CLIENT ALERT

Participants in TRICARE Program Celebrate the Administrative Review Board's Florida Hospital Decision – Should Other Companies Care?

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A few weeks ago, the city of San Francisco paused to celebrate the World Series championship, as millions streamed into downtown San Francisco to cheer their heroes following a sweep of the Detroit Tigers. But, once the final out was made, hardly anyone outside of San Francisco seemed to notice. Baseball fans in Detroit and Washington and St. Louis went about their business, paying little attention to the celebration that unfolded in San Francisco.

In a similar vein, TRICARE Management Activity ("TRICARE") contractors, participants and providers reveled in the recent plurality decision of the U.S. Department of Labor's Administrative Review Board ("ARB"), holding that the Office of Federal Contract Compliance Programs ("OFCCP") lacked jurisdiction over hospitals providing medical services to beneficiaries of TRICARE. Other companies – including those who are pining for more guidance as to what constitutes a "subcontract" under the OFCCP's regulations – perhaps noticed the headlines, but held their celebration in check. Should they, too, uncork the champagne like Giants fans? Or, like Detroit and Washington fans, should they conclude that this celebration is limited to the San Francisco Giants of the government contracting world – the TRICARE providers? This client alert addresses the ARB's opinion in *OFCCP v. Florida Hospital of Orlando* and what – if anything – it means for other companies that may provide goods or services to government contractors.

In a decision authored by Chief Administrative Appeals Judge Paul M. Igasaki and joined by Judge Lisa Wilson Edwards, a plurality of the ARB reversed an Administrative Law Judge's 2010 decision holding that Florida Hospital of Orlando ("Florida Hospital" or "Hospital") was a federal subcontractor subject to OFCCP's jurisdiction. In doing so, the ARB plurality rebuffed the OFCCP's effort to extend its jurisdictional reach.

At issue in the case was whether an agreement between Florida Hospital and Humana Military Healthcare Services ("HMHS") for the Hospital to provide medical services to beneficiaries of TRICARE – the Defense Department's world-wide health care program for active-duty and retired military and their families – rendered the Hospital a government subcontractor. Relying on a key provision of the National Defense Authorization Act for Fiscal Year 2012 ("NDAA"), the ARB plurality held that the language of the contract between the Hospital and HMHS, and the nature of their relationship pursuant to the contract, "preclude[d] OFCCP from asserting jurisdiction over Florida Hospital."

Background

In 2005, Florida Hospital entered into an agreement with HMHS to be part of the network of health care providers that HMHS makes available to TRICARE beneficiaries pursuant to HMHS' prime contract with TRICARE, a component of the Defense Department's Military Health System. In 2007, OFCCP initiated a compliance review of the Hospital, directing it to submit information related to its affirmative action plans and supporting data. The Hospital refused to participate in the review, asserting that it was not a federal contractor or subcontractor subject to OFCCP's jurisdiction.

Pursuant to OFCCP regulations setting forth the obligations of government contractors and subcontractors, a "subcontract" is defined as "any agreement or arrangement between a contractor and any person . . . (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or (2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed." 40 C.F.R. § 60-1.3. A subcontractor is "any person holding a subcontract." *Id.* On their face, the definitions of "subcontract" and "subcontractor" are ambiguous and have been the subject of litigation going back decades, to the *Loffland Brothers* and *Monongahela Railroad* decisions, and to the more recent *Bridgeport Hospital* and *University of Pittsburgh Medical Center* cases.

In response to the Hospital's refusal to participate in the compliance review, OFCCP filed an administrative complaint against the Hospital in December 2008 and, in October 2010, an ALJ of the DoL granted summary judgment to OFCCP. The ALJ held that the Hospital was a covered subcontractor because it "performs 'a portion of the contractor's obligations' by providing some of the medical services to TRICARE'S beneficiaries which HMHS has contracted to provide." In November 2010, Florida Hospital filed exceptions to the ALJ's decision and appealed the grant of summary judgment.

In December 2011, while Florida Hospital's appeal was pending, President Obama signed into law the NDAA. Section 715 of the NDAA states that "the Secretary [of Defense] shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy." 10 U.S.C. § 1097b(a)(3). But then Section 715 jumps to the heart of the *Florida Hospital* dispute by further providing that:

> For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation ***or any other law***, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers ***may not*** be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.

Id. (emphases added)

In short, by enacting Section 715 of the NDAA and redefining who is a "subcontractor" for purposes of "any other law" – including Executive Order 11246 and the OFCCP's regulations – Congress and President Obama trumped the OFCCP's efforts to expand the definition of "subcontractor," at least within the health care industry.

Plurality Decision of the ARB

Holding that the NDAA applied retroactively to OFCCP's Complaint against Florida Hospital, the ARB plurality reversed the ALJ's decision and dismissed the Complaint. In reversing the ALJ's decision, the ARB plurality noted that the NDAA "modifies the definition of contract in contract agreements involving DoD entities." The plurality decision rejected OFCCP's argument that the first prong of the definition of "subcontract" in the OFCCP regulations, which applies to contracts for purchase of services which are "necessary to the performance of any one or more contracts," applied to the contract between Florida Hospital and HMHS. The plurality gave this argument short shrift, relying on the NDAA language limiting the definition of subcontractor.

In the plurality decision, the ARB reasoned that because Florida Hospital's agreement with HMHS "involves the provision of health care providers pursuant to a managed care prime contract between TRICARE and HMHS that includes the requirement to

maintain a network of providers, OFCCP's jurisdiction is removed" by the NDAA. Pursuant to the NDAA, the ARB explained, Florida Hospital's contract with HMHS "is no longer a 'subcontract' under Section 60-1.3 because the element of the contract that is 'necessary to the performance of any one or more contracts' involves the provision of health care network provider services to TRICARE beneficiaries." According to the NDAA, such a contract "may not be considered to be a contract for the performance of health care services or supplies."

In a separate opinion, Judge Luis A. Corchado, concurring in part with and dissenting in part from the plurality decision, addressed the first prong ("Prong One") of the definition of "subcontractor" contained in OFCCP's regulations. Specifically, Judge Corchado asserted that "[b]ecause Prong One applies to any kind of a government contract, Section 715 [of the NDAA] does not resolve the relevant question under Prong One. . . . [T]he relevant question under Prong One is whether Florida Hospital provides supplies or nonpersonal services that HMHS needs to be able to perform its contract with TRICARE." *See* 40 C.F.R. § 60-1.3. According to Judge Corchado, OFCCP raised "compelling arguments that Florida Hospital's medical services are necessary for HMHS to fulfill its obligations under the TRICARE/HMHS Contract." Under Prong One, a determination that such services are necessary would confer jurisdiction over Florida Hospital by OFCCP.

Implications of the Florida Hospital Decision

TRICARE participants and providers are – and should be – celebrating the ARB's plurality decision in *Florida Hospital*. But it is unclear that companies in other industries have any reason to join the celebration. One can read the *Florida Hospital* plurality decision as nothing more than a one-off decision, driven by the unique Congressional action that drove the result. Because the result was driven by the carve-out set forth in the NDAA, one could argue, the *Florida Hospital* decision literally does nothing to resolve the ambiguity surrounding the definition of a "subcontract" or "subcontractor" under the OFCCP's regulations. Alternatively, one could read the various opinions – and Judge Corchado's opinion in particular – as adding "another brick in the wall" of the jurisdictional analysis with which putative subcontractors must wrestle. Indeed, one could conclude that Judge Corchado's opinion – and the ALJ's underlying analysis in the *Florida Hospital* case – must be given full consideration when interpreting the reach of Prong One.

And then there is always "next season." Baseball analysts are already discussing 2013 and whether the Giants can win their third title in four years. For companies interested in the subcontractor analysis, the "next season" is the much anticipated decision of Judge Paul Friedman of the United States District Court for the District of Columbia in the *UPMC* case. That case, which has been pending before Judge Friedman for more than three years, will likely provide the next guidepost as to the jurisdictional reach of the OFCCP.

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