

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 14 June 2011

Case No: 2011-OFC-00005

In the Matter of:

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

Plaintiff,

v.

MANHEIM AUCTIONS, INC., and
MANHEIM AUCTIONS GOVERNMENT SERVICES,
d/b/a MANHEIM GOVERNMENT SERVICES,

Defendant.

**RECOMMENDED DECISION AND ORDER
GRANTING SUMMARY DECISION TO PLAINTIFF
AND
DIRECTING DEFENDANTS TO COMPLY WITH EXISTING LAW AND
IMPLEMENTING REGULATIONS UNDER THREAT OF IMPOSED SANCTIONS**

This cause of action is filed pursuant to Executive Order 11246 (30 Fed. Reg. 12319), as amended; pursuant to Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. §793), as amended; and pursuant to 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (38 U.S.C. §4212), as amended, and is governed by the implementing Regulations found at Code of Federal Regulations (CFR), Title 41, Chapter 60. On December 2, 2010, the Office of Federal Contract Compliance Programs, U.S. Department of Labor (Plaintiff) filed a "Complaint" with the Office of Administrative Law Judges, for an expedited administrative hearing against the above-named Defendant under the provisions of the 41 CFR § 60-30.31. A formal hearing is now scheduled to commence on June 29, 2011, in Atlanta, Georgia.

On December 20, 2010, Defendants filed an "Administrative Answer" to the "Complaint" through their counsel. The Defendants denied that they are subject to the obligations imposed by referenced Executive Orders, statute and regulations; the Defendants denied that they operate

together as a “single entity”; the Defendant Manheim Auctions, Inc. denies that it has a federal government contract of \$50,000.00 or more; and the Defendant Manheim Auctions Government Services, LLC admits that it has a federal government contract but denies that it has 50 or more employees. The Defendants deny that either are a wholly-owned subsidiary of Cox Enterprises, Inc. The Defendants argue that the Plaintiff lacks jurisdiction to require the Defendants to comply with the cited Executive Order, statute or regulations based on Manheim Auctions, Inc.’s lack of government contract and Manheim Auctions Government Services, LLC’s lack of 50 or more employees, which is a denial of allegations #10 and #11 of the “Complaint.” This denial of jurisdiction is based on Defendant’s position that the two defendants do not operate as a single entity, which is a denial of allegation #8 of the “Complaint.” The Defendants’ stated defense of failure to state a claim is a denial of allegation #3 of the “Complaint.” The Defendants’ stated defense of failure of due process is a denial of allegations #12, #13, #14, #15, #16 and #18 of the “Complaint.” The Defendants’ defense that there is no dispute because they have at all times abided by all federal statutes, regulations and guidelines is a general denial of allegations #14, #16 and #17 of the “Complaint.” The Defendants’ raise additional defenses that the regulations at issue are unconstitutional, laches, waiver, estoppel, incomplete investigation, and failure to engage in conciliation discussions. The Defendants “request a non-expedited hearing and pray that the matter be dismissed with prejudice and that Plaintiff be required to reimburse Defendant’s costs and attorneys’ fees associated herewith.”

By Order of December 20, 2010, the Defendants’ “Motion to Dismiss and Award Fees and Costs” and “Motion to Remove From Expedited Hearing” were denied.

By Order of March 28, 2011, the Parties were directed to complete discovery by 5:00 PM, Thursday, May 5, 2011.

On May 17, 2011, Plaintiff filed a “Motion for Summary Judgment” with the Court. Plaintiff avers that the Motion was served on counsel for the Defendants by first class mail posted on May 16, 2011. On May 26, 2011, this Administrative Law Judge granted a request by Defendants’ counsel to extend the time to file a response to the Plaintiff’s “Motion for Summary Judgment” to Tuesday, June 7, 2011. Defendants’ counsel filed its response on June 7, 2011.

The following findings and conclusions are made after deliberation on the respective filings by the Parties.

STATUTORY AND REGULATORY FRAMEWORK

This matter arises under Executive Order 11246, (“Executive Order 11246”), as amended, and regulations issued pursuant thereto; Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793 (“Rehabilitation Act”), as amended and regulations issued pursuant thereto; and Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act, 38 U.S.C. §4212 (“VEVRAA”), as amended and regulations issued pursuant thereto. Jurisdiction is conferred in this matter pursuant to §§208 and 209 of Executive Order 11246, the Rehabilitation Act, VEVRAA, 41 C.F.R. §§60-1.26, 60-741.65, 60-350.65, and 41 CFR Part 60-30.

These statutes, Executive Order and federal regulations set forth nondiscrimination and equal opportunity laws that prohibit discrimination by Federal contractors as well as require affirmative action by Federal contractors to ensure employment opportunities are available regardless of race, gender, color, national origin, religion, or status as a qualified individual with a disability or protected veteran. The Office of Federal Contractor Compliance Programs (OFCCP) administers the provisions of these authorities.

The pertinent provisions of Executive Order 11246 provide -

§202. Except in contracts exempted in accordance with Section 204 of this Order, all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: During the performance of this contract, the contractor agrees as follows:

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin ...
- (2) ...
- (3) ...
- (4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of rules, regulations, and relevant orders of the Secretary of Labor.
- (5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by all rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts

§203. (a) Each contractor having a contract containing the provisions prescribed in Section 202 shall file, and shall cause each of his subcontractors to file, Compliance Reports with the contracting agency or the Secretary of Labor as may be directed. ...

§204. (a) The Secretary of Labor may, when the Secretary deems that special circumstances in the national interest so require, exempt a contracting agency from the requirement of including any or all the provisions of Section 202 of this Order in any specific contract, subcontract, or purchase order.

(b) The Secretary of Labor, may, by rule or regulation, also exempt certain classes of contracts, subcontracts, or purchase orders ...

(c) Section 202 of this Order shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform work connected with and carried on by such corporation, association, educational institution, or society of its activities. ...

(d) The Secretary of Labor may also provide, by rule, regulation, or order, for the exemption of facilities of a contractor that are in all respects separate and distinct from activities of the contractor related to the performance of the contract: provided, that such an exemption will not interfere with or impede the effectuation of the purpose of this Order: and provided further, that in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

§206. (a) The Secretary of Labor may investigate the employment practices of any Government contractor or subcontractor to determine whether or not the contractual provisions specified in Section 202 of this Order have been violated. ...

The pertinent provisions of the Rehabilitation Act provide -

§793. (a) Any contract in excess of \$10,000 entered into by any Federal department or agency for the procurement of personal property and nonpersonal services (including construction) for the United States shall contain a provision requiring that the party contracting with the United States shall take affirmative action to employ and advance in employment qualified individuals with disabilities. The provisions of this section shall apply to any subcontract in excess of \$10,000 entered into by a prime contractor in carrying out any contract for the procurement of personal property and nonpersonal services (including construction) for the United States. ...

(b) ...

(c)(1) The requirements of this section may be waived, in whole or in part, by the President with respect to a particular contract or subcontract ... when the President determines that special circumstances in the national interest so require and states in writing the reasons for such determination.

(c)(2)(A) The Secretary of Labor may waive the requirements of the affirmative action clause required ... with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this chapter. ...

The pertinent provisions of the VEVRAA provide -

§4212. (a)(1) Any contract in the amount of \$100,000 or more entered into by any department or agency of the United States for the procurement of personal property and nonpersonal services (including construction) for the United States, shall contain a provision requiring that the party contracting with the United States take affirmative action to employ and advance in employment qualified covered veterans. This section applies to any subcontract in the amount of \$100,000 or more entered into by a prime contractor in carrying out any such contract.

(a)(2) [requirements related to employment service delivery system]

(b) ...

(c) ...

(d)(1) Each contractor to whom subsection (a)(1) applies shall, in accordance with regulations which the Secretary of Labor shall prescribe, report at least annually to the Secretary of Labor on – (A) the number of employees in the workforce of such contractor, by job category and hiring location, and the number of such employees, by job category and hiring location, who are covered veterans; (B) the total number of new employees hired by the contractor during the period covered by the report and the number of such employees who are qualified covered veterans; and (C) the maximum number and minimum number of employees of such contractor during the period covered by the report.

Federal regulations set forth in Chapter 60, Title 41, of the Code of Federal Regulations related to Executive Order 11246 provide –

§60-1.1 The purpose of the regulations in this part [60-1] is to achieve the aims of parts II, III, and IV of Executive Order 11246 for the promotion and insuring of equal opportunity for all persons without regard to race, color, religion, sex or national origin, employed or seeking employment with Government contractors or with contractors performing under federally assisted construction contracts. The regulations in this part apply to all contracting agencies of the Government and to contractors and subcontractors who perform under Government contracts, to the extent set forth in this part. ...

§60-1.3 ... *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor.

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such government.

Prime contractor means any person holding a contract and, for the purposes of Subpart B of this part, any person who has held a contract subject to the order.

... *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of employer and employee): (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.

Subcontractor means any person holding a subcontract and, for the purposes of Subpart B of this part, any person who has held a subcontract subject to the order. The term “first-tier subcontractor” refers to a subcontractor holding a subcontract with a prime contractor.

§60-1.4(a) *Government contracts.* Except as otherwise provided, each contracting agency shall include the following equal opportunity clause contained in section 202 of the order in each of its government contracts ...

- (1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin ...
- (2) ...
- (3) ...
- (4) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of rules, regulations, and relevant orders of the Secretary of Labor.
- (5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by all rules, regulations and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- (6) In the event of the contractor’s noncompliance with the nondiscrimination clauses of this contract or with such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts

§60-1.4(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

§60-1.4(e) *Incorporation by operation of the order.* By operation of the order, the equal opportunity clause shall be considered a part of every contract and subcontract required by the order and the regulations in this part to include such a clause whether or not it is physically incorporated in such contract and whether or not the contract between the agency and the contractor is written.

§60-1.5(a)(1) *Transactions of \$10,000 or under.* Contracts and subcontracts not exceeding \$10,000, other than Government bills of lading and other than [certain depositories of Federal funds] ... are exempt from the requirements of the equal opportunity clause. ... No agency, contractor or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause: *Provided*, that where a contractor has contract or subcontracts with the Government in any 12-month period which have an aggregate total value (or can be reasonably be expected to have an aggregate total value) exceeding \$10,000, the \$10,000 or under exemption does not apply, and the contracts are subject to the order and the regulations issued pursuant thereto regardless of whether any single contract exceeds \$10,000.

§60-1.5(a)(2) *Contracts and subcontracts for indefinite quantities.* With respect to contract and subcontracts for indefinite quantities ... the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed \$10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of the award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall apply to such contract whenever the amount of a single order exceeds \$10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to the clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

§60-1.5(b)(1) *Specific contracts.* The Deputy Assistant Secretary may exempt an agency or any person from requiring the inclusion of the equal opportunity clause in any specific contract or subcontract when he deems that special circumstances in the national interest so requires. ...

§60-1.b(2) *Facilities not connected with contracts.* The Deputy Assistant Secretary may exempt from the requirements of the equal opportunity clause any of a prime contractor’s or subcontractor’s facilities which he finds in all respects separate and distinct from the activities of the prime contractor or subcontractor related to the

performance of the contract or subcontract, provided that he also finds that such an exemption will not interfere with or impede the effectuation of the order.

§60-1.7(a)(1) Each prime contractor and subcontractor shall file annually, on or before September 30, complete and accurate reports on Standard Form 100 (EEO-1) ... if such contractor or subcontractor (i) is not exempt from the provisions of these regulations in accordance with §60-1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first tier subcontractor; and has a contract, subcontract or purchase order amounting to \$50,000 or more ...

§60-1.7(a)(2) Each person required by §60-1.7(a)(1) to submit reports shall file such a report with the contracting or administering agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with §60-1.7(a)(1), or such other intervals as the Deputy Assistant Secretary may require. ...

§60-1.7(a)(3) The Deputy Assistant Secretary or the applicant, on their own motion, may require a contractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Deputy Assistant Secretary or the applicant deems necessary for the administration of this order.

§60-1.7(a)(4) Failure to file timely, complete and accurate reports as required constitutes substantial noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the Deputy Assistant Secretary an applicant, prime contractor or subcontractor, of any sanctions as authorized by the order and regulations in this part.

§60-1.12(b) *Affirmative Action Programs.* A contractor establishment required under §60-1.40 to develop and maintain a written affirmative action program (AAP) must maintain its current AAP and documentation of good faith effort, and must preserve its AAP and documentation effort for the immediate preceding AAP year, unless it was not then covered by the AAP requirement.

§60-1.12(c)(1) For any record maintained pursuant to this section, the contractor must be able to identify: (i) The gender, race, and ethnicity of each employee; and (ii) Where possible, the gender, race, and ethnicity of each applicant ...

§60-1.12(c)(2) The contractor must supply this information to the Office of Federal Contract Compliance Programs upon request.

§60-1.40(a)(1) Each nonconstruction (supply and service) contractor must develop and maintain a written affirmative action program for each of its establishments, if it has 50 or more employees and: (i) Has a contract of \$50,000 or more; or (ii) Has government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more ...

§60-1.40(a)(2) Each contractor and subcontractor must require each nonconstruction subcontractor to develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees and: (i) Has a contract of \$50,000 or more; or (ii) Has government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more ...

§60-1.43 Each contractor shall permit access during normal business hours to its premises for the purpose of conducting on-site compliance evaluations and complaint investigations. Each contractor shall permit the inspection and copying of such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to the matter under investigation and pertinent to compliance with the Order, and the rules and regulations promulgated pursuant thereto by the agency, or the Deputy Assistant Secretary. Information obtained in this manner shall be used only in connection with the administration of the Order, the Civil Rights Act of 1964 (as amended), and any other law that is or may be enforced in whole or in part by OFCCP.

Federal regulations set forth in Chapter 60, Title 41, of the Code of Federal Regulations related to VEVRAA provide –

§60-250.1(a) The purpose of the regulations in this part [Part 60-250] is to set forth the standards for compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ... which requires Government contractors and subcontractors to employ and advance in employment qualified special disabled veterans, veterans of the Vietnam era, recently separated veterans, and other protected veterans.

§60-250.1(b) This part applies to any Government contract or subcontract of \$25,000 or more entered into before December 1, 2003, for the purchase, sale or use of personal property or nonpersonal services (including construction), except the regulations in 41 CFR part 60-300, and not this part, apply to such a contract or subcontract that is modified on or after December 1, 2003 and the contract or subcontract as modified is in the amount of \$100,000 or more: *Provided*, That subpart C of this part applies only to as described in §60-250.40(a).

§60-250.2(h) *Contract* means any Government contract or subcontract.

§60-250.2(i) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term "Government contract" does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

§60-250.2(i)(3) *Person*, as used in this paragraph (i) and paragraph (l) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

§60-250.2(j) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of \$25,000 or more.

§60-250.2(k) *Prime contractor* means any person holding a contract of \$25,000 or more, and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," includes any person who has held a contract subject to the Act.

§60-250.2(l) *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of employer and an employee): (1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any 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.

§60-250.2(m) *Subcontractor* means any person holding a subcontract of \$25,000 or more and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," includes any person who has held a subcontract subject to the Act.

§60-250.4(a)(1) Contract and subcontracts of \$25,000 or more, are covered by this part. No contracting agency, contractor or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause.

§60-250.4(a)(2) *Contracts and subcontracts for indefinite quantities*. With respect to indefinite delivery-type contracts and subcontracts ... the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will be less than \$25,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of the award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall apply to such contract whenever the amount of a single order is \$25,000 or more. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to the clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

§60-250.5(a) Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam era, Recently Separated Veterans, and Other Protected Veterans.

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or other protected veteran in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or other protected veteran in all employment practices ...
2. ...
3. ...
4. ...
5. ...
6. ...
7. The contractor agrees to comply with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to the Act.
8. [provisions for noncompliance]
9. ...
10. ...
11. The contractor will include the provisions of this clause in every subcontract or purchase order of \$25,000 or more, unless exempted from the rules, regulations, or orders of the Secretary issued pursuant to the [VEVRAA] ... so that such provisions will be binding upon each subcontractor or vendor. ...

§60-250.5(b) Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

§60-250.5(e) *Incorporation by operation of the order.* By operation of the Act, the equal opportunity clause shall be considered a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

§60-250.40(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$50,000 or more.

§60-250.40(b) Contractors described in paragraph (a) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. ...

§60-250.40(d) The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor shall also make the affirmative action program promptly available on-site upon OFCCP's request.

§60-250.60(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a special disabled veteran, veteran of the Vietnam era, recently separated veteran, or other protected veteran in all employment practices. A compliance evaluation may consist of any one or a combination of [(1) compliance review including desk audit, on-site review, and/or off-site analysis; (2) off-site review of records; (3) compliance check; and/or (4) focused review] ...

§60-250.66(b) *Termination.* A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the Act or this part.

§60-250.66(c) *Debarment.* A contractor may be debarred from receiving future contract for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to §60-250.68 ...

§60-250.81 Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Act or this part. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act.

§60-300.1(a) The purpose of the regulations in this part [Part 60-300] is to set forth the standards for compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ... which requires Government contractors and subcontractors to employ and advance in employment qualified special disabled veterans. Disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans are covered veterans under VEVRAA.

§60-300.1(b) This part applies to any Government contract or subcontract of \$100,000 or more entered into or modified on or after December 1, 2003, for the purchase, sale or use of personal property or nonpersonal services (including construction): *Provided*, That subpar C of this part applies only to as described in §60-300.40(a). ... Any contractor or subcontractor whose only contract(s) for the purchase, sale or use of personal property and nonpersonal services (including construction) was entered into before December 1, 2003 (and not modified as described above) must follow part 60-250. Any contractor or subcontractor who has contract(s) for the purchase, sale or use of personal property and nonpersonal services (including construction) that were entered into before December 1, 2003 (and not modified as described above), and contracts that were entered into on or after December 1, 2003, must follow both parts 60-250 and 60-300.

§60-300.2(h) *Contract* means any Government contract or subcontract.

§60-300.2(i) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term "Government contract" does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

§60-300.2(i)(3) *Person*, as used in this paragraph (i) and paragraph (l) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

§60-300.2(j) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of \$100,000 or more.

§60-300.2(k) *Prime contractor* means any person holding a contract of \$100,000 or more, and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," includes any person who has held a contract subject to the Act.

§60-300.2(l) *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of employer and an employee): (1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any 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.

§60-300.2(m) *Subcontractor* means any person holding a subcontract of \$100,000 or more and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," includes any person who has held a subcontract subject to the Act.

§60-300.4(a)(1) Contract and subcontracts of \$100,000 or more, are covered by this part. No contracting agency, contractor or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause.

§60-300-4(a)(2) *Contracts and subcontracts for indefinite quantities*. With respect to indefinite delivery-type contracts and subcontracts ... the equal opportunity clause shall be included unless the purchaser has reason to

believe that the amount to be ordered in any year under such contract will be less than \$100,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of the award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall apply to such contract whenever the amount of a single order is \$100,000 or more. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to the clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

§60-300.5(a) Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

Equal Opportunity for Special Disabled Veterans, Recently Separated Veterans, Other Protected Veterans and Armed Forces Service Medal Veterans.

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a special disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a special disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran in all employment practices ...
2. ...
3. ...
4. ...
5. ...
6. ...
7. The contractor agrees to comply with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to the Act.
8. [provisions for noncompliance]
9. ...
10. ...
11. The contractor will include the provisions of this clause in every subcontract or purchase order of \$100,000 or more, unless exempted from the rules, regulations, or orders of the Secretary issued pursuant to the [VEVRAA] ... so that such provisions will be binding upon each subcontractor or vendor. ...

§60-300.5(b) Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

§60-300.5(e) *Incorporation by operation of the order.* By operation of the Act, the equal opportunity clause shall be considered a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

§60-300.40(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$100,000 or more.

§60-300.40(b) Contractors described in paragraph (a) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. ...

§60-300.40(d) The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor shall also make the affirmative action program promptly available on-site upon OFCCP's request.

§60-300.60(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on

their status as a special disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran in all employment practices. A compliance evaluation may consist of any one or a combination of [(1) compliance review including desk audit, on-site review, and/or off-site analysis; (2) off-site review of records; (3) compliance check; and/or (4) focused review] ...

§60-300.66(b) *Termination*. A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the Act or this part.

§60-300.66(c) *Debarment*. A contractor may be debarred from receiving future contract for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to §60-300.68 ...

§60-300.81 Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Act or this part. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act.

Federal regulations set forth in Chapter 60, Title 41, of the Code of Federal Regulations related to the Rehabilitation Act provide –

§60-741.1(a) The purpose of the regulations in this part [60-741] is to set forth the standards for compliance with section 503 of the Rehabilitation Act of 1973 ... which requires Government contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

§60-741.1(b) This part applies to all Government contracts and subcontracts in excess of \$10,000 for the purchase, sale or use of personal property or nonpersonal services (including construction): *Provided*, That subpart C of this part applies only to as described in §60-741.40(a). ...

§60-741.2(h) *Contract* means any Government contract or subcontract.

§60-741.2(i) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term “Government contract” does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

§60-741.2(i)(3) *Person*, as used in this paragraph (i) and paragraph (l) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

§60-741.2(j) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of \$100,000 or more.

§60-741.2(k) *Prime contractor* means any person holding a contract in excess of \$10,000, and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” includes any person who has held a contract subject to the Act.

§60-741.2(l) *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of employer and an employee): (1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any 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.

§60-741.2(m) *Subcontractor* means any person holding a subcontract in excess of \$10,000 and, for the purposes of subpart D of this part, “General Enforcement and Complaint Procedures,” includes any person who has held a subcontract subject to the Act.

§60-741.4(a)(1) Contract and subcontracts in excess of \$10,000 are covered by this part. No contracting agency, contractor or subcontractor shall procure supplies or services in a manner so as to avoid applicability of the equal opportunity clause.

§60-741.4(a)(3) *Contracts and subcontracts for indefinite quantities.* With respect to indefinite delivery-type contracts and subcontracts ... the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not be in excess of \$10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of the award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall apply to such contract whenever the amount of a single order exceeds \$10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to the clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

§60-741.5(a) Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

Equal Opportunity for Workers with Disabilities.

- 1 The contractor will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disabilities in all employment practices ...
- 2 The contractor agrees to comply with the rules, regulations and relevant orders of the Secretary of Labor issued pursuant to the Act.
- 3 [provisions for noncompliance]
- 4 ...
- 5 ...
- 6 The contractor will include the provisions of this clause in every subcontract or purchase order of \$10,000 or more, unless exempted from the rules, regulations, or orders of the Secretary issued pursuant to the [Rehabilitation Act] ... so that such provisions will be binding upon each subcontractor or vendor. ...

§60-741.5(b) Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

§60-741.5(e) *Incorporation by operation of the order.* By operation of the Act, the equal opportunity clause shall be considered a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

§60-741.40(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$50,000 or more.

§60-741.40(b) Contractors described in paragraph (a) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. ...

§60-741.40(d) The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor shall also make the affirmative action program promptly available on-site upon OFCCP's request.

§60-741.60(a) OFCCP may conduct compliance evaluations to determine if the contractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated in accordance with this part during employment. A compliance evaluation may consist of any one or a combination of [(1) compliance

review including desk audit, on-site review, and/or off-site analysis; (2) off-site review of records; (3) compliance check; and/or (4) focused review] ...

§60-741.66(b) *Termination*. A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the Act or this part.

§60-741.66(c) *Debarment*. A contractor may be debarred from receiving future contract for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to §60-741.68 ...

§60-741.81 Each contractor must permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Act or this part. Information obtained in this manner shall be used only in connection with the administration of the Act, the administration of the Americans with Disabilities Act of 1990 (ADA) and in furtherance of the purposes of the Act and the ADA.

FINDINGS OF UNCONTESTED FACTS

Pursuant to 41 CFR §60-30.23, the following findings of uncontested facts are entered:

1. Defendant Manheim, Inc., formerly Manheim Auctions, Inc. (Manheim), is engaged in the business of wholesale automotive remarketing.
2. Defendant Manheim was incorporated under the laws of Delaware on October 1, 1992, and has its principal office at 6205 Peachtree-Dunwoody Road, NE, Atlanta, Georgia.
3. Each auction facility has a general manager who runs the day-to-day business of each facility.
4. Defendant Manheim provides support and overall company direction based on what it sees as the future needs of the business.
5. Defendant Manheim owns a corporate entity which, in turn, owns Defendant Manheim Auctions Government Services, LLC, d/b/a Manheim Government Services (MAGS).
6. Defendant Manheim has had a four-person board consisting of the following directors: Michael Broe (August 1, 2006 – present); Joseph Luppino (August 1, 2006 – present); Dean Eisner (January 1, 2001 – March 1, 2011); Shauna Muhl (February 17, 2010 – present); and Andrew Merdek (January 2, 1993 – February 17, 2010).
7. Of the five directors who served at various times on Defendant Manheim’s four person board, two – Andrew Merdek (January 2, 1993 – February 17, 2010) and Shauna Muhl (February 17, 2010 – present) – also served as directors on Defendant MAGS’ board of directors.
8. Defendant Manheim currently has thirty-five officers, including: Maria Friedman, Vice President Tax (July 1, 2009 – present); Richard Jacobson, Vice President and Treasurer (January 1, 2009 – present); Shauna Muhl, Secretary (February 17, 2010 – present); and Charles Bowen, Assistant Secretary (February 17, 2010 – present).
9. Other persons served as officers to Defendant Manheim, including: Preston Barnett, Vice President Tax (May 15, 1996 – December 31, 2008); Maria Friedman, Vice President (January 1, 2009 – June 30, 2009); Richard Jacobson, Treasurer (October 1, 1996 – December 31, 2008); Andrew Merdek, Secretary (January 4, 1993 – February 17, 2010); and Shauna Muhl, Assistant Secretary (July 14, 2003 – February 17, 2010).
10. Defendant Manheim takes a monthly consolidated look at the revenue generated by Defendant MAGS to see if Defendant Manheim made money or lost money.

11. Defendant Manheim's accounting department consolidates the financial statements of Defendant MAGS.
12. Defendant Manheim creates a consolidated EEO-1 report that includes employees of Defendant Manheim and Defendant MAGS.
13. Defendant Manheim has a logo – a yellow “M” in a circle next to the word “Manheim” – which Defendant MAGS is authorized to use.
14. Manheim Technology Group is a part of Defendant Manheim, the parent company.
15. Manheim Technology Group provides certain information technology (IT) services, such as maintenance of the Defendant MAGS website, to Defendant MAGS.
16. Manheim Technology Group's IT services are also available to Defendant Manheim's other subsidiaries.
17. Defendant Manheim also has a marketing department which provides certain marketing services to Defendant MAGS.
18. If Defendant MAGS uses Manheim Technology Group's IT services or Defendant Manheim's marketing department's services, Defendant Manheim's accounting department deducts the cost associated with this service from Defendant MAGS' annual budget.
19. Defendant MAGS does not compensate Defendant Manheim for the human resources and accounting services provided to it by Defendant Manheim.
20. On its website, Defendant Manheim states that “Manheim brings together qualified sellers and volume buyers of used vehicles that include automotive dealerships, banks, car rental agencies, car manufacturers, and government agencies;” in this context “Manheim” refers to the Manheim businesses collectively.
21. Between 1998 and 2008, Mr. Demetry worked as an attorney at the law firm of Dow Lohnes, primarily providing legal services to Defendant Manheim, Defendant MAGS, and all of Defendant Manheim's domestic subsidiaries.
22. When Mr. Demetry provided legal services to Defendant MAGS, he would submit invoices for his services to Defendant Manheim.
23. In his current role as Chief of Staff, Mr. Demetry oversees legal matters for Defendant Manheim and Defendant MAGS.
24. Defendant MAGS is engaged in vehicle remarketing services for government agencies and public utility companies.
25. Defendant MAGS has had seventeen indefinite delivery, indefinite quantity (“IDIQ”) Government contracts and one sub contract whereby it provides or provided vehicle remarketing and related services to Government agencies.
26. Defendant MAGS was incorporated under the laws of Delaware on October 15, 1991, and has its principal office at 6205 Peachtree Dunwoody Road, NE, Atlanta, Georgia.
27. Defendant MAGS' board of directors does and did consist of three directors: Jim Hayes (January 1, 2006 – present); Lacey Lewis (July 14, 2006 – present); and Andrew Merdek (January 4, 1993 – February 17, 2010), who was replaced by Shauna Muhl (February 17, 2010 – present).
28. Defendant MAGS has and had the following six officers: Jimmy Hayes, President (January 1, 2006 – present); Maria Friedman, Vice President (January 1, 2009 – present); Richard Jacobson, Vice President and Treasurer (January 1, 2009 – present); Cody Partin, Assistant Vice President Real Estate (June 20, 2010 – present); Shauna Muhl, Secretary (February 17, 2010 – present); Charles Bowen, Assistant Secretary (June 20, 2010 –

present). In addition, Preston Barnett, Vice President (July 23, 1992 – December 31, 2008); Richard Jacobson, Treasurer (July 12, 2002 – December 31, 2008); and Andrew Merdek, Secretary (January 4, 1993 – February 17, 2010) served as officers to Defendant MAGS.

29. In addition to selling vehicles for Government agencies, Defendant MAGS' contracts may require it to clean, detail, and perform maintenance on vehicles, as needed.
30. At the time the initial scheduling letter to Defendant Manheim was issued on April 3, 2007, Defendant MAGS had four employees.
31. At the time the scheduling letter to Defendant MAGS was issued on November 10, 2010, Defendant MAGS had seven employees.
32. In order to perform the services required by its Government contracts, Defendant MAGS uses auction facilities and employees of these facilities to perform "boots-on-the-ground" work.
33. Defendant MAGS and its employees provide oversight and management over the auction facility to ensure that the work is performed as required by the Government contract.
34. To meet the requirements of its Government contracts, Defendant MAGS holds one auction, for each contracting agency, per month.
35. Defendant MAGS pays the auction facility for the services that it provides, "so the bulk of the money goes to the facility that's doing the work."
36. When Defendant MAGS holds auctions at non-Manheim facilities, e.g., facilities owned by Allied Auction or Independent Auction, Defendant MAGS does enter into a "vendor agreement" that describes the terms and conditions that they have to do to meet the contract and basically spells out how business is to be done.
37. Regarding IT service, Defendant Manheim's IT department created and maintains Defendant MAGS' website.
38. Through the Defendant MAGS' website, Defendant MAGS provides a schedule of upcoming public sales, a complete list of vehicles that are being sold, as well as pictures of and electronic condition reports for those vehicles.
39. Defendant Manheim's website links viewers to Defendant MAGS' website.
40. Defendant MAGS' website provides viewers with contact information for the auction facilities where upcoming sales are to be held.
41. Defendant MAGS compensates Defendant Manheim's IT department for services it provides through a journal entry in its budget.
42. Defendant MAGS also uses services provided by Defendant Manheim's marketing department on an infrequent basis in order to promote special projects, including special vehicle sales; advertising in national publications; and to assist Defendant MAGS with promotion of its business at certain conferences.
43. Defendant MAGS does not employ its own Human Resource personnel.
44. Defendant Manheim's human resources department assists Defendant MAGS' new employees with paperwork.
45. Defendant MAGS does not compensate Defendant Manheim for the services Defendant Manheim's human resources department provides Defendant MAGS.
46. Of the eight employees employed by Defendant MAGS during the relevant period, three – Alberta Sharpe, George Herrera, and Michele Freyre – had previously worked for Defendant Manheim.

47. In transferring from Defendant Manheim to Defendant MAGS, the three former Defendant Manheim employees maintained their seniority for purposes of benefits.
48. Of the eight employees employed by Defendant MAGS during the relevant period, two – Nikole Bennett and George Herrera – left Defendant MAGS to work for Defendant Manheim.
49. Defendant MAGS' employees are entitled to the same health insurance, pension plan and bonus program as Defendant Manheim's employees.
50. Defendant Manheim's accounting department provides certain services to Defendant MAGS, i.e., assisting in developing its yearly budget, effectuating intercompany transfers of funds for services provided to MAGS by Defendant Manheim or Defendant Manheim's subsidiaries.
51. During the relevant period, four of Defendant MAGS' employees, including Peter Flynn, worked at Defendant MAGS' operation center, located at 435 Metroplex Drive in Nashville, Tennessee.
52. The space used by Defendant MAGS at 435 Metroplex Drive in Nashville, Tennessee is leased by Manheim Tennessee, one of Defendant Manheim's subsidiaries.
53. During the relevant period, three of Defendant MAGS' employees worked at a building at 6205 Peachtree-Dunwoody Road. Defendant MAGS' director Peter Flynn also had an office in this building where he would work for a few days each month.
54. Defendant MAGS does not have a lease agreement for the offices it maintains in the 6205 Peachtree-Dunwoody Road building.
55. Defendant MAGS pays Defendant Manheim for the office space it uses at 6205 Peachtree-Dunwoody Road as a line item in its budget.
56. As of December 31, 2010, Peter Flynn retired from his position as Director of Defendant MAGS in order to start his own business, the Flynn-Jenson Company.
57. The Flynn-Jenson Company handles government business for Defendant Manheim.
58. As of December 31, 2010, all employees of Defendant MAGS resigned and either began working for the Flynn-Jenson Company or found other employment.
59. Defendant MAGS currently has no employees.
60. Defendant MAGS still exists as an entity and still holds Government contracts.
61. In 2007, Defendant was on the scheduling list sent to the OFCCP Southeast Regional Office by the National Office.
62. On April 3, 2007, the OFCCP Southeast Regional Office initiated a compliance review of Defendant Manheim by mailing a scheduling letter to its facility at 6205 Peachtree-Dunwoody Road, NE, Atlanta, Georgia.
63. Defendant Manheim received the April 3, 2007 scheduling letter, but did not provide any of the information within thirty days as requested in the letter.
64. By letter dated May 18, 2007, Defendant Manheim informed OFCCP that it would not provide the information requested in the scheduling letter because (1) OFCCP has no jurisdiction over Defendant Manheim because Defendant Manheim is not a party to a Government contract; and (2) Defendant Manheim's subsidiary Defendant MAGS is a government contractor but operates as an independent entity within Defendant Manheim's family of companies and employs fewer than 50 people; therefore Defendant MAGS is not required to maintain a written Affirmative Action Program.

65. On May 18, 2007, Defendant Manheim also voluntarily provided OFCCP with a copy of its answers to a 27-point questionnaire prepared and submitted for a 2005 compliance audit of another subsidiary of Defendant Manheim.
66. On August 20, 2007, the OFCCP Southeast Regional Office issued a Notice to Show Cause why OFCCP should not initiate enforcement proceedings against Defendant Manheim.
67. To date, Defendant Manheim has not provided any of the information requested in the April 3, 2007 scheduling letter.
68. Collectively, Defendant Manheim and Defendant MAGS employ more than fifty employees.
69. On November 10, 2010, OFCCP initiated a compliance review of Defendant MAGS by mailing a scheduling letter to its facility at 6205 Peachtree-Dunwoody Road, NE, Atlanta, Georgia.
70. To date, Defendant MAGS has not provided any information requested in the November 10, 2010 scheduling letter.

ADMISSIONS OF FACT ENTERED BY THE DEFENDANTS

The following admissions were entered by the Defendants in their response to the Motion for Summary Decision and are accepted:

1. There are a number of other affiliates above, below, and parallel to Defendant Manheim in the corporate organizational structure.
2. During the “alleged period”¹, Defendant MAGS has also had a number of other directors that were not on Defendant Manheim’s Board of Directors.
3. Defendant Manheim has at least 31 out of 35 current officers that are not officers of Defendant MAGS.
4. Defendant Manheim had only four additional overlapping officers with Defendant MAGS, out of dozens of Defendant Manheim officers, during the “alleged period.”
5. Each location prepares its own budget and financials before Defendant Manheim takes a consolidated look at the budget and financials of the respective location.
6. Defendant Manheim uses a “special reporting procedure” with its EEO-1 specifically approved by the EEOC to minimize the administrative burden on the relevant companies and EEOC. Under this procedure, each subsidiary’s employees are separately listed on the consolidated report.
7. The subsidiaries of Defendant Manheim typically pay for any services provided by Defendant Manheim to them directly or through the budgetary process and Defendant MAGS is not a special case.
8. Defendant Manheim shared only four officers with Defendant MAGS, out of dozens of Defendant Manheim’s officers during the “alleged period.”
9. Defendant MAGS is not beholden by contract or otherwise to use the Defendant Manheim affiliated auctions in performing its services.

¹ As entered below, the “alleged period” subject for review under the Acts and Federal regulations is the period of time subject to compliance review, which commenced on April 3, 2004.

10. Defendant MAGS received material assistance from Defendant Manheim in the day-to-day operation areas of information technology services, advertising and marketing services and human services.
11. Defendant MAGS' website contains MAGS specific content.
12. Defendant MAGS' website was created by Defendant Manheim upon the request of Mr. Peter Flynn as the Director of Defendant MAGS.
13. Defendant MAGS' website also provides Defendant MAGS' point of contact via e-mail and a 1-800 number and other Defendant MAGS specific content.
14. Defendant MAGS' employees, and particularly its director, performed many of the core human resource functions for Defendant MAGS: recruitment, hiring, compensation, and termination.
15. Defendant MAGS paid its employees' salaries, employee health insurance premiums and employee bonuses out of its own budget.
16. The Defendants participated in the same benefits program.
17. Defendant MAGS' government contracts are indefinite delivery, indefinite quantity (IDIQ) contracts, and the amount of payment Defendant MAGS may receive under each contract is dependent upon a number of factors beyond its control.
18. Defendant Manheim is an administrative parent company for a diverse array of subsidiaries, domestic and international and not wholly-owned, that are involved in various aspects of vehicle remarketing services, including physical auctions (regular and salvage), online sales, floor plan financing, and exporting.
19. Defendant Manheim, as an intermediate corporate affiliate, is an indirect owner of stock of Defendant MAGS.
20. Since 2007 Defendant Manheim has had over seventy officers and only four of those officers were ever officers of Defendant MAGS.
21. Defendant MAGS' federal contracting business is, and has always been, only a very small piece of Defendant Manheim's branded portfolio.
22. Defendant MAGS' government contracting business is not the sole or even primary business of Defendant Manheim.
23. Defendant MAGS utilizes Defendant Manheim's affiliated auction facilities from time to time to assist in meeting the requirements of Defendant MAGS' government contracts.
24. On the infrequent occasions when Defendant Manheim's marketing department provided services to Defendant MAGS, Defendant MAGS compensated Defendant Manheim for those services through its budget.
25. Defendant Manheim periodically reviews Defendant MAGS' financial statements, along with those of other Defendant Manheim subsidiaries, in order to make decision relating to the overall business.
26. Defendant MAGS has a budget and day-to-day bookkeeping ledger separate from Defendant Manheim and all other subsidiaries.
27. During the relevant period, Defendant Manheim provided some accounting and human resources services to Defendant MAGS because, for business reasons, it was more cost effective for Defendant Manheim to provide those services to Defendant MAGS.
28. The Defendants both participated in a common health and retirement plan that is arranged by another indirect parent company.
29. Defendant MAGS' employees arranged and oversaw the services necessary to complete the requirements necessary to meet Defendant MAGS' government contracts provisions.

30. Defendant MAGS hires some independent contractors to handle oversight management of auction facilities that Defendant MAG uses to ensure that the requirements of a given contract are met.
31. Defendant MAGS often chooses to use Defendant Manheim affiliated auctions.
32. Defendant MAGS was a business division of a larger conglomerate focused on a specific type of business that involves unique expertise, regulations, and jargon.
33. Defendant Manheim received Plaintiff's initial "Notice of Desk Audit" in April 2007.
34. In August of 2010, Plaintiff informed Defendant Manheim that the Secretary of Labor had investigated the claim and concluded that Defendant Manheim and Defendant MAGS operate as a single entity such that Defendant Manheim is a covered federal contractor due to Defendant MAGS federal contractor status and that Plaintiff had recommended the commencement of administrative enforcement proceeding.

ISSUES

In view of all the foregoing, the following issues remain:

1. Is either Defendant a prime contractor or subcontractor of a Government contract that has a qualifying value under the applicable Acts and implementing regulations?
2. If so, does the Defendant contractor and/or subcontractor have a qualifying number of employees under the applicable Acts and implementing regulations?
3. Are the Defendants operating in a manner so as to be considered a single business entity that functions as a contractor and/or subcontractor of a Government contract of sufficient qualifying value under the applicable Acts and implementing regulations and with a qualifying number of employees under the applicable Acts and implementing regulations?
4. Is a Party to the above captioned matter entitled to Summary Decision?
5. If a Defendant has violated the provisions of an applicable Act as implemented, what is the appropriate sanction to be imposed?

DISCUSSION

In cases such as this, the proceeding before the Office of Administrative Law Judges is generally guided by the Administrative Procedure Act, 5 USC 554, et. seq., and federal regulations at 41 CFR Part 60-30 and 20 CFR Part 18, Subpart B, and the Federal Rules of Civil Procedure. Since this case involves expedited hearing procedures, the Administrative Law Judge is not bound by the formal rules of evidence set forth in 20 CFR Part 18, Subpart B, and is not bound by the Federal Rules of Civil Procedure that conflict with Federal regulations set forth in 41 CFR §§60-30.31 through 60-30.37.

Under these procedural rules, 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. Where no genuine issue of a material fact is found to have been raised, the administrative law judge may issue a decision to the deserving Party to become final as provided by statute or regulations under which the matter is to be heard. Where a genuine

question of a material fact is raised, the administrative law judge must set the case for an evidentiary hearing.

A “material fact” is a fact that affects the outcome of the case. A “genuine issue” exists “if the evidence is such that a reasonable [fact finder] could return a verdict for the non-moving party,” *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 (1986), after “drawing all reasonable inferences in favor of that [non-moving] party.” *Williams v. Utica College of Syracuse University*, 453 F.3d 112, 116 (2nd Cir. 2006); *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590 (11th Cir. 1995) (per curiam) citing *Anderson v. Liberty Lobby, Inc.*, supra. While the burden is on the moving party for the summary judgment “to demonstrate the absence of any material factual issue genuinely in dispute,” *American Intern Group, Inc. v. London American Intern Corp. Ltd.*, 64 F.3d 77, 79 (2nd Cir. 1981), when the party seeking the summary judgment does not bear the ultimate burden of proof at the formal hearing, the moving party need not prove a negative on an issue the non-moving party must prove at the hearing. In such a case the moving party need only point to the absence of proof by the non-moving party to a material fact. The non-moving party may not rest upon mere allegations or denials but must present proof for the material fact so noted. Summary judgment must be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden at trial.” *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, 479 F.3d 799, 802 (11th Cir. 2007), quoting *Johnson v. Board of Regents*, 263 F.3d 1234, 1243 (11th Cir. 2001), quoting *Celotex Corp. v. Catrett*, supra at 322. “If the non-moving party fails to make a sufficient showing on an essential element of [the non-moving party’s] case with respect to which [the non-moving party] has the burden of proof, then the court must enter summary judgment for the moving party.” *Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins. Co.*, supra at 802, quoting *Gonzalez v. Lee County Housing Auth.*, 161 F.3d 1290, 1294 (11th Cir. 1998), quoting *Celotex Corp. v. Catrett*, supra at 323.

The Defendants argue that Defendant Manheim has more than 50 employees but has no government contracts, while Defendant MAGS argues it has government contracts but less than 50 employees. Thus the issues in this case revolve around the “employee-numerosity requirement” for establishing liability of employers to comply with EO 11246, the Rehabilitation Act, and the VECRAA. The “employee-numerosity requirement” is not a jurisdictional requirement but an element of the underlying claim. *Thomas v. Alabama Home Construction*, 271 Fed. Appx. 865 (11th Cir. 2008); *Arbaugh v. Y&H Corporation*, 546 US 500 (2006). Here, there must be at least 50 employees involved in order for EO 11246, the Rehabilitation Act or the VEVRAA to apply² to the Defendants, jointly or individually.

Unlike the Worker Adjustment and Retraining Notification Act (WARN) at implementing regulation 20 CFR §639.3(2), the implementing regulations for EO 11246, the Rehabilitation Act and VEVRAA do not set forth a succinct test to determine when an independent contractor or subsidiary is to be treated as part of a parent company. However since WARN is a reporting requirement statute, the regulations of WARN are instructive. Under WARN, the degree of independence that exists in the subsidiary is evaluated. The factors considered are (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of

² For reason set forth herein, the threshold dollar value of the government contracts awarded Defendant MAGS has been met.

personnel policies emulating from a common source, and (5) the dependency of operations. No one factor is controlling.

Plaintiff cites to Title VII actions and NLRB decisions to advocate a “single employer test” to combine the Defendants into a business entity required to meet reporting and affirmative action requirements. Plaintiff asserts that the Defendants are a “single-entity” when consideration is given to five factors: (1) common ownership, (2) common directors and/or officers, (3) de facto exercise of control, (4) unity of personnel policies emanating from a common source, and (5) dependency of operations, [the same as those under WARN]. The Plaintiff then submits that the “integrated employer test” should be considered using four factors: (1) interrelation of operations, (2) centralized control over labor or employment decisions, (3) common management, and (4) common ownership or financial control.

The Defendants attack the “single employer test” as exceeding statutory authority, impermissibly vague and enforced in an arbitrary and capricious manner. Review of existing case law, demonstrates that versions of the “single employer test” have been applied for decades in WARN cases, employment discrimination cases³ based on protected status of individuals, and whistleblower complaints under numerous Federal Statutes. *Watts v. Marco Holdings, L.P.*, 1997 WL 578783 (N.D. Miss. 1997)(unpub); *Pearson v. Component Technology Corp.*, 247 F.3d 471 (3rd Cir. 2001) and cases cited therein; *Lyes v. City of Riviera Beach, Fla.*, 166 F.3d 1332 (11th Cir. 1999); *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236 (11th Cir. 1998) Accordingly, the assertions of exceeding statutory authority and vagueness are without merit. The issue of arbitrary or capricious application is not relevant to the issues involved in the expedited hearing process, though it may be relevant if, following completion of the compliance review, the Defendants are found in violation of EO 11246, the Rehabilitation Act or VEVRAA.

Here the issue of whether the Defendants rose to the level of a single entity is not an issue unless the evidence fails to establish that Defendant Manheim was not a subcontractor of Defendant MAGS and thus was required in its own corporate status to comply with EO 11246, the Rehabilitation Act and the VEVRAA.

I. The Plaintiff has established that, during the relevant period, Defendant MAGS, as a single entity, is a prime contractor of a Government contract that has a qualifying value under the applicable Acts and implementing regulations.

Under implementing regulations of EO 11246, affirmative action program (AAP) records must be retained for the year immediately preceding the year in review and certain personnel and employment records must be retained for a year after the recorded action or creation of the record, whichever is longer, 41 CFR §60-1.12. Under 41 CFR §60-300-80 regulations implementing VEVRAA⁴ certain personnel and employment records must be retained for two years after the recorded action or creation of the record, whichever is longer. Under

³ Under the aggregation test in discrimination cases, the most important factor is “What entity made the final decisions regarding employment matters related to the person claiming discrimination”, *Roberts v. Fulton County Railway, LLC*, 2008 WL 5115053, *2 (N.D. Ga. 12/2/2008) citing *Trevino v. Celanese Corp.*, 701 F.2d 397, 404-405 (5th Cir. 1983)

⁴ The contracts involved refer to those in existence April 3, 2007.

implementing regulations of the Rehabilitation Act, certain personnel and employment records must be retained for two years after the recorded action or creation of the record, whichever is longer, 41 CFR §60-741.80. The record keeping period is reduced to one year after the record action or creation of the record if the contractor has less than 150 employees or contracts valued at less than \$150,000.

Here it is established that Defendant MAGS is in the business of storage, service and remarketing of government vehicles under Government and Public Utility contracts, (Defendants' Exhibit F). The Plaintiff began a compliance review of Defendant Manheim on April 3, 2007 and Defendant MAGS on November 10, 2010, if the companies are not considered so intertwined as to be one business. Since January 1, 2011, Defendant MAGS's contracts are serviced by the Flynn-Jenson Company and Defendant MAGS has no employees, (Defendant's Exhibit F). Accordingly, under the relevant federal regulations, the "relevant period" due to maintenance of records requirements began no earlier than January 1, 2006 for Defendant MAGS if considered a business entity intertwined with Defendant Manheim and January 2009 if considered a separate government contractor.⁵

For the period commencing April 3, 2007, Defendant MAGS held 18 government contracts that are classified as indefinite delivery/indefinite quantity (IDIQ) contracts, including General Services Administration (GSA) contract #GS-30F-P0027, eight U.S. Marshals Service contracts including contract #MS01P0016, United States Postal Service, the Drug Enforcement Administration, and the Army/Air Force Exchange Services (Defendant MAGS' response to Interrogatory No. 9; Defendant's Exhibit D). GSA contract #GS-30-P0027 was issued November 21, 2003 and entered into by Defendant MAGS on March 1, 2004 and was still in effect on and after April 3, 2007. The GSA contracts and U.S. Marshal contracts generated income in excess of \$200,000.00 annually. (Defendant MAGS' response to Interrogatory No. 9; Deposition of M. James and Exhibits 9 and 10 thereto). On January 6, 2010, MAGS billed GSA \$2,460.00 for a single day of auction contract work performed under GSA contract #GS-30-P0027, (Exhibit 7 in Deposition of J. Demetry and Exhibit 7 thereto). It is uncontested that Defendant MAGS holds at least one auction per Government contract per month.

On November 10, 2010, Defendant MAGS was awarded GSA multi-year contract #GS-30F-X0028 (includes the initial year of 2011 and provides for four optional additional years) for auction and marshalling services based on solicitation QMAE-F9-100006N, valued by Plaintiff's witness at a total five year amount of \$72,412,500.00. On October 31, 2010, Defendant MAGS valued the contract at \$13,500,000.00 and projected that \$2,650,000.00 of that amount would be passed through to subcontractors, including \$1,987,500.00 to "large business concerns." Under Government contract GS-30F-X0028, Defendant MAGS has subcontracted to the Flynn-Jenson Co., Defendant MAGS has entered vendor agreements for auction services, and auctions have been held to meet the requirements of the Government contract. (Deposition of M. James and

⁵ The Flynn-Jenson Company is not named in the above captioned matter. No determination is required at this time to whether Defendant MAGS is doing business as Flynn-Jenson Company, the Flynn-Jenson Company is a shell company of Defendant MAGS, the Flynn-Jenson Company is a wholly owned subsidiary of either Defendant, or the Flynn-Jenson Company is a first-tier subcontractor of Defendant MAGS since December 31, 2010.

Exhibit 5 thereto; Deposition of J. Demetry and Exhibits 5 and 11 thereto; Deposition of P. Flynn)

After deliberation on the record for summary decision, this Administrative Law Judge finds that the reasonable annual value of Government IDIQ contracts issued to MAGS as a prime contractor and performed by Defendant MAGS through its associates, employees, subcontractors and vendors for the period commencing January 2005 and continuing through the present, are IDIQ contracts with a reasonable annual value in excess of \$150,000.00, a qualifying value under the applicable implementation regulations.

II. The Plaintiff has failed to establish that, during the relevant period, Defendant Manheim, as a single entity, is a subcontractor of a Government contract that has a qualifying value under the applicable Acts and implementing regulations.

Defendant Manheim advertises to the general public that it “was established in 1945 as a wholesale vehicle auction operation” and “has set the industry standard for buying and selling used vehicles at live auctions and online [by bringing] together qualified sellers and volume buyers of used vehicles that include automotive dealerships, banks, car rental agencies, car manufacturers and government agencies.” (Exhibit 4 of J. Demetry deposition)

On October 31, 2010, Defendant MAGS laid out its plan for subcontracting \$2,650,000.00 of GSA contract GS-30F-X0028 for⁶ “vehicle auction support services”. Defendant MAGS indicated that \$662,500.00 of the plan for subcontracting “vehicle auction support services” would be to small business in the form of printing services, vehicle transport services, security services, office supplies and equipment, facility maintenance, promotional items, and selected mechanical services (not further identified). The remaining \$1,987,500 (75% of the total) for “vehicle auction support services” would be contracted to “large business concerns.” Defendant MAGS indicated that M. Freyre would function as it “small business coordinator” from 6205 Peachtree-Dunwoody Road, telephone number: 687-645-2090; facsimile number: 687-645-3002; and e-mail address: Michele.freyre@manheim.com, and would have overall responsibility for the contractors subcontracting program. Defendant MAGS agreed to maintain specific records related to small business subcontractors and to require subcontractors to submit periodic small business reports with both the basic contract number and their respective unique DUN. Defendant MAGS also represented that it “uses standard business accounting procedures to ensure timely payment of amounts” due subcontractors. The Government contract also required performance of certain vehicle repairs, storage services, destruction of removed equipment two business days after sale, marshalling/exchange services, and maintenance of adequate public liability and property damage/loss insurance. (Exhibit 11 of J. Demetry deposition)

During the relevant period, Defendant MAGS would utilize auction facilities throughout the United States to discharge the specific requirements of the relevant Government contracts. These facilities were both subsidiaries of Defendant Manheim and auction facilities unrelated to the Defendants. Defendant Manheim, through its subsidiaries, handled nearly 10,000,000

⁶ This contract was awarded on November 11, 2010, the same day as the date of Notice sent to Defendant MAGS. Since the Notice was sent by mail to Defendant MAGS, this contract is subject matter relevant to Defendant MAGS.

vehicles in remarketing services in 2010. Not all of those transactions involved Government vehicles. (Deposition of J. Demetry and Exhibits 4 and 5 thereto)

During the relevant period, Defendant Manheim provided Defendant MAGS website, e-mail and information technology services; it provided office space with utilities in the building at 6205 Peachtree-Dunwoody Road; and it provided promotional assistance. These services provided Defendant MAGS were directly related to Government contract requirements placed on Defendant MAGS and constitute actions of a “de facto” subcontractor. However, Plaintiff has failed to establish that the reasonable annual value of these services in direct support of the Government contracts to require conforming to EO 11246, the Rehabilitation Act or the VEVRAA. Accordingly, Defendant Manheim, as a single entity, was at best a subcontractor without a qualifying value under the applicable Acts and implementation regulations.

III. The Plaintiff has failed to establish that, during the relevant period, Defendant MAGS, as a single entity, had a qualifying number of employees under the applicable Acts and implementing regulations.

Plaintiff has submitted as an uncontested fact that Defendant MAGS submitted a May 18, 2007 letter asserting that Defendant MAGS employs fewer than 50 people. Plaintiff has not directly addressed the number of employees of Defendant MAGS but asserts that the Defendants function as a single entity and employ more than 50 people combined.

Defendant MAGS asserts that it has no employees as of December 31, 2010, and that the number of employees during the relevant period never exceeded eight.

Since the facts must be construed most favorable to the non-moving Party in a determination on Summary Decision, this Administrative Law Judge finds that the Plaintiff has failed to establish that during the relevant period, Defendant MAGS, as an entity, employed the number of employees needed to qualify under the applicable Acts and implementing regulations.

IV. The Plaintiff has established that, during the relevant period, Defendant Manheim, as a single entity, had a qualifying number of employees under the applicable Acts and implementing regulations.

Defendant Manheim advises the general public through its internet marketing that it has more than 26,000 employees in 130 countries, though its officer testified that the number is less than 24,000. (Deposition of J. Demetry and Exhibit 4 thereto; Defendant’s Exhibit F). Defendant Manheim admits that it currently has 35 officers and that since 2007 it has had over 70 officers, of which three had served as officers for Defendant MAGS.

This Administrative Law Judge finds that the Plaintiff has established that Defendant Manheim has employed in excess of 150 personnel during the period since April 3, 2007. This is a qualifying number under the applicable regulations.

V. The Plaintiff has established that, during the relevant period, Defendants' Manheim and MAGS operated as a single business entity that functioned as a contractor and/or subcontractor of a Government contract of sufficient qualifying value under the applicable Acts and implementing regulations and with a qualifying number of employees under the applicable Acts and implementing regulations.

As noted above, Defendant Manheim maintains a website touting its ability and industry expertise in used vehicle remarketing and the nearly 10 million vehicles, representing more than \$59 Billion in value, that were processed by its subsidiaries in 2010.

On December 24, 2009, A. Merdek, acting as Secretary for Manheim Remarketing, Inc. and as Secretary for Manheim Remarketing, Inc. acting as sole member of Defendant MAGS, signed and "Operating Agreement" for Defendant MAGS as the "company" and Manheim Remarketing, Inc. as the "member". The "Operating Agreement" represents that Defendant MAGS converted from a Delaware corporation to a Delaware limited liability company on December 24, 2009. The "Operating Agreement" gives the board of directors of Defendant MAGS the general power to conduct business and take actions authorized by law. It specifically provides that only Manheim Remarketing, Inc., has the power to voluntarily dissolve Defendant MAGS; no disbursements for costs and expenses incurred by Defendant MAGS or set-aside of funds by Defendant MAGS may be made without Manheim Remarketing, Inc. approval; Manheim Remarketing, Inc., has the board to remove, replace and/or change any member of Defendant MAGS' board of directors and to change the number of directors on said board; Manheim Remarketing, Inc., is the sole representative of Defendant MAGS for all tax matters with the discretionary power to make decisions and expenditures that are binding on Defendant MAGS; Manheim Remarketing, Inc., has the power to override any action by Defendant MAGS' board of directors including amendments to the "Operating Agreement"; Defendant MAGS may only maintain offices at locations deemed advisable by Manheim Remarketing, Inc.; all cash available to Defendant MAGS for disbursement may only be disbursed to Manheim Remarketing, Inc. and then only in the amounts and times as solely determined by Manheim Remarketing, Inc.; and Manheim Remarketing, Inc., has the power "to sell, assign, pledge, or otherwise encumber or transfer all or any part of its interest in the Company to any person. (Exhibit 10 to Deposition of P. Flynn) When read as a whole, the "Operating Agreement" demonstrates that Manheim Remarketing, Inc. is doing business as Defendant MAGS, at least since December 24, 2009.

Defendant Manheim and Defendant MAGS share the same registered agent: Corporation Service Company, 40 Technology Parkway South #300, Norcross, Georgia, and have the same principal office address: 6205 Peachtree Dunwoody Road, Mail Stop CP-12, Atlanta, Georgia. (Exhibits 11 and 12 to Deposition of P. Flynn) Under the "Operating Agreement" such office location is not permitted without the approval of Manheim Remarketing, Inc..

During the period from October 6, 2000 to January 2002, P. Flynn was Defendant MAGS' Director of Federal Programs. In January 2002 through December 31, 2010, he served as the Director of Defendant MAGS. The majority of auction facilities used by Defendant MAGS to meet the requirements of its Government contracts were owned by Defendant Manheim. The employees at the respective auction facilities would perform tasks essential to the performance of

Defendant MAGS' Government contracts. Defendant MAGS also utilized call center services of Remarketing Solutions, Inc., to meet the requirements of its Government contracts. When Remarketing Solutions, Inc., downsized, Defendant MAGS found it necessary to hire three employees of Remarketing Solutions, Inc., to meet the requirements of Defendant MAGS' Government contracts. Defendant MAGS offers its employees health benefits and pension benefits through the human resources department of Defendant Manheim and followed Defendant Manheim's bonus program for its employees. Defendant Manheim provided human resource services and technical IT support services to Defendant MAGS without cost. Defendant MAGS paid Defendant Manheim for remarketing services as provided. Defendant Manheim provided accounting services to Defendant MAGS. Defendant MAGS, through a budget request to Defendant Manheim's accounting department, would establish a "negotiated" annual operating budget for Defendant MAGS and Defendant Manheim's accounting department would reduce Defendant MAGS' line item budgets by amounts for office rent, telephone, and utilities provided to Defendant MAGS by Defendant Manheim, without a separate check being issued to Defendant Manheim from Defendant MAGS' operating accounts. Defendant MAGS paid auction facilities associated with Defendant Manheim on a monthly basis "through an intercompany transaction [by Defendant Manheim's accounting department] because it was a convenient way to do it to the auctions instead of sending out 40 different checks." (Deposition of P. Flynn and Exhibits thereto)

In April or May 2010, Defendant Manheim, through N. Peluso, its Senior Vice President for Customer Management, approached P. Flynn to discuss outsourcing Defendant MAGS' Government contracts to the Flynn-Jensen Company. Discussions between Defendant Manheim's Senior Vice President, N. Peluso, and Defendant MAGS' Director P. Flynn concerning Defendant "Manheim want[ing] to keep the MAGS contracts that were in place" continued until December 2010 when a 5-year contract was entered into by the participants on behalf of Defendant Manheim and Flynn-Jensen Company. Since January 1, 2011, the Flynn-Jenson Company⁷, with P. Flynn as President, "handles government business for [Defendant] Manheim ... [and] provides a service to [Defendant] Manheim to meet the requirements of the government contracts in [Defendant] MAGS." The Flynn-Jenson Company services all of the Federal contracts held by Defendant MAGS. "Flynn-Jensen is administering the contracts as a service to [Defendant] Manheim for a fee. ... the contracts that MAGS held. ... Flynn-Jensen rents equipment ... from [Defendant] MAGS [and] pay a monthly fee [of] \$1000.00 [for] the use of the equipment ... necessary to run [Flynn-Jensen] and office space ... [under] a lease agreement with [Defendant] MAGS." Flynn-Jensen Company leases office space and utilities at 435 Metroplex Drive from Defendant Manheim. Defendant Manheim is considered a client by Flynn-Jensen Company. (Deposition of P. Flynn; Defendant Manheim's response to Interrogatory 1)

Employees of Defendant Manheim who left to work for Defendant MAGS retained the seniority and benefits achieved at Defendant Manheim while working for Defendant MAGS. Employees of Defendant MAGS who left to work for Defendant Manheim retained seniority and benefits achieved at Defendant MAGS while working for Defendant Manheim. (Deposition of P. Flynn)

⁷ P. Flynn described ownership of his company as 50% his, 30% his daughter's and 20% his son's.

Reporting requirements placed on Defendant MAGS by the Equal Employment Opportunity Act and regulations [EEO-1 reports] were prepared, submitted and maintained by Defendant Manheim throughout the relevant periods.

The evidence, when viewed in a light most favorable to the Defendants, establishes that –

- a. During the relevant period, Defendant Manheim had a degree of common ownership over Defendant MAGS.

Defendant Manheim admits that it is an indirect owner of stock of Defendant MAGS and an administrative parent company for a diverse array of subsidiaries, domestic and international and not wholly-owned, that are involved in various aspects of vehicle remarketing services, including physical auctions (regular and salvage), online sales, floor plan financing, and exporting. It did not contest that Defendant Manheim owns a corporate entity which, in turn, owns Defendant MAGS.

Defendant MAGS director of operations from January 2002 through December 2010 (P. Flynn) testified that Defendant MAGS conducted business in the same manner throughout his time as director. The December 2009 “Operating Agreement” set forth in detail how Defendant MAGS was wholly owned by Remarketing Solutions, Inc, and all financial disbursements and profits were controlled an entity other than Defendant MAGS and that actions by Defendant MAGS’ Board of Directors were subject to disapproval by an entity other than Defendant MAGS. Defendant MAGS’ director of operations also testified how Defendant Manheim’s Senior Vice President for Customer Management solicited him throughout most of 2010 to form a company after his retirement and to take over management of all of Defendant MAGS’ Government contracts on a fee servicing basis.

The foregoing demonstrates that Defendant Manheim possessed ownership interest in Defendant MAGS’ and its sole assets, its Government contracts.

- b. During the relevant period Defendant Manheim and Defendant MAGS shared common directors and officers.

Defendant Manheim had a Board of Directors consisting of four directors. Defendant MAGS had a Board of Directors consisting of three directors. The Defendants had interlocking Boards of Directors when with Andrew Merdek (January 2, 1993 – February 17, 2010 with Defendant Manheim and January 4, 1993 – February 17, 2010 with Defendant MAGS) and Shauna Muhl (February 17, 2010 – present with Defendant Manheim and February 17, 2010 – present with Defendant MAGS).

Defendant Manheim has thirty-five corporate officers. Defendant MAGS had five corporate officers. The Defendants shared corporate officers when the following individuals served: Maria Friedman (Vice President Tax from July 1, 2009 – present with Defendant Manheim and Vice President from January 1, 2009 – present with Defendant MAGS), Richard Jacobson (Vice President from January 1, 2009 – present and Treasurer

from October 1, 1996 to December 31, 2008, both with Defendant Manheim and Vice President from January 1, 2009 – present and Treasurer from July 12, 2002 – December 31, 2008, both with Defendant MAGS), Shauna Muhl (Secretary from February 17, 2010 to present with Defendant Manheim and Secretary from February 17, 2010 – present with Defendant MAGS), Charles Bowen (Assistant Secretary from February 17, 2010 – present with Defendant Manheim and Assistant Secretary from June 20, 2010 – present with Defendant MAGS), Andrew Merdek (Secretary from January 4, 1993 – February 17, 2010 with Defendant Manheim and Secretary from January 4, 1993 – February 17, 2010 with Defendant MAGS), and Preston Barnett (Vice President Tax from May 15, 1996 – December 31, 2008 with Defendant Manheim and Vice President from July 23, 1992 – December 31, 2008 with Defendant MAGS).

The foregoing demonstrates that at all times relevant, Defendant Manheim controlled at least 1/3 of Defendant MAGS's Board of Directors with one of its own directors and controlled at least 3/5 of Defendant MAGS' officer positions with one of its own officers.

c. The Defendant Manheim exercised de facto control over Defendant MAGS.

The evidence established that all funding was managed by Defendant Manheim's accounting department. Defendant MAGS' Director of Operations, P. Flynn testified as to how he would submit budgets to Defendant Manheim for approval, would submit statements to Defendant Manheim's accounting department for invoicing payments to Defendant Manheim's affiliated auction facilities and the serviced Government agencies, all payouts of contract proceeds were completed by Defendant Manheim's accounting department. This is consistent with the December 2009 "Operating Agreement" that indicates that all decisions on office locations, expenditures, and disbursements were made subject to Defendant MAGS' sole stockholder's discretion and that the sole stockholder could override any decision by Defendant MAGS' Board of Directors as well as sell any or all of Defendant MAGS' assets, which consisted mainly of Government contracts, and could dissolve Defendant MAGS at will. Based on P. Flynn's testimony this was the way Defendant MAGS operated throughout his time as director, from January 2002 through December 2010.

The extent of Defendant Manheim's control over Defendant MAGS was made especially clear when Defendant Manheim's Senior Vice President for Customer Management negotiated with P. Flynn, while he was still employed by Defendant MAGS in 2010, entered into a contract with P. Flynn, d/b/a Flynn-Jensen Company, for performing all Government contract requirements held by Defendant MAGS, and effectively left Defendant MAGS a paper entity with no employees and no Government contract servicing.

The foregoing demonstrates that at all time relevant, Defendant Manheim exercised de facto control over Defendant MAGS.

d. The Defendant had unity of personnel policies emulating from a common source.

The Defendants utilized the same human resources department within Defendant Manheim's corporate structure. The Defendants ensured that personnel moving from one Defendant's business entity to the other's business entity would maintain their seniority and benefits acquired during employment. Benefits included participation in health and pension programs established through Defendant Manheim. As the Defendants' argued, this is not a controlling factor, but is an indication of interwoven policies and procedures that undermines Defendants' argument that the Defendants were completely separate business entities.

The more weighty action by Defendant Manheim over Defendant MAGS was taking control of all EEO-1 reporting requirements for Defendant MAGS. The evidence establishes that Defendant Manheim submitted these reports for all affiliated Manheim entities with the individual entries broken out by business entity. Such report can only be accomplished if Defendant Manheim maintained the personnel records of Defendant MAGS. It is noted that the reports sought in this expedited action are similar to the EEO-1 reports Defendant Manheim prepares on behalf of Defendant MAGS.

The foregoing demonstrates the Defendants had unity of personnel policies emulating from a common source.

- e. Defendant MAGS was dependent on Defendant Manheim for its continuity of operations.

Much evidence and discussion was entered as to how Defendant MAGS fit into the spider-web of Defendant Manheim's affiliates. Argument was made that the funneling of most Government contract proceeds from Defendant MAGS to Defendant Manheim's affiliates as subcontracting auction facilities through Defendant Manheim's accounting department. There is no evidence that any of Defendant Manheim's affiliated auction facilities were granted waivers from the requirements of EO 11246, the Rehabilitation Act or VEVRAA. The inference is that Defendant MAGS was created as a small-business closely-held or shell company in order to obtain Government contracts for the sole benefit of Defendant Manheim and its affiliates.

However, in this case such analysis is not required. Here, Defendant Manheim, through its Senior Vice President for Customer Management, ended Defendant MAGS' discharge of all Government contracts held by Defendant MAGS and the requirements thereunder, when Defendant Manheim stripped Defendant MAGS those contract requirements and retained the Flynn-Jensen Company to perform all Government contract duties formerly performed by Defendant MAGS while leasing to the Flynn-Jensen Company office space and equipage that had been necessarily used by Defendant MAGS to discharge its Government contract requirements. The evidence clearly demonstrates that when this action was complete, Defendant MAGS was left with no employees. No clearer demonstration can be made that indicates Defendant MAGS' operations are totally dependent on Defendant Manheim.

The foregoing demonstrates that at all relevant times Defendant MAGS' operations were dependent on Defendant Manheim.

After deliberation on the Motion for Summary Decision, Response thereto and the supporting evidence submitted by the respective Parties, this Administrative Law Judge finds that, during the relevant period, Defendant Manheim and Defendant MAGS are a single entity that satisfies the “employee-numerosity requirement” of EO 11246, the Rehabilitation Act and the VEVRAA as well as the threshold Government contract values required by EO 11246, the Rehabilitation Act and the VEVRAA and their respective implementing Federal regulations. Accordingly, the Defendants are jointly and individually liable for meeting the requirements set forth in Executive Order 11246, the Reorganization Act, the VEVRAA, and their respective implementing instructions.

VI. No genuine issue as to a material fact remains and Plaintiff is entitled to a judgment as a matter of law.

The action now pending before this Administrative Law Judge is that of an expedited hearing based on the Defendants’ refusal to give supply or grant access to records or other information for an off-site compliance review / desk audit as required by the equal opportunity clause of Government contracts and the Defendants’ constructive refusal to allow on-site compliance reviews to be conducted. 41 CFR §60-30.31.

Here a compliance review under the regulations was initiated against Defendant Manheim on April 3, 2007 and against Defendant MAGS on November 10, 2010. The Government IDIQ contracts controlled during the relevant periods by the Defendants were reasonably worth in excess of \$200,000.00 per year. At the relevant times, the Defendants acted as a single business and employed more than 50 people. At no time has either of the named Defendants submitted the information requested for a desk audit and determination of the need for an on-site review as part of a compliance review under the regulations.

In view of all the foregoing, this Administrative Law Judge finds that the Defendants have failed to comply with the requirements of a compliance review under Federal regulations without good cause; that no genuine issue of a material fact at this stage of the compliance review process exists; and that Plaintiff is entitled to a judgment as a matter of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After deliberations on the evidence submitted for consideration on the Motion for Summary Decision, this Administrative Law Judge finds:

1. Since January 2002, Defendant Manheim and Defendant MAGS have operated as a single entity for purposes of the applicable statutes, Executive Order and implementing Federal regulations.
2. Since January 2002, Defendant Manheim and Defendant MAGS, as a single entity, have had Government contracts of sufficient value and employees of sufficient number to be subject to the reporting and affirmative action program requirements of the applicable statutes, Executive Order and implementing Federal regulations.

3. The Defendants through the April 2007 notice to Defendant Manheim were notified of the need to submit information to Plaintiff as part of a regulatory compliance review.
4. The records and AAP period of review under the April 2007 notification commenced January 2005.
5. The Defendants through the November 2010 notice to Defendant MAGS were notified of the need to submit information to Plaintiff as part of a regulatory compliance review.
6. The records and AAP period of review under the November 2010 notification commenced January 2008.
7. The Defendants have failed to comply with the requirements of the compliance reviews without good cause.
8. Plaintiff is entitled to summary judgment as a matter of law.
9. Plaintiff is entitled to an Order directing Defendants to comply with the regulatory compliance reviews initiated April 2007 and November 2010.
10. Plaintiff is entitled to an Order imposing authorized sanctions if Defendants fail to comply with an Order directing Defendants' compliance with the regulatory compliance reviews.

ORDER

It is hereby **ORDERED** that:

1. The Defendants, through their officers, directors, partners, representatives and agents, jointly and individually, provide all program information requested in the Notifications of April 2007 and November 2010 to Plaintiff's representatives no later than 4:00 PM on the business day next following the thirtieth calendar day after this Order becomes final under the law.
2. The Defendants, through their officers, directors, partners, representatives and agents, jointly and individually, permit, cooperate and otherwise provide for an on-site compliance review by Plaintiff's representatives as related to all programs and information requested in the Notifications of April 2007 and November 2010 commencing no later than 4:00 PM on the business day next following the forty-fifth calendar day after this Order becomes final under the law, unless otherwise agreed in writing by Plaintiff representatives.
3. The Defendants, through their officers, directors, partners, representatives and agents, jointly and individually, promptly comply with all the provisions of Executive Order 11246, the Rehabilitation Act, the VEVRAA, and the respective implementing Federal regulations, including those required by compliance review regulations and procedures.
4. Should the Defendants fail to comply with the Orders set forth above, Plaintiff is directed to take all administrative steps necessary to terminate all existing Government contracts held by the Defendants, jointly and individually, and to debar the Defendants, jointly and

individually, from receiving and participating in any future Government contracts for a period of at least three years or until the Defendants comply with the provisions of Executive Order 11246, the Rehabilitation Act, the VEVRAA, and the respective implementing Federal regulations, whichever period is longer.

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ALAN L. BERGSTROM
Administrative Law Judge

ALB/jcb
Newport News, Virginia

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.