



In the Matter of:

ARB CASE NO. 98-003

ALJ CASE NO. 97-OFC-14

DATE: November 14, 1997

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

PLAINTIFF,

v.

TRINITY INDUSTRIES, INC.

DEFENDANT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

FINAL DECISION AND ORDER

This action arises under Executive Order No. 11,246 (30 Fed. Reg. 12319), as amended by Executive Order No. 11,375 (32 Fed. Reg. 14303), and Executive Order No. 12,086 (43 Fed. Reg. 46501) (the Executive Order); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. §4212 (VEVRAA)(sometimes collectively referred to as the contract compliance laws). Defendant Trinity Industries (Trinity) fabricates steel and various steel products and owns and operates a facility in Asheville, North Carolina, which is part of its Railcar Division. Stipulations of Fact and Legal Issues (Stip.) at 2. Trinity is a government contractor, and its Asheville facility is not separately incorporated and is not a separate legal entity. *Id.* The parties stipulated that no activity carried out, work performed, or product produced at Trinity's Asheville facility is connected or related to the performance of any government contract between Trinity and the government. *Id.* at 3-4.^{1/}

^{1/} The record is silent on whether any activity at the Asheville facility is necessary to the performance of any contract between another contractor and the government. *See* 41 C.F.R. §1.4 (definition of subcontract).

In August 1996 Plaintiff, the Office of Federal Contract Compliance Programs (OFCCP), in order to conduct a compliance review under the contract compliance laws, requested that Trinity provide copies of its affirmative action programs and supporting information for its Asheville, North Carolina facility.^{2/} Stip. at 4. Trinity refused. Trinity also refused to permit OFCCP to conduct an on-site compliance review at the Asheville facility. *Id.* OFCCP then brought this action under expedited enforcement procedures^{3/} seeking an order directing Trinity to comply with the contract compliance laws or have its current contracts canceled and be debarred from future contracts. The case was submitted to a Department of Labor Administrative Law Judge (ALJ) on stipulated facts. Recommended Decision and Order (R. D. and O.) at 3.

The ALJ held that the statutes, order and regulations involved here cover all the facilities of a covered contractor, unless the contractor has obtained a waiver for a specific facility. Because Trinity admitted it was a covered contractor and did not obtain a waiver for the Asheville facility,^{4/} the ALJ found that Trinity violated the contract compliance laws when it refused to comply with OFCCP's requests. R. D. and O. at 12-13. The ALJ recommended that Trinity be ordered to provide its affirmative action program and supporting documentation and grant OFCCP access to the Asheville facility for an on-site compliance review. If Trinity failed to comply, the ALJ recommended it be debarred and that its current contracts be canceled. *Id.* at 17- 18.

Trinity excepted to the R. D. and O., arguing that its Asheville facility is not subject to the provisions of the contract compliance laws. The matter is now before us for decision.

DISCUSSION

Trinity argues that because its Asheville facility does not perform work related to Trinity's government contract, Trinity is not required to comply with the contract compliance laws with regard to that facility. This argument is unsupported either by the plain meaning of the contract compliance laws or the case law upon which Trinity relies.

We begin this inquiry with the statutory and executive order language at issue. The Executive Order and its implementing regulations prohibit Federal contractors and

^{2/} 41 C.F.R. §§60-1.40(c), 60-250.53, 60-741.81 (1996).

^{3/} 41 C.F.R. §§60-30.31-30.37 (1996).

^{4/} Trinity addressed a request for a waiver for the Asheville facility to the District Director of OFCCP in Charlotte, N.C. as part of its response to OFCCP's request for the affirmative action programs. The District Director notified Trinity he did not have the authority to grant a waiver and that such requests should be directed to the Deputy Assistant Secretary for OFCCP. *See* Stip., Exhibits 1, 2, and 3. There is no evidence that Trinity made any further efforts to obtain a waiver. In any event, OFCCP did not grant a waiver.

subcontractors with contracts of \$10,000 or more from discriminating against employees and applicants for employment on the basis of race, color, sex, religion, or national origin. Section 503 of the Rehabilitation Act of 1973 requires all federal contractors and subcontractors with contracts of \$10,000 or more to take affirmative action to employ and advance in employment qualified individuals with disabilities. 29 U.S.C. §793(a) (Supp. 1997). Section 4212 of VEVRAA requires all federal contractors and subcontractors holding contracts of \$10,000 or more to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era. 38 U.S.C. §4212. Under the Executive Order "[t]he contractor" is required to furnish required information and reports and to permit access to its books, records, and accounts so that OFCCP may ascertain compliance with the Executive Order. Regulations enforcing Section 503 and the VEVRAA contain similar requirements applicable to "the contractor." 41 C.F.R. §§60-741.81, 60-250.53.

Trinity concedes that it holds contracts with the federal government. Stip. at 2. It argues that only those Trinity facilities which actually perform work related to its government contracts are subject to the requirements of the contract compliance laws. Trinity therefore asserts that because the Asheville facility does no work related to Trinity's federal contract, it is exempt from the contract compliance laws.

Trinity confuses the terms "contractor" with "facility" as those words are used in the contract compliance laws and regulations. Moreover, Trinity ignores the specific intent of the contract compliance laws to exempt facilities of covered contractors only by the choice of the Secretary of Labor.

A. "Contractor" Status of Asheville Facility.

"Prime contractor" is defined in the contract compliance laws as "any person holding a contract," and a "person" is "any natural person, corporation, partnership [or] unincorporated association . . ." 41 C.F.R. §§60-1.3; 60-250.2; 60-741.2. Trinity stipulated that the Asheville facility "is not separately incorporated and does not constitute a legal entity separate from [Trinity]." Stip. at 2. It also stipulated that Trinity Industries, Inc., a corporation, holds government contracts and meets the other thresholds for application of the written affirmative action program requirements. *Id.* Thus, Trinity is a covered government contractor. The contract compliance regulations specifically require development of written affirmative action programs for each establishment of a contractor. 41 C.F.R. §§60-1.40, 60-250.5, 60-741.40. Thus, it is absolutely clear that Trinity, as a contractor, has the responsibility to assure compliance of all of its facilities with the contract compliance laws absent some applicable exemption.

B. The Exemptions of the Contract Compliance Laws.

All three of the contract compliance laws and their regulations at issue here have explicit provisions for the exemption of specific contractor facilities. Thus, the Executive Order provides:

The Secretary of Labor may . . . provide, by rule, regulation, or order, for the exemption of facilities of a contractor which are in all respects separate and distinct from activities of the contractor related to the performance of the contract: Provided, that such an exemption will not interfere with or impede the effectuation of the purposes of this Order; and provided further, that in the absence of such an exemption all facilities shall be covered by the provisions of this Order.

E.O. 11246, Section 204. The VEVRAA and Section 503 regulations contain virtually interchangeable waiver provisions. *See* 41 C.F.R. §60-250.3(a)(5); 41 C.F.R. §60-741.4(b)(3) (1996). Moreover, Congress specifically included a waiver provision in its 1992 amendments to the Rehabilitation Act. Amended Section 503(c)(2) provides:

2(A) The Secretary of Labor may waive the requirement of the affirmative action clause required by regulations promulgated under subsection (a) of this section with respect to any of a prime contractor's or subcontractor's facilities that are found to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract, if the Secretary of Labor also finds that such a waiver will not interfere with or impede the effectuation of this chapter.

(B) such waivers shall be considered only upon the request of the contractor or subcontractor. The Secretary of Labor shall promulgate regulations that set forth the standards used for granting such a waiver.

29 U.S.C. §793(c)(2)(A) and (B).^{5/} Trinity makes no claim that it received a waiver from the contract compliance laws for its Asheville facility. Trinity did *seek* such an exemption under the Executive Order. *See* n.4, above. However, the request was made to the wrong office, and Trinity was so notified. Trinity did not resubmit a waiver request.

We will briefly discuss Trinity's arguments although we find them to be without merit. First, Trinity argues that the contract compliance laws only apply to contractors and subcontractors, and that "the Asheville facility is neither a contractor nor a subcontractor" Brief in Support of Exceptions to the Administrative Law Judge's Recommended Decision and Order (Def. Br.) at 7. This argument is specious. Trinity *is* a contractor: as such it is required to comply with the contract compliance laws. The only available means of exempting the Asheville facility from the requirements placed upon Trinity is for Trinity to request and the Secretary of Labor to grant a waiver, neither of which has happened. Trinity appears to believe that the waiver provisions are self executing. Thus in footnote 1 of its brief Trinity states that

^{5/} OFCCP published the separate facility waiver regulations for notice and comment on February 14, 1996. 61 Fed. Reg. 5902. *See also* correction notice, published on March 8, 1996. 61 Fed. Reg. 9532. No final regulations have yet been issued.

"Trinity . . . took the first step in putting OFCCP on notice that Asheville was exempt." Def. Br. at 2, n.1. Of course, the waiver is not dependent upon Trinity's "notification" of the Secretary. Rather, the Secretary must grant the waiver.

Moreover, Trinity's argument fails to recognize a simple principle of statutory construction: the drafters intended to give meaning to the words and phrases used such that the language should not be interpreted in a manner that renders a provision of the statute meaningless. In this case, if a contractor is somehow able unilaterally to exempt one of its facilities which does not perform work related to the contract, the language of the Executive Order and Section 503 including a specific requirement that a waiver be requested from and granted by the Secretary would be rendered meaningless.

Second, Trinity argues that the VEVRAA and Section 503 do not apply to the Asheville facility because they both contain provisions which state that "[t]he provisions of this section shall apply to any subcontract entered into by a prime contractor in carrying out any contract for the procurement of personal property and non-personal services (including construction) for the United States." 38 U.S.C. §4212; 29 U.S.C. §793. Trinity argues that "[h]ere, the statutory language contemplates the obligations of the contracting party, and notes specifically that the obligation extends to related entities that *assist in carrying out the contract*." Def. Br. at 8 (emphasis in original). Trinity's recitation of these statutory provisions is accurate, however, the provisions have nothing to do with the facts of this case. Rather, these provisions are concerned with assuring that prime contractors bind their subcontractors on a government contract to the contract compliance laws. Here we are not discussing the relative responsibilities of a prime contractor and its subcontractor. The Asheville facility is not Trinity's subcontractor; it is a part of Trinity itself.

Trinity relies on several cases to support its argument that facilities of a covered contractor are exempt from the contract compliance laws if they do not perform work related to the contract. As discussed below, none of these cases apply to the factual situation presented here.

First, Trinity relies heavily upon *Board of Governors of the University of North Carolina v. United States Dept. of Labor*, 917 F. 2d 812 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2013 (1991)(UNC). UNC had challenged the Department of Labor's decision that all 16 campuses in the UNC system were required to comply with the contract compliance laws even though some of them did not have federal government contracts. The Fourth Circuit held, based upon its analysis of North Carolina state law, that the UNC system was one state agency for contract compliance purposes, and therefore that all campuses must comply. Trinity argues that if we were to scrutinize the details of Trinity's "governance" in the same fashion that the Fourth Circuit analyzed UNC's governance, we would reach the conclusion that Trinity's system is not unitary for contract compliance law purposes, and that only Trinity facilities that participate in federal contracts should be required to comply with the federal contract compliance laws.

There are several flaws in Trinity's argument. First, Trinity overlooks the fact that the Fourth Circuit, in evaluating UNC, was applying Department of Labor regulations that apply specifically and only to state and local government contractors, which Trinity is not. The regulation at issue in *UNC* provides that:

The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

41 C.F.R. § 60-1.5(a)(4). The Fourth Circuit quoted this language, and then stated, "[c]learly an agency, instrumentality, or subdivision of a *state government* that was not participating in work on or under the contract would not be subject to OFCCP's review authority." *UNC* at 818 (emphasis supplied). In its brief, Trinity replaces "state government" in the Fourth Circuit's statement with "[an entity]," and then argues that it is "an entity" and is entitled to an exemption. It is not in Trinity's power to alter the meaning of a regulation by rewriting it. The regulation cited is found only in the Department of Labor's OFCCP regulation addressing "Contracts with State or local governments." *See* 41 C.F.R. §60-1.5(a)(4).

Trinity also relies upon *Hammond v. Donovan*, 538 F. Supp. 1106 (W.D. Mo. 1982), to support its position. Def. Br. at 11-12. *Hammond* is totally inapposite. In *Hammond*, the issue decided by the court was whether an agreement between the federal government and a facility was a grant or a contract. If it was a grant, as the district court held, then the federal contract compliance laws did not apply. Here, there is no dispute that the agreement between Trinity and the federal government is a contract, and that Trinity is a federal contractor. Nothing in *Hammond* is applicable to this case.

Trinity also cites *OFCCP v. Loffland Bros. Co.*, OEO 75-1, 1984 WL 72744 (Apr. 16, 1984). Def. Br. at 12. The issue in *Loffland* was whether Loffland was a government contractor or subcontractor. The fact that Trinity is a federal contractor is not in dispute.

Trinity cannot successfully support its arguments by citing passages from irrelevant decisions. Its attempt to do so merely accentuates the barrenness of its legal arguments. The ALJ correctly determined that all of Trinity's facilities are required to comply with the contract compliance laws as a result of Trinity's status as a government contractor. Trinity has violated E.O. 11,246, VEVRAA, and Section 503 by refusing to provide copies of its affirmative action programs and the requested supporting information and records for its Asheville, North Carolina facility and by refusing to permit access to the premises for an on-site compliance review.

ORDER

Trinity Industries, Inc. is ordered to cease and desist from violating Executive Order 11,246, VEVRAA, and Section 503 by denying the Office of Federal Contract Compliance

Programs information required to complete a compliance review of Trinity's Asheville facility pursuant to 41 C.F.R. Part 60.

Trinity Industries is ordered, no later than 30 days from the issuance of this Order, to cease and desist from denying the Office of Federal Contract Compliance Programs access to its premises at Asheville, North Carolina, to conduct an on-site compliance review including interviews, and inspection of such records and other materials as may be relevant and material to verifying Trinity's compliance status pursuant to 41 C.F.R. Part 60.

Should Trinity Industries, Inc. fail to comply with this order within thirty days of its issuance, it is ordered that the present government contracts of Trinity Industries, Inc. be canceled, terminated, or suspended, and that Trinity Industries, Inc. be declared ineligible for further contracts and subcontracts, and from extension or modification of any existing contracts and subcontracts, until such time that it can satisfy the Secretary of Labor, or her designee, the Deputy Assistant Secretary for OFCCP, that it is in compliance with the provisions of E.O. 11,246, Section 503, and VEVRAA, and the regulations issued pursuant thereto, which have been found here to have been violated.

The sanctions invoked here shall be applicable to Trinity Industries, Inc., its officers, subsidiaries and divisions and all purchasers, successors, assignees and transferees.

SO ORDERED.

DAVID A. O'BRIEN
Chair

KARL J. SANDSTROM
Member

JOYCE D. MILLER
Alternate Member