

U.S. Department of Labor

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Issue Date: 08 June 2017

Case No.: 2017-OFC-00005

In the Matter of

**OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS
U.S. DEPARTMENT OF LABOR**
Plaintiff

v.

BAKER DC, LLC
Defendant

Appearances: Andrea Luby, Esq., Andrea Appel, Esq. (For Plaintiff)
John C. Fox, Esq., David Copus Esq. (For Defendant)

Before: LYSTRA A. HARRIS
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ENFORCING ONSITE REVIEW

This matter arises under Executive Order 11246, (“Executive Order 11246”), as amended, and regulations issued pursuant thereto; Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §793, as amended and regulations issued pursuant thereto; and Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act, 38 U.S.C. §4212, as amended and regulations issued pursuant thereto.

I. PROCEDURAL HISTORY

On January 13, 2017, the Office of Federal Contract Compliance Programs, United States Department of Labor, (“Plaintiff” or “OFCCP”) filed a complaint against Baker DC, LLC (“Defendant” or “Baker DC”) alleging that Defendant refused to supply records and refused to permit Plaintiff to perform an on-site compliance review in violation of Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and section 4212 of the Vietnam Era Veterans’ Readjustment Assistant Act. *See* Complaint at 1. Defendant filed an answer to Plaintiff’s complaint on February 2, 2017 (“Answer”), admitting and denying allegations in the Complaint and offering its affirmative defenses.

On January 20, 2017, the Office of Administrative Law Judges (“OALJ”) issued a Notice of Docketing, Assignment, and Initial Pre-Hearing Order. A telephonic conference call was held on February 8, 2017 to address whether expedited hearing proceedings will apply. Present were counsel for Plaintiff, Andrea Luby, Esq. and counsel for Defendant, John C. Fox, Esquire, and David Copus, Esq. At the conference call, Plaintiff’s request for expedited hearing procedures was denied. A Telephonic Conference Call Summary and Order was issued on February 13, 2017.

On February 27, 2017, Plaintiff filed a Motion for Reconsideration of Order Denying Expedited Hearing and Motion to Quash Subpoenas. On March 6, 2017, Defendant filed its Memorandum Opposing OFCCP’s Motion for Reconsideration.

A second telephonic conference was held on April 4, 2017. Present were counsel for Plaintiff, attorneys Andrea Luby and Andrea Appel, and counsel for Defendant, John C. Fox. A Telephonic Conference Call Summary and Order was issued on April 5, 2017. Pursuant to the conference call and order, Plaintiff’s Motion for Reconsideration of Order Denying Expedited Hearing was granted. The Order scheduled the hearing for May 23, 2017.

By letter dated April 11, 2017, Defendant filed a Motion to Conduct Four Depositions Duces Tecum. Plaintiff filed an opposition to Defendant’s Motion on April 18, 2017. On April 21, 2017, an Order was issued Partially Granting Defendant’s Motion to Conduct Depositions.¹

A hearing was held on May 23, 2017. At the hearing, Plaintiff’s Exhibits (“PX”) 1 through 16, Defendant’s Exhibits (“DX”) 5, 20, 24-26, 34, 35, and 37-42, and Administrative Law Judge Exhibits (“ALJX”) 1 through 2, were admitted into the record. Briefs were set to be due by June 2, 2017. Both parties submitted closing briefs.

During the hearing, Defendant objected to the redaction in PX 9. Transcript “T.” 13. Plaintiff asserted a formal claim of law enforcement and deliberate process privilege regarding the redacted portion in PX 9.² T. 13. In support its privilege claim, Plaintiff submitted an attestation from Tom Dowd, the Acting Director of OFCCP. T. 13. Defendant’s objection to the redacted portion of PX 9 was overruled, and the law enforcement privilege was allowed. T. 194.

II. SUMMARY OF FACTS

Defendant is a government subcontractor, within the meaning of Executive Order 11246, located in the District of Columbia and has 50 or more employees. Defendant was awarded two federal subcontracts to perform construction work in 2015 at St. Elizabeths West Campus in Washington, D.C. *See* Complaint at ¶ 2-5; Answer at ¶ 2-5; PX 4-5.

¹ The Order granted Defendant’s request to depose three of the witnesses. The Order found that Defendant failed to establish good cause for taking a Rule 30(b)(6) deposition of a witness from OFCCP headquarters.

² Plaintiff explained that the redacted portion contains direct quotations from OFCCP’s internal guidance. T. 19. “The redaction is for an internal OFCCP policy talking about how subcontractors are scheduled for inspection on construction mega projects.” T. 20. Plaintiff explained that the reason OFCCP is withholding this information is because it does not want contractors to be able to figure out “when OFCCP is coming or when OFCCP is not coming.” T. 20.

For a construction projects it deems a “Mega Construction Project,”³ OFCCP assists the general contractor and subcontractors in complying with equal opportunity requirements.⁴ Additionally, OFCCP conducts compliance reviews of the general contractor and some subcontractors.

On September 30, 2014, the General Services Administration (“GSA”) awarded Grunley Construction Company, Inc. (“Grunley”) a \$139 million contract to renovate a building on the St. Elizabeths West Campus. OFCCP selected this project as a Mega Project and Grunley agreed to participate in OFCCP’s Mega Project program. *See* Complaint at ¶ 8-12; Answer at ¶ 8-12. Construction work on phase II of the St. Elizabeths Mega Project began on February 3, 2015. PX 9. At an OFCCP outreach event on February 9, 2015, several individuals complained to OFCCP officials about Defendant’s discriminatory policies and actions. PX 16.

In June and September 2015, Grunley notified OFCCP that it had awarded a federal subcontract to Defendant for the St. Elizabeths project in the amounts of \$100,000 and \$15 million, respectively. PX 4-5. The project was to begin in October 2015 and end in August 2017. *Id.* Defendant began working on the project in November 2015. PX 6.

In March 2016, Plaintiff notified Defendant that it had been selected for compliance review by sending a Construction Compliance Evaluation Notice (the “Notice”) to Defendant’s Vice President, Ken Fender. PX 10; DX 34. In the Notice, Plaintiff notified Defendant that it will begin an on-site review on May 11, 2016. In response to the Notice, Defendant’s counsel, John Fox, called and emailed OFCCP’s District Director in Baltimore, Tom Wells, to obviate the need for an entrance conference on May 11, 2016. On May 3, 2016, an OFCCP compliance officer, Michelle Higginbotham, called Defendant’s lawyer and asked to interview Defendant’s Corporate Compliance Manager, as well as two other managers. On May 11, 2016, Ms. Higginbotham interviewed Defendant’s Corporate Compliance Manager as well as two other managers. *See* Complaint at ¶ 15-19; Answer at ¶ 15-19; PX 12.

On May 18, 2016, Plaintiff emailed John Fox requesting specific documents as part of an on-site review and on-site employee interviews to be conducted on June 6, 2016.⁵ John Fox denied these requests. Plaintiff’s attorneys and Defendant’s attorney had a conference call on June 8, 2016 regarding Defendant’s denial of access, but the parties did not reach an agreement.

On June 9, 2016, Plaintiff issued a Notice to Show Cause advising Defendant to show cause for its denial of access to its Washington, DC worksites. After issuing the Notice to Show Cause, OFCCP attempted to obtain Defendant’s voluntary compliance, but was unsuccessful. *See* Complaint at ¶ 20-23; Answer at ¶ 20-23.

³ In this recommended decision “Mega Construction Project” and “Mega Project” are used interchangeably.

⁴ A Mega Construction Project has a value of at least \$25 million and a duration of at least one year. Complaint at ¶ 8; Answer at ¶ 8; PX 1.

⁵ The requested documents included an employee roster, a list of active projects, payroll records, and applicant tracking data. *See* Complaint at ¶ 20; Answer at ¶ 20.

III. SUMMARY OF EVIDENCE

A. *Documentary Evidence*⁶

PX 1: OFCCP Mega Construction Project Basic Fact Sheet:

This document describes the purpose of the Mega Construction Project Program. In selecting a Mega Construction Project, OFCCP “works with the [GSA] and other federal agencies to identify large, high-profile projects when they are funded, long before any construction begins.” Projects selected for the Mega Construction Project Program are valued at \$25 million or more and are expected to last for at least one year.

PX 2: OFCCP’s Mega Construction Project Frequently Asked Questions (FAQs):

This document provides that “all Mega Construction Project (‘MCP’) prime contractors that employ trades workers directly are subject to compliance evaluations. In addition, on each MCP, OFCCP uses neutral selection criteria to select some or all of the subcontractors for review.”

PX 3: Memorandum of Understanding (‘MOU’) on Mega Construction Projects between DOL and GSA

This is a MOU between the GSA and DOL in order to enhance the enforcement of equal employment opportunity requirements. Under the MOU, the GSA agrees to provide to the director of OFCCP annually, within 30 days of appropriation approval, a list of Mega Construction Projects that have been approved for funding.

PX 4-5: Letters notifying OFCCP of subcontract award

In a letter dated June 12, 2015, Grunley notified OFCCP that Grunley had awarded a \$100,000 subcontract to Defendant on the St. Elizabeths Mega Project. The estimated start date was October 9, 2014 and the completion date is August 4, 2017.

In a letter dated September 24, 2015 Grunley notified OFCCP that Grunley had awarded a \$15,050,000 contract to Defendant on the St. Elizabeth’s Mega Project for the same construction dates.

PX 6: Utilization Report showing months Baker DC worked on the St. Elizabeths project

This report shows that Defendant worked on the St. Elizabeths project in November 2015, December 2015, and January 2016.

⁶ This recommended decision only summarizes the most pertinent evidence but all of the admitted evidence has been considered.

PX 7: List of Contractors Working on Phase 2 of the St. Elizabeths MegaProject

This document is a redacted copy of a chart of “Contractors Working on Phase 2 of St. Elizabeths Megaproject.” The rows show a list of 21 subcontractors and contractors, with the names of the contractors blacked out, except for Defendant and Grunley. The columns are dated March 2015 through April 2017. A guide on the bottom provides that blue highlight denotes the subcontractors scheduled for review. Both Baker DC and Grunley are highlighted for review. The chart also includes x’s for some of the contractors corresponding to some of the months. The x’s indicate the months that the contractor worked on the Mega Project. The chart shows that Defendant worked on the St. Elizabeths project from November 2015 to April 2016 and then from June to August 2016.

PX 8: List of Construction Contractors to Schedule for Compliance Reviews for Phase 2 of St. Elizabeths Megaproject

This document contains a chart listing the contractors working on the St. Elizabeths Megaproject with the company names redacted except for Grunley and Defendant. The chart (as partially replicated below)⁷ shows the month each contractor reached three months’ work at the St. Elizabeths Megaproject and the date the contractor is scheduled for review.

#	Contractor	Month Reached 3 Months’ Work	Date Scheduled for Review
1	Grunley Construction Co., Inc.	Prime Contractor	2/29/16
2		May 2015	8/1/16
3		May 2015	8/1/16
4		June 2015	
5		June 2015	
6		August 2015	
7		August 2015	
8		January 2016	2/29/16 (received credible verbal complaints followed by a formal complaint)
9		January 2016	
10	Baker DC	January 2016	3/17/16 (received credible verbal complaints)

There were four other contractors who reached three months’ work on January 2016.

PX 9: Note to File Describing Scheduling of Baker DC

This document contains two redacted portions. The first paragraph states “Per OFCCP’s internal Guidance (INT) 2015-02 dated November 18, 2014...” followed by several redacted sentences. The document next states:

⁷ The chart is not replicated in full; there are six more contractors listed after Baker DC.

Construction work on Phase 2 of the St. Elizabeths megaproject in Washington, D.C. started on February 3, 2015, whereas Baker DC LLC did not initiate work at St. Elizabeths until November 2015 and continued working there through at least February 2016. However, OFCCP received complaints of alleged employment discrimination by Baker DC from credible third parties.

It then contains a few redacted sentences. The document finishes by stating “[t]his justified temporarily skipping over several other subcontractors that started working at St. Elizabeths earlier than Baker DC and also have completed at least three months of work there.”

PX 10: Scheduling letter Scheduling On-Site for May 11, 2016

Plaintiff wrote a letter dated March 17, 2016 addressed to Ken Fender, Vice President of Defendant, informing Mr. Fender that OFCCP is scheduling an onsite compliance evaluation on May 11, 2016 at the Washington DC facility to evaluate compliance with Executive Order 11246. The evaluation was to cover the period from January 1, 2015 through December 1, 2015. The letter states that while onsite, OFCCP will request to review and copy various documents. The letter included an attachment, *Attachment A: Sample Onsite Documents*, listing some of the documents that OFCCP could request during the onsite review.

PX 11: Email from John Fox to Tom Wells dated April 28, 2016

John Fox wrote an email to Tom Wells offering to submit some information voluntarily in order to obviate the need for an Entrance Conference on May 11. Mr. Fox explained that there are no onsite HR Managers in Defendant’s office. Mr. Fox recommended an earlier phone call with Defendant’s human resources (“HR”) principals or another conference call on May 11.

PX 12: Emails between Michelle Higginbotham, Tom Wells, and John Fox

This document contains a series of emails. Michelle Higginbotham sent an email to John Fox on May 2, 2016, explaining that she is the compliance office for Defendant’s onsite review. She wrote that she had a conversation with Robin and Denise who informed her that the HR individual responsible for Defendant is out on medical leave and would not be back until May 1st, thus the onsite review was pushed to mid-May. Ms. Higginbotham asked for the names and locations of Defendant’s HR principals. She asked if the CEO or facility director is also unavailable for the entrance conference.

Mr. Fox emailed a response on the same day, stating that Tom Wells canceled the May 11 Entrance Conference and was in the process of putting together a call. Mr. Fox wrote that he answered all of Ms. Higginbotham’s questions in an email that he sent to Tom Wells. On May 3, 2016, Ms. Higginbotham requested that all emails be sent to her regarding this matter. She wrote that the entrance conference will be conducted virtually

on May 11. Ms. Higginbotham will interview Ms. Parker, Ms. Beesley who is the Regional HR Manager, and Mr. Maravilla, the individual responsible for hiring workers for Defendant. Subsequent email discussions pertained to scheduling the Entrance Conference and individual interviews. Tanya Bennett from OFCCP and Tom Wells were copied on the emails.

Tom Wells clarified in an email dated May 3, 2016 to Ms. Higginbotham that he did not cancel the May 11 Entrance Conference but simply agreed that it may not be done in person. On May 5, 2016, Ms. Higginbotham requested that all support data and all items from the scheduling letter be submitted no later than May 11 at 9 am. On May 6, 2016, Mr. Fox asked Tom Wells to advise him as to what method OFCCP used to select Defendant for an audit and why OFCCP selected Defendant for an audit.

On May 18, 2016, Tom Wells sent an email to John Fox formally requesting all documents identified in the March 17, 2016 scheduling letter. Mr. Wells requested an additional 18 items from Defendant covering the period of January 1, 2015 through December 31, 2015. Mr. Wells requested to complete the onsite review on June 6, 2016.

PX 13: Notice to Show Cause June 9, 2016

OFCCP sent a Notice to Show Cause dated June 9, 2016 to Mr. Fender asking him why enforcement proceedings should not be initiated pursuant to Sections 208 and 209 of Executive Order 1124. The letter explains that on June 8, 2016, John Fox as representative of Defendant, denied access to the facility. The letter provides that Defendant must grant Plaintiff access to the facility to conduct an onsite compliance evaluation within 30 days of the receipt of this Notice, or Plaintiff will commence enforcement proceedings.

PX 14: Defendant's Response to Notice to Show Cause

John Fox sent a letter dated July 6, 2016 responding to the Notice to Show Cause. Mr. Fox asked Plaintiff for Plaintiff's probable cause or equivalent to conduct an onsite investigation and at which locations.

PX 15: Defendant's Responses to OFCCP's First Requests for Admissions

PX 16: Memo describing statements made to OFCCP about Baker DC

Tom Wells wrote a memo to Michele Hodge, Regional Director, dated December 21, 2016. The memo states that at an outreach event on February 9, 2015, several African American individuals asked OFCCP officials to look into Baker DC. OFCCP Assistant District Director Tanya Bennett overheard five African-Americans talking about how discriminatory Baker DC was as a company. Additionally an African-American man and woman came up to OFCCP personnel and complained about Baker DC's treatment of African Americans. One individual called Tanya Bennett several days after the event and made five specific allegations about discrimination.

DX 5: Administrative Complaint

DX 20: May 16, 2016 Email from Michelle Higginbotham to Daniel Baker

Michelle Higginbotham sent an email to Daniel Baker on May 16, 2016 informing him that Defendant has been selected for a routine compliance review. Ms. Higginbotham asked Mr. Baker to contact her as soon as possible to schedule a date to come to the facility and collect necessary information.

DX 24-26: Email from Brittany Taylor to Ken Fender- June 25

These exhibits are emails between Brittany Taylor, OFCCP Compliance Officer, and Defendant's employees regarding a 2014 onsite review.

DX 34: Scheduling Letter (same as PX 10)

DX 35: Sample Scheduling Letter from OFCCP to a contractor in a supply service industry.

DX 37: Email from John Fox to Tom Wells May 6, 2016 (same email in PX 12)

John Fox sent an email to Tom Wells on May 6, 2016 asking him to explain what method Plaintiff used to select Defendant for an audit and why Plaintiff selected Defendant for an audit.

DX 38: Email from John Fox to Tom Wells May 23, 2016 (same email in PX 12)

John Fox sent an email to Tom Wells explaining that Defendant did not consider Attachment A to be an official request for documents but only as a sample showing what documents OFCCP may request during an audit.

DX 39: Email from John Fox to Tom Wells June 1, 2016 (same email in PX 12)

John Fox reiterated his request for information regarding how Plaintiff selected Defendant for an audit. Mr. Fox asserted that Plaintiff never began on site audit.

DX 40: Email from John Fox to Andrea Luby

John Fox sent an email to Andrea Luby, counsel for Plaintiff, stating that Plaintiff does not have probable cause to conduct a desk audit of Defendant.

DX 41 Andrea Luby letter to John Fox

Andrea Luby wrote a letter to John Fox on December 21, 2016 stating that the Office of the Regional Solicitor in Philadelphia approved this case for litigation and will file a complaint as soon as December 30, 2016.

DX 42: Plaintiff's Rule 26(a) Disclosures

B. Hearing Testimony

Michele Hodge

Michele Hodge is OFCCP's Regional Director since 2011 and the Acting Regional Director since 2009. T. 44. As a Regional Director, she oversees the mid-Atlantic region in OFCCP's operation and mission. T. 45. She reports to the current Acting Director of OFCCP, Tom Dowd. T. 46. Ms. Hodge supervises the deputy regional director, who supervises the regional office managers and district directors including Tom Wells. T. 46.

Ms. Hodge explained that for Mega Projects, OFCCP reaches out to the procurement agency, which is usually the GSA, and works with the agency to establish timelines for the project. T. 48. For the St. Elizabeths project, the Coast Guard and Homeland Security were the procurement agencies. T. 48. The GSA was charged with overseeing that project. T. 49. Next, OFCCP participates in the free bid process, during which time OFCCP brings all of those interested in bidding on the contract together and makes presentations on their obligations under the project. T. 53. The bidders are informed that they would be subject to a compliance review if they are selected for a project. T. 53-54. OFCCP then establishes an EEO committee of which the prime contractor is the active party. T. 54. As subcontracts are awarded, subcontractors participate in the EEO meetings as well. T. 55. As the prime contractor awards subcontractors, the prime contractor is required to inform OFCCP of subcontract awards over \$10,000. T. 56. For Mega Projects, that information is complied. T. 56.

During the EEO committee meeting, the subcontractor is notified that it could be scheduled for an audit. T. 57. Then, a compliance officer notifies the specific contractor that they are scheduled for an audit and an onsite date is agreed upon, which is usually within 30 days of the notification. T. 57. During an onsite, OFCCP first conducts an entrance conference during which OFCCP meets with the top official of the company or a delegate. T. 57. The entrance conference is conducted to educate the subcontractor on what is expected during the compliance evaluation. T. 57. After the entrance conference, OFCCP commences gathering data and interviewing. T. 58.

Ms. Hodge testified that OFCCP became aware of the St. Elizabeths project through the media and the news. OFCCP requested that the project be classified as a Mega Project because it met all the criteria for a Mega Project. The St. Elizabeths project was selected as a Mega Project when an OFCCP regional office gathered information about the project and submitted a memo to the national office for approval as a selected mega project. T. 60.

As a prime contractor for phase two of the St. Elizabeths project, Grunley had the responsibility of notifying its subcontractors of their obligations. T. 61. OFCCP became involved in the St. Elizabeths construction project in 2010. T. 62. Phase two of the project began sometime in 2015. T. 62. By the time that Defendant bid for work on phase two of the project, the St. Elizabeths project had been selected as a Mega Construction Project for five years. T. 63.

On cross-examination, Ms. Hodge explained that the selection of a Mega Project is determined at the district office level and approved by the national office. T. 66. Ms. Hodge explained that OFCCP needs to know when GSA has appropriations for a Mega Construction Project. T. 68. She further stated that GSA uses OFCCP's definition of a Mega Construction Project and notifies OFCCP when it appropriates funds for a project that meets that definition. T. 68. OFCCP then uses "that information to identify, based on the capacity of the office, which has limited resources, inventory on present investigations, on how we would proceed with selecting a mega" for OFCCP compliance review. T. 68. Ms. Hodge maintained that not all Mega Construction Projects are selected for an audit and that the OFCCP district office makes that determination, based on consideration of which are likely to have the greatest economic impact. T. 69.

According to Ms. Hodge, there is no OFCCP policy requiring the selection of a project for an OFCCP compliance review or audit in phase one automatically places the project for such selection in phase two. T. 69.

Michelle Higginbotham

Ms. Higginbotham has worked as a compliance officer for OFCCP for the last five years. T. 86. For selected Mega Construction Projects, Ms. Higginbotham collects prescheduling information: information about the current projects underway, number of employees, duration of the projects, and other basic information. T. 87. She collects this information to determine if OFCCP has jurisdiction for scheduling a construction review. T. 87.

Ms. Higginbotham called Defendant in March 2016; she determined from her phone call conversation with Robin Parker and Denise Haaser that Defendant fell under OFCCP's jurisdiction. T. 88. Defendant and OFCCP agreed to schedule an onsite review on May 11, 2016. T. 88. Typically during an onsite, the compliance officer interviews the CEO or facility director and HR personnel and asks for records pertaining to employment activity. T. 90.

Ms. Higginbotham conducted a "virtual" onsite via telephone on May 11, 2016 during which she interviewed Ms. Haaser, Ms. Parker, and another woman in human resources. T. 92. Ms. Higginbotham requested documents during the May 11, 2016 interview. T. 94. During the May 11, 2016 interviews, Defendant did not object to OFCCP's compliance review and did not raise a Fourth Amendment challenge to the review. T. 101.

On cross-examination, Ms. Higginbotham testified that she routinely requests the collection of prescheduling information, but these requests do not include requests for documents. T. 103-104. She testified that she did not request documents in the audit to be delivered before the onsite. T. 104. The re-cross examination contains the following exchange between Ms. Higginbotham and Defendant:

Q: Why are you requesting records before the onsite audit?

A: Because you told us not to come onsite

Q: And you perceived that to be permission to request records before the onsite?

A: Well, it was my understanding that you agreed to conduct the virtual onsite, and then you also agreed that you would be submitting documents just as if the virtual onsite had not been accomplished virtually, but physically at the location.

T. 112.

Tom Wells

Tom Wells has been the director of the OFCCP Baltimore District Office since 2007. T. 116. He testified that the St. Elizabeths project was selected as a Mega Construction Project at the time Grunley applied for its prime contract. T. 118. Grunley submitted subcontract award notifications to OFCCP. T. 121. For a selected Mega Project, the prime contractor is always scheduled for review. T. 123. The subcontractors become eligible for scheduling once they reach three months' of work on the Mega Project. T. 123. Grunley submits monthly utilization reports for all of the subcontractors working on the project. T. 123.

Mr. Wells testified that Grunley sent monthly utilization reports of the construction work at St. Elizabeths during phase two, like the document in PX 6. T. 124. OFCCP uses the utilization reports to determine which months the subcontractors are working on the Mega Project. T. 126.

PX 7 is a spreadsheet that Mr. Wells created to keep track of the months that various subcontractors worked on the megaproject in phase two. T. 126. Mr. Wells explained that he highlighted the companies scheduled for review in blue, which is reflected in gray on the exhibit. T. 127. PX 7 shows that Defendant began working on the mega project in November 2015 and reached its three-month date at the end of January 2016. T. 128. The document shows that there are three subcontractors who began working on the mega project much earlier, in March 2015. T. 128. The x's on the chart represent the months that the subcontractors had construction work on the Mega Project. T. 128.

Mr. Wells created the spreadsheet in PX 8 using data from the monthly utilization reports. T. 129-130. It shows that two contractors were scheduled for review on February 29, 2016. T. 130. The first contractor, Grunley, was scheduled first because it is the prime contractor. T. 130. Contractor number 8 was scheduled on the same date because OFCCP received "credible complaints of discrimination against that company." T. 131. Defendant was the next company scheduled for review on March 17, 2016. T. 131. Defendant reached its three month date at the end of January 2016, which is the same date as contractor number 8. T. 131. Defendant and contractor number 8 were not scheduled the same day due to Plaintiff's resources—Plaintiff had already scheduled two reviews in February. T. 131.

The next contractors to be scheduled for review were contractor numbers 2 and 3. T. 132. They were scheduled for review because they were the next contractors to reach three months of work on the Mega Project. T. 132. Mr. Wells explained that OFCCP schedules contractors for whom it receives credible complaints out of order because such companies are of concern to OFCCP and its procedures. T. 133. Contractor number 8 and Defendant were moved up on the list for scheduling because OFCCP received credible complaints. T. 133. OFCCP has

never received credible complaints of discrimination against a contractor and not moved them up the list. T. 133. Mr. Wells summarized the criteria used to select subcontractors for review: “If they had completed three months of construction work on the mega project, we—they would be scheduled in the order in which they reached that point unless we had received credible reports of discrimination, in which case they would move up the list.” T. 152.

Mr. Wells explained that a “formal complaint” is when someone completes an OFCCP complaint form and files it with the agency. T. 134. He confirmed that no formal complaint had been filed against Defendant. T. 134. OFCCP first received complaints about Defendant at an outreach event for another review when some of the attendees complained to Assistant District Director Tanya Bennett. T. 135. The attendees described specific complaints about the company; they mentioned a particular foreman and stated that African-Americans were not hired. T. 135. The attendees stated that a woman who applied for an apprenticeship was not selected. T. 135.

On March 17, 2016, Mr. Wells prepared the memo in PX 9 to record why a contractor was scheduled for review. T. 136-137. Mr. Wells testified that he found the complaints against Defendant to be credible based on the fact that OFCCP received the information from several people and there was specificity to the complaints. T. 138. Mr. Wells’ determination that the complaints were credible moved up the scheduling of Defendant higher on the list. T. 138. Mr. Wells defined credible as “good reason to believe that the statements could be true.” T. 138.

Once OFCCP receives a credible complaint, it tries to schedule the contractor as expeditiously as possible, given OFCCP’s resources. T. 138. OFCCP received complaints in February 2015 and Defendant reached its three month date for compliance review in January 2016. T. 139. OFCCP did not schedule a review in January 2016 because it would have only become aware of Defendant’s three month date in mid-February of 2016, when Grunley submitted its monthly utilization report. T. 139.

Mr. Wells was referred to PX 10, Attachment A entitled “Sample Onsite Documents.” T. 141. Mr. Wells included this attachment because it is part of the standard OFCCP construction scheduling letter. T. 141. Mr. Wells did not intend for Defendant to gather all of these documents upon receipt of the letter and provide them to OFCCP. T. 141. The Attachment A at PX 10 served to notify contractors of the types of documents that OFCCP may ask for during an onsite. T. 142. OFCCP actually asks the contractor to provide documents after the onsite has begun. T. 142.

OFCCP was not able to conduct onsite interviews of Defendant’s employees and was not able to collect any documents. T. 144. Mr. Wells was referred to PX 11, an email between himself and Mr. Fox. T. 144. He understood Mr. Fox to convey in that email that because no one would be physically present at Defendant’s Washington DC offices, the interviews could be done via telephone. T. 145.

Mr. Wells described the steps of an onsite review. First, OFCCP starts with an entrance conference with the chief managing officials, during which HR individuals may also be present. T. 145. Then, OFCCP conducts interviews of management personnel. T. 145. Then using a list

of current projects where there are employees, OFCCP determines which construction sites to visit to conduct employee interviews. T. 145. OFCCP would also request documents and work out a date for the submission of those documents. T. 145.

Mr. Wells wrote an email requesting several items from Defendant; the document request was made by email because Defendant notified OFCCP that there would not be anyone at the physical location and so the onsite phase of the review was initiated telephonically. T. 147. Mr. Wells wrote an email to Mr. Fox to establish that the onsite phase of the review had begun and that OFCCP was requesting documents. T. 148.

On cross-examination, Mr. Wells said that he did not personally speak to any of the individuals who complained about Defendant. T. 159. The individuals spoke only with Tanya Bennett who then conveyed the complaints orally to Mr. Wells a few days later. T. 159. All of the complaints referenced in PX 16 were oral complaints. T. 159. Mr. Wells did not make any notes about the complaints when Ms. Bennett told him about them. T. 159. Mr. Wells does not know if any of the complainants, besides one, worked for Defendant. T. 160.

In PX 16, there is a reference to five individuals sitting around a table discussing incidents of discrimination. T. 161. Mr. Wells said he does not know where the discrimination occurred or what form of discrimination took place. T. 161. He maintained that a single individual made the allegations in numbers one, two, three, four, and five as listed in PX 16. T. 161. Mr. Wells confirmed he was unaware of how any of the individuals who raised the allegations of discrimination knew about the possible discrimination at Defendant company. T. 162. For example, Mr. Wells does not know what project an individual named Mike Ham, and identified as a foreman, worked on for Defendant, or how many times Mr. Ham purportedly used the “N” word as an individual alleged. T. 162-163. As for another complaint about failure to hire a woman for apprenticeship, Mr. Wells acknowledged he does not know for which project she applied for or when she applied. T. 163.

Mr. Wells said he did not make any determination if the discrimination claims outlined in PX 16 were true. T. 166. He added that such determination would have been done through the compliance review OFCCP sought to conduct. T. 166. Mr. Wells confirmed no complaints were filed based on the allegations outlined in PX 16. T. 169-170. He also confirmed that, after February 9, 2015, there was no effort made to interview the individuals who made the complaints. T. 173.

Mr. Wells said that OFCCP does not have any written procedures for a “virtual” onsite compliance review. T. 184. A virtual onsite was conducted in this case because contractor’s counsel informed OFCCP that there was no one physically at the Washington office that could have assisted in the review. T. 184.

Mr. Wells confirmed that when OFCCP requested documents from Defendant, none of the document requests pertained to any of the allegations of discrimination outlined in PX 16. T. 186. On re-direct, Mr. Wells acknowledged that some of the documents that OFCCP requested would have shed light on the validity of the complaints made against Defendant. T. 186-188.

Robin Parker

Robin Parker is the Human Resources Information Systems (“HRIS”) manager for Baker Concrete. T. 207. She works in Monroe, Ohio and reports to Denise Haaser. T. 207. She testified that Baker DC is affiliated with Baker Concrete, Inc. T. 208. Ms. Parker first received notice of the 2016 audit when she received a voicemail from OFCCP. T. 215. Ms. Parker spoke with Ms. Higginbotham about conducting an onsite audit and then had an interview with Ms. Higginbotham on May 11, 2016. T. 216- 217. Ms. Parker testified that Ken Fender is the vice president/general manager of Baker DC and works at Baker DC in Washington DC. T. 218.

Denise Haaser

Denise Haaser is the corporate director of human resources for the “Baker umbrella of companies, which would include Baker DC” and works in Monroe, Ohio. T. 228. She explained that Ken Fender is the territory general manager and vice president of Baker DC. T. 238. She stated that Tonya Beesley is the regional human resource manager that works with Ken Fender in Washington DC. T. 239. Ms. Beesley’s main office is in Ohio but, Ms. Beesley travels to Baker DC. T. 240.

Ms. Haaser addressed prior audits that she had been involved in. She said that for audits conducted in 2008 and 2013, she was told that the audits were routine. T. 240. She understood a routine audit to mean that OFCCP would come onsite and make sure that the company is compliant with all the regulations required of a federal contractor. T. 241. In answer to the question as to why Defendant was selected for an audit in 2008 and 2013, Ms. Haaser stated: “I don’t know what they gave us in terms of saying why we were chosen, other than that we were a federal contractor and they knew that they had purview to come onsite.” T. 241.

IV. PARTIES’ POSITIONS

Plaintiff-OFCCP

OFCCP argues that Baker has violated Executive Order 11246, and the regulations promulgated thereunder, by refusing to allow OFCCP to perform an on-site compliance review and by refusing to provide certain documents. Plaintiff’s Brief at 12. OFCCP asserts that its compliance review should proceed because it selected Defendant using neutral administrative procedures. *Id.* at 14. Mr. Wells’ testimony described the criteria used in selecting a subcontractor. *Id.* at 19. OFCCP argued that Mr. Wells’ selection was neutral because he relied upon “credible complaints” of discrimination to move Defendant up on the list of contractors eligible for review. *Id.* at 19.

Defendant-Baker DC

Defendant argues that OFCCP’s effort to conduct an on-site audit of Defendant violated the Fourth Amendment. Defendant’s Brief at 2. Defendant explained that OFCCP’s administrative plan is not neutral because it included human intervention—namely Mr. Wells’ discretion in determining whether a complaint was “credible.” *Id.* at 4. Defendant noted that

Mr. Wells did not have sufficient knowledge about the complaints to determine if the complaints were credible. *Id.* Defendant cited to *Trinity Indus., Inc. v. OSHRC*, 16 F.3d 144, 1463 (6th Cir. 1994) in which a concurring opinion provided that a neutral administrative plan must rely on “either random selection or selection by relevant statistics that have no individual human component for the reason that searches flowing from these types of plans could not be the product of an agency’s arbitrary decision.” Additionally, Defendant argued that the complaints against Defendant were not credible and therefore OFCCP’s enforcement action violates the Fourth Amendment.

Defendant also argued that OFCCP did not use a neutral plan to select the St. Elizabeths project as a Mega Construction Project. *Id.* Finally, Defendant argued that OFCCP did not have authority to demand documents from Defendant for off-site review. *Id.* at 8.

V. ISSUE

Did OFCCP use neutral criteria in selecting Baker DC for an on-site compliance review?

VI. DISCUSSION

A. Executive Order 11,246 and Related Statutes

Executive Order 11246, section 503 of the Rehabilitation Act of 1973, and section 4212 of the Vietnam Era Veterans’ Readjustment Assistant Act and corresponding federal regulations set forth nondiscrimination and equal opportunity laws that prohibit discrimination by Federal contractors as well as require affirmative action by Federal contractors to ensure employment opportunities are available regardless of race, gender, color, national origin, religion, or status as a qualified individual with a disability or protected veteran. The Office of Federal Contractor Compliance Programs (OFCCP) administers the provisions of these authorities.

Together, these statutes and regulations require that government contractors and subcontractors (1) treat their employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran; and (2) take affirmative action to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination based on their color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam Era, or status as a disabled veteran.

The OFCCP conducts compliance reviews periodically to determine whether covered government contractors are in compliance with the affirmative action and nondiscrimination requirements of those laws and their implementing regulations. *See* 41 C.F.R. §60. The regulations implementing Executive Order 11246 provide for a compliance review in three stages: (1) a desk audit; (2) an on-site review conducted at the contractor’s establishment; and (3) an off-site analysis of information gathered. *See* 41 C.F.R. § 60-1.20(a)(1).

B. Administrative Searches under the Fourth Amendment

The Fourth Amendment's requirements apply to searches of businesses conducted by administrative agencies. *Marshall v. Barlow's*, 436 U.S. 307, 320 (1978) (holding that a provision of the Occupational Safety and Health Act ("OSHA") giving OSHA the authority to inspect establishments without a warrant is unconstitutional insofar as it purports to authorize inspections without a warrant or its equivalent...). For an administrative search to be valid under the Fourth Amendment, an agency must first show probable cause. *Id.* Probable cause exists when there is either "specific evidence of an existing violation" or when it is established that the agency chose the particular company according to "reasonable legislative or administrative standards." *Id.*

Pursuant to *Barlow's*, the D.C. Circuit, under whose jurisdiction this case arises, has held that an administrative search violates the Fourth Amendment unless an agency can show that a company's selection is based on: (1) specific evidence of an existing violation, (2) reasonable legislative or administrative standards that have been met with respect to that particular contractor or (3) an administrative plan containing specific neutral criteria. *Beverly Enters. v. Herman*, 130 F. Supp. 2d 1, 36 (D.C. Cir. 2000) citing *United States v. Mississippi Power*, 638 F.2d 899, 907 (5th Cir. 1981).

i. *Is OFCCP's Administrative Plan Neutral?*

Plaintiff asserts that Defendant was selected based on an administrative plan containing specific neutral criteria. The D.C. Circuit has held that "in determining whether a search is conducted according to neutral criteria, the court considers whether the search is 'the product of the unreviewed discretion of the enforcement officer.'" *Beverly Enters.*, 130 F. Supp. 2d 37. The Fifth Circuit has held that a plan contains specific neutral criteria if the "plan as a whole is susceptible of neutral, non-arbitrary application." *Indus. Steel Prods. Co. v. OSHA*, 845 F.2d 1330, 1333 (5th Cir. 1988).

As noted above, Defendant cited to *Trinity Indus.*, 16 F.3d 144, a Sixth Circuit Case, for the proposition that a neutral plan requires that there be "no individual human component." See Defendant's Brief at 4. Defendant's citation is misguided. In that case, the Sixth Circuit held that OSHA's administrative plan, OSHA Instruction CPL 2.45A, was not neutral because it allowed the Secretary to conduct a full-scope inspection authorized only on the basis of an employee complaint. *Trinity Indus.*, 16 F.3d at 1460. While the Sixth Circuit found that OSHA's use of an employee complaint to select a company for review was not neutral, the Court noted that it might view OSHA's decision to search differently "if the site had been due for a programmed, wall-to-wall inspection even in the absence of an employee complaint."⁸ *Id.* at fn. 2.

Trinity Industry is distinguishable from the present case. In *Trinity Industry*, the Sixth Circuit found that "the initiation of a search under the plan hinges on the filing of an employee complaint." *Id.* at 1460. In the present case, the selection of a subcontractor for an audit does

⁸ The Sixth Circuit cited to *In the Matter of Inspection of the Workplace Located at 526 Catalan Street*, 741 F. 2d 172, 177 (8th Cir. 1984) which upheld a comprehensive search when, among other factors, OSHA would have carried out a programmed search within several months even if an employee complaint had never been filed.

not hinge on a complaint but rather on the duration of time that a subcontractor worked on a Mega Project. Mr. Wells testified that Defendant could not have been scheduled for a compliance review in February 2015, when OFCCP received discrimination complaints, because Defendant only became eligible for review in January 2016. T. 139. Unlike in *Trinity Industry*, Defendant was already on the list of subcontractors eligible for a compliance review but was scheduled out of order due to complaints. The Sixth Circuit specifically noted that OSHA's actions in *Trinity Industry* may be viewed differently if the company was already due for a review.⁹

The Fifth Circuit has considered and upheld administrative plans that contained a "human component." In *Industrial Steel Products*, OSHA's administrative plan consisted of a high-hazard establishments list based on injury rates which allowed the deletion of an establishment based on certain specified reasons. *Indus. Steel Prods.*, 845 F.2d at 1333. In addition to the specified deletion reasons, the plan provided that "deletions may be made for other reasons only upon the approval of OSHA's regional administrator and director of field operations." *Id.* Thus, although the administrative plan was based on non-discretionary data and contained specific reasons for deleting an establishment, it also allowed human intervention by permitting deletion of an establishment through an administrator's approval. The Fifth Circuit found that OSHA's administrative plan was based on specific neutral criteria. *Id.*

In the Fifth Circuit case cited by the D.C. Circuit, *Mississippi Power*, 638 F. 2d 899, the Fifth Circuit directed the District Court to determine if GSA's administrative plan in conducting contract compliance reviews pursuant to Executive Order 11246 contained neutral criteria. *United States v. Mississippi Power & Light Co.*, 1984 U.S. Dist. LEXIS 20730 (S.D. Miss. 1984). Under GSA's administrative plan, compliance personnel were instructed to follow several factors in selecting contractor facilities for review. *Id.* at 8-9. These factors included: whether the contractor's EEO-1 reports revealed a poor minority or female employment profile; whether there were complaints of employment discrimination filed against the contractor with the appropriate agencies; and whether the contractor was perceived in the community as an unfair employer. The District Court held that the plan contained specific neutral criteria for scheduling federal contractors. *Id.*

Like the cases above, OFCCP's administrative plan for selecting subcontractors working on a Mega Construction Project at issue in this matter contains specific neutral criteria. Mr. Wells' credible testimony establishes that a subcontractor is selected for review when the subcontractor reaches three months' work on a Mega Project. T. 123. OFCCP keeps track of all of the subcontracts awarded on a Mega Project and tracks the duration of each subcontractor's work based on the prime contractor's utilization reports. T. 122, 126. Thus, all subcontractors are included and listed for review and all subcontractors become eligible for review once they reach three months' work on a Mega Project. The subcontractors are scheduled sequentially based on the date that they reach three months' work. T. 132. A subcontractor is moved up on the list for a compliance review if OFCCP receives credible complaints of discrimination. T. 133. OFCCP always schedules subcontractors with credible complaints ahead of other subcontractors. *Id.*

⁹ It is also notable that Defendant cited to the concurring opinion in that decision rather than the majority opinion.

Notably, a subcontractor must be eligible for a compliance review in order to be scheduled out of order based on a credible complaint. An on-site review is not triggered by a complaint but rather by the amount of time that a contractor worked on a Mega Project. Accordingly, the District Director does not have “unreviewed discretion” in scheduling a subcontractor for a compliance review; the District Director must schedule subcontractors based on the month that they started working on the Mega Project. In order to schedule a subcontractor out of order, the District Director must first receive a credible complaint of discrimination and must document why a particular subcontractor was scheduled out of order.

The plan protects against the harms that the Supreme Court delineated in *Barlow’s*. OFCCP’s plan does not transfer “almost unbridled discretion upon executive and administrative officers.” *Barlow’s*, 436 U.S. at 323. In fact, the OFCCP District Director has little discretion in scheduling a compliance review; the only determination that the OFCCP Director makes is if a complaint is credible. *See* T. 138. OFCCP’s plan as implemented in this matter is not unlike OSHA’s protocol in *Industrial Steel Products* or GSA’s administrative plan in *Mississippi Power*.

OFCCP has established that Defendant was chosen for an on-site audit pursuant to an administrative plan with specific neutral criteria. Tom Wells’ testimony explained the procedure that OFCCP uses in selecting a subcontractor and explained why Defendant was scheduled for review in March 2016. His testimony demonstrates that OFCCP follows specific guidelines for selecting a subcontractor for review and these guidelines do not give OFCCP unbridled discretion in selecting contractors. Consequently, Plaintiff’s requested audit of Defendant does not violate the Fourth Amendment.

ii. Credibility of Discrimination Complaints

Defendant asserted that the complaints that OFCCP received about Baker DC were not credible. *See* Defendant’s Brief at 4. Specifically, Defendant noted that Mr. Wells did not hear the complaints himself and no one in OFCCP took any action to verify the complaints. *Id.* at 4-5. Mr. Wells testified why he found the complaints to be credible; he testified that there was specificity to the complaints and the information came from several people. T. 138. He defined credible as “good reason to believe that the statements could be true.” T. 138. He also explained that neither he nor anyone else investigated the veracity of the complaints because that determination would have been made through the onsite audit. T. 166.

OFCCP did not have to investigate the complaints in order to determine if they were true; a search based on an administrative plan is different from a search based on evidence of a specific violation. In an OSHA case, the Tenth Circuit made a distinction between an inspection based on an administrative plan and an inspection based on specific evidence of an existing violation. The court held that “when a warrant is sought to conduct an inspection according to a general administrative plan, it is reasonable that the magistrate not be concerned with questions of the reliability of evidence and the probability of violation.” *Marshall v. Horn Seed Co.*, 647 F.2d 96, 100 (10th Cir. 1981).¹⁰ As Mr. Wells testified, the veracity of the complaints would

¹⁰ The Tenth Circuit explained: “the Secretary argues that in deciding whether to issue a warrant based on specific evidence of an existing violation... the magistrate is not to give any consideration at all to the reliability of the

have been gauged from the onsite review. Thus, OFCCP was not required to conduct a detailed investigation of the complaints of alleged discrimination and if they were correct. Mr. Wells explained why he determined that the complaints were credible.

iii. OFCCP's Selection of St. Elizabeths as a Mega Construction Project

Defendant contended that OFCCP did not establish the existence of a neutral plan in selecting St. Elizabeths as a Mega Construction Project. *See* Defendant's Brief at 8. However, the selection of St. Elizabeths as a Mega Construction Project is immaterial to the selection of Defendant for a compliance review at issue in this case; St. Elizabeths was already a selected Mega Construction Project when Grunley awarded a subcontract to Defendant. T. 63. Consequently, Defendant was aware that St. Elizabeths was selected as a Mega Construction Project when it decided to work on the project. Defendant self-selected into the project by choosing to work on the St. Elizabeths project with the knowledge that the St. Elizabeths project had been designated a Mega Construction Project.

C. OFCCP's Document Request

Defendant maintains that OFCCP unlawfully demanded documents from Defendant because OFCCP did not conduct an onsite review. *See* Defendant's Brief at 8. Defendant contends that demanding off-site production of documents violates OFCCP's policy and the Paperwork Reduction Act. *Id.* at 9. Defendant asserted that OFCCP's phone interviews on May 11, 2016 did not constitute an "onsite review." *Id.*

The testimonial and documentary evidence in this case establish that OFCCP had begun an onsite review on May 11, 2016. Ms. Higginbotham, the compliance officer assigned to this investigation, testified that she conducted a virtual onsite review on May 11, 2016; she interviewed three employees and requested documents during the interviews. T. 92. Ms. Higginbotham explained that OFCCP was unable to physically come onsite to conduct an onsite audit because Defendant told OFCCP not to come onsite. T. 112. She stated that Defendant agreed to conduct a virtual onsite and to submit document as if the onsite review was accomplished virtually. T. 112. Mr. Wells also testified that OFCCP conducted a 'virtual' onsite review because Defendant informed OFCCP there is no one physically available in its Washington DC office to could assist in an onsite compliance review. T. 184.

The email evidence in this case confirms the hearing testimony of Ms. Higginbotham and Mr. Wells. Emails between Ms. Higginbotham, Mr. Wells, and Mr. Fox reveal that OFCCP agreed to commence a compliance review telephonically at Defendant's request, because there was no one available in Defendant's Washington DC office. PX 12. In a May 3, 2016 email, Ms. Higginbotham expressly stated that she will conduct the entrance conference virtually. *Id.* Thus, the record supports a finding that OFCCP began an onsite review on May 11, 2016.

evidence or the probability of violation. While this is true of inspections conducted according to a regulatory plan, we cannot agree the same holds for warrant applications based on specific evidence of a violation." *Horn Seed Co.*, 647 F.2d at 10.

VII. CONCLUSION

OFCCP has established that it followed an administrative plan with specific neutral criteria in selecting Baker DC LLC for an onsite compliance review. Consequently, OFCCP's selection of Baker DC LLC for a compliance review does not violate the Fourth Amendment.

VIII. RECOMMENDED ORDER

It is recommended that the Secretary enter the following order:

1. No later than 30 days from the issuance of this Order, Defendant Baker DC LLC, through its officers, directors, partners, representatives and agents, jointly and individually, permit the Office of Federal Contract Compliance Programs, U.S. Department of Labor, to conduct and complete its compliance review, including, but not limited to, an on-site review, and provide OFCCP all of the requested documents as part of such compliance review, in accordance with §60-1.20(a)(1)(ii).
2. Should Defendant Baker DC LLC fail to comply with the Order set forth above, OFCCP will be permitted take all administrative steps necessary to terminate all existing Government contracts held by Baker DC LLC, jointly and individually, and to debar Baker DC from receiving and participating in any future Government contracts for a period of at least three years or until the Baker DC LLC complies with the provisions of Executive Order 11246, the Rehabilitation Act, the VEVRAA, and the respective implementing Federal regulations, whichever period is longer.

LYSTRA A. HARRIS
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: To appeal, you must file exceptions (“Exceptions”) with the Administrative Review Board (“Board”) within ten (10) days of the date of receipt of the administrative law judge’s recommended decision.

The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

If filing paper copies, you must file an original and four copies of the Exception with the Board, together with one copy of this decision. If you e-File your Exception, only one copy need be uploaded.

Exceptions may be responded to by other parties. Responses must be filed with the Board within seven (7) days after receipt of the exceptions. Briefs or exceptions and responses shall be served simultaneously on all other parties to the proceeding. *See* 41 C.F.R. § 60-30.36.

After expiration of the time for filing exceptions, the Board is to issue a final Administrative order which shall be served on all parties. If the Board does not issue a final Administrative order within thirty (30) days after the expiration of the time for filing exceptions, this recommended decision shall become a final Administrative order which shall become effective on the thirty-first (31st) day after expiration of the time for filing exceptions. *See* 41 C.F.R. § 60-30.37; *see also* 41 CFR 60–30.30 (which is applicable to the Board's review of this recommended decision, except as to specific time periods).