



Issue Date: 31 October 2011

In the Matter of

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

Plaintiff

v.

O'MELVENY & MYERS LLP,

Defendant

Case No.: 2011-OFC-00007

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

The Plaintiff, United States Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), alleges that the Defendant, O'Melveny & Meyers LLP ("O'Melveny"), violated its obligations under Section 202 of Executive Order 11246 ("Executive Order 11246" or the "Executive Order");<sup>1</sup> Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793 (the "Rehabilitation Act"); and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. § 4212 ("VEVRAA"), when it failed to produce documents requested by OFCCP and refused to permit OFCCP access to its Washington, D.C. office for an onsite compliance review.

By motion dated August 29, 2011, the Defendant moved for Summary Judgment, arguing that it does not hold a qualifying "Government contract" subject to the Plaintiff's jurisdiction under the Executive Order, the Rehabilitation Act, or VEVRAA. ("Def. Mem. I.") The Plaintiff responded and cross-motivated for Summary Judgment on September 9, 2011. ("Pl. Mem.") The Defendant submitted an opposition to the Plaintiff's Motion for Summary Judgment on September 23, 2011. ("Def. Mem. II.") For the reasons set forth below, I deny the Defendant's Motion for Summary Judgment and grant the Plaintiff's Motion for Summary Judgment.

<sup>1</sup> 30 Fed. Reg. 12,319 (Sept. 24, 1965) as amended by Executive Order 11375, 32 Fed. Reg. 14,303 (Oct. 13, 1967) (adding gender to list of protected characteristics), as amended by Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in the Department of Labor), and Executive Order 13279, 67 Fed. Reg. 77,141. All references herein to "Executive Order 11246" or the "Executive Order" include these amendments.

## Background

Collectively, Executive Order 11246, the Rehabilitation Act, and VEVRAA prohibit federal government contractors from discriminating against employees or applicants for employment on the basis of race, color, sex, religion, national origin, disability, or veteran status, and require federal government contractors to take affirmative action to ensure equal employment opportunity. These laws authorize the Secretary of Labor to enforce their non-discrimination and affirmative action obligations. Pursuant to this authority, OFCCP has promulgated regulations that, *inter alia*, require federal government contractors and subcontractors to furnish reports and other information about their affirmative action programs. 41 C.F.R. § 60-1.7 (2010). If a contractor fails to comply with its obligations under these regulations, OFCCP may initiate an administrative enforcement proceeding. 41 C.F.R. §§ 60-1.26, 60-250.65, 60-741.65. And, after a full evidentiary hearing, a contractor found to be in violation of the above-cited laws may have its contracts canceled, terminated, or suspended, and may be debarred, *i.e.*, declared ineligible for future government contracts. 41 C.F.R. §§ 60-1.27, 60-250.66, 60-741.66.

### *Defendant's Contract with the Department of Energy*

Effective October 7, 2001, the Defendant, O'Melveny and Meyers LLP, entered into a contract with the U.S. Department of Energy—Contract No. DE-AC01GC30795 (“DOE Contract”)—under which it agreed to provide legal advice and assistance in connection with the DOE’s divestiture of the Elk Hills Naval Petroleum Reserve. (*See* DOE Contract, Government Exhibit 1 to the Administrative Complaint.) Section B.1 of the contract, entitled “Items Being Acquired,” describes the services the Defendant agreed to perform:

Legal Support Services for professional legal assistance to the Office of General Counsel to provide specialized legal advice and assistance in connection with the sale of Naval Petroleum Reserve Numbered 1 and the study of alternatives for the other Naval Petroleum Reserves. Services shall also include expert advice on legal and final issues pertaining to: oil and gas industry business practices and procedures; California real estate, land use and conveyancing; environmental requirements; oil and gas law; and financial and related financing matters in connection with the sale of the assets.

(DOE Contract at p. 2.) Additionally, the Contract’s “Statement of Work” provides that the Defendant:

Shall provide representation to the Department of Energy in the administrative proceedings initiated for the equity redetermination process. Specifically, the services will include, but not be limited to, the following:

...

Assisting in the review and termination of the Unit Plan Contract applicable to the Elk Hills Naval Petroleum Reserve Numbered 1, and assisting in the equity redetermination process pursuant to that Contract, giving particular regard to the protection of the interests of the U.S. Government.

Providing written and oral representation of the Department of Energy in any proceedings related to the equity redetermination process.

Assisting in any related litigation or administrative proceedings.

The Contractor will submit documents, memoranda, opinions, etc. for review and approval of the Deputy General Counsel for Technology Transfer and Procurement, Department of Energy. The assistance may also be in the form of oral advice or participation, in person, or by telephone, and can require frequent and urgent consultation and coordination on a priority basis.

(DOE Contract at p. 13-14.) The principal place of performance was identified as the “Contractor’s Facility.” (Contract at p. 19.) Initially, the contract term was dated October 7, 2001 through October 6, 2002, but the contract was later amended and modified numerous times to extend the term, increase funding, and add attorneys authorized to perform work under the contract. At the time of the nineteenth amendment, effective October 7, 2009, the amount payable to the Defendant under the DOE contract totaled \$3,415,340.00.

From January 2007 through April 2011, the Defendant’s work under the DOE Contract involved representing the DOE in connection with an appeal Chevron U.S.A., Inc. (“Chevron”) filed before the DOE’s Office of Hearings and Appeals (OHA) contesting a determination made by the Assistant Secretary for Fossil Energy regarding Chevron’s and the DOE’s respective equity interests in the Elk Hills Naval Petroleum Reserve. (Additional Stipulated Facts, Government Exhibit 1 to Pl. Mem., at ¶ 1). Pursuant to the Contract, the Defendant entered its appearance on behalf of the DOE, and received copies of all orders, pleadings, and correspondence in connection with the OHA proceedings. (Declaration of Ada L. Mitrani, Government Exhibit 2 to the Pl. Mem., at ¶ 3.) No one from the DOE expressly dictated when or for how long any of the Defendant’s attorneys were to take vacation time or other leave, but the hearings and other deadlines arising from the OHA proceedings necessarily required the Defendant’s attorneys who performed work under the contract to schedule their vacation and leave time accordingly. (Additional Stipulated Facts at ¶ 2.) During this period, the DOE did not provide the Defendant with any computers, office space, office furniture, law library, equipment, or tools in connection with its work under the DOE Contract. *Id.* at ¶ 3.

OFCCP provided a Declaration from Ada L. Mitrani, Esq., a trial attorney with the DOE’s Office of General Counsel in Washington, D.C., who was involved with the OHA proceedings (Mitrani Decl. at ¶ 2). Throughout the proceedings, most of Ms. Mitrani’s contact was with two attorneys in the Defendant’s Los Angeles office: Robert Swerdlow and Strefan Fauble. *Id.* at ¶ 4. She recalls reviewing and sometimes revising the pleadings and substantive correspondence drafted by the Defendant’s Attorneys before the Defendant filed them or sent them to opposing counsel. *Id.* However, Ms. Mitrani asserts that she did not select any particular attorney at the Defendant’s firm to work on the OHA proceedings, and that she did not personally meet any of Defendant’s attorneys regarding the OHA proceedings until March 2009, at the oral argument before the OHA in Washington, D.C. *Id.* at ¶ 6. Additionally, she contends that the Defendant’s attorneys did not perform any work under the DOE Contract at the DOE’s Office of General Counsel’s offices. *Id.* at ¶ 7.

*Defendant's Refusal to Comply with the OFCCP Compliance Review*

On January 9, 2009, the District Director of OFCCP's Baltimore/Washington District Office, Tom G. Wells, sent a scheduling letter to the Defendant's Washington, D.C. office initiating a compliance review and requesting a copy of the Defendant's Affirmative Action Plan and other specified supporting documentation. (Stipulated Fact 6.) The Defendant responded to Mr. Wells by letter dated January 21, 2009, stating, in part:

As a law firm engaged in the practice of law . . . we do not believe that our services constitute a government contract or a subcontract as defined in 41 C.F.R. § 60-1.3 of the OFCCP's rules and regulations. When we last discussed this general subject with the chief-OFCCP, Defense Contracts Administration Service, Los Angeles Region, he concurred in our conclusion that the federal executive orders do not apply to general legal advice absent a specific federal government contract. We are not aware of any current matters we are handling that involve a federal contract.

Mr. Wells replied by letter dated March 16, 2009, informing the Defendant that the DOE Contract brought it within OFCCP's jurisdiction, and again requesting copies of the Affirmative Action Program and supporting documentation detailed in the January 9, 2009 scheduling letter. The Defendant responded by letter dated April 23, 2009, asserting that the firm was "not previously advised at any time . . . that our work for the DOE rendered O'Melveny a "contractor" and therefore, have operated under the assumption that O'Melveny does not fall within the OFCCP's jurisdiction." The Defendant asserted this assumption was "warranted by OFCCP rules and regulations," which define a "Government contract" subject to OFCCP's jurisdiction as a contract "between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services." And, according to the Defendant, the professional legal services it provided under the DOE Contract were "by their very nature 'personal,'" and thus not within the OFCCP's definition of "Government contract."

After numerous unsuccessful subsequent attempts to obtain the Defendant's Affirmative Action Plan, the Plaintiff filed an administrative complaint with the Office of Administrative Law Judges on July 8, 2011, requesting an order enjoining the Defendant from refusing to comply with the requirements of the Executive Order, the Rehabilitation Act, and VEVRAA, and directing the Defendant to (1) provide all documents requested in the January 9, 2009 scheduling letter, and (2) permit OFCCP access to its facilities if requested and otherwise to permit OFCCP to conduct and complete its compliance review (Stipulated Facts 10-18.) As noted above, both parties have moved for summary decision. They have stipulated to the relevant facts necessary to decide the instant dispute, as set forth in the Stipulated Facts accompanying Defendant's Statement of Uncontested Facts, and disagree only on the legal implications of those facts.

## STANDARD OF REVIEW

The Rules of Practice and Procedure for administrative hearings before the Office of Administrative Law Judges, found at Title 29 C.F.R. Part 18, and the OFCCP Rules of Practice, found at 41 C.F.R. §60-30.23, provide that an administrative law judge may enter summary judgment for either party if the pleadings, depositions, affidavits, material obtained by discovery, or other materials show that there is no genuine issue of material fact. 29 C.F.R. §18.40; 41 C.F.R. §60-30.23; *see* Fed. R. Civ. P. 56(c).<sup>2</sup> This standard is virtually identical to Rule 56(c) of the Federal Rules of Civil Procedure, which provides that summary judgment is appropriate when the record “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”<sup>3</sup> Fed.R.Civ.P. 56(c); *see* 41 C.F.R. §60-30.23. No genuine issue of material fact exists when the “record taken as a whole could not lead a rational trier of fact to find for the non-moving party.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The party moving for summary judgment has the burden of establishing the absence of evidence to support the non-moving party’s case. *Celotex Corp. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Thus, in reviewing a request for summary judgment, I must view all of the evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242 (1986).

## DISCUSSION

I agree with the representations of the parties, and find that there are no material facts in dispute. Therefore, the only issue is one of law. For the following reasons, I conclude that the Plaintiff is entitled to judgment as a matter of law.

### ***A. The DOE Contract Explicitly Requires the Defendant to Comply with Executive Order 11246, the Rehabilitation Act, and VEVRAA***

The Plaintiff contends that, by signing the DOE Contract, the Defendant bound itself to the terms set forth in the Contract, and thus explicitly agreed to comply with the Executive Order, the Rehabilitation Act, and VEVRAA, and upon request, to produce documents and permit access to its premises for a compliance review. (Pl. Mem. at 7-10.) In support of this contention, the Plaintiff points to several provisions of the Federal Acquisition Regulation (FAR)—48 C.F.R. §§ 52.222-26, 52.222-35, 52.222-36, and 52.222-37—that were incorporated into the DOE Contract with “the same force and effect as if they were given in full text.” *See*

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<sup>2</sup> Title 29 C.F.R. Part 18 provides that the Federal Rules of Civil Procedure apply to situations not controlled by Part 18 or rules of special application, and that an administrative law judge may take any appropriate action authorized by the Rules of Civil Procedure for the District Courts.

<sup>3</sup> Typically, when faced with cross-motions for summary judgment, a court must rule on each party’s motion on an individual and separate basis, determining in each case whether a judgment may be entered for the moving party. *See Held v. American Airlines, Inc.*, 13 F.Supp.2d 20, 23 (D.D.C. 1998). Such a separate analysis is not necessary here, however, because the parties’ cross-motions address the exact same issue and the exact same set of facts. In fact, the parties have stipulated to all of the material factual circumstances that affect the outcome of the instant determination. I have thus consolidated the analysis for both motions into one for the sake of convenience and simplicity.

DOE Contract, p. 32, Section I.2. The first of these provisions, 48 C.F.R. §§ 52.222-26, entitled “Equal Opportunity,” provides, in pertinent part:

(a) *If, during any 12-month period* (including the 12 months preceding the award of this contract), *the Contractor has been or is awarded nonexempt Federal contracts and/or subcontracts that have an aggregate value in excess of \$10,000, the Contractor shall comply with subparagraphs (b)(1) through (11) of this clause.* Upon request, the Contractor shall provide information necessary to determine the applicability of this clause.

(b) During performance of this contract, the Contractor agrees as follows:

(1) The Contractor shall not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin . . . .

(2) The Contractor shall 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 . . . .

...

(6) *The Contractor shall comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor.*

...

(8) *The Contractor shall permit access to its premises, during normal business hours, by the contracting agency or the OFCCP for the purpose of conducting on-site compliance evaluations and complaint investigations. The Contractor shall permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.*

(9) If the OFCCP determines that the Contractor is not in compliance with this clause or any rule, regulation, or order of the Secretary of Labor, this contract may be canceled, terminated, or suspended in whole or in part and the Contractor may be declared ineligible for further Government contracts, under the procedures authorized in Executive Order 11246, as amended. In addition, sanctions may be imposed and remedies invoked against the Contractor as provided in Executive Order 11246, as amended; in the rules, regulations, and orders of the Secretary of Labor; or as otherwise provided by law.

...

48 C.F.R. §§ 52.222-26 (2001) (emphasis added). Subparagraph (b)(2) of the second provision, 48 C.F.R. § 52.222-35, provides, “[t]he Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Vietnam Era Veterans’ Readjustment Assistance Act of 1972 (the Act), as amended,” and subparagraph (b)(2) of the third provision, 48 C.F.R. § 52.222-36(a)(2), provides “[t]he Contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor (Secretary) issued under the Rehabilitation Act of 1973 (29 U.S.C. 793) (the Act), as amended.” The fourth provision, 48 C.F.R. § 52.222-37, requires contractors to submit annual reports to the Secretary of Labor regarding the contractor’s employment of veterans.

The Defendant asserts that these provisions apply only to entities holding a “Government contract,” and “the mere inclusion of these provisions within the DOE Contract is not sufficient to render O’Melveny a government contractor where, as here, it lacks the requisite “Government contract.” (Def. Mem. I at 5; Def. Mem. II at 2.) As stated in box 17 of the DOE Contract’s first page, however, “[t]he rights and obligations of the parties to the contract shall be subject to and governed by the following documents: (a) this award/contract . . . and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein . . . .” The Defendant is thus bound by the above-listed FAR provisions incorporated in the DOE contract. Accordingly, if the Defendant was “awarded nonexempt Federal contracts,” the incorporated provision at section 52.222-26 mandates that it must, *inter alia*, “permit access to its premises, during normal business hours, by the contracting agency or the OFCCP for the purpose of conducting on-site compliance evaluations and complaint investigations,” and “permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.” 48 C.F.R. §§ 52.222-26 (2001).<sup>4</sup> The Defendant has never asserted that the DOE meets one of the specified exemptions listed at FAR section 22.807, nor is there any evidence indicating this to be the case.

The Defendant further contends that the Plaintiff’s position “fails because the [DOE Contract] also incorporates other provisions that are clearly inapplicable to O’Melveny’s services under the DOE Contract.” (Def. Mem. at 11.) In support of this contention, the Defendant cites a FAR provision incorporated in the DOE Contract, 48 C.F.R. § 52.229-5, which refers to taxes and contracts performed in U.S. Possessions or Puerto Rico, and is irrelevant to the services the Defendant provided under the DOE contract (Def. Mem. at 11.) But such an argument disregards the DOE Contract’s explicit warning that “the rights and obligations of the parties to the contract shall be subject to and governed by . . . such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein . . . .” Consequently, I agree with the Plaintiff, and find that a single inapplicable provision does not nullify the remaining FAR provisions incorporated under the DOE Contract.

## **B. The DOE Contract is a Nonpersonal Services Contract**

The Defendant asserts that it is not required to comply with the Executive Order, the Rehabilitation Act, the VEVRAA, or any associated regulations, because the service it provided under the DOE Contract—“legal advice and assistance” in connection with the DOE’s sale of the Elk Hills Naval Petroleum Reserve in California—does not fall within the applicable regulatory definition of a “Government contract.” (Def. Mem. I at 5; Def. Mem. II at 2.) In defining a “Government contract,” the Defendant points to the OFCCP regulations implementing Executive Order 11246, the Rehabilitation Act, and VEVRAA. The regulation implementing Executive Order 11246, 41 C.F.R. § 60-1.3, defines a “Government contract” as:

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<sup>4</sup> The Defendant has stipulated that the DOE has paid it \$50,000.00 or more annually under the Contract since January 1, 2007 (Stipulated Fact 4).

[A]ny agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term ‘personal property,’ as used in the section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term ‘nonpersonal services’ as used in this section includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include: (1) Agreements in which the parties stand in the relationship of employer and employee; and (2) Federally assisted construction contracts.

The regulations implementing the Rehabilitation Act and VEVRAA contain essentially the same definition. *See* 41 C.F.R. §§ 60-741.2(i), 60-250.2(i).

According to the Defendant, the DOE Contract does not constitute a qualifying “Government contract,” as defined in 41 C.F.R. §§ 60-1.3, 60-250.2(i), or 60-741.2(i) (hereinafter referred to as “OFCCP regulations”), because legal advice is not listed as one of the examples of nonpersonal services, and “the professional legal services that O’Melveny provided under the DOE contract are not analogous to any of the listed examples of nonpersonal services.” (Def. Mem. I at 5.) The Plaintiff responds that the nonpersonal services listed in the regulations are explicitly non-exclusive, and should not be constructed to be representative of any particular type of service, since they are “so different from each other that it is difficult to categorize them together by type.” (Pl. Mem at 19.) Because nothing in the above-cited regulations’ reference to “nonpersonal services” excludes the work that the Defendant performed under the contract, I agree with the Plaintiff, and find the Defendant’s interpretation to be unduly restrictive.<sup>5</sup>

For guidance on interpreting the reference to “nonpersonal services” in the above-cited regulations, the Plaintiff points to the definition of a “nonpersonal services contract” and “personal services contract” in Part 37 of the FAR. The Defendant responds that these definitions apply only to 48 C.F.R. Part 37, and should not be used to interpret OFCCP regulations. (Def. Mem. I at 6-7.) But the Administrative Review Board has rejected the Defendant’s argument, and affirmed an Administrative Law Judge’s reliance on the FAR’s definition of “nonpersonal services contract” for purposes of determining whether an entity was subject to the OFCCP’s jurisdiction. *See OFCCP v. UPMC Braddock*, ARB Case No. 08-048, slip op. at 9-10 (May 29, 2009), *review pending*, *UPMC Braddock v. Solis*, C.A. No. 09-1210 (D.D.C.).<sup>6</sup> Even absent this binding precedent, however, I would nevertheless find that it is appropriate to look to the FAR to interpret the meaning of “nonpersonal services” in the OFCCP

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<sup>5</sup> I note that the Executive Order purports to be broad in the sweep of its application. Section 202 provides that, with the exception of certain types of contracts defined in Section 204 (which are not relevant in the instant case), “all Government contracting agencies shall include in every Government contract . . .” requirements that the contractor not discriminate in employment “. . .because of race, color religion, sex, or national origin.” Thus, as one court has noted, “[t]he literal language of the Executive Order does not betray any presidential intent that the order should be parsimoniously interpreted.” *Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744, 747 (D. Md. 1976).

<sup>6</sup> The Defendant argues this case “is currently on appeal to the D.C. District Court, and is thus non-binding and unpersuasive precedent.” Of course, until and unless the District Court reverses this finding, it remains “binding precedent.”

regulations. Neither the Executive Order, the Rehabilitation Act, VEVRAA, nor the OFCCP regulations comprehensively define “nonpersonal services.” It is thus logical to turn to the FAR—a regulation codified and published for the purpose of establishing uniform policies and procedures for acquisition by all executive agencies—to obtain a comprehensive definition. *See* 48 C.F.R. §1.101 (2001). Indeed, the FAR section referenced by the Plaintiff to define “nonpersonal services contract” and “personal services contract,” explicitly applies to “all contracts and orders for services regardless of the contract type or kind of service being acquired,” and is, therefore, directly applicable to the DOE contract. *See* 48 C.F.R. § 37.000.<sup>7</sup>

The Defendant further maintains that, if the definitions at Part 37 of the FAR are applicable, the DOE Contract constitutes a “personal services contract.” Under Part 37, a “nonpersonal services contract” is defined as “a contract under which the personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.” 48 C.F.R. § 37.101 (2001). A “personal services contract,” by contrast, is “characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel.” § 37.104(a). Such a relationship “occurs when, as a result of (i) the contract’s terms or (ii) the manner of its administration during performance, contractor personnel are subject to the relatively continuous supervision and control of a Government officer or employee.” § 37.104(c)(1). The key question is:

Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account.

§ 37.104 (c)(2). The FAR lists the following descriptive elements as a guide to assess whether a proposed contract is personal in nature:

- (1) Performance on site.
- (2) Principal tools and equipment furnished by the Government.
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel
- (5) The need for the type of service provided can reasonably be expected to last beyond one year.
- (6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to—

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<sup>7</sup> I reject the Defendant’s contention that applying the FAR’s definition of “nonpersonal services contract” renders superfluous certain portions of 41 C.F.R. § 60-1.3, and agree with the Plaintiff that the FAR’s definition of “nonpersonal services contract” is fully consistent with the exclusion of “Agreements in which the parties stand in the relationship of employer and employee” from the definition of “Government contract” in 41 C.F.R. § 60-1.3.

- (i) Adequately protect the Government's interest;
- (ii) Retain control of the function involved; or
- (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

48 C.F.R. § 37.104 (d).

The Defendant contends that its relationship with the DOE under the DOE Contract satisfies a majority of these elements, because it provided legal services “in furtherance of [an] assigned function or mission” of the DOE. According to the Defendant, personnel in the DOE’s Office of General Counsel provided legal services comparable to those that the Defendant provided under the DOE Contract. For support, the Defendant points to the DOE Contract, which explicitly states that the Defendant was hired to assist the DOE in-house counsel. The Defendant additionally notes that the DOE’s need for its services was reasonably expected to last for more than one year, as reflected by the DOE Contract’s provisions for options to extend the term, which lasted ten years. Finally, the Defendant argues that the inherent nature of legal services is collaborative, requiring a close working relationship between attorney and client, but with the client always retaining final decision making authority. Thus, according to the Defendant, the very nature of its services reasonably required Government direction and supervision, and the Government, as with any other client, retained full control of all of the legal matters on which the Defendant provided advice and assistance.

I disagree, and find that the totality of these factors weigh against finding that the DOE Contract was personal in nature. Applying the same criteria outlined at 48 C.F.R. § 37.104 (d), the U.S. Court of Appeals for District of Columbia Circuit observed: “‘Supervision’ is a criterion that in importance far exceeds the others. As used in this context, supervision means control of the individual workman’s physical conduct, not just oversight; control of the individual in the performance of his work and of the manner in which the work is done is usually decisive.” *Lodge 1858, AFGF v. Webb*, 580 F.2d 496, 504 (D.C. Cir.) (internal citations and quotations removed), *cert. denied*, 439 U.S. 927 (1978).

The DOE Contract explicitly states that the principal place of performance was to be the Defendant’s offices, and the Defendant furnished the principal tools and equipment for its attorneys. Contrary to the Defendant’s contentions, its work under the DOE Contract is not “best conceived of as an extension of work done by DOE’s own employees in its Office of General Counsel,” (Def. Mem. II at 9.), as the undisputed evidence demonstrates that the Defendant merely provided legal services in accordance with the specifications set forth in the DOE contract. These services were not subject to the type of supervision and control that the Government normally exercises over its employees: at no point did the DOE retain physical control over the Defendant’s attorneys or the means by which the Defendant’s attorneys performed under the contract. Rather, as the Plaintiff points out, the relationship between the Defendant and the DOE’s Office of General Counsel was typical of the relationship between a client and its outside counsel: DOE attorney Ada Mitrani reviewed and sometimes revised the pleadings or correspondence drafted by the Defendant’s attorneys before the documents were either filed with the OHA or sent to opposing counsel; she “did not select any particular O’Melveny attorney to work on the OHA Proceedings, like an employer might assign certain employees to do particular work.” (Pl. Mem at 17; Mitrani Decl. at ¶¶ 4, 6.) Neither Ms. Mitrani

nor anyone else from the DOE controlled how, when, or where the Defendant's work under the contract was to take place.

Additionally, it is noteworthy that the DOE is prohibited from contracting for personal services unless explicitly authorized to do so by statute. The federal government is generally "required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws," and the FAR prohibits agencies from awarding personal services contracts unless they have specific statutory authorization to do so. 48 C.F.R. § 37.104 (a),(b). The Defendant points to no such statutory authority, and nothing in the DOE Contract suggests that it was awarded under a specific statutory authorization for personal services.

### **C. Defendant's Obligation to Permit OFCCP's Compliance Review is Not Moot**

The Defendant argues that the issues presented in this case are moot because it has not performed any work under the DOE Contract since July 2010, and it is unlikely to perform any additional work before the contract expires on October 6, 2011. (Def. Mem. I at 12.) As noted in *OFCCP v. Loffland Bros. Co.*, OEO 75-1 (April 16, 1984), however, a person who has completed the obligations under a government contract but violated the Executive Order or regulations during the performance of the contract is considered a contractor for purposes of the enforcement provisions of the Executive Order and regulations. The Defendant was performing work under the DOE Contract when the compliance review was initiated on January 9, 2009, and the Defendant's obligation to perform work under the contract continued until October 6, 2011. Accordingly, notwithstanding the fact that the DOE Contract has expired, the Defendant is required to permit OFCCP to conduct its compliance review.

### **ORDER**

Upon consideration of the parties' respective Motions for Summary Judgment, IT IS HEREBY ORDERED that the motion of Plaintiff Office of Federal Contract Compliance Programs is GRANTED and the motion of Defendant O'Melveny & Meyers LLP is DENIED. Accordingly, within thirty days of the date of this Order, Defendant shall provide all documents requested by OFCCP in the January 9, 2009 scheduling letter, shall permit OFCCP access to its facilities if requested and shall otherwise allow OFCCP to conduct and complete its compliance review.

**SO ORDERED.**

**A**

LINDA S. CHAPMAN  
Administrative Law Judge

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file exceptions (“Exception”) with the Administrative Review Board (“Board”) within fourteen (14) days of the date of issuance of the administrative law judge’s recommended decision. The Board’s address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 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.