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

COMPLAINANT,

v.

FLORIDA HOSPITAL OF ORLANDO,

RESPONDENT.

ARB CASE NO. 11-011

ALJ CASE NO. 2009-OFC-002

DATE: July 22, 2013

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Plaintiff:
M. Patricia Smith, Esq.; Katherine E. Bissell, Esq.; Christopher Wilkinson, Esq.; Beverly I. Dankowitz, Esq.; Consuela A. Pinto, Esq.; and Theresa Schneider Fromm, Esq.; *United States Department of Labor,* Washington, District of Columbia

For the Defendant:
Leslie Selig Byrd, Esq. and Judy K. Jetelina, Esq.; *Bracewell & Giuliani LLP*, San Antonio, Texas

For the American Hospital Association, as Amicus Curiae:
Melinda Reid Hatton, Esq. and Lawrence Hughes, Esq.; *American Hospital Association*, Washington, District of Columbia; F. Curt Kirschner, Esq. and Christopher T. Scanlon, Esq.; *Jones Day*, San Francisco, California; and Alison B. Marshall, Esq.; *Jones Day*, Washington, District of Columbia

For the Humana Military Health Services, Inc., and Health Net Federal Services, LLC, as Amicus Curiae:
Arthur N. Lerner, Esq.; Christopher Flynn, Esq.; and J. Catherine Kunz, Esq.; *Crowell & Moring LLP*, Washington, District of Columbia

For the TriWest Healthcare Alliance Corporation, as Amicus Curiae:
Janet E. Kornblatt, Esq.; Phoenix, Arizona

For the National Association of Chain Drug Stores, as Amicus Curiae:
Mary Ellen Kleiman, Esq. and Don L. Bell, II, Esq.; ***National Association of Chain Drug Stores*****, Alexandria, Virginia**

For the National Women's Law Center, as Amicus Curiae:
Fatima Goss Graves, Esq. and Devi Rao, Esq.; ***National Women's Law Center*****, Washington, District of Columbia, and Jennifer Mathis, Esq.;** ***Bazelon Center for Mental Health Law*****, Washington, District of Columbia**

For the Leadership Conference on Civil and Human Rights, as Amicus Curiae:
Lisa M. Bornstein, Esq.; ***The Leadership Conference on Civil and Human Rights*****, Washington, District of Columbia**

For the Lawyer's Committee for Civil Rights Under Law, as Amicus Curiae:
Ray P. McClain, Esq. and Jane Dolkart, Esq.; ***Employment Discrimination Project, Lawyer's Committee for Civil Rights Under Law*****, Washington, District of Columbia**

For the National Partnership for Women & Families, as Amicus Curiae:
Sarah Crawford, Esq.; ***National Partnership for Women & Families*****, Washington, District of Columbia**

BEFORE: Paul M. Igasaki, ***Chief Administrative Appeals Judge*****; E. Cooper Brown,** ***Deputy Chief Administrative Appeals Judge*****; Joanne Royce,** ***Administrative Appeals Judge*****; Luis A. Corchado,** ***Administrative Appeals Judge*****; and Lisa Wilson Edwards,** ***Administrative Appeals Judge,*** **presiding en banc. Chief Judge Igasaki and Judge Edwards*****, concurring in part, and dissenting.***

DECISION AND ORDER OF REMAND ON RECONSIDERATION

This Decision and Order is issued pursuant to the Administrative Review Board's Order Granting Motion for Reconsideration, issued July 22, 2013**.** This case arises under Executive Order 11246, as amended;[1] Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C.A. § 793 (Thomson Reuters/West 2008); and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C.A. § 4212 (West 2002 & Thomson Reuters Supp. 2012) (Veterans' Act) (collectively the "Equal Opportunity Laws" or "EO Laws"). These laws authorize the Department of Labor's Office of

[1] Executive Order 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965), was amended by Executive Order 11375, 32 Fed. Reg. 14303 (Oct, 13, 1967) (adding gender to list of protected characteristics), and Executive Order 12086, 43 Fed. Reg. 46,501 (Oct. 5, 1978) (consolidating enforcement function in the Department of Labor).

Federal Contract Compliance Programs (OFCCP) to ensure that Federal contractors and subcontractors covered by these laws comply with them and the corresponding implementing regulations.[2]

OFCCP initiated this action against Respondent Florida Hospital of Orlando (Florida Hospital or the Hospital) after the Hospital rebuffed OFCCP's efforts to review the Hospital's compliance with the EO Laws. Florida Hospital claimed that OFCCP had no jurisdiction over it. Following the parties' stipulation of facts and cross-motions for summary decision, the Administrative Law Judge (ALJ) granted OFCCP's motion and denied Florida Hospital's motion. Finding that OFCCP had jurisdiction, the ALJ ordered Florida Hospital to comply with OFCCP's requests for information.

Upon review of the ALJ's Summary Decision and Order (D. & O.), the ARB, through a majority of the Board presiding en banc, concludes that OFCCP has jurisdiction to pursue its compliance review under the EO laws against Florida Hospital pursuant to 41 C.F.R. § 60-1.3(1) (2012). Accordingly, we vacate the ALJ's Summary Decision and Order in this matter. Additionally, we remand this matter to the ALJ for further consideration, consistent with this Decision and Order, of whether OFCCP is nevertheless barred from asserting jurisdiction over Florida Hospital because the payments the Hospital receives under the TRICARE program constitute federal financial assistance.

INTRODUCTION

At the outset, we note that certain undisputed facts fundamentally impact our decision and set this case apart from previous ARB decisions involving contracts for healthcare services. Most significantly, it is undisputed that Florida Hospital performs medical services as part of an "integrated" healthcare delivery system known as TRICARE[3] that begins with the United States Department of Defense's stated goal of providing "an improved and uniform program of medical and dental care for members [of the uniformed services] and certain former members of those services, and for their dependents." 10 U.S.C.A. § 1071 (Thomson Reuters 2010). TRICARE "has partnered with regional contractors in the three U.S. regions [like Humana Military Healthcare

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2 *See* 41 C.F.R. Parts 60-30 (Executive Order 11246), 60-741 (Rehabilitation Act), and 60-250 (Veterans' Act) (2012).

3 TRICARE refers to the managed health care program that the Department of Defense established under the authority of Chapter 55 of Title X of the U.S. Code, principally 10 U.S.C.A. § 1097 (Thomson Reuters 2010 & Thomson Reuters Supp. 2012), and includes the competitive selection of contractors to financially underwrite the delivery of health care services under the Civilian Health and Medical Program of the Uniformed Services ("CHAMPUS"). 10 U.S.C.A. § 1072(7) (Thomson Reuters 2010).

Services (HMHS)] to provide healthcare services and support to beneficiaries."[4] The parties agreed that Florida Hospital provided more than $100,000 of healthcare services to TRICARE beneficiaries. In this sense, this case differs from cases where individuals agree to work for a federal agency that secures insurance or manages group healthcare insurance for its employees. Despite its active role in the integrated healthcare system the Department of Defense created, Florida Hospital argues that OFCCP has no jurisdiction over it and that it does not have to comply with the EO Laws OFCCP enforces.

From a procedural aspect, this case has two litigation phases. Our opinion addresses each phase separately. The first phase began with the Administrative Complaint and ended with the ALJ's decision. In its Administrative Complaint (the Complaint), OFCCP asserted jurisdiction over Florida Hospital as a subcontractor on two different bases defined at 41 C.F.R. §§ 60-1.3(1) and (2) (Prong One and Two, respectively).[5] Administrative Complaint at ¶¶ 5, 12 (filed Dec. 18, 2008). As described more fully below, the parties stipulated to a number of facts and filed cross-motions for summary decision. OFCCP argued for summary decision as to its jurisdiction under Prong One and Prong Two, asserting that Florida Hospital's contract with HMHS met the definitions of a covered "subcontract" under the EO Laws. Florida Hospital argues that its contract does not fit within those definitions. In addition, Florida Hospital argues that an exclusion in the EO Laws applies, taking it out of OFCCP's jurisdiction. The ALJ issued a Summary Decision and Order on October 18, 2010 (D. & O.) granting OFCCP's motion for summary decision and ordering Florida Hospital to comply with OFCCP's compliance review request. In ruling that OFCCP has jurisdiction over Florida Hospital, the ALJ relied solely on Prong Two and found it unnecessary to address Prong One. Florida Hospital petitioned the Board for review.

The second phase occurred after the parties and various amici briefed the issues raised in Florida Hospital's petition for review before the ARB. On December 31, 2011, while the case was pending before the ARB, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2012 (NDAA), Pub. L. 112-81 (Dec. 31, 2011), authorizing, inter alia, appropriations for military activities for the Department of Defense. The new legislation included Section 715 entitled "Maintenance Of The Adequacy Of Provider Networks Under The TRICARE Program," amending 10 U.S.C.A. § 1097b(a) (Thomson Reuters 2010 & Thomson Reuters Supp. 2012) (TRICARE program: financial management).

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[4] Plaintiff's Memorandum of Law in Response to Defendant's Motion for Summary Judgment and in Further Support of Plaintiff's Motion for Summary Judgment at 6 (filed on June 7, 2010) (quoting Stipulated Facts, Joint Exhibit (JX) C and Defendant's Exhibit (DX) 11).

[5] OFCCP did not cite the regulations in its Complaint but did track the regulatory language defining "subcontract." *See also* 41 C.F.R. §§ 60-741.2, 60-250.2(l).

In response, Florida Hospital moved to dismiss the case as moot pursuant to Section 715. The Board ordered a second round of briefing to permit responses to Florida Hospital's motion to dismiss. On October 19, 2012, after briefing by the parties and various interested amici, the Board, presiding en banc, issued a plurality decision reversing the ALJ's decision and dismissing the complaint against Florida Hospital.[6] On November 13, 2012, OFCCP filed a motion for reconsideration, to which Florida Hospital objected. By separate order, we granted OFCCP's motion for reconsideration. As explained below, upon reconsideration a the Board finds: (1) that OFCCP has withdrawn its assertion of jurisdiction under 41 C.F.R. § 60-1.3(2) (Prong Two) in light of Section 715, thereby rendering the issue of OFCCP jurisdiction under Prong Two moot; (2) that OFCCP is thus expressly prohibited from pursuing jurisdiction under Prong Two to enforce its 2007 Scheduling Letter; (3) that the Florida Hospital contract with HMHS qualifies as a subcontract under 41 C.F.R. § 60-1.3(1) (Prong One) as a matter of law; (4) that unaddressed issues of law and unresolved issues of material fact prevent us from deciding whether the Florida Hospital subcontract is excluded from OFCCP's jurisdiction as part of a federal financial assistance program; thus requiring that (5) we remand this matter on the issue of federal financial assistance.

BACKGROUND

A. Undisputed Facts

Except as otherwise noted, the following facts are taken from the parties' Joint Stipulated Facts (SF) filed with the ALJ on May 17, 2010.

1. Prime contract requires that HMHS provide a network of medical providers to serve TRICARE beneficiaries

OFCCP's asserted jurisdiction over Florida Hospital originates with the contractual arrangement between TRICARE Management Activity (TRICARE or TMA), a Department of Defense Field Activity, and Humana Military Healthcare Services (HMHS). TRICARE is the Defense Department's world-wide health care program for active duty and retired military and their families. SF ¶ 5. "To assist with the administration of this Government paid healthcare entitlement, referred to as the 'T RICARE program,' TMA contracts for managed care support." SF ¶ 7. The managed care support contractors' responsibilities include enrollment, referral management, medical management, claims processing and customer service. Additionally, these contractors underwrite healthcare costs and establish networks of providers who agree to follow TRICARE program rules and procedures when treating TRICARE patients, but who remain independent and do not operate under the Defense Department's direction and control. SF ¶ 7. Beneficiaries under TRICARE can still obtain care from any healthcare provider of their choice, whether network or non-network, subject to varying co-pays and deductibles depending on which provider they use. SF ¶ 8.

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[6] *OFCCP v. Florida Hosp. of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-002 (ARB Oct. 19, 2012).

Since August 2003, HMHS has contracted with TRICARE to provide networks of healthcare providers to TRICARE beneficiaries. SF ¶ 9. Pursuant to Section C of the Prime Contract, HMHS "shall assist the [Department of Defense's] Regional Director and Military Treatment Facility Commander in operating an *integrated* healthcare delivery system combining resources of the military's direct medical care system and the contractor's managed care support to provide health, medical, and administrative support services to eligible beneficiaries."[7] Among numerous requirements, the Prime Contract requires HMHS to: (1) provide a managed, stable, high-quality network or networks of healthcare providers that complement the clinical services provided to TRICARE beneficiaries, and (2) include in such networks "49,000 physicians and behavioral health professionals in the categories of primary care, medical specialists, surgical" in a manner that will "provide the full scope of benefits to enrollees." SF ¶¶ 10, 11, 15. The contractor "shall inform the Government within 24 hours of any instances of network inadequacy relative to the Prime and/or Extra service areas and shall submit a corrective action plan with each notice of an instance of network inadequacy."[8]

2. Subcontract between HMHS and Florida Hospital requires the Hospital to provide health care services to TRICARE beneficiaries as part of the network of providers set out in the prime contract

Respondent Florida Hospital is a not-for-profit hospital owned and operated by Adventist Health System. SF ¶ 1. Since at least April 2005, Florida Hospital has had an agreement with HMHS (Hospital Agreement) to be an HMHS Participating Hospital "under the terms and conditions of this Agreement and agrees to provide healthcare services for Beneficiaries in accordance with the TRICARE regulations, policies and procedures." Hospital Agreement at ¶ 2.[9] The Hospital Agreement "applies to all services provided by Florida Hospital for all persons designated by HMHS as eligible members, including active duty military personnel (Beneficiaries) to receive benefits under an agreement between HMHS and TMA." *Id.* at ¶ 1. Under the Hospital Agreement, Florida Hospital "receive[s] and review[s] applications for qualified physicians in accordance with Hospital's Medical staff and governing body credentialing policies and procedures and bylaws and agrees not to deny staff privileges to any qualified physicians," and will provide "documentation regarding physicians with privileges at Hospital" to HMHS. *Id.* at ¶ 6; SF ¶ 20. Stated simply, TRICARE (the government), HMHS (the prime government contractor), and Florida Hospital (the network provider), along with other network providers, form an integrated healthcare delivery system for government paid healthcare services.

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[7] Stipulated Facts, JX A (Section C-1 (General), Description/Specifications/Work Statement). (Emphasis added.) See also JX A, Section C, C-7.1 (Technical Requirements) (saying the same).

[8] *Id.* at C-7.1.4.

[9] SF ¶ 16; *see also* JX B (Hospital Agreement between HMHS and Florida Hospital).

B. Proceedings Before the ALJ

On August 14, 2007, OFCCP sent Florida Hospital a Scheduling Letter notifying the Hospital that it was selected for a compliance review pursuant to OFCCP's investigative authority under the Equal Opportunity Laws. SF ¶ 33; Administrative Complaint at ¶ 9. The Office of Management and Budget (OMB No. 1215-0072) approved the Scheduling Letter. Administrative Complaint at ¶ 9. The compliance review required that Florida Hospital provide certain information pertaining to its affirmative action plans and supporting data. Two weeks later, Florida Hospital notified OFCCP that it would not participate in the compliance review, stating that it was not a federal contractor or subcontractor within OFCCP's jurisdiction. *Id.* at ¶ 11. OFCCP issued a Notice to Show Cause on December 3, 2007, asking Florida Hospital to explain why enforcement proceedings should not be commenced against it for failing to comply with OFCCP's Scheduling Letter. SF ¶ 37; Administrative Complaint at ¶ 14.

On December 18, 2008, due to Florida Hospital's continued refusal to comply, OFCCP filed the Complaint with the Office of Administrative Law Judges, reciting the Prong One and Two definitions of a covered "subcontractor" under the Equal Opportunity Laws. Administrative Complaint at ¶¶ 5, 12. OFCCP requested that Florida Hospital be (1) permanently enjoined from failing and refusing to comply with the requirements of the Equal Opportunity Laws, and (2) directed to permit OFCCP access to its facilities to complete its compliance review. Administrative Complaint (relief requested).

Following the filing of cross-motions by the parties for summary decision, on October 18, 2010, the ALJ entered a Summary Decision and Order in OFCCP's favor ordering Florida Hospital to adhere to the compliance review. Relying solely on Prong Two, the ALJ determined that Florida Hospital is a covered subcontractor under the EO Laws 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," citing *OFCCP v. UPMC Braddock*, ARB No. 08-048, ALJ Nos. 2007-OFC-001, -002, -003 (ARB May 29, 2009). D. & O. at 4. The ALJ rejected Florida Hospital's argument that it was part of a federal financial assistance program, which would have rendered Florida Hospital outside the scope of OFCCP's investigatory authority. D. & O. at 6. The ALJ held that Florida Hospital "is subject to the affirmative action provisions" enforced by OFCCP, granted OFCCP's motion for summary decision, and denied Florida Hospital's motion. D. & O. at 7.

C. Proceedings before the Administrative Review Board

Florida Hospital filed exceptions to the ALJ's Summary Decision with the ARB on November 1, 2010. Florida Hospital asserted, among other things, that the ALJ erred in holding that Florida Hospital was a federal subcontractor under 41 C.F.R. Part 60.

On January 9, 2012, following briefing by the parties on the issues raised by Florida Hospital's exceptions, Florida Hospital moved to dismiss the case as moot pursuant to the enactment of NDAA Section 715, which amended 10 U.S.C.A. § 1097b(a). In response, the Board entered an order requesting further briefing addressing the amendment's impact, if any, on the resolution of this case and the requirements of the EO Laws and the applicable regulations.

Florida Hospital contends that under Section 715 it is not a subcontractor subject to OFCCP's jurisdiction and that the case must be dismissed as moot. More specifically, Florida Hospital argues that Section 715 categorically eliminated Prongs One and Two as a basis for OFCCP jurisdiction over TRICARE network providers like Florida Hospital. OFCCP argues that Section 715 removes one basis for its jurisdiction over Florida Hospital in this case but does not address OFCCP's reliance on Prong One jurisdiction.[10] OFCCP argues that the legislative history of Section 715 supports a narrow interpretation "given the marked difference between the initial bill and the bill that was ultimately enacted."[11] Additionally, OFCCP argues that Section 715 has no impact because the provision cannot be applied retroactively.[12] Various interested amici filed additional briefs addressing these issues.

JURISDICTION AND STANDARD OF REVIEW

The ARB has jurisdiction to review exceptions to an ALJ's D. & O. and to issue the Department's final decision in cases arising under the EO Laws.[13] The ARB reviews de novo an ALJ's grant of summary decision, under the same standard that governs the Department of Labor Administrative Law Judges.[14] Under 29 C.F.R. § 18.40(d) (2012), an ALJ may enter summary decision where the pleadings, affidavits, material obtained by

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[10] Plaintiff OFCCP's Response to ARB's Request for Briefing at 6 (filed with ARB Mar. 13, 2012).

[11] *Id*. at 7.

[12] *Id*. at 9-11.

[13] *See* 41 C.F.R. §§ 60-30.30, 60-250.65(b)(1), and 60-741.65(b)(1).

[14] *Charles v. Profit Inv. Mgmt.,* ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011).

discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.[15] The standard for granting summary decision is patterned after Rule 56 of the Federal Rules of Civil Procedure, the rule governing summary judgment in the federal courts.[16] Florida Hospital appeals the granting of OFCCP's motion for summary decision and the denial of Florida Hospital's motion for summary decision.

ISSUES ADDRESSED

1. Whether NDAA Section 715 has removed all OFCCP's jurisdiction over TRICARE network provider contracts.

2. If Section 715 does not resolve this matter, whether OFCCP has demonstrated that the Florida Hospital contract qualifies as a subcontract under Prong One.

3. If the Florida Hospital contract qualifies as a subcontract, whether it is otherwise exempted from OFCCP jurisdiction because it is part of a federal financial assistance program.

DISCUSSION

A. Statutory and Regulatory Framework of the EO Laws

As previously indicated, OFCCP seeks to ensure that Florida Hospital complies with the Equal Opportunity Laws, which an Executive Order and two statutes. Executive Order 11246[17] prohibits Federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex or national origin.[18] The Executive Order also requires government contractors and subcontractors to take affirmative action to ensure that equal opportunity is provided in all aspects of employment, including upgrading, demotion, transfer, recruitment, layoff or termination, rates of pay or other forms of compensation, and selection for training.[19] The Order gives the Secretary of Labor

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[15] *White v. American Mobile Petroleum, Inc.*, ARB No. 12-058, ALJ No. 2011-STA-032, slip op. at 3 (ARB May 31, 2013); *Elias v. Celadon Trucking Svcs., Inc.*, ARB No. 12-032, ALJ No. 2011-STA-028, slip op. at 3 (ARB Nov. 21, 2012).

[16] *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011).

[17] 30 Fed. Reg. 12319 (Sept. 24, 1965), as amended (*see supra* at 2, n.1).

[18] *See* Executive Order 11246, Subpart B, Sec. 202.

[19] *Id*.

authority to investigate the employment practices of any government contractor or subcontractor as those terms are defined by the EO Laws.[20]

Like Executive Order 11246, Section 503 of the Rehabilitation Act, 29 U.S.C.A. § 793, requires that Federal contractors and subcontractors (with respect to contracts greater than $10,000) affirmatively act to employ and advance in employment qualified individuals with disabilities. Section 402 of the Veterans' Act, 38 U.S.C.A. § 4212, requires that Federal contractors and subcontractors (with respect to contracts greater than $100,000) affirmatively act to employ, and advance in employment, qualified special disabled veterans, Vietnam-era veterans, and any other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

The regulations enforcing OFCCP's authority to conduct compliance reviews of Federal government contractors and subcontractors under the EO Laws are set out at 41 C.F.R. Chap. 60 (Office of Federal Contract Compliance Programs, Equal Employment Opportunity). These regulations apply to all Government contracting agencies and to contractors and subcontractors who perform under Government contracts.[21] Under the regulations, a "contract" is "any Government contract or subcontract."[22] A "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,"[23] and the term "contractor" means "a prime contractor or subcontractor."[24]

"Prime contractor" refers to "any person holding a contract and, for the purposes of Subpart B of this part, any person who had held a contract subject to the order."[25] The

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[20] *See* Executive Order 11246, Subpart B, Sec. 206(a).

[21] *See* 41 C.F.R. § 60-1.1. Chapter 60 of Title 41 of the Code of Federal Regulations sets out OFCCP's regulatory authority to conduct compliance reviews pursuant to the Rehabilitation Act at 41 C.F.R. Part 60-741 (Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities), and the Veterans' Act at 41 C.F.R. 60-250 (Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Recently Separated Veterans, and Other Protected Veterans). These Sections set out the same compliance review authority as that pursuant to Executive Order 11246.

[22] 41 C.F.R. § 60-1.3.

[23] *Id*.

[24] *Id*.

[25] *Id*. "Order" refers to parts II, III, and IV of Executive Order 11246, and Executive Order amending such order, and any other Executive Order superseding such order.

term “subcontractor” means “any person holding a subcontract and, for the purpose of Subpart B of this part, any person who had held a subcontract subject to the order.”[26] A “subcontract” is defined as follows:

> *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an 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;
>
> (2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.

41 C.F.R. § 60-1.3.

The regulations state that “each contracting agency shall include the . . . equal opportunity [EEO] clause contained in Section 202 of the [Executive] [O]rder in each of its Government contracts.”[27] The regulations state that the EEO clause is “incorporated by reference in all Government contracts and subcontracts,” and “by operation of the [Executive] Order” is “considered to be a part of every contract and subcontract required by the Order and the regulations . . . whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written.”[28]

Subpart B of 41 C.F.R. § 60-1 authorizes OFCCP to “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 employees are . . . treated during employment without regard to race, color, religion, sex, or national origin.”[29] A compliance review is a “comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts

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[26] *Id.*

[27] 41 C.F.R. § 60-1.4 (equal opportunity clause).

[28] 41 C.F.R. § 60-1.4(d), (e).

[29] 41 C.F.R. § 60-1.20(a).

undertaken by the contractor."[30] The compliance review may take place as a desk audit, an on-site review, or an off-site analysis of information provided by the contractor.[31]

OFCCP may initiate administrative or judicial enforcement proceedings where it determines violations of the EO Laws occurred.[32] OFCCP is authorized to refer matters to the Solicitor of Labor with a recommendation that "administrative enforcement proceedings . . . be brought to enjoin violations."[33] Where "a contractor refuses to submit an affirmative action program, or refuses to supply records or other requested information, or refuses to allow OFCCP access to its premises for an on-site review . . . OFCCP may immediately refer the matter to the Solicitor . . . ."[34]

B. Florida Hospital's Motion to Dismiss Appeal Pursuant to Section 715 of the NDAA

After the parties fully briefed the petition for review in this matter, President Obama signed into law the NDAA. Section 715 of that act addressed managed care support contracts under the TRICARE program. In Section 715, entitled "Maintenance Of The Adequacy Of Provider Networks Under The TRICARE Program," Congress amended 10 U.S.C.A. § 1097b(a) by adding the following new paragraph pertaining to network providers under TRICARE managed care support contracts:

> (3) In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy. 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

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[30] 41 C.F.R. § 60-1.20(a)(1).

[31] 41 C.F.R. § 60-1.20(a)(1)(i)-(iii).

[32] 41 C.F.R. § 60-1.26(a)(i)-(x).

[33] 41 C.F.R. § 60-1.26(b)(1).

[34] 41 C.F.R. § 60-1.26(b).

> contract for the performance of health care services or supplies on the basis of such requirement.[35]

Relying on Section 715, Florida Hospital moved to dismiss this appeal as moot, arguing that OFCCP no longer has jurisdiction over Florida Hospital under Prong One or Prong Two.

1. *Prong Two Jurisdiction (41 C.F.R. § 60-1.3(2))*

After reviewing OFCCP's briefs addressing Section 715 and its motion for reconsideration, we conclude that OFCCP has withdrawn its pursuit of jurisdiction over Florida Hospital under Prong Two, 41 C.F.R. § 60-1.3(2). In response to the ARB's order requesting further briefing in light of Section 715, OFCCP conceded that Section 715 removed its previously asserted reason for Prong Two jurisdiction over Florida Hospital.[36] In its motion for reconsideration, OFCCP reiterated this concession, stating as follows:

> As OFCCP has argued, Section 715's plain language removes *one* basis for OFCCP's jurisdiction over TRICARE network providers, as articulated in the second prong of the OFCCP's subcontract definition at 41 C.F.R. § 60-1.3. OFCCP can no longer assert that HMHS's obligation to create a network of health care providers encompasses the obligation to deliver medical services and that by providing such medical services as a subcontractor to HMHS, Florida Hospital performed, undertook or assumed HMHS's obligations under the prime contract to deliver those services.[37]

Following the Board's initial ruling, OFCCP did not proffer any arguments in support of any other basis for Prong Two jurisdiction. Given OFCCP's briefing, we find that OFCCP has abandoned its pursuit of Prong Two jurisdiction. Accordingly, there is no need to analyze that issue as it has been rendered moot.[38] It is undisputed that the ALJ's decision was based entirely on Prong Two; therefore, we vacate that decision and hold that this forecloses OFCCP from enforcing its 2007 Scheduling Letter by relying on Prong Two.

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[35] *See* 10 U.S.C.A. § 1097b(a)(3).

[36] OFCCP's Response to ARB Request for Briefing on Section 715 at 6.

[37] OFCCP's Motion to Reconsider at 9.

[38] The failure to argue a particular point may be deemed an abandonment or waiver of the argument. *See Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513, 527 (1994); *Russell v. United States*, 369 U.S. 749, 754 n. 7 (1962).

We turn next to the parties' dispute as to whether Prong One remains as a viable alternative basis for jurisdiction in this matter.[39]

2. Prong One Jurisdiction (41 C.F.R. § 60-1.3(1))

In its motion to dismiss, Florida Hospital argues that Section 715 categorically removed Prong One as a basis for OFCCP to exercise jurisdiction over TRICARE network providers. Even if Section 715 does not foreclose Prong One jurisdiction, Florida Hospital argues, Section 715 eliminated OFCCP's initial basis for jurisdiction under Prong One, and OFCCP should not be permitted to raise new arguments after Congress passed the NDAA. To the contrary, OFCCP argues that Section 715 does not create the categorical prohibition argued by Florida Hospital and that OFCCP sufficiently preserved a legal basis for asserting jurisdiction under Prong One independently from Prong Two.[40] We agree with OFCCP. To create a necessary analytical framework, we will begin with the text and legislative history of Section 715 and then analyze its effect on Prong One jurisdiction over TRICARE network provider contracts.[41]

Section 715's Terms and Legislative History

A straightforward reading of NDAA Section 715 reveals that it has limited impact. As we previously stated, Section 715 amends 10 U.S.C.A. § 1097b(a) by adding subsection 1097b(a)(3). The relevant part focuses entirely on the interpretation of the Medical Network Clause and provides as follows:

> 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*.[42]

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[39] In concluding that the issue of whether Section 715 bars OFCCP's assertion of jurisdiction under Prong Two is moot, we expressly reserve, without resolving, the question of whether OFCCP may assert jurisdiction under Prong Two in other cases with network provider agreements for reasons other than those prohibited by Section 715.

[40] The ALJ did not address Prong One, having ruled that Prong Two provided sufficient jurisdiction.

[41] We note that OFCCP objected to any retroactive application of Section 715. Because we find that Section 715 does not preclude Prong One jurisdiction, we see no need to address the issue of retroactivity.

[42] 10 U.S.C.A. § 1097b(a)(3) (emphasis added).

This portion of the new subsection 1097b(a)(3) consists of two clauses. The first clause (Clause One) identifies the issue: determining whether a network provider is a subcontractor for purposes of the Federal Acquisition Regulations (FAR) or any other law. Then, to resolve that issue, the second clause (Clause Two) establishes a *singular* and *narrow* limitation that applies to the Medical Network Clause found in TRICARE-managed care support contracts. Clause Two merely prohibits the government from using the Medical Network Clause (establishing, managing, and maintaining a network of providers) *as the basis* for labeling a managed care support contract as a contract to *perform* healthcare services. Stated more clearly, Section 715 simply clarifies that a Medical Network Clause does not translate into a duty to perform healthcare services. Contrary to Florida Hospital's argument, no language in Section 715 categorically bans the ability to label a TRICARE network provider as a "subcontracter" or categorically eliminates OFCCP jurisdiction over TRICARE network providers. In fact, in Section 715 there is no prohibition directed at network providers. Florida Hospital does not persuasively explain which words create the categorical exclusion of all TRICARE network medical providers from OFCCP's jurisdiction.

The legislative history to Section 715 removes any doubt of Congress's deliberate intent to substantially limit the Section 715's reach. The Senate proposed the original amendment to 10 U.S.C.A. § 1097b(a) on June 22, 2011, as Section 702. That section provided as follows:

> Network providers under such provider network agreements *are not considered subcontractors* for purposes of the Federal Acquisition Regulation or any other law.[43]

There is no question that this initial version categorically and clearly declared that no "network providers" were "subcontractors." On November 17, 2011, the Executive Office of the President objected to the categorical exclusion of TRICARE network providers from being considered subcontractors.[44] Following a conference committee to resolve the differences between the Senate and House, Congress made Section 702 the first clause in a new Section 715 but deleted one critical phrase, "*not considered*," and added an introductory phrase.[45] Removing the phrase "not considered" converted Section 702 from a complete ban against the "subcontractor" label to a permissive clause,

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[43] *See* S. 1867, 112th Cong. § 702 (2011) (emphasis added.).

[44] *See* Statement of Administration Policy, S. 1867 - National Defense Authorization Act for FY 2012, Nov. 17, 2011, at 4; http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

[45] *See* 157 Cong. Rec. H8356, H8411, H8592 (daily ed. Dec. 12, 2011)(Conference report on H.R. 1540, - National Defense Authorization Act for Fiscal Year 2012).

implicitly allowing for network providers to be considered subcontractors in some instances. In addition to removing the phrase "not considered," Congress added a clause to Section 702 that fundamentally changed the primary focus of the amendment away from network provider agreements and toward the prime contract. By adding the last phrase "on the basis of such requirement," Congress substantially limited the prohibitive language in Section 715. The Senate's proposed Section 702 fundamentally differed from Section 715. While Section 702 was a free-standing and unconditional ban applying to all network provider contracts, the new Section 715 simply clarifies, as a matter of law, the interpretation of the Medical Network Clause in TRICARE-managed care support contracts. With this understanding and history of Section 715, we next examine whether Florida Hospital correctly argues that Section 715 removes TRICARE network healthcare providers from the definition of "subcontracts" under Prong One and thereby removing jurisdiction from OFCCP.

Prong One Coverage and Network Providers

Determining whether Section 715 categorically eliminates Prong One coverage over Florida Hospital as a network provider requires a careful comparison of the two provisions. To completely neutralize Prong One coverage over network providers, on the face of the provisions alone, the expressed reach of Prong One must fall entirely within Section 715's limited prohibition. We find that Prong One's reach extends beyond Section 715's reach as demonstrated by a step-by-step review of Prong One's definition of "subcontracts."

Under Prong One, the term "subcontract" includes agreements between a covered prime contractor and another "person" where the agreement meets a general requirement and two Prong One specific conditions. The general requirement exists in the prefatory part of the definition and applies to Prong One and Prong Two subcontracts: that the prime contractor and subcontractor "do not stand in the relationship of an employer and employee" in the agreement in question (the "Non-employment Requirement").[46] This requirement simply excludes from the definition of "subcontract" all employer-employee agreements. This requirement does not implicate Section 715, as the Non-employment Requirement focuses on the legal relationship of the parties rather than the particular category of work or services to be provided, such as "network providers." In contrast, Section 715 only focuses on whether the prime contractor (like HMHS) can be considered a healthcare provider and the issue of employer-employee agreements is irrelevant. No party argues that HMHS and Florida Hospital entered into an employer-employee agreement; therefore, this requirement presents no obstacle in this case.

Beyond the Non-employment Requirement, Prong One's definition of "subcontract" contains two specific conditions. Those are: (1) the agreement must be for the purchase, sale or use of "personal property or nonpersonal services" (the "Purchase Condition"); and (2) the personal property and/or nonpersonal services must be "necessary to the [prime contractor's] performance of" its prime contract with the

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[46] This requirement also applies to the definition of "Government contract."

government (the "Necessary for Performance Condition"). The Purchase Condition immediately whittles Prong One's entire focus down to "purchase, "sale," or "use" agreements (the "Purchase Condition"). So long as the purchase is for personal property and/or nonpersonal services (discussed later), the Purchase Condition is met, as a matter of law. Under the Purchase Condition, the focus is on the nature of the purchased items or services and *not* the prime contractor's duties. Again, this question does not implicate Section 715 which focuses on the prime contractor's duties (whether the prime contractor's duties can be classified as providing "health care services").

Unlike the Purchase Condition, the Necessary for Performance Condition *does* focus on the prime contractor's duties. That condition requires that the purchased items be necessary for the performance of the prime contract. To decide what is "necessary" for the performance of the prime contract one must determine what the prime contractor is required to do. The prime contract can be for anything and, in fact, many different kinds of contracts have qualified as Prong One subcontracts.[47] After determining what the prime contract requires, the next question is whether the purchased items are "necessary" for any one or more of the prime contractor's duties. In some cases, Section 715 *might* settle that "performing healthcare services" is not a required contractual duty, but it leaves unanswered the real question of what *is* required under the prime contract. Most likely, the Government has required the prime contractor to do something under a contract and that "something" is the focus of the Necessary for Performance Condition. Consequently, the Prong One definition can apply to *any* kind of purchase, sale, or use agreement meeting the conditions set forth above. Section 715's limited prohibition focusing solely on a particular aspect of Managed Care Contracts does not categorically preclude us from determining whether Managed Care Contracts meet the definition of Prong One, even if such contract does not include the duty of performing health care services.

Turning to the case before us, then, the outcome will turn on what HMHS *is required* to do under its prime contract with the federal government and whether Florida Hospital provides personal property or nonpersonal services necessary for any one of HMHS's contractual duties. As we previously stated, OFCCP abandoned its argument on appeal that HMHS is required to perform healthcare services and, therefore, we do not consider the "performance of healthcare services" as an HMHS duty in our decision. But eliminating the "performance of health care services" as a consideration leads to Florida Hospital's remaining procedural objection in this case, which must be addressed before applying Prong One to the facts of this case.

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[47] *See, e.g., Dep't of Labor v. Coldwell Banker & Co.*, No. 1978-OFC-012, slip op. at 4, 1987 WL 774229 (Sec'y Aug. 14, 1987) (property management contract with the building owner was a subcontract because it was necessary to the government lease agreement); *OFCCP v. Monongahela R.R. Co.,* No. 1985-OFC-002, slip op. at 2-3 (ALJ Apr. 2, 1986), 1986 WL 802025, *aff'd* No. 1985-OFC-002, 1987 WL 967412 (Sec'y Mar. 11, 1987) (company that transported coal was a subcontractor because the coal was necessary to the government contract for electricity).

OFCCP's Independent Basis for Jurisdiction under Prong One

In its reply brief in support of its motion to dismiss the appeal, Florida Hospital argues that OFCCP's initial jurisdictional claim rested entirely on HMHS's alleged duty to "perform healthcare services" and that now OFCCP impermissibly raises new arguments after Florida Hospital filed its motion to dismiss. Florida Hospital argues that OFCCP's allegedly new arguments should be disregarded pursuant to Board precedent where it refused to consider arguments raised by a party for the first time on appeal.[48] In response, OFCCP contends that it asserted in its complaint and throughout this litigation that it had Prong One jurisdiction on bases that had nothing to do with Section 715. We agree with OFCCP that it previously raised an independent basis for jurisdiction under Prong One that is properly before us.

As a general principle of appellate jurisprudence, the Board may consider any alternative ground asserted by the moving party and supported by the record.[49] But the Board must be sure that the parties had a fair opportunity to address the alternative theory.[50] As we explain below, we find that OFCCP's independent legal argument for Prong One jurisdiction focusing on other HMHS duties is not a new legal argument. We also find that the parties sufficiently addressed OFCCP's alternative basis for jurisdiction under Prong One, and that issue is now squarely before us.

Beginning with its Complaint, OFCCP tracked Prong One and expressly asserted that Florida Hospital provided "nonpersonal services, which, in whole or in part, were necessary to the performance of Humana's contract or contracts with TRICARE."[51] Nowhere in its Complaint did OFCCP tether Prong One jurisdiction to one theory nor did it expressly say it was based on exactly the same theory as Prong Two jurisdiction. OFCCP repeatedly asserted Prong One jurisdiction in "Plaintiff's Memorandum in

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48 In support of its argument, Florida Hospital cites to the Board's decisions in *Administrator, Wage & Hour Div., USDOL v. Lung Assocs., P.A.*, ARB No. 09-029, ALJ No. 2007-LCA-013 (ARB Mar. 24, 2011); *Carter v. Champion Bus., Inc.,* ARB No. 05-076, ALJ No. 2005-SOX-023 (ARB Sept. 29, 2006), and *Lewandowski v. Viacom, Inc.*, ARB No. 08-026, ALJ No. 2007-SOX-088, slip op. at 10 (ARB Oct. 30, 2009). We agree with the general proposition that the Board may decline to address a concretely new argument. But, as we explain, OFCCP does not raise new arguments and none of these cases sufficiently compare to the case before us.

49 *See, e.g.*, *AquaTex Indus., Inc. v. Techniche Solutions*, 479 F.3d 1320, 1328 (Fed. Cir. 2007); *Perez v. Volvo Car Corp.*, 247 F.3d 303, 310 (1st Cir. 2001).

50 *See, e.g., Andersen v. Chrysler Corp.*, 99 F.3d 846, 855, n.5 (7th Cir. 1996)(may consider alternative grounds if nonmoving party had fair opportunity to submit evidence and contest the issue).

51 See Administrative Complaint ¶¶ 5, 12.

Support of its Motion for Summary Judgment."[52] In its summary judgment memorandum, OFCCP argued that Florida Hospital's services were necessary to the TRICARE/HMHS Contract because of a number of HMHS contractual obligations and duties that were separate from any allegation that HMHS was required to provide medical services.[53] The following quote from its summary judgment memorandum succinctly spells out the independent basis for Prong One jurisdiction:

> The Prime Contract between HMHS and TRICARE states that HMHS "shall provide a managed, stable, high-quality network or networks, of individual and institutional health care providers" and shall "establish [these] provider networks through contractual arrangements." (JSF ¶¶ 10-11). Defendant was and is one of the healthcare providers that HMHS has contracted with to fulfill its obligations to TRICARE. (JSF ¶ 22).[54]

When Florida Hospital filed a cross-motion, OFCCP expressly relied on its summary judgment memorandum as part of its response, further preserving its independent basis for Prong One jurisdiction.[55]

After the ALJ's ruling, and long before Section 715 was passed, OFCCP continued to assert an alternative basis and legal theory for jurisdiction under Prong One and denied that it had waived this claim. In its response to Florida Hospital's exceptions, OFCCP reiterated that HMHS was required to establish a network of health care providers, and that Florida Hospital was such a network provider and thereby provided services and supplies necessary to HMHS's obligations under the TRICARE/HMHS Contract.[56] Florida Hospital then accused OFCCP of switching its Prong One argument to rely solely on Florida Hospital's "status" as a network provider.[57] OFCCP disagreed

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[52] Plaintiff's Memorandum in Support of its Motion for Summary Judgment at 2, 3, 5-8, 18.

[53] *Id.* at 6-7.

[54] *Id.* at 8.

[55] See Plaintiff's Memorandum of Law in Response to Defendant's Motion for Summary Judgment and in Further Support of Plaintiff's Motion for Summary Judgment at 1.

[56] See Plaintiff OFCCP's Response to Defendant's Exceptions to the ALJ's Summary Decision and Order at 4, 10-11 (filed Dec. 3, 2010)("the relevant question is whether the *services* that Defendant contracted with HMHS to provide are necessary . . . .")(emphasis added.)

[57] See Defendant's Reply to Plaintiff's Response to Defendant's Exceptions at 2 (dated Feb. 7, 2011).

and pointed back to its motion for summary decision where it expressly discussed Florida Hospital's provision of services as the necessary service, not merely its "status" as a network provider.[58] Moreover, the parties stipulated that Florida Hospital actually provided $100,000 in services, meaning that Florida Hospital went beyond mere "status" as a network health care provider. OFCCP reiterated its alternative legal basis for Prong One jurisdiction in its February 28, 2011 rebuttal to Florida Hospital's reply, where it argued that HMHS was obligated to "contract with hospitals like Defendant to join [the network] and provide such medical services" and thereby making Defendant's role necessary for HMHS to fulfill its TRICARE/HMHS Contract. More importantly, in its motion for summary decision and exceptions, Florida Hospital argued that its contract was not necessary and that it involved personal services. Florida Hospital's own arguments made it clear to us that the parties understand that an independent Prong One jurisdiction was at issue below and on appeal. We find OFCCP's Complaint and Motion for Summary Decision raised a separate and remaining basis for its motion for summary decision. Therefore, we deny Florida Hospital's motion to dismiss and we now consider the parties' motions for summary decision under Prong One, as applied to this case; specifically whether the Florida Hospital contract with HMHS meets the two conditions to qualify as a Prong One subcontract.

C. The Parties' Motions for Summary Decision under Prong One

As we indicated, both parties filed motions for summary judgment addressing whether the Florida Hospital contract met the two conditions under Prong One jurisdiction.[59] OFCCP carries the burden of establishing that it has jurisdiction over Florida Hospital.[60] More specifically, to secure a summary decision, OFCCP must

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[58] See Plaintiff OFCCP's Rebuttal (Surreply) to Defendant Florida Hospital's Reply at 3 (dated Feb. 28, 2011)("Plaintiff has never argued that Defendant was paid merely for its "status" as a network provider"). See also Plaintiff's Memorandum in Support of its Motion for Summary Judgment at 3 ("Defendant has provided and continues to provide *services* which are necessary to the performance of HMHS's Prime Contract with TRICARE . . . .").

[59] Again, neither party argues that HMHS and Florida Hospital have an employer-employee relationship; therefore, the Non-employment Requirement for all subcontracts is satisfied and not an issue in this case.

[60] OFCCP has the burden of proof to establish or prove coverage over a party under the EO laws by a preponderance of the evidence. *OFCCP v. Keebler Co.*, No. 1987-OFC-020, slip op. at 3 (ARB Sept. 4, 1996) (arising under Section 503 of the Rehabilitation Act); *see also OFCCP v. Keebler Co.*, ARB No. 97-127, ALJ No. 1987-OFC-020, slip op. at 8, 30, 35 (ARB Dec. 21, 1999) (OFCCP has the burden to produce credible evidence); *OFCCP v. Keebler Co.*, No.1987-OFC-020, slip op. at 1, 4 (ARB Dec. 12, 1996).

Specifically, Executive Order 11246, Section 503 of the Rehabilitation Act, and the Veterans' Act and their implementing regulations are silent concerning the burden of proof to be applied in enforcement cases under the EO Laws. Departmental regulations applicable to this case provide that "[u]nless otherwise required by statute or regulations, hearings shall be

demonstrate through undisputed facts and supporting law that the Florida Hospital contract meets the two conditions for a Prong One jurisdiction (the Purchase Condition and the Necessary for Performance Condition). Florida Hospital argues that its contract with HMHS meets neither of these conditions. We are persuaded by OFCCP that the Florida Hospital contract satisfies both Prong One conditions as a matter of law.

The Purchase Condition and Nonpersonal Services

The parties' disagreement as to whether the Florida Hospital contract satisfies the Purchase Condition centers on the meaning of the term "nonpersonal services." The EO Laws contain no statutory definition for this term. The program-specific regulations merely describe the term but the parties advance opposite interpretations of the description.[61] That description simply provides that nonpersonal services "includes, but is not limited to, the following services: Utilities, construction, transportation, research, insurance, and fund depository."[62] OFCCP argues that this is a "non-exclusive list of examples" and that the Board has previously determined that "medical services" can qualify as "nonpersonal services."[63] Florida Hospital disagrees and argues that health care services materially differs from this list and does not fit within the category of "nonpersonal services."[64] The description expressly states that the list is not exclusive; therefore we understand the list to serve as a guide of what kind of services might qualify as nonpersonal services.[65] But we find that this list of examples provides very little

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conducted in conformance with the Administrative Procedure Act." 5 U.S.C.A. § 554 (West 1996); 29 C.F.R. § 18.26 (2012). Accordingly, the burden of proof required by the Administrative Procedure Act (APA) governs enforcement cases under the EO Laws. *OFCCP v. Bank of America*, ARB No. 07-090, ALJ No. 2006-OFC-003, slip op. at 7-8, n.36 (ARB Sept. 30, 2009)(arising under Executive Order 11246); *Keebler Co.*, ARB No. 97-127, slip op. at 22 (arising under Section 503 of the Rehabilitation Act); *OFCCP v. Goodyear Tire & Rubber Co.*, ARB No. 1997-039, ALJ No. 1994-OFC-011, slip op. at 9-10 (ARB Aug. 30, 1999)(arising under Section 503 of the Rehabilitation Act). Under the APA, the standard of proof in administrative adjudications "is the traditional preponderance-of-the-evidence standard." *Steadman v. SEC*, 450 U.S. 91, 102 (1981) (construing the provision at 5 U.S.C.A. § 556(d) (West 1996) that provides, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof"); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277 (1994) (reaffirming *Steadman).*

[61] See 40 C.F.R. § 60-1.3 (definition of "government contract").

[62] *Id.*

[63] Plaintiff's Memorandum in Support of its Motion for Summary Decision at 7.

[64] Defendant's Motion for Summary Judgment and Supporting Brief at 4 n.2 (filed on May 17, 2010).

[65] See *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 36 (1990)("words grouped in a list should be given related meaning")(internal quotation marks omitted). We also note that, in *UPMC Braddock v. Harris*, __ F. Supp. 2d __, 2013 WL 1290939, slip op. at 10 (D.D.C.,

guidance as to the definition of "nonpersonal services," and we must look elsewhere for additional guidance.

Moving beyond the program-specific description of nonpersonal services, the parties disagree about which other regulatory definitions should apply to further define this term. OFFCP argues we should apply the definition found in the Federal Acquisition Regulations (FARs) at 48 C.F.R. § 37.101 (2012), the same definition we applied in *UPMC Braddock,* ARB No. 08-048, slip op. at 9-10. Pursuant to 48 C.F.R. § 37.101, "nonpersonal services" means that the services may not be subject to the kind of supervision and control "usually prevailing in relationships between the government and its employees." *Id*. at 9. In contrast, Florida Hospital argues that the Board should look to the Office of Personnel Management (OPM) Federal Employees Health Benefits Acquisition Regulation (FEHBAR) at 48 C.F.R. § 1601.170-4 (2012) and that definition expressly excludes "providers of direct medical services or supplies to a contractor's health benefit plans."[66] It also argues that the plain meaning of "nonpersonal" services implicitly excludes "personal" services and medical services are inherently "personal" services.[67] We find that the definition of "nonpersonal services" for purposes of the EO Laws is now settled by the Board's decision in *UPMC Braddock*.

The Applicable Rulings in UPMC Braddock

In *UPMC Braddock*, while the facts differed in some material aspects, we find that the district court's ruling on the definition of "nonpersonal services" applies here. Like this case, the OFCCP in *UPMC Braddock* attempted to conduct a compliance review of a healthcare provider as a subcontractor under Prong One, as well as Prong Two. The U.S. Office of Personnel Management contracted with the University of Pittsburgh Medical Center's Health Plan (UPMC), a health maintenance organization. UPMC had contracts with several hospitals that would provide the health care services, some of which were the respondents in *UPMC Braddock* (UPMC Braddock Hospital). The ALJ found and the Board affirmed that the "Defendants provided 'nonpersonal services' because they were neither in an employer-employee relationship with the UPMC nor under the supervision and control that an employer would exercise over its employees." *UPMC Braddock,* ARB No. 08-048, slip op. at 10.

In affirming the Board's decision in *UPMC Braddock*, the district court affirmed two Board rulings pertaining to the meaning of "nonpersonal services" that now apply to the Florida Hospital contract. First, for the definition of "nonpersonal services," the

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Mar. 30, 2013), the court found this list merely identifies examples of contracts where the contractor provides ongoing services to the government but maintains exclusive supervisory control over its personnel. As we explain later, seeing the list in this light is consistent with the definition of "nonpersonal services."

[66] Defendant's Motion for Summary Judgment and Supporting Brief at 4 n.2 (filed on May 17, 2010).

[67] *Id*.

district court affirmed the Board's reliance on Chapter 1 of Title 48 of the FARs, particularly 48 C.F.R. §§ 22.801, 37.101 and 37.104. The district court found significant that Chapter 1 establishes general procurement rules pertaining to nondiscrimination by contractors and subcontractors (48 C.F.R. § 22.800) and defines "subcontract" in a virtually identical manner (48 C.F.R. § 22.801) as the EO Laws. *UPMC Braddock*, __ F. Supp. 2d __, slip op. at 9. 48 C.F.R. § 37.101 defines the overall category of "service contracts" and then the subset of "nonpersonal services contracts" with more detail than the EO laws, and provides as follows in relevant part:

> "*Service contract*" means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a nonpersonal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis. . . .
>
> "*Nonpersonal services contract*" means 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. § 37.104(a) defines "personal services" as follows, in relevant part:

> (a) A *personal services contract* is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.
>
> (b) Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so.
>
> (c)(1) An employer-employee relationship under a service contract 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. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a Government employee.

Second, the district court also affirmed the Board's rejection of Chapter 16 of the FAR regulations as a source for the definition of "subcontract."[68] Notwithstanding OPM's involvement in the contracting, the district court in *UPMC Braddock* rejected OPM's FEHBAR at 48 C.F.R. § 1602.170-15, which provides as follows:

> Subcontractor means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor, *except for providers of direct medical services or supplies pursuant to the Carrier's health benefits plan*.

(Emphasis added). The district court rejected the FEHBAR because "it has no apparent connection to any agency besides OPM" and "no evident connection to employment practices."[69] The district court further found that it made no sense that one particular class of contracts, healthcare providers, would be excluded from the definition of subcontract in the EO Laws.[70] For the same reasons stated by the district court, we find that the FEHBAR does not apply to the Florida Hospital contract, especially where OPM is not involved with either the HMHS contract or the Florida Hospital contract.

Expanding on UPMC Braddock

The district court in *UPMC Braddock* also rejected the argument that "nonpersonal services" excludes services that are "personal" between a service contractor (a medical provider) and a third party beneficiary (the patient) of the service contractor.[71] In addressing this argument, the district court expanded on the Board's decision by adding that the term "nonpersonal service" has nothing to do with the nature of a relationship between a service contractor (UPMC Braddock Hospital) and third party beneficiaries (the patients) of the government HMO contract.[72] The court ruled that "nonpersonal services" focuses on "the relationship between the contractor and the

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[68] See FEHBAR at 48 C.F.R. § 1601.101(b).

[69] *UPMC Braddock*, __ F. Supp. 2d __, slip op. at 9.

[70] *Id*. at 10.

[71] *Id.* at 10-11. In fact, the FAR expressly allows for and regulates "nonpersonal health care services" contracts. *See* 48 C.F.R. § 37.4.

[72] *UPMC Braddock*, __ F. Supp. 2d __, slip op. at 10.

employees of the subcontractor" and the degree of control the government or prime contractor (the purchasers) exercises over the delivery of purchased services.[73]

For several reasons, we agree that the terms "nonpersonal" and "personal" services in the EO Laws focus on the purchaser's degree of control over the "delivery of services" purchased under a "service contract." To begin with, in providing general procurement definitions for these terms, the FAR regulations at 48 C.F.R. §§ 37.101 and 37.104 expressly focus on the degree of control resulting from the terms of a service contract or the manner in which the contract is administered. 48 C.F.R. § 37.104(d) lists six factors to consider when assessing the degree of control under a service contract. Where a service contract involves substantial control over the delivery of services, an "employer-employee relationship under [such] service contract *occurs*" (a de facto employer-employee relationship).[74] This distinction is critical because, as 48 C.F.R. § 37.104(a) makes clear, the government is generally required to hire employees by "direct hire under competitive appointment or other procedures required by the civil service laws."[75] Acquisition of "personal services by contract, rather than by direct hire, circumvents [the civil service laws] unless Congress has specifically authorized acquisition of the services by contract."[76] Consequently, and generally speaking, the difference between a de facto "personal services contract" and a nonpersonal services contract often means the difference between an unlawful and a lawful services contract.

Relying on the FAR regulations at 48 C.F.R. §§ 37.101 and 37.104 to define "nonpersonal services" allows this term to have a different meaning from the Non-employment Requirement in the EO laws, resulting in a complementary understanding of these terms. As stated earlier, the Non-employment Requirement excludes from the term "Government contracts" and "subcontracts" any agreements where the contracting parties "stand in the relationship of employer and employee."[77] Yet, the EO Laws also expressly impose the "nonpersonal services" condition on government contracts as well as

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[73] *Id*.

[74] 48 C.F.R. § 37.104(c)(1)-(2), (d)(6)(ii) (emphasis added).

[75] Significantly, TRICARE's enabling statutes expressly govern the manner in which the Secretary of Defense and the Secretary of Homeland Security (for certain non-Navy activities of the Coast Guard) may enter into personal service contracts with individuals to carry out "health care responsibilities" at "medical treatment facilities of the Department of Defense" and "locations outside medical treatment facilities." *See* 10 U.S.C.A. § 1091(a)(1), (2) (Thomson Reuters 2010).

[76] 48 C.F.R. § 37.104(a).

[77] See 41 C.F.R. § 60-1.3.

subcontracts.[78] In light of 48 C.F.R. §§ 37.101 and 37.104, we understand the Non-employment Requirement as focusing on "direct hires" or agreements where the parties

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[78] We note that legislative history of the regulatory definition of "subcontract" suggests that the term "nonpersonal" was added after the Non-employment Requirement was in place. First, we note that the term "nonpersonal services" has existed in federal procurement terminology as far back as the 1930s and 1940s. *See* 10 C.F.R. § 35. 7 (1938), 4 Fed. Reg. 1598 (Apr. 13, 1939), and 10 C.F.R. § 35.7 (1939 Sup.) (all expressly referring to the engagement of "nonpersonal services" and "contracts for nonpersonal service, as for the hire of a wagon and team"); Federal Property and Administrative Services Act of 1949, 40 U.S.C.A. § 102 (Thomson/West 2005 & Thomson Reuters Supp. 2012). Yet, as of January 1, 1968, the definitions for "Government contract" and "Subcontract" in the regulations implementing the equal employment opportunity requirements for Government contracts set forth in Executive Order 10925, 26 Fed. Reg. 1977 (Mar. 6, 1961), and Executive Order 1114, 28 Fed. Reg. 6485 (June 22, 1963), did not contain the word "nonpersonal" in referring to "supplies or services." *See* 41 C.F.R. § 60-1.2(h), (k) (1968) (revised as of Jan. 1, 1968). But the term "Government contract" included the non-employment requirement while the term "Subcontract" did not. *Compare* 41 C.F.R. § 60-1.2(h) (1968) (revised as of Jan. 1, 1968) (defining a "Government contract" as one "in which the parties, respectively, do not stand in the relationship of employer and employee), *with* 41 C.F.R. § 60-1.2(k) (1968) (revised as of Jan. 1, 1968) (making no reference to a "relationship of employer and employee").

On February 15, 1968, the Secretary of Labor issued a Notice of Proposed Rule Making, proposing new permanent regulations revising the regulations at 41 C.F.R. Part 61to implement Executive Order 11246, which vested in the Secretary of Labor the functions related to Government contracts previously exercised by the President's Committee on Equal Employment Opportunity. 33 Fed. Reg. 3000-3002 (Feb. 15 1968). The proposed regulations revised the definitions of "Government contract" and "subcontract" and were permanently implemented on May 28, 1968. 33 Fed. Reg. 7804 (May 28, 1968). The revised definition of "subcontract" added the non-employment requirement. *See* 41 C.F.R. § 60-1.3(w) (1969); 33 Fed. Reg. 7805 (defining "subcontract" as one "in which the parties do not stand in the relationship of an employer and an employee"). But the word "nonpersonal" was not added to the new proposed definitions of "Government contract" or "subcontract" (leaving the operative phrase "supplies or services"). *See* 41 C.F.R. § 60-1.3(m) and (w) (1969); 33 Fed. Reg. 7805. Interestingly, the term "services" was defined in the new proposed definition of "Government contract" to include the exact same list of examples that currently exist for "nonpersonal services" in the definition of "Government contract." *Compare* 41 C.F.R. § 60-1.3(m) (1969), *with* 41 C.F.R. § 60-1.3 (2012).

When Section 503 of the Rehabilitation Act was issued in 1973, it stated that its provisions applied to a contract "for the procurement of personal property and nonpersonal services." 29 U.S.C.A. § 793(a). OFCCP subsequently revised the regulations implementing Section 503 of the Rehabilitation Act to add the term "nonpersonal" to the definitions of "Government contract" and "subcontract," while still retaining the non-employment requirement. *See* 57 Fed. Reg. 48084, 48088-48089 (Oct. 21, 1992); 61 Fed. Reg. 19336, 19339, 19341 (May 1, 1996). Later, OFCCP similarly revised the regulations implementing

expressly intended to create an employer-employee relationship.[79] Meanwhile, the term "personal services contracts" refers to those contracts that in effect resemble an "employer-employee" relationship because of the nature of the contract terms or the manner in which the contract is administered.

The FAR definition at 48 C.F.R. § 37.101 also fits with the examples of nonpersonal services listed in the EO Laws' definition of "government contract," such as utilities, construction, and transportation. With little need for supervision, the government or a prime contractor can hire companies to install and maintain gas furnaces in a government building, build temporary housing facilities on a worksite, or operate a shuttle service for government employees traveling to and from work. Similarly, the government or a prime contractor can purchase medical services for third-party beneficiaries (federal workers or military personnel) and be billed in bulk for such services with no involvement in the doctor-patient meetings leading up to those services.

Turning to the facts in this case, we find that the HMHS contract with Florida Hospital is for the purchase of nonpersonal services. It is undisputed that "[n]either HMHS nor TRICARE has any involvement, direction or control over the provision of health care services/supplies provided by Florida Hospital."[80] It is undisputed that TRICARE and HMHS impose a certain standard of care and reporting, but the parties stipulated and the undisputed facts demonstrate that the medical care professional operates independently from HMHS when deciding the ultimate care provided to the beneficiaries. The medical providers then bill HMHS for covered services and HMHS administers the payment from the Government to Florida Hospital. We now turn to the second condition for Prong One jurisdiction, the Necessary for Performance Condition.

Necessary for Performance Condition

The threshold for the Necessary for Performance Condition is low. By its plain terms, the Florida Hospital contract satisfies this condition if Florida Hospital provides, "in whole or in part," personal property or nonpersonal services necessary to the performance of the HMHS contract. We find that it does.

Executive Order 11246, *see* 62 Fed. Reg. 44174-44176 (Aug. 19, 1997), and the Veterans' Act, *see* 70 Fed. Reg. 72148, 72151-72152 (Dec. 1, 2005).

[79] Often "direct hires" are appointments without a contract. Courts have often discussed this paradigm of three categories of government personnel: (1) "direct hires; (2) personal services contractors; and (3) nonpersonal services contractors. *See Tsosie v. United States*, 452 F.3d 1161, 1162-1165 (10th Cir. 2006); *deTorres v. Comm'r*, 65 T.C.M. (CCH) 2381 (1993).

[80] Defendant's Motion for Summary Judgment and Supporting Brief at 3 (filed on May 17, 2010) (citing C. Smith Decl. (Def. Ex. 1)).

The parties again advance different views of HMHS's duties under its contract as it relates to the role of the health care services Florida Hospital provides. OFCCP points to numerous requirements under the prime contract to argue that Florida Hospital's health care services are necessary to the performance of the prime contract. For example, OFCCP noted before the ALJ that the prime contract states that HMHS "*shall* provide a managed, stable, high-quality network, or networks, of individual and institutional health care providers" and shall "establish [these] provider networks through contractual arrangements."[81] OFCCP argues that HMHS is more than an insurer.[82] It argues that the HMHS contract is more than a "reimbursement agreement."[83] Most importantly, it is undisputed that Florida Hospital performs some medical services as part of an "integrated" healthcare delivery system that begins with the United States Department of Defense's stated goal of providing "an improved and uniform program of medical and dental care for members [of the uniformed services] and certain former members of those services, and for their dependents."[84]

Florida Hospital raises several arguments to minimize the significance of its role with respect to the HMHS contract. Florida Hospital argues that HMHS merely provides "administrative services" and that HMHS is not really dependent on Florida Hospital's role.[85] Florida Hospital also argues that even if HMHS was required to create a network of providers, Florida Hospital's "status" as a network provider is not a necessary "service" as required under Prong One.[86] It argues that the Board has previously found, in *OFCCP v. Bridgeport Hosp.*, ARB No. 00-034, ALJ No. 1997-OFC-001 (ARB Jan. 31, 2003), that the obligation to establish a network of providers does not mean that the provider's role is necessary to the prime contractor's duties. *Id.* Third, it argues that it is not a necessary service because beneficiaries may opt to use other providers.[87] We are not persuaded by these arguments.

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[81] Plaintiff's Motion for Summary Judgment at 8 (filed with the ALJ May 17, 2010).

[82] *Id*. at 12-13.

[83] Plaintiff's Memorandum of Law In Response to Defendant's Motion for Summary Judgment and In Further Support of Plaintiff's Motion for Summary Judgment at 3 (filed on June 7, 2010).

[84] 10 U.S.C.A. § 1071.

[85] See Defendant's Motion for Summary Judgment and Supporting Brief at 2 (filed on May 17, 2010).

[86] Defendant's Reply to Plaintiff's Response to Defendant's Exceptions at 3 (filed on Feb. 7, 2011).

[87] Defendant's Motion for Summary Judgment and Supporting Brief at 7 (filed on May 17, 2010).

The record indisputably establishes medical services as the essential reason for the TRICARE-HMHS-Florida Hospital arrangement. We find that the stipulated facts establish that HMHS's duties as an administrator were incidental to the overall goal of obtaining medical services. Florida Hospital made a critical admission that amplifies this point when it stated that "HMHS has agreed to provide medical services at negotiated rates to TRICARE beneficiaries."[88] We understand that HMHS was not going to directly "provide medical services" but it would indirectly ensure that they were provided. But providing medical services is clearly TRICARE's goal, and HMHS's role as an intermediary is an essential means to that goal. Indeed, it is hard to understand how HMHS could fulfill its contract to create an integrated health delivery system without the services from network providers like Florida Hospital. "In sum, TRICARE is a health care program; not merely an insurance reimbursement program like Medicare Parts A and B."[89] It would be strange to find that Florida Hospital's contract was not necessary to the HMHS prime contract simply because TRICARE sought the assistance of HMHS to achieve its overall goal of creating a healthcare program for its active duty members, retired members, and their dependents.

Again, the ARB's holding in *UPMC Braddock*, as affirmed by the district court, bolsters our finding in this case. Like the intermediary in *UPMC Braddock*, HMHS is much more than an insurer; HMHS must establish and maintain a high-level network to ensure that members actually receive medical care, not simply insurance or access to health care.

We also reject Florida Hospital's argument that the Board's decision in *Bridgeport*, ARB No. 00-034, slip op. at 6, requires dismissal of this appeal. Florida Hospital argues that *Bridgeport* limits the focus in this case to the "single and dispositive question" of whether "HMHS agree[d] to provide medical services in its agreement with TRICARE."[90] First, we disagree that *Bridgeport* mandates such a narrow question in this case. The ARB in *Bridgeport* agreed with the ALJ, for several reasons, that the prime contractor committed only to provide health insurance and reimbursement, and "made no commitment to assure hospital care or services to enrollees."[91] If the prime contractor did not have a duty to "assure health care services," then Bridgeport Hospital's actual provision of health care services would not be necessary to the prime contractor's performance. Consequently, the ARB simply concluded that questions about Prong One

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[88] Defendant's Motion for Summary Judgment and Supporting Brief at 2 (filed on May 17, 2010)(citing O'Shaunessy Decl. (Def. Ex. 2)).

[89] Plaintiff's Memorandum of Law In Response to Defendant's Motion for Summary Judgment and In Further Support of Plaintiff's Motion for Summary Judgment at 6 (filed on June 7, 2010).

[90] Defendant's Reply to Plaintiff's Response to Defendant's Exceptions at 3 (dated Feb. 7, 2011).

[91] *Bridgeport*, ARB No. 00-034, slip op. at 6.

"do not arise in this appeal."[92] Moreover, from the limited record before us, it appears that this case materially differs from the facts in *Bridgeport*. In *Bridgeport*, the OPM contracted with Blue Cross and Blue Shield to provide healthcare insurance, and then Blue Cross and Blue Shield contracted with Bridgeport Hospital to provide medical services. OPM was acting as a human resources office securing health insurance, not running a government funded healthcare program. In this case, TMA administers a "worldwide healthcare program" seeking to create an "integrated healthcare delivery program" for its beneficiaries.[93] The stipulated facts before us do not demonstrate that this case sufficiently parallels *Bridgeport*. Therefore, to the extent that Florida Hospital correctly read the Board's holding in *Bridgeport*, it is not binding in this case.

Finally, we find as immaterial Florida Hospital's argument that it had not expressly agreed to be such a subcontractor.[94] The Board previously rejected this argument in *UPMC Braddock*, noting that the EO laws mandate inclusion of their equal opportunity clauses in any federal contract or *subcontract*[95] and their implementing regulations provide that the equal opportunity clauses are incorporated by operation of law in "every contract and *subcontract* required by [the relevant law] and regulations . . . to include such a clause whether or not it is physically incorporated in each such contract and whether or not the contract between the agency and the contractor is written."[96] "[W]here regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties."[97] The EO laws implementing regulations have the force and effect of law.[98] So the equal opportunity clauses are incorporated by operation of each law into Florida Hospital's agreement with HMHS.

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[92] *Id.*

[93] SF ¶ 5 and JX A Section C-1 of the Prime Contract (General), Description/Specifications/Work Statement.

[94] See Defendant's Exceptions to Recommended Summary Decision and Order of Administrative Law Judge at 13.

[95] *See* 30 Fed. Reg. 12,319 § 202; 29 U.S.C.A. § 793(a); 38 U.S.C.A. § 4212(a)(1) (emphasis added).

[96] 41 C.F.R. §§ 60-1.4(e), 60-250.5(e), 60-741.5(e) (emphasis added); *UPMC Braddock*, ARB No. 08-048, slip op. at 5.

[97] *UPMC Braddock*, ARB No. 08-048, slip op. at 6, quoting *United States v. New Orleans Public Serv., Inc.,* 553 F.2d 459, 469 (5th Cir. 1977).

[98] *See New Orleans Public Serv.*, 553 F.2d at 465 ("[A]n Executive Department regulation which is issued pursuant to an act of Congress and by the department responsible for the administration of the statute has the force and effect of law if it is not in conflict with an express statutory provision." (citing *Maryland Cas. Co. v. United States*, 251 U.S. 342, 349 (1920)).

Having met the conditions for a "subcontract" under Prong One, we affirm the ALJ's ruling sustaining OFCCP's jurisdiction, although on the grounds that the Florida Hospital contract is a "subcontract" under Prong One as a matter of law. The question then becomes whether Florida Hospital can demonstrate that it is nevertheless exempt from OFCCP jurisdiction because the payments it receives under the TRICARE program constitute federal financial assistance.

D. Florida Hospital Invokes the Financial Assistance Program Exclusion

The final issue pending before us is whether HMHS's reimbursement payments to Florida Hospital under the network provider agreements qualify as federal financial assistance thereby excluding Florida Hospital from OFCCP's jurisdiction. As a preliminary matter, neither party has pointed to any statute or regulation indicating that federal financial assistance programs exclude the possibility of coverage under the EO Laws, much less that TRICARE cannot be covered by both the EO Laws and Title VI.[99] In our view, this issue should be expressly settled before the parties and the ALJ spend resources analyzing whether TRICARE is a federal financial assistance program.[100] In a cross-motion for summary judgment, Florida Hospital argues that TRICARE has stated that it is a federal financial assistance program subject to Title VI of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000d *et seq.* (West 2003), and substantially resembles the federally subsidized health programs like Medicare Part A and Part B. Because courts have found that Medicare payments constitute federal financial assistance, Florida Hospital argues that the payments to Florida Hospital also constitute federal financial assistance not subject to OFCCP's jurisdiction.[101] OFCCP argues that TRICARE was

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[99] Pointing to page 6 of Plaintiff's [OFCCP's] Memorandum of Law In Response to Defendant's [Florida Hospital's] Motion for Summary Judgment and In Further Support of Plaintiff's Motion for Summary Judgment (filed on June 7, 2010), Florida Hospital argues that OFCCP concedes that it does not have jurisdiction over federal financial assistance programs. *See* Defendant's Reply to Section II(D) of Plaintiff's Response to Defendant's Motion for Summary Judgment at 2. However, we do not see the concession as stated by Florida Hospital. OFCCP makes the following more limited concessions: (1) "Thus, OFCCP admits that Medicare Parts A and B do not by themselves give rise to OFCCP jurisdiction" and (2) "receipt of federal 'financial assistance' is not the same as having a federal contract." See Plaintiff's Memorandum of Law in Response to Defendant's Motion for Summary Judgment and in Further Support of Plaintiff's Motion for Summary Judgment at 6 (filed on June 7, 2010).

[100] We note that 41 C.F.R. § 60-1.1 expressly prohibits applying the EO Laws to "any action taken to effect compliance with respect to employment practices subject to title VI of the Civil Rights Act of 1964," but it does not refer to the Title VI and the EO Laws as exclusive of each other, nor does it suggest that receiving federal financial assistance precludes jurisdiction under the EO Laws.

[101] See Defendant's Motion for Summary Judgment and Supporting Brief at 14-24.

established to ensure or optimize the delivery of quality medical services to military personnel (or uniformed services) and, therefore, it is different from Medicare and not a federal financial assistance program.

The ALJ concluded that TRICARE differs from Medicare and, therefore, is not a federal financial assistance program. He reasoned that Medicare is merely an insurance program that "does not *provide* medical services to its beneficiaries, it simply pays for such services," whereas the purpose of TRICARE is to ensure or "optimize the *delivery* of health care services" or, apparently, to provide medical services.[102] Thus, he concluded that Medicare and TRICARE "are totally different programs."[103] Relying on *UPMC Braddock*, ARB No. 08-048, slip op. at 8-9, the ALJ held that he was not obligated to apply a regulatory definition of "subcontractor" under the FAR if it conflicts with the Secretary's OFCCP regulations implementing the anti-discrimination provisions of the laws enforced by OFCCP. Finally, the ALJ rejected as inapposite the cases Florida Hospital cited to support its argument that TRICARE is like Medicare and, therefore, constitutes federal financial assistance.[104] As we explain below, we find that the parties failed to address the most critical question in addressing the issue of federal financial assistance: the "intention of the government."[105]

While we found no direct parallel[106] to the case before us, at least two federal appellate court cases convince us that congressional intent determines whether TRICARE

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102 D. & O. at 5 (emphasis added).

103 *Id.* at 6.

104 *Id*.

105 *DeVargas v. Mason & Hanger-Silas Mason, Co., Inc.*, 911 F.2d 1377, 1382 (10th Cir. 1990). We say that the "parties" failed to address the central issue, but we note, without addressing, that only one party carries the burden of proof on this issue. Where the material facts are undisputed, the party carrying the burden of proof will suffer the consequences of failing to advance a convincing legal basis. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (stating that summary judgment is proper "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 of proof at trial"). In any event, in this case, the issue of federal financial assistance is too complex and significant to dispose of it on such a procedural note.

106 In many of the cases in which parties have addressed the issue of federal financial assistance, the plaintiff argued that the defendant received federal financial assistance and was thereby obligated to comply with various non-discrimination laws. In the case before us, the opposite is true. Florida Hospital stipulated that it *does* receive federal financial assistance through TRICARE and is obligated to comply with the non-discrimination laws of Title VI of the Civil Rights Act of 1964, thereby excepting it from OFCCP's jurisdiction under the EO Laws. SF ¶¶ 29 and 30.

is a federal financial assistance program.[107] The labels an agency assigns or the expectations of the beneficiaries are not dispositive.

In *Shotz v. American Airlines, Inc.*, the United States Court of Appeals for the Eleventh Circuit focused on Congressional intent to determine that the program in that case was not a federal financial assistance program.[108] In *Shotz*, a potential plaintiffs' class of persons with disabilities sued ten airline carriers for alleged violations of the Rehabilitation Act. The plaintiffs claimed that the airlines were required to comply with Section 504 of the Rehabilitation Act, 29 U.S.C.A. § 794 (Thomson Reuters/West 2008), because they received federal financial assistance under the Air Transportation Safety and System Stabilization Act, 49 U.S.C.A. § 40101 (Thomson/West 2007)(the "Stabilization Act").[109] The plaintiffs argued that part of the aid distributed under the Stabilization Act "went far beyond compensating actual or potential losses" and therefore was a subsidy, that is, financial assistance.[110] Unlike the case before us, the defendants argued that they did not receive federal financial assistance and, therefore, were not obligated to comply with the non-discrimination laws under the Rehabilitation Act. In ruling that the plaintiffs' argument "misse[d] the mark," the court explained that the question was not whether the distribution was in the nature of compensation or a subsidy, but whether Congress intended the financial distribution to be a subsidy and, more specifically, a subsidy that would "trigger the coverage of § 504" of the Rehabilitation Act.[111] The court in *Shotz* explained that it "must look to the Act itself" to determine such congressional intent.[112]

Similarly, in *DeVargas v. Mason & Hanger-Silas Mason Co.,* the United States Court of Appeals for the Tenth Circuit looked to "the intention of the government" to

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107 As we discuss further, those cases are *Shotz v. American Airlines, Inc.*, 420 F.3d 1332, 1335-1336 (11th Cir. 2005) and *DeVargas*, 911 F.2d at 1382 (10th Cir.1990). *See also U.S. Dep't of Trans. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 604 (1986) (the Supreme Court ruled that to determine who is a recipient of federal financial assistance under Section 504 of the Rehabilitation Act, "[w]e look to the terms of the underlying grant statute").

108 *See Shotz*, 420 F.3d at 1335-1336.

109 Congress passed the Stabilization Act to compensate airlines for losses they sustained from the September 11, 2001 terrorist attacks. 49 U.S.C.A. § 40101.

110 The plaintiffs conceded, for argument purposes, that under 49 U.S.C.A. § 40101(a)(2)(A) funds were not federal financial assistance but argued that the funds under 49 U.S.C.A. § 40101(a)(2)(B) were.

111 *Shotz*, 420 F.3d at 1336.

112 *Id*.

determine that a potential employer did not receive "federal financial assistance."[113] After being medically disqualified from applying for a position as a security inspector, DeVargas sued the prospective employer (Mason & Hanger), alleging violation of Section 504 of the Rehabilitation Act among other claims. Pursuant to a contract with the Regents of the University of California (Regents), Mason & Hanger supplied security inspectors for the Los Alamos National Laboratory, which the Regents operated for the United States Department of Energy. DeVargas argued that Mason & Hanger received federal financial assistance because it was paid above the fair market value for its contract services. The court in *DeVargas* rejected the argument that the fair market value for services dictated whether the government provided federal financial assistance. Instead, the court set out to determine the congressional intent behind the contract and looked at several factors, including the study that advocated for privatizing the security inspector positions and the fact that the government awarded the contract through a competitive bidding process. In essence, the court determined that the contract with Mason & Hanger was based upon a business decision, and Congress did not intend to subsidize Mason & Hanger's operations.[114]

For the same reasons explained in the *Shotz* and *DeVargas* cases, we conclude that we must rely on congressional intent to decide whether the TRICARE program is a federal financial assistance program governed by Title VI of the Civil Rights Act of 1964. For several reasons, we find that the record before us is insufficient to determine whether the Hospital Agreement emanates from a TRICARE program that receives federal financial assistance. First, an introductory look at the statutes governing the TRICARE program demonstrates that the TRICARE program is very comprehensive. The TRICARE/HMHS Contract expressly incorporates Title 10, Chapter 55 (Chapter 55), of the United States Code, making Chapter 55 a logical starting point to decipher Congressional intent. Chapter 55 begins with the following stated purpose:

> The purpose of this chapter is to create and maintain high morale in the uniformed services by providing an improved and uniform program of medical and dental care for members and certain former members of those services, and for their dependents.[115]

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[113] *DeVargas*, 911 F.2d at 1382.

[114] *Cf. Airline v. Sch. Bd. Of Nassau County*, 772 F.2d 759, 762 (11th Cir. 1985)("when the federal government makes payments for obligations incurred as a market participant such payments do not constitute 'federal assistance.'")(citations omitted).

[115] 10 U.S.C.A. § 1071.

Chapter 55 also includes a definition section that defines the term "TRICARE program" as:

> the managed health care program that is established by the Department of Defense under the authority of this chapter, principally section 1097 of this title, and includes the competitive selection of contractors to financially underwrite the delivery of health care services under the Civilian Health and Medical Program of the Uniformed Services.[116]

Section 1097, 10 U.S.C.A. § 1097, governs contracts for medical care for retirees, dependents, and survivors: alternative delivery of health care.[117] "The TRICARE program also relies upon other available statutory authorities, including 10 U.S.C.A. § 1099 (Thomson Reuters 2010) (health care enrollment system) and 10 U.S.C.A. § 1096 (Thomson Reuters 2010) (resource sharing agreements)."[118] Neither of the parties analyzed whether Congress intended that funding for any of these statutory provisions constituted federal financial assistance or a part of military compensation or entitlements that TRICARE would provide through military medical providers and/or private medical providers.

Second, the record indicates that TRICARE evolved into the program that it is today, making analysis of congressional intent more complex. For example, Florida Hospital suggests that "TRICARE began in 1966 with the passage of the Dependents Medical Care Act, which created the Civilian Health and Management Activity of the Uniformed Services ("CHAMPUS") beginning in 1967."[119] "In 1988, the CHAMPUS Reform Initiative was implemented, which offered service families a choice of ways in which they might use their military health care benefits and this program subsequently became known as TRICARE."[120] "From 2001 to the present, TRICARE has been continually expanded in an effort to make medical care coverage available to eligible beneficiaries, without regard to age or location."[121] Again, nowhere do the parties

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[116] 10 U.S.C.A. § 1072(7).

[117] See also 10 U.S.C.A. §§ 1079, 1086 (Thomson Reuters 2010 & Thomson Reuters Supp. 2012) (as to coverage).

[118] 32 C.F.R. § 199.17(a)(1)(3) (2012) (which describes the TRICARE program and benefits).

[119] Defendant's Motion for Summary Judgment and Supporting Brief at 1 (citing the TRICARE website (www.tricare.mil)).

[120] *Id.*

[121] *Id.*

specifically analyze whether Congress intended for one or all these evolutions to be federal financial assistance.

Third, the stipulations demonstrate that Florida Hospital agreed to provide a wide array of medical services. Pursuant to the Hospital Agreement, "Florida Hospital agreed to become a Participating Hospital of HMHS under the terms and conditions of that agreement and to provide health care services for Beneficiaries designated as eligible to receive benefits under the agreement between HMHS and TRICARE in accordance with the TRICARE rules, regulations, policies and procedures." SF ¶ 16. The Hospital Agreement "applies to all services provided by Florida Hospital for all persons designated by HMHS as eligible members, including active duty military personnel (Beneficiaries) to receive benefits under an agreement between HMHS and TRICARE Management Activity (TMA)." *Id*. at ¶ 22. The parties stipulated that Florida Hospital provided at least $100,000 in medical services. *Id*. at ¶ 17. While the Hospital Agreement suggests that Florida Hospital must be prepared to provide services for beneficiaries under all parts of the TRICARE program, we cannot assume this fact.[122] Consequently, whether by stipulation or an evidentiary hearing, the record must contain sufficient settled and clear facts explaining which programs, medical services, beneficiaries and corresponding federal funding source(s) relate to the medical services Florida Hospital provides prior to the ALJ's analysis of the Congressional intent question.

In the end, we find it more appropriate to remand this matter for further findings and/or legal argument by the parties on the issue of federal financial assistance. Our ruling on this issue of federal financial assistance is simply that the parties must provide additional argument and supplement the facts as necessary on the issue of congressional intent to allow the ALJ to make the necessary additional findings of fact and ultimate determination on the issue of federal financial assistance.

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[122] We note that the passage of the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988), established that the anti-discrimination provisions of Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973, among other laws, can apply to other programs of a recipient of federal financial assistance, even if only one of its programs received federal financial assistance. The Civil Rights Restoration Act of 1987 overturned the decision in *Grove City College v. Bell*, 465 U.S. 555, 570-71 (1982), which created the "program-specific" doctrine that limited the reach of Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C.A. § 1681(a) (Thomson Reuters 2010), to those programs that actually received federal financial assistance. *See Doe v. Salvation Army*, 685 F.3d 564, 567-68 (6th Cir. 2012) (explaining the passage of the Civil Rights Restoration Act of 1987 as a response to *Grove City* and its progeny); *Haybarger v. Lawrence Cnty. Adult Prob. & Parole,* 551 F.3d 193, 200 (3d Cir. 2008) (same); *McCormick v. Sch. Dist. of Mamaroneck,* 370 F.3d 275, 287-88 (2d Cir. 2004) (same). Consequently, we leave it to the parties to argue whether the details of the Florida Hospital agreement are relevant if any part of the TRICARE program constitutes federal financial assistance.

Conclusion

OFCCP having withdrawn its assertion of jurisdiction under 41 C.F.R. § 60-1.3(2) (Prong Two), we consider as moot the issue of whether NDAA Section 715 precludes OFCCP's assertion of Prong Two jurisdiction over the Florida Hospital subcontract, leaving only the question of OFCCP's assertion of Prong One jurisdiction to enforce the 2007 Scheduling Letter. For the preceding reasons, we find that the Florida Hospital contract with HMHS qualifies as a subcontract under 41 C.F.R. § 60-1.3(1) (Prong One) over which OFCCP has jurisdiction under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act. The ALJ's Summary Decision Order is vacated in light of our ruling, and this case is remanded for further consideration of the issue of federal financial assistance consistent with this Decision and Order.

SO ORDERED.

LUIS A. CORCHADO
Administrative Appeals Judge

E. COOPER BROWN
Deputy Chief Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

Chief Judge Igasaki and Judge Edwards, ***concurring in part, and dissenting.***

The majority's decision to revisit OFCCP's authority to conduct a compliance review of Florida Hospital under Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 404 of the Veterans' Act conflicts with Section 715 of the National Defense Authorization Act. The majority denies Prong Two jurisdiction on the basis of mootness. We concur with the majority that OFCCP lacks jurisdiction under Prong Two but, as OFCCP accepts, because Section 715 requires it. See OFCCP Brief in Support of Motion for Reconsideration at 9. The enactment of Section 715 of the NDAA removes OFCCP's jurisdiction under either Prong One or Prong Two based on the specific contract at issue in this case. We do not, therefore, believe that it is necessary to resolve the question whether TRICARE qualifies as a federal financial assistance program. Because we believe the majority's decision exceeds the Department's authority, we respectfully dissent.

Section 715 Of The National Defense Authorization Act Precludes OFCCP's Jurisdiction To Conduct A Compliance Review Of Florida Hospital

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v.*

American Trucking Ass'ns, Inc., 310 U.S. 534, 542 (1940). The majority's decision in this case departs from Congress's clear intent set out at Section 715 of the National Defense Authorization Act to remove from the definition of subcontracts for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract where the element of the contract that is "necessary to the performance of any one or more contract" involves the provision of health care network provider services to TRICARE beneficiaries.

A. *Administrative Proceedings Below*

1. *Office Of Federal Contract Compliance Program Policy Directive 293*

On December 16, 2010, two months after the ALJ issued a summary Decision and Order granting OFCCP's motion for summary decision and ordered Florida Hospital to comply with the compliance review request, OFCCP issued Directive 293 on "Coverage of Health Care Providers and Insurers." Coverage of Health Care Providers and Insurers, Directive 293, Department of Labor, Office of Federal Contract Compliance Programs Order, No. ADM Notice/JUR (Dec. 16, 2010) (Directive 293). Directive 293 provided guidance on "assessing when health care providers and insurers are federal contractors and subcontractors based on their relationship with a Federal health care program and/or participants in a Federal health care program" for purposes of OFCCP jurisdiction. *Id.* at 1. The Directive addressed coverage questions pertaining to Medicare, TRICARE, and Federal Employees Health Benefit Plan (FEHBP). *Id.* at 1, 3-4. OFCCP stated in the Directive that jurisdiction is driven by the existence of a "federal contractor or subcontractor relationship." *Id.* at 5. The Directive states: "If a company holds a covered Government contract or is a subcontractor to a Government contract, then all of the company's establishments and facilities are subject to OFCCP regulatory requirements, regardless of where the contract is to be performed." *Id.* The Directive further states:

> Under each of the Federal Programs, a company may enter into a direct (prime) contract with a Government agency, and/or a prime contractor may subcontract elements of its contractual obligations to provide health care services, insurance, administrative support or other supplies and services. It is these contractual relationships over which OFCCP has enforcement authority.

Id. at 6. Under the Directive, subcontract relationships may be covered where, as set out in OFCCP regulations, there is as follows:

> [A]n underlying prime contract between a Federal Program and/or its contracting agency and a company, insurer, or health care provider, and if so, what the obligations are under that contract. . . .

> [And where] there is also an agreement between the prime contractor and the subcontracting company (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 the underlying contract, or (2) under which any portion of the prime contractor's contractual obligation is performed.

Id. at 7-8. "To assess whether there is a subcontract within OFCCP's jurisdiction, the nature and purpose of BOTH the prime contract AND the subcontract at issue will be examined." *Id.* at 8. "If the subcontract satisfies at least one of the two prongs discussed above, then a subcontract within OFCCP jurisdiction exists." *Id.* The Directive set out as an example the provision of Florida Hospital's healthcare services to TRICARE beneficiaries pursuant to the TRICARE/HMHS prime contract, and the HMHS/Florida Hospital (subcontract) Agreement. *Id.* at 9.

2. Intervening Legislative Action: Section 715 of the NDAA of 2012

On November 1, 2010, Florida Hospital filed timely exceptions with the ARB to the ALJ's decision granting OFCCP's motion for summary decision and ordering Florida Hospital to comply with OFCCP's compliance review request. While the case was pending before the ARB, and a year after OFCCP issued Policy Directive 293, President Obama, on December 11, 2011, signed the National Defense Authorization Act for Fiscal Year 2012, authorizing, inter alia, appropriations for military activities for the Department of Defense. The legislation included Section 715, entitled "Maintenance Of The Adequacy Of Provider Networks Under The Tricare Program." This provision amended 10 U.S.C.A. § 1097b, which addressed the TRICARE program, by adding the following new paragraph:

> (3) In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy. 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.

See 10 U.S.C.A. § 1097b(a)(3) (Dec. 31, 2011).

On April 25, 2012, four months after enactment of Section 715, OFCCP rescinded Policy Directive 293, effective immediately, in light of questions raised with respect to OFCCP's jurisdiction over health care providers. OFCCP's rescission Notice states: "[R]ecent legislation and related developments in pending litigation warrant rescission of the Directive at this time." Notice of Rescission, Department of Labor, OFCCP ADM Notice/Rescission No. 301 (Apr. 25, 2012).

B. The terms of the prime and sub-contracts in dispute fall within the scope of Section 715 of the NDAA and prelude OFCCP's jurisdiction to conduct a compliance review of Florida Hospital pursuant to Executive Order 11246, Section 503 of the Rehabilitation Act, and Section 502 of the Veterans' Act

To determine whether the terms of the prime and sub-contract fall within the scope of Section 715, it is instructive to evaluate the nature of the contractual language as set out by the appropriate regulations.

1. The TRICARE/HMHS prime contract requires HMHS to develop a network of health care providers that will serve TRICARE beneficiaries

Subpart B of 41 C.F.R., Chapter 60, is the portion of the regulations setting out OFCCP's enforcement authority. *See* 41 C.F.R. 61-1, Subpart B (General Enforcement; Compliance Review and Complaint Procedure). These regulations define "Prime contractor" as "any person holding a contract and, for the purposes of Subpart B of this part, any person who had held a contract subject to the Order." 41 C.F.R. § 60.1.3. A "Subcontract" is "any agreement or arrangement between a contractor and any person (in which the parties *do not* stand in the relationship of an employer and an employee): (1) For the 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 obligations under any one or more contracts is performed or undertaken or assumed." *Id.* (emphasis added). The term "subcontractor" means "any person holding a subcontract and, for the purpose of Subpart B of this part, any person who had held a subcontract subject to the Order." *Id.*

The regulations state that "each contracting agency shall include the . . . equal opportunity clause contained in Section 202 of the [Executive] [O]rder in each of its Government contracts." 41 C.F.R. § 60-1.4 (equal opportunity clause). The regulations state that the EEO clause is "incorporated by reference in all Government contracts and subcontracts," and "by operation of the [Executive] Order" is "considered to be a part of every contract and subcontract required by the Order and the regulations . . . whether or not it is physically incorporated in such contracts and whether or not the contract between the agency and the contractor is written." 41 C.F.R. § 60-1.4(d), (e).

The nature of the prime contract between TRICARE (the government agency) and HMHS (the private entity/prime contractor) involves an agreement between the parties that HMHS will provide a "managed, stable high-quality network or networks of individuals and institutional health care providers." Stip. Facts ¶ 10. The prime

TRICARE/HMHS contract agreement is replete with the terms under which HMHS will provide a network of health care providers to TRICARE and its beneficiaries, including the requirement that the provider network "be established in 100% of the South Region," and that HMHS inform the "government within 24 hours of any instances of network inadequacy," that HMHS "maintain the provider network size of 49,000 physicians and behavioral health professionals as measured on a monthly basis," and that "network providers and their support staff gain sufficient understanding of applicable TRICARE program requirements, policies, and procedures." See JX A, Section C Description/Specifications/Work Statement. Thus, the prime contract constitutes an agreement by HMHS to provide a network of health care service providers to TRICARE beneficiaries in TRICARE's designated South Region. JX A, TRICARE/HMHS Award/Contract.

2. *The agreement between HMHS and Florida Hospital constitutes a subcontract designed to provide health care services to TRICARE beneficiaries pursuant to the terms of the prime contract*

While OFCCP conceded on reconsideration that Section 715 of the NDAA removed Prong Two jurisdiction over Florida Hospital[123], OFCCP argued that the Hospital Agreement is a subcontract under the definition set out at Prong One because "Florida Hospital's services as a participant in the network were 'necessary to the performance' of the TRICARE/HMHS prime contract, meeting the first prong of the subcontractor definition." Plaintiff OFCCP's Response to ARB's Request for Briefing at 4; see also OFCCP Brief in Support of Motion for Reconsideration at 9-10.

Regardless of the Prong One analysis OFCCP advances, the terms of the subcontract agreement (Hospital Agreement) between HMHS and Florida Hospital are designed to effectuate the terms of the prime TRICARE/HMHS contract. Under the subcontract Florida Hospital agrees to be a provider of health care services to TRICARE beneficiaries.[124] Like the prime contract, the impetus of the terms of the subcontract is

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[123] See OFCCP Brief in Support of Motion for Reconsideration at 9 ("As OFCCP has argued, Section 715's plain language removes *one* basis for OFCCP's jurisdiction over TRICARE network providers, as articulated in the second prong of the OFCCP's subcontract definition at 41 C.F.R. 60-1.3. OFCCP can no longer assert that HMHS's obligation to create a network of health care providers encompasses the obligation to delivery medical services and that by providing such medical services as a subcontractor to HMHS, Florida Hospital performed, understood or assumed HMH's obligation under the prime contract to liver those services.") (emphasis in original, footnote omitted).

[124] *See* JX B, Hospital Agreement at ¶ 1 (Scope of Agreement: This Agreement shall apply to all services provided by Hospital to all persons designated by HMHS as eligible members, including active duty military personnel (Beneficiaries), to receive benefits under an agreement between HMHS and TRICARE Management Activity."); *see also id* at ¶ 2 ("Hospital desires to become a participating Hospital of HMHS under the terms and conditions of this Agreement and agrees to provide health care services for Beneficiaries in accordance with TRICARE regulations, policies, and procedures.").

for Florida Hospital to provide health care services to TRICARE beneficiaries and be part of the network of provider services pursuant to the prime TRICARE/HMHS contract. The TRICARE South Region includes the state of Florida, and Florida Hospital is included among the health care services providers available to TRICARE beneficiaries in that region.[125]

3. Section 715 of the NDAA precludes OFCCP's jurisdiction over Florida Hospital based on the terms of the subcontract with HMHS, which effectuates the TRICARE prime contract for the provision of a provider network

Section 715 of the NDAA of 2012 contains language that modifies the definition of contract in contract agreements involving DoD entities. The HMHS/Florida Hospital subcontract falls within the scope of Section 715's language.

Section 715 states that the Secretary will "maintain adequate networks of providers including institutional" providers. The undisputed facts in this case establish that institutional providers encompass "hospital[s]" and Florida Hospital is a hospital that entered into a Hospital Agreement with Government Contractor HMHS. The statute further reads that in determining whether "network providers [Florida Hospital] under such provider network agreements [Florida Hospital/HMHS subcontract] are subcontractors for purposes of the Federal Acquisition Regulation or any other law [40 C.F.R. § 60-1.3], a TRICARE managed care support contract [TRICARE/HMHS prime contract] that includes the requirement to establish, manage, or maintain a network of providers [JX A, at Section C ¶ 1] may not be considered to be a contract [or subcontract, *see* 41 C.F.R. § 60-1.3 – a contract is any "Government contract or subcontract"] for the performance of health care services or supplies on the basis of such requirement." Applying Section 715 to the subcontract in this case, and under the definition of "subcontract" as set out under 41 C.F.R. § 60-1.3, the fact that the Hospital Agreement (subcontract) 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. Under Section 715, the subcontract 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.

The majority states, *supra* at 14-15, that Section 715 should be interpreted narrowly because the Conference Report did not adopt the Senate's earlier version of this provision that expressly excluded health care providers under the TRICARE network qualifying as Federal government contractors. *See* National Defense Authorization Act for Fiscal Year 2012, Senate Report 1253, Rep. No. 112-26, 112th Cong., 1st Sess. at p. 221, Sec. 702 (June 22, 2011). That provision, NDAA Section 702, expressly stated that TRICARE "[n]etwork providers under such provider network agreements are not considered subcontractors for purposes of the Federal Acquisition Regulation (FAR) or

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[125] *See* JX C, Handbook at 6; *see also* SF ¶ 16.

any other law." The Administration undertook a "review with relevant agencies, including the Departments of Defense, Labor, and Justice, to clarify the coverage of health care providers under federal statutes applicable to contractors and subcontractors." Cong. Rec. H8592 (Dec. 12, 2011). The conferees agreed that "this is a complex issue [that merited] continued review from the Committees on Armed Services of the Senate and the House of Representatives and other committees of jurisdiction in the Senate and the House of Representatives." *Id.*

A Conference Report was drafted that apparently resolved discrepancies between the two measures. *See* Conference Report on H.R. 1540, National Defense Authorization Act for Fiscal Year 2012, 112th Cong. 1st Sess., Sec. 715 at p. 4310 (Dec. 12, 2011). This negotiated agreement between the House and Senate versions of the language became the final legislation. Although the language of Section 715 is less explicit than the prior Section 702, applying Section 715, at least with respect to the contracts at issue in this case (the prime TRICARE/HMHS contract and the resulting subcontract between HMHS/Florida Hospital), creates no ambiguity with respect to the contract here in dispute, and indeed, given the contracts at issue here, renders the same result; the express language of the HMHS/Florida Hospital subcontract designed to incorporate Florida Hospital as a part of the network of provider services renders it as "not a contract" in light of Section 715 because it involves the provision of network provider services to beneficiaries of TRICARE.

After Section 715's enactment, OFCCP rescinded Directive 293 (Coverage of Healthcare Providers and Insurers) on April 25, 2012. Notice of Rescission, Department of Labor, OFCCP ADM Notice/Rescission No. 301 at 1 (Apr. 25, 2012). OFCCP stated in the rescission Notice that it would "continue to use a case-by-case approach to make coverage determinations in keeping with its regulatory principles applicable to contract and subcontract relationships and OFCCP case law." *Id.* Indeed, with the enactment of Section 715, Congress has spoken to "the precise question at issue" at least with respect to the specific contract provisions at issue in this case, *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council Inc.*, 467 U.S. 837, 842 (1984), and the ARB must give effect to Congress's unambiguously expressed intent. *Id.* at 842-843. Given the specific prime and sub-contract language at issue here, and the relationships that formed under the contracts, the recent enactment of Section 715 unambiguously forecloses OFCCP from asserting jurisdiction over Florida Hospital in this specific case. *See National Cable & Tele. Ass'n* v. *FCC*, 567 F.3d 659, 663 (D.C. Cir. 2009) ("if the statute unambiguously forecloses the agency's interpretation . . . [the court will] disregard the agency's view and 'give effect to the unambiguously expressed intent of Congress.'"). Given the contractual terms at issue here, OFCCP's motion for reconsideration should be denied.

Finally, the majority remands the case in part for the ALJ to further consider whether the TRICARE program qualifies as a federal financial assistance program and if so, quite possibly, falls outside OFCCP's jurisdiction on that basis. See *supra* at 36. Because we believe that the terms of the prime and sub-contracts in dispute in this case

preclude OFCCP jurisdiction pursuant to Section 715 of the NDAA, we do not address the question raised by the majority with respect to the status of the TRICARE as a federal financial assistance program.

PAUL M. IGASAKI
Chief Administrative Appeals Judge

LISA WILSON EDWARDS
Administrative Appeals Judge