

Subcontractors & Affirmative Action Regulations?

By Hope Eastman

As we have previously reported, the Office of Federal Contract Compliance Programs (OFCCP) has issued new regulations supplementing government contractors' obligations to engage in affirmative action. It is important to note that these regulations apply not only to prime contractors but also to certain subcontractors.

Issuance of new OFCCP regulations and an updated Federal Contract Compliance Manual brings renewed attention to a case decided in March 2013. *UMPC Braddock Hospital v. Harris*, ___ F.2d ___, 2013 WL 1290939 (D.D.C. March 30, 2013). The D.C. Circuit ruled in no uncertain terms that the OFCCP's laws and regulations apply to subcontractors even where their subcontracts with the prime contractors are silent as to whether they are government contractors and require compliance by their subcontractors. Even in the absence of notice, the OFCCP obligations apply. This includes the obligation to prepare affirmative action plans.

The triggers are not that big for the many subcontractors in our area who work for prime contractors. A single government subcontract worth \$50,000 performed by a company with 50 or more employees can trigger all of the E.O. 11246 affirmative action-related requirements with respect to the hiring and advancement of women, minorities and individuals with disabilities. A single contract worth \$100,000 will trigger these obligations with respect to veterans for a company with 50 or more employees. The nondiscrimination requirements, but not the affirmative action requirements, are triggered by an aggregate of \$10,000 in contracts over a twelve month period regardless of the number of employees.

Subcontractors who supply goods and services to the many companies who are direct government contractors need to be more vigilant about whether they are selling to government contractors in a way that is contributing significantly to the performance of the government contract.

Subcontractors who contract with or supply government contractors are well advised to regularly assess whether they are covered by the affirmative action regulations and, if so, promptly take steps to bring themselves into compliance.