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## ARB Rejects OFCCP's Claim of Jurisdiction based on Florida Hospital's TRICARE Participation

By David Goldstein

For nearly four years, the Office of Federal Contract Compliance Programs (OFCCP) has been tenaciously pursuing jurisdiction over healthcare providers based on the theory that providers participating in, and receiving more than \$50,000 in reimbursement from, the Department of Defense's TRICARE program qualify as federal government subcontractors who are required to comply with the agency's regulations. Even when Congress passed legislation in December 2011 that appears designed to reject OFCCP's position, the agency's director, Patricia Shiu, responded that "this is not over yet."

Well, the issue may be over now. On October 19, 2012, the Department of Labor's Administrative Review Board (the ARB or Board), in a divided opinion, rejected the OFCCP's argument that it had jurisdiction over Florida Hospital of Orlando based solely on the hospital's participation in TRICARE. See *OFCCP v. Florida Hospital of Orlando*, ARB Case No. 11-011. Unfortunately, the decision leaves open the possibility that some arrangements under TRICARE could support OFCCP jurisdiction.

### Background

TRICARE is the Department of Defense (DOD) program that pays for the medical benefits of active duty and retired military personnel and their families. The DOD has three direct contractors that administer the TRICARE program: (1) Humana Military Health System; (2) TriWest; and (3) Health Net. These three contractors, in turn, enter into contracts with hospitals and other medical providers to provide medical care and supplies to military personnel and their family members covered by TRICARE. The TRICARE administrator and direct contractor in the Florida Hospital of Orlando case was Humana Military Healthcare Services, Inc. (HMHS).

When the hospital resisted the OFCCP's efforts to initiate an audit, claiming it was not a covered government contractor, the matter ultimately came before a Department of Labor administrative law judge (ALJ).

The issues before the ALJ were:

- Whether the hospital's contract with HMHS under the TRICARE program was a federal

subcontract, thereby subjecting it to OFCCP jurisdiction, because the hospital's contract (1) was necessary to the performance of HMHS's direct contract with TRICARE, or (2) required the hospital to perform any portion of HMHS's obligation under its direct contract with TRICARE; and

- Whether the DOD's assertion that TRICARE payments were federal financial assistance (not contract payments) trumped the DOL's opinion that the payments were pursuant to a federal contract.

The ALJ concluded that hospitals that participate in the TRICARE program are subcontractors because they assume the performance of part of HMHS's obligation in its contract with the DOD. The ALJ also concluded that TRICARE payments were not federal financial assistance and, thus, were subject to regulatory obligations applicable to federal contracts and subcontracts.

The Florida Hospital of Orlando appealed the ALJ's decision to the ARB.

On December 31, 2011, while the Florida Hospital case was still pending before the ARB, President Obama signed into law the National Defense Authorization Action for Fiscal Year 2012 (NDAA). It included a provision that specifically addressed the OFCCP's assertion of jurisdiction over TRICARE providers. In particular, Section 715 of the NDAA states, in relevant part:

(3) In establishing rates and procedure 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 or 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.* (emphasis added)

Although Section 715 was widely viewed as intending to foreclose further assertions of OFCCP jurisdiction based solely on TRICARE, the OFCCP interpreted the provision differently. To support its continued assertion of jurisdiction over Florida Hospital, the OFCCP first noted that it has jurisdiction over two different types of "subcontracts" based on the definition of that term in its regulations. The first prong of the applicable regulation defines a subcontract as "any agreement or arrangement between a contractor and any person . . . (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more [covered government] contracts. . ." 41 C.F.R. § 60-1.3. The second prong of the applicable regulation defines a subcontract as "any agreement or arrangement between a contractor and any person . . . (2) [u]nder which any portion of the contractor's obligations under any one or more [covered government] contracts is performed or undertaken or assumed." *Id.*

The OFCCP admitted that Section 715 bars it from arguing that a provider has entered into a covered "subcontract" based on the second prong of the definition of a subcontract. However, it then argued that Section 715 did not bar it from asserting jurisdiction over a TRICARE participant based on the first prong of the definition.

As this is an extremely technical argument, it is worth quoting from the ARB's description of the OFCCP's position:

[OFCCP admits] that it "can no longer assert . . . that HMHS's obligation to create a network of healthcare 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" . . . OFCCP contends, however, that Section 715 does not address the first prong of the subcontract definition that "TRICARE contracting with HMHS to set up a network of providers and ensure access to care for TRICARE beneficiaries [and] HMHS discharged this obligation in part by contracting with Florida Hospital to become a network provider." OFCCP argues that Florida Hospital's services as a participant in the network were "necessary to the performance of the TRICARE – HMHS prime contract and met the first prong of the subcontractor definition . . . ."

ARB opinion at 9. In their plurality decision, two members of the ARB – Chief Administrative Appeals Judge Paul Igasaki and Judge Lisa Wilson Edwards – found that the purpose of the prime contract between HMHS and TRICARE was to develop a network of healthcare providers that

will serve TRICARE beneficiaries and that the agreement between HMHS and Florida Hospital was likewise to provide healthcare services to TRICARE beneficiaries “and be part of the network of provider services pursuant to the prime TRICARE/HMHS contract.” Judges Igasaki and Edwards then concluded that because Florida Hospital’s agreement “involves the provision of healthcare providers pursuant to a managed care prime contract between TRICARE and HMHS that includes the requirement to maintain a network of providers[,]” the agreement cannot be considered to be a covered “subcontract” under either prong of the definition of a subcontract in light of the language of Section 715. ARB Opinion at 23.

Unfortunately, the other three judges wrote separate opinions to explain their reasoning, and these opinions suggest that the OFCCP’s “Prong One” argument might prevail in other contexts.

Judge E. Cooper Brown supported the result because he determined that the OFCCP’s Prong One argument was not properly before the ARB. Judge Brown was satisfied that the OFCCP had the disputed jurisdiction over Florida Hospital under its Prong One argument, but expressed concern that the ALJ had not addressed that argument, having decided the jurisdiction issue on other grounds. Ordinarily, according to Judge Brown, the issue should, therefore, be remanded to the ALJ for an initial decision that could then be reviewed by the ARB. However, in this case, Judge Brown noted that the OFCCP’s assertion of jurisdiction under Prong One before the ALJ had been premised upon the agency’s construction of the TRICARE-Humana Prime Contract as a contract for the delivery of healthcare services. In other words, the OFCCP’s Prong One argument before the ALJ was different from its Prong One argument before the ARB. Under such circumstances, Judge Brown found that the ARB may neither entertain the new argument that the OFCCP raised for the first time on appeal nor order that the matter be remanded for consideration of the argument by the ALJ. Accordingly, Judge Brown agreed that the OFCCP lacked jurisdiction over Florida Hospital and concurred in the decision to dismiss the OFCCP’s complaint. However, Judge Brown did not agree with the plurality’s rejection of the OFCCP’s Prong One argument or the plurality’s broad holding that Section 715 completely divests OFCCP of jurisdiction based solely on TRICARE participation.

In another separate opinion, Judge Luis Corchado took an entirely different approach, reading Section 715 as not resolving the relevant question under Prong One. According to Judge Corchado:

Because Prong One applies to any kind of a government contract, Section 715 does not resolve the relevant question under Prong One. As explained earlier, Section 715 prevents the OFCCP from using certain words in a TRICARE managed care support contract to label the TRICARE/HMHS contract as a contract to perform healthcare services. But the relevant question under Prong One is whether Florida Hospital provides supplies or non-personal services that HMHS needs to be able to perform its contact with TRICARE.”

ARB Opinion at 35. Judge Corchado thus found that Section 715 did not eviscerate the OFCCP’s Prong One argument and that the ARB should have determined whether the OFCCP did indeed have jurisdiction under that prong.

Interestingly, although Judge Corchado’s position regarding the interpretation of Section 715 appears to lean the OFCCP’s way, he also wrote at length regarding another issue that was not touched upon in the plurality decision and that appears to favor Florida Hospital’s position. Although many entities that enter into contracts or subcontracts with the federal government are subject to the OFCCP’s jurisdiction, those that receive federal financial assistance (often referred to as grants) are not. One of the arguments that Florida Hospital made in opposing the OFCCP’s assertion of jurisdiction was that TRICARE constitutes federal financial assistance (analogous, for example, to Medicare parts A and B) and not a government contract. The OFCCP replied by arguing that TRICARE was established to ensure or optimize the delivery of quality medical services to military personnel and therefore was different from Medicare and not a federal financial assistance program. The ALJ agreed that unlike Medicare, TRICARE is *not* a federal financial assistance program. Judge Corchado criticized the ALJ’s reasoning on this issue and would have remanded the case back to the ALJ for reconsideration of it even if the ARB had otherwise agreed with the agency’s jurisdictional arguments.

Finally, Judge Joanne Royce not only agreed with Judge Corchado on the viability of the OFCCP’s Prong One argument, but suggested that the OFCCP could also assert jurisdiction over Florida Hospital under Prong Two for reasons other than those prohibited by Section 715.

## Conclusion

The OFCCP's effort to expand its jurisdiction over healthcare providers based on their participation in TRICARE has suffered another significant blow. Historically, the OFCCP has tended to back off of such aggressive positions after this type of defeat. In light of the agency's limited resources and many other initiatives, it may not pursue this issue any further. However, as it was a surprise to see the OFCCP adhere to its position despite Congress's passage of Section 715, only time will tell what happens next.

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