# CLIENT ALERT

## Hospitals Contracting With HMO to Provide Medical Services to Federal Employees Held to be "Subcontractors" Even Where Subcontract Fails To Include EEO And Affirmative Action Provisions

**Jun.17.2009**

In a potentially far-reaching decision issued by the Administrative Review Board ("ARB") of the U.S. Department of Labor ("DoL"), several Pittsburgh-area hospitals were recently found to be "subcontractors" for purposes of Executive Order 11246 and, therefore, subject to audit by the Office of Federal Contract Compliance Programs ("OFCCP"). The hospitals were contracted providers for a health maintenance organization ("HMO") participating in the Federal Employees Health Benefits Program ("FEHBP").

The decision, *Office of Federal Contract Compliance Programs v. UPMC Braddock*, ARB Case No. 08-048 (May 29, 2009), is notable because the ARB found (1) the hospitals are subject to the jurisdiction of the OFCCP even absent the required contractual language between the prime contractor and subcontractor; (2) the definition of "subcontractor" in the prime contract, which excepted providers of direct medical services and supplies, was invalid because it was narrower than the definition in the OFCCP's regulations; and (3) a parallel definition of "subcontractor" set forth in the Federal Acquisition Regulation ("FAR") at 48 C.F.R. § 1602.170-14 was not applicable because it conflicted with, and was narrower than, the definition set forth in the OFCCP's regulations. The ARB distinguished an earlier ruling that reached an opposite result, because the prior case did not involve hospitals contracting with an HMO.

In *UPMC,* the OFCCP argued that defendant hospitals in or near Pittsburgh were federal subcontractors subject to Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 402 of the Vietnam Era Veteran's Readjustment Assistance Act of 1974 ("VEVRAA"). Together, these three laws prohibit federal contractors and subcontractors from discriminating against employees or applicants for employment based on race, color, sex, religion or national origin, disability, and veteran status; covered contractors and subcontractors must also take affirmative action to provide equal employment opportunities.

Each defendant-hospital was party to an HMO contract with the University of Pittsburgh Medical Center Health Plan ("UPMC Health Plan"). The contracts required the hospitals to provide medical products and services to federal employees pursuant to the prime contract between UPMC Health Plan and the United States Office of Personnel Management ("OPM"). The hospitals received scheduling letters for audits by the OFCCP, but refused to submit to the audits on several grounds, including that they had never agreed to become federal subcontractors. The OFCCP referred the matter to the Solicitor's office, a hearing was held before an administrative law judge ("ALJ"), and the ALJ determined the hospitals were "subcontractors" for purposes of the relevant laws. The hospitals appealed this decision to the ARB.

The ARB held that the hospitals were bound by the equal opportunity provisions and the OFCCP's regulations, even though UPMC Medical Center did not include these mandatory clauses in its agreements with the defendants. The ARB applied what is known in the government contracts arena as "the *Christian* Doctrine," whereby mandatory contract clauses are included in a contract by operation of law if the clause expresses a "significant or deeply ingrained strand of public procurement policy." The ARB found the EEO/affirmative action clauses were properly in that category.

The ARB went on to find that the definition of "subcontractor" in the UPMC-OPM contract conflicted with the mandates in the three legal authorities because it excepted providers of medical services and supplies, holding that provisions in a government contract that conflict with binding federal law are invalid or void.

Finally, the ARB held the FAR definition of "subcontractor" under 48 C.F.R. § 1602.170-14 was not applicable. Because the FAR's definition would exclude defendants, who are providers of direct medical services and supplies, it was invalid as contrary to a federal statute. The ARB ultimately held that the defendants' contract with the UPMC met the definition of "subcontract" set forth in the OFCCP regulations implementing Executive Order 11246, VEVRAA, and the Rehabilitation Act. Applying the OFCCP's definition of "subcontract," the ARB found that provision of medical services and supplies was an essential component of the UPMC's contract and the contract depended on defendants to offer these supplies and services. Therefore, defendant hospitals contracted to provide a "portion of the contractor's obligation" and were subcontractors subject to the equal opportunity provisions.

Finally, the ARB distinguished this case from its 2003 decision in *Bridgeport Hospital*, where the ARB held a hospital was not a "subcontractor" to the FEHBP prime contract between the Blue Cross Blue Shield Association ("BCBSA") and OPM because the prime contract did not require BCBSA to provide medical services. Here, by contrast, the ARB said, the prime contract clearly required UPMC Medical Center to provide medical services.

The *UPMC* decision underscores the need for employers to examine their contractual relationships to determine the extent to which they may be deemed "subcontractors" for affirmative action purposes, even if the underlying contract with the prime contractor is silent on this issue.

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