



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

**ARB CASE NO. 12-014**

**ALJ CASE NO. 2011-OFC-007**

**PLAINTIFF,**

**DATE: August 30, 2013**

**v.**

**O'MELVENY & MYERS LLP,**

**DEFENDANT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Shannon Fink, Esq.; Consuela A. Pinto, Esq.; Christopher B. Wilkinson, Esq.; M. Patricia Smith, Esq.; U.S. Department of Labor, Washington, District of Columbia**

*For the Respondent:*

**Janna K. Rearick, Esq.; O'Melveny & Myers, LLP, New York, New York**

**BEFORE: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; Luis A. Corchado, Administrative Appeals Judge. Judge Royce dissents.**

### **DECISION AND ORDER OF REMAND**

This case arises under Executive Order 11246, as amended;<sup>1</sup> 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

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<sup>1</sup> 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).

(West 2002)(collectively the Equal Opportunity Laws or EO Laws). At issue is whether Defendant O'Melveny & Myers LLP (Defendant or O'Melveny) is a government contractor subject to the requirements of the Equal Opportunity Laws and their implementing regulations at 41 C.F.R. Chapter 60 (2012).<sup>2</sup>

OFCCP, charged with responsibility for ensuring compliance with the EO Laws' equal opportunity mandates, initiated this action through an administrative complaint filed with the Department of Labor's Office of Administrative Law Judges alleging that the Defendant violated its obligations under the laws when it failed to produce documents OFCCP requested and refused to permit OFCCP access to its Washington, D.C. office for an onsite compliance review undertaken pursuant to the EO Laws. Following the parties' cross-motions for summary judgment, the ALJ issued a Recommended Decision and Order granting OFCCP's motion and denying O'Melveny's motion. The ALJ ordered that O'Melveny comply with OFCCP's request for document and inspection pursuant to OFCCP's compliance review authority.<sup>3</sup>

The matter is now before the Administrative Review Board (ARB or the Board) upon O'Melveny's filing of timely exceptions to the ALJ's Recommended Decision and Order (D. & O.). Generally, we agree with the ALJ's analysis that 48 C.F.R. § 37.104 governs this case, but we find that the factual record does not permit a summary decision. Therefore, for the following reasons, the Board vacates the D. & O. and remands this case to the ALJ for further consideration.

## **BACKGROUND<sup>4</sup>**

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

Defendant O'Melveny, a law firm of more than fifty employees, entered into a contract with the U.S. Department of Energy (DOE), effective October 7, 2001 (the Contract), under which it agreed to provide legal advice and assistance, including legal representation in administrative proceedings, in connection with the DOE's divestiture of the Elk Hills Naval Petroleum Reserve. The contract (attached to OFCCP's administrative complaint as Government Exhibit 1) describes at page 2, Section B.1, the services the Defendant agreed to perform:

Legal Support Services for professional legal assistance to the Office of General Counsel to provide specialized legal advice and assistance in connection with the sale of Naval Petroleum Reserve Numbered 1 and the study of alternatives for the other Naval

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<sup>2</sup> 41 C.F.R. Part 60-30 (implementing Executive Order 11246), Part 60-250 (implementing VEVRAA), and Part 60-741 (implementing the Rehabilitation Act).

<sup>3</sup> *OFCCP v. O'Melveny & Myers*, ALJ No. 2011-OFC-007 (Oct. 31, 2011) (Recommended Decision and Order on Cross-Motions for Summary Judgment (D. & O.)).

<sup>4</sup> The Background statement is extracted from the ALJ's D. & O. unless otherwise noted.

Petroleum Reserves. Services shall also include expert advice on legal and final issues pertaining to: oil and gas industry business practices and procedures; California real estate, land use and conveyancing; environmental requirements; oil and gas law; and financial and related financing matters in connection with the sale of the assets.

Additionally, at pages 13-14 of the contract, under “Statement of Work,” the services O’Melveny was to provide are more explicitly described:

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

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

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

Assisting in any related litigation or administrative proceedings . . . .

The assistance may also be in the form of oral advice or participation, in person, or by telephone, and can require frequent and urgent consultation and coordination on a priority basis.

Section C.1, pages 13-14, also describes the “scope of work,” which includes:

analyzing and providing opinions on legal issues involving such subjects as oil and gas law, environmental law, real and personal property conveyancing, and statutory and regulatory requirements.

The contract term was initially for one year, October 7, 2001, through October 6, 2002, although the initial terms of the Contract set forth an “Estimate Level of Effort” for each year through October 6, 2006.<sup>5</sup> The Contract permitted DOE to “unilaterally extend the term of th[e] contract by written notice and, in fact, the Contract was subsequently amended and modified numerous times to extend the term, increase funding, and add attorneys authorized to perform work under the contract. For the entire duration of the Contract, from October 7, 2001, to October 6, 2011, including all extensions and amendments, the amount payable to O’Melveny totaled \$3,415,340.00. O’Melveny asserts without dispute that, in April 2011, DOE entered into

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<sup>5</sup> Government Exhibit 1, Sec. B.3, p. 3.

the final settlement agreement regarding the “longstanding dispute over equity rights to the Elk Hills Naval Petroleum Reserve,” ten years after O’Melveny first executed the Contract.

### *Contract Administration*

The record contains no evidence establishing the actual work performed or its administration for the first five years of the contract. For the period commencing in January 2007, however, the record contains a very general discussion about O’Melveny’s actual work. The evidence presented or facts to which the parties stipulated indicate that O’Melveny’s work under the contract, among other things, involved representing the DOE before the agency’s Office of Hearings and Appeals (OHA) in connection with a challenge to DOE’s equity interest in the Elk Hills Naval Petroleum Reserve. The DOE attorney “primarily involved” in the OHA proceedings played no role in the selection of the O’Melveny attorneys assigned to represent DOE and had no personal meetings with any of the firm’s attorneys until March 2009, at the time of oral argument before OHA.<sup>6</sup> Consistent with the contractual stipulations that O’Melveny’s principal place of performance was “Contractor’s Facility” and that “Contractor shall furnish all personnel, facilities, equipment, material, supplies . . . necessary for, or incident to, the performance [of the contract]” (Contract, pp. 2, 19), DOE did not provide O’Melveny with computers, office space, office furniture, law library, equipment or tools in connection with the firm’s legal representation of DOE in the OHA proceedings; nor did the O’Melveny attorneys involved in the OHA proceedings perform any work at the offices of DOE’s General Counsel.

Throughout the OHA proceedings, which concluded in April 2011, O’Melveny attorneys received copies of all orders, pleadings, and correspondence in connection with the proceedings. The attorney in DOE’s Office of General Counsel, primarily involved in the OHA proceedings, reviewed and sometimes revised the pleadings and substantive correspondence the O’Melveny attorneys<sup>7</sup> drafted, before the firm’s attorneys filed them or sent them to opposing counsel.<sup>8</sup> Beyond these general facts, there is no detail of the of the O’Melveny attorneys’ actual roles and the actual work performed under the Contract. For example, it is unclear whether O’Melveny was lead counsel during the OHA hearings, whether such work accounted for the majority of the

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<sup>6</sup> The parties further stipulated that no one from DOE expressly dictated when or for how long any of the O’Melveny attorneys involved in the OHA proceedings were to take vacation time or other leave; although the hearings and other deadlines arising from the proceedings necessarily required the firm’s attorneys to schedule their vacation and leave time accordingly. Parties’ Additional Stipulated Facts, at ¶ 2.

<sup>7</sup> As far as can be determined from the evidence of record, at any time less than a handful of O’Melveny’s attorneys appear to have been directly involved in the OHA proceedings. See Declaration of Ada Mitrani, the DOE attorney primarily involved in the OHA proceedings, who indicated that most of her contact was with two attorneys in O’Melveny’s Los Angeles office. Government Exhibit 2, attached to OFCCP’s Memorandum in Support of Summary Judgment.

<sup>8</sup> Compare the express provision under the contract with DOE requiring that, “The Contractor will submit documents, memoranda, opinions, etc. for review and approval of the Deputy General Counsel for Technology Transfer and Procurement, Department of Energy.” Contract, at p. 14.

Contract dollars spent, or whether DOE regularly contacted O'Melveny throughout the Contract period to perform other work on an "as needed" basis.

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

In January 2009, the District Director of OFCCP's Baltimore/Washington District Office sent a scheduling letter to O'Melveny's Washington, D.C. office initiating a compliance review under the EO Laws. The scheduling letter requested a copy of the Defendant's Affirmative Action Plan and other specified supporting documentation. In response, O'Melveny wrote, in relevant part, that "[a]s a law firm engaged in the practice of law . . . we do not believe that our services constitute a government contract or a subcontract as defined in 41 C.F.R. § 60-1.3 of the OFCCP's rules and regulations." Moreover, O'Melveny asserted, "the chief-OFCCP, Defense Contracts Administration Service, Los Angeles Region, concurred in our conclusion that the federal executive orders do not apply to general legal advice absent a specific federal government contract."

In subsequent correspondence the District Director insisted that O'Melveny's contract with DOE brought the firm within OFCCP's jurisdiction. O'Melveny, conversely, insisted that its contract with DOE did not meet the OFCCP definition of "Government contract" because the professional legal services it provided under the contract were "by their very nature 'personal'" and thus that O'Melveny did not fall within OFCCP's jurisdiction under the EO Laws.

After numerous unsuccessful attempts to secure O'Melveny's compliance with its request for documents, OFCCP filed an administrative complaint with the Office of Administrative Law Judges (OALJ) on July 8, 2011, requesting an order enjoining O'Melveny from refusing to comply with the requirements of the Executive Order, the Rehabilitation Act, and VEVRAA. OFCCP requested that OALJ direct O'Melveny to (1) provide all documents requested in the OFCCP's January 2009 scheduling letter, and (2) permit OFCCP access to O'Melveny's facilities and otherwise permit OFCCP to conduct and complete its compliance review. As previously noted, both parties moved for summary decision. Their respective motions were based upon stipulated facts deemed relevant by both parties and several "uncontested" facts and affidavits offered by each. Upon consideration, the ALJ granted OFCCP's motion for summary decision. O'Melveny has timely appealed the ALJ's decision to the ARB.

### **JURISDICTION AND STANDARD OF REVIEW**

The ARB has jurisdiction to review exceptions to an ALJ's Recommended Decision and Order and is charged with authority to issue the Department's final decision in cases arising under the Equal Opportunity Laws.<sup>9</sup> 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.<sup>10</sup> Under 29 C.F.R. § 18.40(d)(2013), an ALJ may enter summary decision where the

<sup>9</sup> See 41 C.F.R. §§ 60-30.30, 60-250.65(b)(1), 60-741.65(b)(1).

<sup>10</sup> *Charles v. Profit Inv. Mgmt.*, ARB No. 10-071, ALJ No. 2009-SOX-040 (ARB Dec. 16, 2011).

pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.<sup>11</sup> 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.<sup>12</sup>

## DISCUSSION

The Equal Opportunity Laws collectively prohibit federal government contractors from discriminating against employees or applicants for employment on the basis of race, color, sex, religion, national origin, disability, or veteran status. The laws require federal government contractors to take affirmative action to ensure equal employment opportunity, and authorize the Secretary of Labor to enforce the laws' nondiscrimination and affirmative action obligations. Pursuant to this authority, OFCCP has promulgated regulations that require, among other things, federal government contractors to furnish reports and other information about their affirmative action programs. *See* 41 C.F.R. § 60-1.7. If a contractor fails to comply with these regulatory obligations, OFCCP is authorized to initiate administrative enforcement proceedings. *See* 41 C.F.R. §§ 60-1.26, 60-250.65, 60-741.65. A contractor found to be in violation of the EO Laws and their implementing regulations may have its contract canceled, terminated, or suspended. The contractor may also be debarred and declared ineligible from entering into future government contracts. *See* 41 C.F.R. §§ 60-1.27, 60-250.66, 60-741.66.

There are two bases for the ALJ's ruling in OFCCP's favor here: (1) that O'Melveny contractually obligated itself to comply with the EO Laws because the contract with DOE incorporates by reference several provisions of the Federal Acquisition Regulations that expressly state that the contracting party agrees to comply with the EO Laws and their implementing regulations; and (2) that the DOE contract constituted a covered "Government contract" subject to the EO Laws because the legal services O'Melveny provided were "nonpersonal services" within the meaning of the EO Laws' implementing regulations found at 41 C.F.R. §§ 60-1.3, 60-741.2(i), and 60-250.2(i). In rendering her decision on behalf of OFCCP, the ALJ also rejected O'Melveny's argument that the issues presented in this case are moot because its contract with DOE has expired.

The central issue on appeal is whether the contract for services that the Defendant entered into with DOE constitutes a "Government contract" within the meaning of 41 C.F.R. §§ 60-1.3, 60-741.2(i), and 60-250.2(i), thereby requiring O'Melveny to comply with Executive Order 11246, the Rehabilitation Act, and VEVRAA. Before turning to that issue, however, we address O'Melveny's other challenge on appeal to the ALJ's decision: concerning the ALJ's conclusion

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<sup>11</sup> *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).

<sup>12</sup> *Reamer v. Ford Motor Co.*, ARB No. 09-053, ALJ No. 2009-SOX-003, slip op. at 3 (ARB July 21, 2011).

that O'Melveny contractually obligated itself to comply with the EO Laws, a conclusion that we reject.<sup>13</sup> Given the sparse record before us, we agree with O'Melveny's understanding of the Contract's incorporation language: the fact that the laws or their implementing regulations are incorporated into the DOE contract by reference merely signifies that *should* any of the cited laws or regulations be applicable, the parties agree to their adherence. To interpret the incorporated references in any other manner would render a number of the references in the DOE contract nonsensical, as for example the incorporation by reference of 48 C.F.R. § 52.229-5 (cited by O'Melveny), which refers to taxes on contracts performed in U.S. Possessions or Puerto Rico, or reference to 48 C.F.R. § 52.249-4, which requires the use of U.S.-flag air carriers for government-financed international air transportation of personnel. Consequently, in the specific circumstances of this case, we agree with O'Melveny that the incorporated references to various FAR pertaining to the EO Laws are applicable to O'Melveny only if its contract with DOE constitutes a "Government contract" within the meaning of those laws and their implementing regulations.<sup>14</sup>

We thus turn to the central issue of whether O'Melveny's contract with DOE constitutes a qualifying "Government contract." In concluding that the contract was a Government contract subject to OFCCP jurisdiction, the ALJ resorted to the regulations implementing the Equal Opportunity Laws and the Federal Acquisition Regulations (FAR) at 48 C.F.R. Part 37. Based on the definitions of "Government contract" and "nonpersonal services" found therein, and the ARB's decision in *OFCCP v. UPMC Braddock*, ARB No. 08-048, ALJ No. 2007-OFC-001 (ARB May 29, 2009),<sup>15</sup> the ALJ concluded that O'Melveny's contract was not a contract for personal services, as O'Melveny argued, but a contract for nonpersonal services thereby meeting the definition of a "Government contract" subject to OFCCP jurisdiction. On appeal, O'Melveny challenges the ALJ's determination maintaining, as it did before the ALJ, that the FAR are not applicable or, if held to be applicable, that the legal services O'Melveny provided under the DOE contract nevertheless do not meet the FAR definition of "nonpersonal services."

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<sup>13</sup> We deem O'Melveny to have waived any argument of error on the ALJ's part with respect to her ruling on the question of mootness. O'Melveny does not address the issue in its briefs on appeal, and O'Melveny's counsel did not address the issue at oral argument before the Board. Assuming the issue was properly before the Board, we would nevertheless affirm the ALJ's ruling on mootness for the reasons stated in the ALJ's Decision and Order. See ALJ D. & O. at 11, citing *OFCCP v. Loffland Bros. Co.*, OEO 75-1 (Apr. 16, 1984).

<sup>14</sup> As the ARB recognized in *UPMC Braddock*, ARB No. 08-048, whether the EO Laws regulations are, or are not, expressly incorporated by reference in the contract in this case is irrelevant to the question of whether the contract at issue constitutes a "Government contract" under the EO Laws. The equal opportunity provisions of the EO Laws are incorporated into all government contracts by operation of law. *UPMC Braddock*, ARB No. 08-048, slip op. at 4-6. *Accord United States v. New Orleans Pub. Servs., Inc.*, 553 F.2d 459, 469 (5th Cir. 1977), *vacated and remanded on other grounds*, 436 U.S. 942 (1978); *Liberty Mutual Serv. Co. v. Friedman*, 485 F. Supp. 695, 702-703 (D. Md. 1979).

<sup>15</sup> Subsequent to the ALJ's D. & O., the U.S. District Court for the District of Columbia affirmed on appeal the ARB's decision in *Braddock*. *UPMC Braddock v. Harris*, \_\_\_ F. Supp. 2d \_\_\_, 2013 WL 1290939 (D.D.C. Mar. 30, 2013).

For O’Melveny to be subject to OFCCP’s jurisdiction under the EO Laws, the contract with DOE must constitute a “Government contract” within the meaning of the EO Laws’ implementing regulations, which define “Government contract” in pertinent part as:

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

41 C.F.R. § 60-1.3. See also 41 C.F.R. §§ 60-741.2(i), 60-250.2(i) (setting forth same definition).

The ALJ turned to 48 C.F.R. § 37.104 to determine whether the Contract was a “nonpersonal services” contract. We agree with the ALJ regarding the applicability of 48 C.F.R. § 37.104. As the ALJ noted, neither the EO Laws nor the OFCCP regulations define the term “nonpersonal services.” At best, the OFCCP regulations provide limited guidance on the meaning of the term through the non-exclusive listing of “utilities, construction, transportation, research, insurance, and fund depository” as examples of nonpersonal services.<sup>16</sup> Limited as it is, that guidance is instructive as it focuses, consistent with the FAR’s definition of nonpersonal services, on the relationship between a contractor’s personnel and the contracting government agency. As the District Court in *UPMC Braddock* pointed out, “This non-exclusive list sets forth classic illustrative examples of arrangements in which a contractor provides an ongoing service to the government while maintaining exclusive supervisory control over its own personnel.”<sup>17</sup>

The question of whether O’Melveny’s contract with DOE is a qualifying Government contract within the meaning of the OFCCP equal opportunity regulations thus turns on whether the contract is for nonpersonal services of a nature similar to the illustrative examples cited in the OFCCP regulations or, instead, constitutes an agreement “in which the parties stand in the relationship of employer and employee.”<sup>18</sup> To resolve this question we turn for guidance, based on our thoroughly explained rationale in *OFCCP v. UPMC Braddock* and *OFCCP v. Florida Hospital*, to the FAR found in Title 48 of the Code of Federal Regulations, and the definitions found at 48 C.F.R. § 37.101. Notwithstanding O’Melveny’s argument to the contrary, we consider resort to FAR for assistance in defining “nonpersonal services” under the EO Laws’ regulations governing Government contracts especially appropriate given that the FAR “is

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<sup>16</sup> *OFCCP v. Florida Hospital of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-002, slip op. at 21 (ARB July 22, 2013).

<sup>17</sup> *UPMC Braddock*, 2013 WL 1290930, at \*10.

<sup>18</sup> 41 C.F.R. § 60-1.3.



designed to prescribe ‘policies and procedures pertaining to nondiscrimination in employment by contractors and subcontractors.’”<sup>19</sup>

Upon examination of the FAR, we find that their definition of the term “nonpersonal services” and the distinction drawn between nonpersonal and personal service contracts are consistent with the illustrative examples of nonpersonal services cited in the OFCCP regulations and their exclusion of agreements “in which the parties stand in the relationship of employer and employee.” Pursuant to 48 C.F.R. § 37.101, the term “nonpersonal services contract” refers to “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.” In contrast, the term “personal services contract” is defined at 48 C.F.R. § 37.104 in relevant part as follows: “A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel.” Subsection (c)(1) further provides: “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.”

To assist in determining whether a government contract is for personal or nonpersonal services, the FAR identify six specific indicia<sup>20</sup> of personal services contract (referred to as “descriptive elements”) at 48 C.F.R. § 37.104(d) as guidance.<sup>21</sup> The FAR emphasize that the overarching and “key question” for assessing whether a government contract is for personal

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<sup>19</sup> *UPMC Braddock*, 2013 WL 1290939 at \*9 (quoting 48 C.F.R. § 22.800).

<sup>20</sup> Section 37.104 identifies the six descriptive elements but fails to include the historical language more clearly stating that the presence of each factor indicates the kind of supervision involved in a personal services contract. See Comptroller General Decision, B- 183487, 77-1 CPD P 326, 1977 WL 13057, pp. 3-4 (Comp. Gen. Apr. 25, 1977).

<sup>21</sup> The following “descriptive elements” are listed at 48 C.F.R. § 37.104(d):

- (1) Performance on site.
- (2) Principal tools and equipment furnished by the Government.
- (3) Services are applied directly to the integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- (4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- (5) The need for the type of service provided can reasonably be expected to last beyond one year.
- (6) The inherent nature of the service, or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order to –
  - (i) Adequately protect the Government’s interest;
  - (ii) Retain control of the function involved; or
  - (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

services is: “Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?” 48 C.F.R. § 37.104(c)(2).<sup>22</sup> The six indicia serve as a guide in the evaluation of this question and must be balanced together by looking at the terms and actual performance of the contract.<sup>23</sup> In support of its contention that its contract for the provision of legal services constitutes a personal services contract under FAR’s definition, O’Melveny cites the FAR “descriptive elements,” arguing that the contract with DOE satisfies the majority of these elements, including Government supervision and control. OFCCP cites the same FAR provision and the same criteria in support of its argument that the legal services O’Melveny provided under the contract are, instead, nonpersonal services.

In determining whether a government contract is for personal or nonpersonal services, the FAR dictate that “[e]ach contract arrangement must be judged in the light of its own facts and circumstances.”<sup>24</sup> Here, the parties have stipulated to what they consider the facts necessary for determining as a matter of summary decision whether O’Melveny’s contract with DOE is or is not a contract for nonpersonal services.<sup>25</sup> Notwithstanding the parties’ stipulations, we find that the facts to which the parties have stipulated are insufficient to reach a decision on whether or not the legal services O’Melveny has provided under the contract with DOE are personal or nonpersonal in nature.

There is arguably no dispute with respect to several of the criteria listed at 48 C.F.R. § 37.104(d). The parties agree, and the evidence of record reflects, that the principal place of performance under the contract was not on or at government facilities, but at O’Melveny’s offices (Factor 1),<sup>26</sup> and that the principal tools and equipment necessary for contract performance were not furnished by the DOE (Factor 2).<sup>27</sup> Nor is there any dispute that a primary

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<sup>22</sup> Section 37.104(c)(2) further provides: “The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous Government supervision of a substantial number of contractor employees would have to be taken strongly into account (see [§ 37.104(d)]).”

<sup>23</sup> Comptroller General Opinion, 53 Comp. Gen. 542, B- 180303, 1974 WL 8520, p. 4 (Comp. Gen. Feb. 1, 1974) (“any evaluation of a support service contract must be based on a realistic view of the provisions of the entire contract as well as the manner in which it is to be performed and administered”).

<sup>24</sup> 48 C.F.R. § 37.104(c)(2).

<sup>25</sup> There is no evidence in the record that any procurement officer designated the Contract as either “personal services” or “nonpersonal” when the contract was approved. Nor is there any such indication on the Standard Form 26 used for the Contract. Lastly, we have found no decision from the Comptroller General providing dispositive guidance in a previous case.

<sup>26</sup> See DOE Contract at p. 19, Sec. F; Affidavit of DOE Attorney Mitrani, at 7.

<sup>27</sup> See DOE Contract at p.2, Sec. B.1, and p. 25, Sec. H.5; Parties’ Additional Stipulated Fact No. 3.

focus of the Contract terms and legal services O'Melveny provided were directly applied to the DOE's efforts in furthering an assigned mission of the agency, i.e., divestiture of the Elk Hills Naval Petroleum Reserve and defending DOE's equity interest in that divestiture (Factor 3).<sup>28</sup> However, we have no evidence indicating whether the remainder of O'Melveny's legal services were directly applied to an assigned DOE mission. Finally, as to Factor 5, the record evidence supports the conclusion that the need for the legal services required under the contract could reasonably be expected to last beyond one year.<sup>29</sup>

Based on the limited evidence in the record, four of the six factors would appear to cut equally for and against the conclusion that O'Melveny's services under the DOE contract were of either a personal or nonpersonal nature. Regarding the remaining two factors under 48 C.F.R. § 37.104(d), however, we find the factual record presented by the parties insufficient to reach a conclusion one way or the other in resolving the issue of whether the DOE contract is a qualifying "Government contract" under the EO Laws.

Regarding the question of whether comparable services to those O'Melveny provided, meeting comparable needs of the DOE, are performed by the DOE using civil service personnel ("Descriptive element" number 4), O'Melveny asserts that DOE's General Counsel's Office provides comparable services using DOE personnel. Factor 4 focuses on whether civil servants also performed the same services required in the Contract. This concern has played a significant role in previous Comptroller General decisions.<sup>30</sup> In support of its position, O'Melveny cites the DOE contract at page 2, Section B1. However, that provision does not address the question of whether DOE personnel were (or could be) providing comparable services. It merely states that O'Melveny was to provide "professional legal assistance to the Office of the General Counsel." This is not evidence that would support a finding that legal services comparable to those O'Melveny provided, meeting comparable needs of DOE, are performed by DOE or other federal agency civil service personnel. In either case, there is insufficient record evidence to decide this issue.

Finally, we turn to one of the more critical factors for assessing whether a government contract is for personal or nonpersonal services: the nature of the Government's supervision and control over the contractor's employees ("Descriptive element" number 6).<sup>31</sup> Factor 6 examines

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<sup>28</sup> See DOE Contract at p. 2, Sec. B.1, and at p. 13, Secs. C.2.1, C.2.2; Affidavit of Attorney G. Thorpe; Affidavit of DOE Attorney Mitrani; Parties' Additional Stipulated Fact No.1.

<sup>29</sup> The DOE Contract at p. 3, Sec. B.3, provided for the extension of the contract beyond its initial one year term, and the evidence of record indicates that the contract was extended pursuant to numerous amendments of contract.

<sup>30</sup> See Comptroller General Decision, B- 183487, 77-1 CPD P 326, 1977 WL 13057, pp. 2-3 (Comp. Gen. Apr. 25, 1977).

<sup>31</sup> The District of Columbia Circuit noted in evaluating and applying similar criteria to that codified under FAR, albeit in a context unrelated to the present case, that Government supervision "is a criterion that in importance far exceeds the others." *Lodge 1858 AFGE v. Webb*, 580 F.2d 496, 504 (D.C. Cir. 1978). In assessing whether government-contracted legal services are personal or

the “inherent nature” of the contracted work to see if supervision is “required.” It does not actually focus on whether supervision occurs, but whether it should occur.<sup>32</sup> For example, in this case it seems that close supervision should have occurred “to protect the Government’s interest” in the Elk Hills oil fields where Chevron agreed in 2011 to pay the United States \$108 million.<sup>33</sup> Consequently, the affidavits in the record stating that there was no close supervision is not relevant to Factor 6; the question is what government interests were at stake, or what government supervision was needed to “retain control of the function” or “full governmental responsibility for the function”? “The inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, Government direction or supervision of contractor employees in order to – (i) Adequately protect the Government’s interest; (ii) Retain control of the function involved; or (iii) Retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.” 48 C.F.R. § 37.104(d)(6) (“Descriptive element” number 6).<sup>34</sup> It must be demonstrated that the supervision is necessary to assure that the Government’s interests are protected, that control of the contractually-provided services is maintained, or that a duly authorized government official or employee retains full personal responsibility for the provided services.

O’Melveny argues before the Board that DOE retained full control under the contract over all legal matters upon which O’Melveny worked, citing DOE Attorney Mitrani’s affidavit in which she indicated she reviewed and occasionally revised O’Melveny pleadings and

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nonpersonal services, Professor Luneburg has noted, “the degree of government supervision and control over the work of the service provider is of utmost importance,” yet will vary in importance depending upon the nature of the legal services provided. “Where the agency wants to obtain merely an outsider’s legal evaluation, the need for close control over the performance of the attorney’s work would appear generally unnecessary. However, where the [private] attorney litigates on behalf of the government, there are serious questions as to whether the agency should (or can in some instances) surrender that degree of control necessary to permit characterization of the contractor as ‘independent’ as that term is generally used in government personnel law. The degree of control requisite in furnishing legal services in matters falling between these extremes is less clear cut: aside from constitutional concerns, the need to protect the governmental and public interests at stake would seem, as a policy matter, to create at least a presumption in favor of substantial supervision and control.” William Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399, 411-412 (1988).

<sup>32</sup> As Professor Luneburg notes in his Notre Dame Law Review article, p. 399: “Where an attorney gives more than his legal opinion and, in addition, his actions based on his judgment have a direct impact on members of the general public, as a matter of good administrative policy (and also in recognition of constitutional concerns) close supervision and control by the agency would appear to be called for in many instances.”

<sup>33</sup> In reaching this conclusion, we nevertheless reject as applicable to this case the equation expressed in *Lodge 1858 AFGE v. Webb* of close supervision to actual physical control given the inherent nature of legal services.

<sup>34</sup> With regard to legal services in the conduct of litigation, Professor Luneburg has noted, “[FAR] element (6) would appear to be particularly implicated, though no one factor may be dispositive in finding that [the] services are personal.” 63 NOTRE DAME L. REV. at 414.

correspondence, and by drawing an analogy to the typical attorney-client relationship. The very nature of the legal services it provided, O'Melveny asserts, required Department of Energy direction and supervision and, like any other client, DOE retained full control of all legal matters on which O'Melveny provided legal advice and assistance.

As previously noted, FAR focuses upon whether or not the personnel rendering the services are subject, "either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." 48 C.F.R. § 37.101. The DOE contract's terms are of little assistance in addressing this question.<sup>35</sup> Consequently, we necessarily turn to the manner of the DOE contract's administration, and whether the parties' stipulated facts and/or the uncontroverted evidence of record aids in the assessment of the nature of the supervision DOE provided.

Regarding DOE's supervision and control exercised under the contract, both parties cite, rely upon, and argue over the period from January 2007 through April 2011, the period during which O'Melveny's services involved representation of DOE in administrative proceedings. Notwithstanding that the Defendant's services under the DOE contract began in October 2001, the parties inexplicably disregard almost six years of legal services provided under the contract, focusing instead upon the legal services O'Melveny provided for the last approximately four years of the contract. DOE Attorney Mitrani's affidavit, offered into evidence by OFCCP, addresses the supervision and control DOE exercised over O'Melveny's attorneys during this period. Attorney Mitrani, who represents in her affidavit that she was the "OGC attorney primarily involved in the administrative proceedings before DOE's Office of Hearings and Appeals (OHA) regarding the determination of DOE's and Chevron U.S.A., Inc.'s respective equity interest in [the divested petroleum reserve]," states that "most of my contact was with two attorneys at O'Melveny's Los Angeles office. . . . I reviewed and sometimes revised the pleadings and substantive correspondence these attorneys drafted before O'Melveny filed them or sent them to opposing counsel." Mitrani Affidavit at 4. Furthermore, Mitrani states that she "did not select any particular O'Melveny attorney to work on the OHA proceedings," and that she did not personally meet with any O'Melveny attorneys regarding the OHA proceedings until oral argument before OHA – when she met the O'Melveny attorney that appeared on behalf of DOE. *Id.* at 4, 6.<sup>36</sup>

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<sup>35</sup> The DOE contract at page 14, Section C.2.2. provides: "The Contractor will submit documents, memoranda, opinions, etc. for review and approval of the Deputy General Counsel for Technology Transfer and Procurement, DOE." At Section H of the DOE Contract, pages 24-25, it is specified that the work under the contract "shall be subject to the technical direction of the [DOE] Contracting Officer's Representative (COR)." At page 15 of the DOE contract, it is further provided that, "DOE will evaluate the contractor once per year based on the five [performance] measurements noted [in the contract, i.e., clarity, completeness, cost, quality, timeliness]." Aside from the fact that these provisions do little to address the particular concerns and criteria set forth under 48 C.F.R. § 37.104(d)(6), there is no evidence of record demonstrating compliance with these provisions in the contract's implementation and administration.

<sup>36</sup> The parties also stipulated that during this period no one from DOE or DOE's Office of General Counsel "expressly dictated" when or how long any O'Melveny attorney was to take vacation or leave time, "although hearings and other deadlines arising from the DOE matter

Because this record evidence is very generally focused on only the period from January 2007 to the DOE contract's conclusion, it leaves unaccounted approximately three million dollars in O'Melveny legal services and is woefully inadequate for drawing any meaningful conclusion regarding the supervision and control DOE exercised over O'Melveny's attorneys during the entire ten-year period the DOE contract covered. Assuming, on the other hand, that there exists a justifiable reason for only presenting evidence pertaining to the administration of the DOE contract commencing in January 2007, still the evidence of record does not afford a sufficient basis upon which any meaningful conclusion can be reached regarding the nature and extent of DOE's supervision and control of O'Melveny's attorneys for this four-year period. There was very little detail of the work O'Melveny actually performed to determine whether it was directly connected to an "integral" DOE function or mission or whether it was work that federal civil service employees could not perform. See 48 C.F.R. § 37.104(d)(3), (4). Mitrani's affidavit, upon which both parties primarily rely, does not address whether DOE direction and supervision of the legal services O'Melveny provided during this four-year period was necessary to assure that the Government's interests were protected, or necessary to assure that control of the contractually-provided services was maintained, or that it was necessary that a duly authorized DOE official or employee retain full personal responsibility for the provided legal services. The parties' stipulations and the additional evidence submitted (i.e., Mitrani's affidavit) are simply an inadequate basis upon which to determine whether the factors identified under FAR "Descriptive element" number 6 (48 C.F.R. § 37.104(d)(6)) support a finding whether the legal services O'Melveny provided were personal or nonpersonal in nature.

#### CONCLUSION

Notwithstanding the parties' stipulation prescribing an agreed-upon factual record upon which to rule on the cross-motions for summary decision presented, we find that the parties' stipulations and the uncontroverted evidence of record nevertheless provide an insufficient factual basis upon which a determination can be made as to whether the legal services O'Melveny provided under the DOE contract were personal or nonpersonal in nature. Accordingly, the ALJ's Recommended Decision and Order is **VACATED**, and this case is **REMANDED** to the ALJ for further proceedings consistent with this Decision and Order of Remand.

**SO ORDERED.**

**E. COOPER BROWN**  
**Deputy Chief Administrative Appeals Judge**

**LUIS A. CORCHADO**  
**Administrative Appeals Judge**

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necessarily required O'Melveny attorneys performing work under the contract to schedule their vacation and leave time accordingly." Parties' Additional Stipulated Fact No. 2.

**Judge Royce, dissenting:**

I would affirm the ALJ's finding that the DOE contract with O'Melveny is a nonpersonal services contract. We ruled recently in *OFCCP v. Florida Hospital of Orlando*;

[A]s 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." 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." 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.

ARB No. 11-011, ALJ No. 2009-OFC-002, slip op. at 25 (ARB July 22, 2013)(footnotes omitted). The contract under which O'Melveny's services were acquired did not cite specific statutory authorization for personal services, nor did O'Melveny identify any such statutory authorization for the services in question.<sup>37</sup> 48 C.F.R. § 37.104(b) states: "Agencies shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. 3109) to do so." Given the lack of explicit statutory authorization for the O'Melveny contract, the presumption of agency regularity, and no suggestion that the contract was unlawful, the 10-year contract between DOE and O'Melveny was necessarily a nonpersonal service contract - as opposed to a prohibited personal service contract.<sup>38</sup> O'Melveny admitted at oral argument before the Board that the contract form it signed was one for nonpersonal services.<sup>39</sup> This admission is consistent with the ALJ's finding that the services were nonpersonal and suggests that the parties themselves considered the contract to be a routine nonpersonal service contract - at least until the OFCCP decided to enforce the EO laws.

Additionally, the finding that the contract in question is a nonpersonal one, subject to the EO Laws, conforms to my understanding of contemporary acquisition practice. I agree with the

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<sup>37</sup> D. & O. at 11.

<sup>38</sup> William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399, 416 (1988)("Because of the impact on the scheme of civil service regulation, agencies must rely on 'specific' statutory authorization in order to justify the award of a personal services contract, whether for legal services or others.").

<sup>39</sup> The Board held oral argument in this matter on June 26, 2013. The following was an interchange between Judge Corchado and Janna Rearick, representing O'Melveny:

Q: O'Melveny agrees that it's undisputed that at least the form was a non-personal services form?

A: Yes.

ALJ and the majority that OFCCP regulations should be construed consistently with the FAR, which address personal and nonpersonal service contracts.<sup>40</sup> But my review of the literature suggests that acquisition practice in connection with distinguishing between personal and nonpersonal service contracts has for decades reflected inconsistent interpretations of statute, regulation, and policy.<sup>41</sup> Today the FAR distinction between a nonpersonal service contract and a personal one is all but meaningless; the FAR prohibition against personal service contracts (absent statutory authorization) is largely ignored, rarely enforced,<sup>42</sup> and no longer relevant to the operation of the federal government, which has become increasingly privatized and now relies heavily on service contracts of all varieties.<sup>43</sup> Since there is no longer any meaningful distinction between a personal and nonpersonal service contract for acquisition purposes, the distinction should likewise be abolished for purposes of the OFCCP regulations and enforcement of the EO Laws. It follows that the EO Laws should attach to any service contract executed by the federal government under its general contracting authority, including the one before us.

**JOANNE ROYCE**  
**Administrative Appeals Judge**

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<sup>40</sup> See also *Florida Hospital*, ARB No. 11-011, slip op. at 22-27.

<sup>41</sup> See, e.g., Michael K. Grimaldi, *Abolishing the Prohibition on Personal Service Contracts*, 38 J. LEGIS. 71, 84 (2012) (“As agencies routinely rely on service contracts to replace their depleted government staffs, the prohibition against personal service contracts is now seen as a dead letter – a failed policy that is seldom enforced and in need of reform.”); Paul C. Light, *The New True Size of Government*, NYUWAGNER ORG PERFORM. INITIATIVE, RESEARCH BRIEF NO. 2, 11 (2006), available at <http://wagner.nyu.edu/files/admissions/True%20Size%20Research%20Brief.pdf> (More than half the 2005 total of all employees working for the federal government were contract employees. By 2005, “there were five-and-a-half contractors and grantees for every federal civil servant.”); Russell N. Fairbanks, *Personal Service Contracts*, 6 MIL. L. REV. 1, 22 (1959)(“Thus, in the future as in the past, it will be next to impossible to predict with any degree of certainty whether a given arrangement will offend the Comptroller General’s policy [prohibiting personal service contracts].”).

<sup>42</sup> “The Government Accountability Office (GAO) has authority to review federal contractor bid protests and reject contracts that authorize personal service contracts. Yet, these GAO opinions almost universally find that the contract is not one for personal services . . . .” Grimaldi, *supra* note 42, at 83-84 (footnotes omitted).

<sup>43</sup> See Grimaldi, *supra* note 42, at 82-85(“The services that contractors perform run the gamut from low-level janitorial work to background checks, and classified intelligence work. The service contractors are doing the exact same work as federal employees; so although the size of the federal civil service has been reduced, the number of contractors working on behalf of the government has skyrocketed.”).