to permit access to its books, records, and accounts so that OFCCP may ascertain compliance with the Executive Order. Regulations enforcing Section 503 and the VEVRAA contain similar requirements applicable to "the contractor" and "the subcontractor." *See* 41 C.F.R. §§ 60-250.53, 60-741.53.

### **"Subcontractor" As Defined And Applied Pursuant To OFCCP Regulations**

The sole legal issue in dispute is whether Bridgeport, during the applicable period, was a covered subcontractor, as that term is defined in the applicable regulations, and, therefore, was obligated to comply with the affirmative action requirements under Executive Order 11246, VEVRAA and Section 503.

The OFCCP regulations applicable here provide that a "subcontractor" is any person holding a "subcontract." *See* 41 C.F.R. § 60-1.3; 41 C.F.R. § 60-250.2; 41 C.F.R. § 60-741.2. A "subcontract" is defined as:

""[A]ny agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, 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.

OFCCP's motion for summary judgment and supporting brief argues that Bridgeport meets the definition of subcontractor under both of the numbered paragraphs of § 60-1.3. OFCCP first argues that Bridgeport is a subcontractor because "it performed services and provided supplies *necessary even essential* to the performance of the contract between [Blue] and OPM." (Emphasis added)<sup>2</sup> In support of this argument, OFCCP asserts that without the payment agreement between Blue and Bridgeport, Bridgeport "would not have been providing services and supplies to Government employees under FEHBP...and the payment agreement was necessary to the performance of the contract between Blue and OPM ."<sup>3</sup> OFCCP's second argument is that Bridgeport is a subcontractor because it "had *performed, undertaken and assumed* a portion of the prime contract" by providing the medical services and supplies to government employees as agreed to in the prime contract. (Emphasis added)<sup>4</sup>

***Services necessary for performance of prime contract***

There is very little case law interpreting the term subcontractor as used by the Executive Order and the implementing regulations. OFCCP's brief references the Fourth Circuit Court decision in *Liberty Mutual Insurance Co. v. Friedman*, 639 F.2d 164 (4th Cir. 1981), the Secretary of Labor's decision in *U.S. Department of Labor v. Coldwell Banker & Co.*, 78-OFCCP-12, ALJ Recommended Decision, June 8, 1979, *aff'd*, August 14, 1987, and an Administrative Law Judge Decision and Order in *OFCCP v. Monongahela Railroad Co.*, 85-OFCC-2, April 2, 1986, *aff'd*, March 11, 1987. OFCCP cites the holdings in these cases as support for its contention that a government contractor's agreement with a third party should be considered a "subcontract" to its government contract if the type of service provided by the third party is necessary to the ultimate performance of the government contract

In *Liberty Mutual Insurance Co.*, *supra*, the Fourth Circuit held that an insurance company selling a blanket workers' compensation policy to an employer that held a government contract was a "subcontractor" within the definition set forth in 41 C.F.R. § 60-1.3. The Court reasoned that because all employers including government contractors are compelled to comply with state workers' compensation laws, the insurance company was providing a service necessary to the performance of the federal contract and therefore must be considered a subcontractor under the definition.<sup>5</sup>

---

<sup>2</sup>Memorandum In Support of Motion For Summary Judgment, p. 11.

<sup>3</sup>*Id.* pp. 11, 12.

<sup>4</sup>*Id.* p. 11.

<sup>5</sup>The Fourth Circuit ultimately ruled that the workers' compensation insurance company was not covered by the Executive Order. The Court found that the extension of the equal employment opportunity requirements to insurance underwriters exceeded the scope of the statute authorizing Executive Order 11246. The court found such companies to be too indirectly related to government contracts to have been

In *Monongahela Railroad Co.*, *supra*, the Monongahela Railroad Company hauled coal which was eventually purchased by Detroit Edison, a direct federal contractor. The administrative law judge determined that Monongahela was a subcontractor as the coal-hauling service provided by Monongahela was necessary for Detroit Edison to comply with its contract to supply power to the federal facility. The railroad argued that it was not a subcontractor because Detroit Edison was not solely dependant on its transportation system since other carriers transported coal to Detroit Edison. However, the ALJ rejected the company's argument. The judge held that it was irrelevant whether the railroad's particular service, as opposed to that of other carriers, was "necessary." Rather, the judge reasoned, the service is necessary if it is the type of service required for the performance of the contract.

In *Coldwell Banker*, *supra*, the Secretary upheld the Administrative Law Judge's finding that Coldwell Banker was a subcontractor by virtue of agreements it entered into to manage commercial properties. The commercial property owners, the prime contractors, leased property to federal government agencies, which occupied the buildings as tenants. The Administrative Law Judge concluded that Coldwell Banker was a subcontractor under the Executive Order because the services it provided were necessary for the prime contractor to perform its contract.

The aforesaid decisions cited by OFCCP support its contention that Bridgeport would be a subcontractor if the services Bridgeport renders to Blue are necessary for Blue's performance of its prime contract. Bridgeport does not quarrel with OFCCP's interpretation of the holdings of these cases. Rather, Bridgeport argues that its agreement with Blue is not a subcontract of the Federal Blue Cross contract as it merely supplies hospitalization and medical services directly to individuals, some of whom happen to be government employees or dependents of government employees. The service is to the patient, not to Federal Blue Cross.

Initially, there is no assertion that Bridgeport has a contract with the federal government. At issue is whether the reimbursement agreement which Bridgeport has with Blue causes Bridgeport to be considered a subcontractor to the contract between Blue and the federal government's Office of Personnel Management wherein Blue is required to furnish health insurance to government employees under the Federal Employees Health Benefits Program. Blue is one of among 15 to 20 health care providers available to federal employees under the health benefit program.

The agreement between Blue and Bridgeport, an acute care hospital, obligates Bridgeport to accept pre-arranged published and discounted charges for the hospital medical services it supplies to the members of Blue. Bridgeport agrees to accept such reimbursement in full satisfaction of the amount due from the government employees who are enrolled in Blue. *See* Section 3.1 of Exhibit F. Bridgeport agrees to bill a Blue member for only the applicable deductibles, copayments, coinsurance or penalties. *See* Section 2.4.2 of Exhibit F.

Bridgeport argues persuasively that this reimbursement agreement it signed with Blue is

---

within the contemplation of the drafters of the legislation.

not necessary for Blue to fulfill its obligation to OPM to provide health insurance to government employees. In *Monongahela Railroad Co., supra*, the ALJ determined that a Railroad Company that transported coal to a powerplant which sold power to a federal facility was a subcontractor to the Utility because the coal was "necessary" for the Utility to be able to provide power to the federal facility. Here, OFCCP has not shown how the reimbursement agreement between Blue and Bridgeport is necessary for Blue to be able to fulfil its contract with OPM. There is no allegation that, absent the agreement, government employees who are members of Blue could not seek treatment from Bridgeport. The reimbursement agreement allows Blue members to receive treatment at Bridgeport at a rate discounted from Bridgeport's normal fee, thereby resulting in cost savings for Blue's members, and possibly permitting Blue to lower its premiums. The likely result of no agreement would be that members would pay higher fees for medical treatment at Bridgeport or seek treatment at other medical facilities. But, an agreement is not a prerequisite to Bridgeport treating Blue members or Blue being able to fulfill its contract with OPM.

The Blue Cross and Blue Shield Service Benefit Plan administered by Blue for OPM establishes a Preferred provider organization arrangement. Plan members are encouraged to use Preferred provider facilities because their medical fees to members are less and Blue pays a higher percentage of the fee. Preferred providers have contracted with Blue to render covered services at less cost. The Plan provides for three payment plans in light of agreements with hospitals: (1) Preferred Hospital where the plan pays in full for unlimited days and has no admission deductible; (2) Member Hospital where the standard option plan also pays in full for unlimited days but has a \$250.00 admission deductible; and (3) Non-member Hospital where the plan pays 70% of "non-member" rates after a \$250.00 deductible.<sup>6</sup>

Bridgeport's agreement with Blue results in Bridgeport being either a Preferred or a Member hospital. In either case Blue pays a higher percentage of the cost of its members treatment than if no agreement existed. Clearly, a consequence of the agreement between Blue and Bridgeport is less cost to Blue members, less cost to Blue and thus an overall less costly Federal Employees Health Benefits Program. Conversely, however, the lack of the reimbursement agreement would not preclude Blue from being able to offer medical benefit insurance to its federal employee members, and would not preclude Blue from paying insurance benefits to those treated at Bridgeport as the federal employee members would be reimbursed in accord with the provisions for treatment at non-member hospitals.

DOL's argument that the Bridgeport reimbursement agreement is "necessary" to Blue's contract with OPM apparently stems from the fact the agreement lowers costs to Blue and its members. However, under such reasoning, any concern that does business with Blue, and whose business potentially affects Blue's costs, such as public utilities, advertising, real estate costs, space rental, etc., would be considered "necessary." Such an expansive interpretation of the definition of subcontractor would read the modifier "necessary" out of the definition as all third party contracts would be considered necessary.

---

<sup>6</sup>Blue Cross and Blue Shield Service Benefit Plan for 1996, attachment to Exhibit F.

***Perform, undertake or assume***

OFCCP argues at page 14 of its memorandum in support of motion for summary judgement that Bridgeport qualifies as a subcontractor under Paragraph 2 of the definition because "[t]hrough its payment reimbursement contract with [Blue], the hospital had 'performed, undertaken or assumed' a portion of [Blue's] obligation to OPM by providing the medical services and supplies to Federal Government employees as agreed to in the prime contract." OFCCP's argument is inconsistent with the contract that Blue has with OPM. That contract does not obligate Blue to provide "medical services and supplies" to government employees. Rather the contract requires Blue to provide health insurance to federal employees so that all or a part of their bills for medical expenses will be paid. In support of its argument, OFCCP cites Section 2.2 of Blue's agreement with OPM and the 1996 Service Benefit Plan.<sup>7</sup> Section 2.2 discusses the benefits that Blue is to provide government employees and references the benefits set forth in the 1996 Service Benefit Plan. Those benefits pertain to health insurance not medical treatment. As previously discussed, Blue's agreement with Bridgeport involves reimbursement of medical fees and its purpose is cost containment. It does not require Bridgeport to provide health insurance or, in fact, even medical treatment.

OFCCP's request for a finding that Blue's obligation to OPM to provide insurance is performed, undertaken or assumed by Bridgeport because of Bridgeport's agreement to accept certain preset amounts in full or partial payment of medical treatment is not accepted. Bridgeport's contract with Blue does not require Bridgeport to "perform, undertake or assume" any part of Blue's contract to provide health insurance.

***Definition of subcontractor under the OPM regulations***

Amicus argues that OFCCP lacks jurisdiction in this matter because Bridgeport cannot be a subcontractor in light of OPM's regulatory definition of subcontractor. Amicus is correct that under the OPM regulations, Bridgeport is not a subcontractor. The OPM regulations governing the Federal Blue Cross contract<sup>8</sup> expressly exclude "providers of direct medical services" from the definition of subcontractor. Section 1.3 of the contract between Blue and OPM provides that the Federal Employees Health Benefits Acquisition Regulation, 48 C.F.R. § 1601 et. seq., governs the contract. Under these regulations, a subcontractor is defined as "any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor, *except for providers of direct medical services or supplies pursuant to the Carrier's health benefit plan.*" 48 C.F.R. § 1602.170-14. (Emphasis added).

---

<sup>7</sup>Exhibit F.

<sup>8</sup>These regulations implement and supplement the Federal Acquisition Regulation (FAR), of the Code of Federal Regulations, specifically for administering and acquiring contracts with health insurance carriers in the Federal Employees Health Benefits Program. The function of these regulations is to "identify basic and significant acquisition policies unique to the Federal Employees Health Benefits Program." 48 C.F.R. §1601.103.1(b).

However, Amicus' argument that the definition of subcontractor in the acquisition regulation is controlling here is not accepted. The definitions therein and their application to subcontractor and medical provider may be instructive as to the actual functions of a medical provider, but they are not determinative. OFCCP's interpretation of the Executive Order through duly promulgated regulations can not be affected by acquisition regulations, the purpose of which is acquiring and administering contracts with health insurance carriers in the Federal Employees Health Benefits Program.

### **CONCLUSION OF LAW**

The agreement between Blue Cross and Blue Shield of Connecticut and Bridgeport Hospital does not constitute a subcontract under 41 C.F.R. § 60-1.3 and Bridgeport Hospital is not a subcontractor to the contract between Blue Cross and Blue Shield of Connecticut and the U.S. Office of Personnel Management under 41 C.F.R. § 60-1.3. Thus OFCCP does not have statutory authority to bring this action against Bridgeport Hospital.

### **RECOMMENDED ORDER**

#### **IT IS HEREBY RECOMMENDED THAT:**

Summary Judgment be entered in favor of the Defendant, Bridgeport Hospital, and that this matter be **HEREBY DISMISSED**.

**SO ORDERED.**

**THOMAS M. BURKE**  
*Associate Chief Administrative Law  
Judge*

**NOTICE:** This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Administrative Review Board (ARB), U.S. Department of Labor, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. The ARB has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in cases adjudicated under the regulations at 41 C.F.R. Part 60. Pursuant to §60-30.36, "within ten days after receipt of the recommended findings, conclusions and decision, any party may submit exceptions to said recommendations. Exceptions may be responded to by other parties within seven days after receipt by said parties of the exceptions. All exceptions and responses shall be filed with the Administrative Review Board, United States Department of Labor. Briefs or exceptions and responses shall be filed with the Secretary. Briefs or exceptions and responses shall be served simultaneously on all parties to the proceeding."