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How can my company be a government contractor if we do not even have a contract?

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By Angelique Lyons

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The Office of Federal Contract Compliance Programs has long held that a company without a federal contract can be a government contractor if it operates as a “single entity” with a subsidiary, parent or other entity that is a federal contractor. But a recent case expanded that principle to a situation in which *neither* entity was a federal contractor by itself.

In *OFCCP v. Manheim Auctions, Inc.*, an Administrative Law Judge held that the two companies were sufficiently related to be a single entity, and therefore that their employees and federal contracts had to be aggregated for purposes of establishing coverage. Manheim Auctions, Inc., had 50 or more employees but no federal contracts. Its subsidiary, Manheim Auctions Government Services, LLC, had federal contracts worth \$50,000 or more but fewer than 50 employees. Neither company thought it was a covered contractor because separately neither company met the jurisdictional requirements, but when treated as a single entity, the companies were covered.

Having been found to operate as a single entity, both companies are jointly and individually liable for meeting the affirmative action plan and recordkeeping requirements under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Vietnam Era Veterans' Readjustment Assistance Act.

In determining whether a company is a single entity sufficiently related to another company, the OFCCP will analyze the following five criteria: (1) common ownership; (2) common directors or officers; (3) *de facto* exercise of control; (4) unity of personnel policies emanating from a common source; and (5) dependency of operations.

The ALJ found that Manheim Auctions and the Government Services subsidiary had common directors and officers; that Manheim had *de facto* control because it managed the funding of the subsidiary; that the two entities had the same human resources department, were treated as a single company for purposes of determining employee seniority, and shared EEO-1 reporting; and that Manheim provided office space, information services and promotional assistance to the subsidiary.

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Companies should examine their relationships with their parents and subsidiaries to evaluate whether hidden coverage exists that would impose liability under the affirmative action laws.

If you have any questions about this Notice, please contact any member of Constangy's **Strategic Affirmative Action practice group**, or the Constangy attorney of your choice.

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