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CONTRACTS - PAYMENTS - PROGRESS - SUSPENSION - EQUAL OPPORTUNITY PROGRAM COMPLIANCE ALTHOUGH THE SUSPENSION OF PROGRESS PAYMENTS FOR VIOLATIONS OF THE STANDARD EQUAL OPPORTUNITY CLAUSE IN A CONTRACT IS A SANCTION WHICH IS AUTHORIZED BY SECTION 209(A)(5) OF EXECUTIVE ORDER 11246, UNDER THE REGULATIONS OF THE DEPARTMENT OF LABOR THE FINAL DECISION FOR INVOKING THE SANCTIONS REFERRED TO IN 41 CFR 60-1.24(C)(3) IS FOR DETERMINATION ONLY AFTER THE CONTRACTOR HAS BEEN AFFORDED AN OPPORTUNITY FOR A HEARING. FURTHERMORE, EVEN THOUGH A CONTRACTOR'S COMPLIANCE OR NONCOMPLIANCE WITH THE EQUAL OPPORTUNITY CLAUSE IS A QUESTION OF FACT, 41 CFR 60-1.1 SPECIFICALLY EXCLUDES EQUAL OPPORTUNITY MATTERS FROM DETERMINATION UNDER THE DISPUTES CLAUSE, AND THE DETERMINATION RESPONSIBILITY THEREFORE VESTS IN THE CONTRACT COMPLIANCE OFFICER OR OTHER OFFICIALS REGULARLY INVOLVED IN EQUAL OPPORTUNITY PROGRAMS. THUS, A CONTRACTOR'S COMPLIANCE POSTURE IS FOR CONSIDERATION UNDER THE REGULATIONS AND NOT THE PROGRESS PAYMENT CLAUSE AND PROGRESS PAYMENTS MAY NOT BE SUSPENDED WITHOUT A HEARING.

TO THE ACTING DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE, FEBRUARY 5, 1973:

REFERENCE IS MADE TO YOUR LETTER OF SEPTEMBER 25, 1972, REGARDING SANCTIONS AGAINST CONTRACTORS IN CASE OF NONCOMPLIANCE WITH EXECUTIVE ORDER 11246, AS AMENDED.

YOU STATE THAT THE PRINCIPAL SANCTIONS PRESENTLY AVAILABLE ARE CONTRACT CANCELLATION AND DEBARMENT, BUT YOU ARE NOW CONSIDERING THE WITHHOLDING OF "PROGRESS PAYMENTS" DURING THE PERFORMANCE OF A CONTRACT SUBJECT TO THE EXECUTIVE ORDER, WHENEVER THE CONTRACT INVOLVED INCLUDES PROVISIONS FOR PROGRESS PAYMENTS AND THERE APPEARS TO BE A VIOLATION OF THE ORDER. YOU ADVISE THAT SUCH PROGRESS PAYMENTS WOULD BE WITHHELD UNTIL SUCH TIME AS THE VIOLATION IS CURED, AND THAT THE CONTRACTOR WOULD NOT HAVE THE RIGHT TO REQUEST A FORMAL HEARING REGARDING THE PROPRIETY OF THE SUSPENSION OF HIS PROGRESS PAYMENTS.

YOU POINT OUT THAT 41 CFR 60-1.1 PRECLUDES RESORT TO THE CONTRACT'S "DISPUTES" CLAUSE PROCEDURES CONCERNING DISPUTES RELATIVE TO A CONTRACTOR'S COMPLIANCE WITH HIS OBLIGATIONS UNDER THE EQUAL OPPORTUNITY CLAUSE, BUT THAT THE CONTRACTOR MAY BE NOTIFIED OF THE PROPOSED SUSPENSION BY A SHOW CAUSE NOTICE ALLOWING HIM 30 DAYS "TO BE HEARD" ON THE MATTER. CONTINUED NONCOMPLIANCE WOULD PRECIPITATE A NOTICE OF PROPOSED DEBARMENT AND CONTRACT CANCELLATION ALLOWING THE CONTRACTOR AN OPPORTUNITY FOR A FULL HEARING AT THAT TIME.

YOU EXPRESS YOUR BELIEF THAT THE PROPOSED PROCEDURE FOR SUSPENDING PROGRESS PAYMENTS, WHEN A CONTRACTOR IS CONSIDERED TO BE IN VIOLATION OF THE EQUAL

OPPORTUNITY CLAUSE, IS AUTHORIZED BY EXECUTIVE ORDER 11246, AND IS CONSISTENT WITH FEDERAL PROCUREMENT LAW PRINCIPLES. REGARDING THE LATTER CONTENTION, YOU NOTE THAT PARAGRAPH (C) OF THE STANDARD PROGRESS PAYMENT CLAUSES PROVIDES FOR SUSPENSION OF PROGRESS PAYMENTS UPON A FINDING BY THE CONTRACTING OFFICERS THAT THE CONTRACTOR HAS BREACHED A MATERIAL REQUIREMENT OF THE CONTRACT, AND YOU INDICATE THAT A REVISION OF THOSE CLAUSES IS NOT REQUIRED FOR EQUAL OPPORTUNITY SUSPENSIONS OF PROGRESS PAYMENTS. YOU SUGGEST THAT ALL THAT IS NEEDED IS THAT CONTRACTING OFFICERS BE INSTRUCTED BY THEIR AGENCY HEAD TO CONSIDER COMPLIANCE WITH THE EQUAL OPPORTUNITY CLAUSE IN DETERMINING A CONTRACTOR'S ENTITLEMENT TO PROGRESS PAYMENTS. YOU ASK FOR OUR COMMENTS REGARDING THE PROPOSED PROCEDURES.

WE AGREE WITH YOUR POSITION THAT THE SUSPENSION OF A CONTRACTOR'S PROGRESS PAYMENTS FOR VIOLATIONS OF THE STANDARD EQUAL OPPORTUNITY CLAUSE OF HIS CONTRACT IS A SANCTION WHICH IS AUTHORIZED BY SECTION 209(A)(5) OF EXECUTIVE ORDER 11246. THIS PORTION OF THE ORDER PERMITS, AMONG OTHER THINGS, SUSPENSION OF A CONTRACT, OR A PORTION THEREOF, IN ACCORDANCE WITH SUCH RULES, REGULATIONS OR ORDERS AS THE SECRETARY OF LABOR MAY ISSUE OR ADOPT, FOR FAILURE OF THE CONTRACTOR TO COMPLY WITH THE NONDISCRIMINATION PROVISIONS OF THE CONTRACT. PURSUANT TO YOUR DEPARTMENT'S REGULATION WHICH IS SET OUT AT 41 CFR 60-1.24(C)(3), THE DIRECTOR, OFFICE OF FEDERAL CONTRACT COMPLIANCE, OR THE AGENCY HEAD WITH THE APPROVAL OF THE DIRECTOR, MAY IMPOSE SUCH SANCTIONS AS ARE AUTHORIZED BY THE ORDER. THESE SANCTIONS, AS INDICATED ABOVE, INCLUDE THE SUSPENSION OF A "PORTION" OF A CONTRACT, AND IT IS OUR OPINION THAT THE PROGRESS PAYMENT PROVISIONS OF A CONTRACT FALL WITHIN THAT TERMINOLOGY. HOWEVER, THE SAME REGULATION ONLY PERMITS SUCH A SANCTION "IF THE FINAL DECISION REACHED IN ACCORDANCE WITH THE PROVISIONS OF SECTION 60-1.26 IS THAT A VIOLATION OF THE EQUAL OPPORTUNITY CLAUSE HAS TAKEN PLACE."

SECTION 60-1.26 PERTAINS TO CONDUCTING EITHER AN INFORMAL OR FORMAL HEARING FOR DETERMINING THE COMPLIANCE POSTURE OF A CONTRACTOR WITH THE TERMS OF THE EQUAL OPPORTUNITY CLAUSE OF HIS CONTRACT. WHILE SECTION 60- 1.26 DOES NOT SPECIFICALLY REFER TO ORDERS FOR SUSPENSION OF A PORTION OF A CONTRACT, IT SEEMS CLEAR THAT THE REGULATIONS CONTEMPLATE THAT THE FINAL DECISION FOR INVOKING THE SANCTIONS REFERRED TO IN SECTION 60-1.24(C)(3) WILL BE RENDERED ONLY AFTER THE CONTRACTOR HAS BEEN AFFORDED AN OPPORTUNITY FOR A HEARING. ALTHOUGH YOU STATE THAT UNDER SECTION 60-1.28 THE CONTRACTOR MAY BE NOTIFIED OF THE PROPOSED SUSPENSION OF PROGRESS PAYMENTS BY A SHOW CAUSE NOTICE ALLOWING THE CONTRACTOR 30 DAYS "TO BE HEARD" ON THE MATTER, THERE APPEARS TO BE NO BASIS FOR IMPOSING SANCTIONS WITHOUT A HEARING SO LONG AS THE CONTRACTOR MAKES A TIMELY RESPONSE TO THE ABOVE CAUSE ORDER. THUS, IT IS OUR VIEW THAT THE PRESENT REGULATIONS OF THE DEPARTMENT OF LABOR IMPLEMENTING EXECUTIVE ORDER 11246 DO NOT AUTHORIZE, WITHOUT A HEARING, THE SUSPENSION OF A CONTRACTOR'S PROGRESS PAYMENTS FOR AN INDICATED VIOLATION OF THE EQUAL OPPORTUNITY CLAUSE OF HIS CONTRACT. FURTHER, IT IS OUR OPINION THAT A RIGHT TO A HEARING, PRIOR TO IMPOSITION OF SUCH A SANCTION, IS CONFERRED UPON A CONTRACTOR BY THE PROVISIONS OF THE REGULATIONS AND BY THE INCLUSION OF SUCH REGULATIONS BY REFERENCE THERETO IN PARAGRAPH 6 OF THE EQUAL OPPORTUNITY CLAUSE OF HIS CONTRACT.

CONCERNING THE SUSPENSION OF PROGRESS PAYMENTS UNDER THE PROVISIONS OF PARAGRAPH (C) OF THE STANDARD PROGRESS PAYMENT CLAUSES, 41 CFR 1-30.510 1(A)(AS DISTINGUISHED FROM IMPOSITION OF A SANCTION UNDER THE EQUAL OPPORTUNITY CLAUSE), THIS PARAGRAPH PERMITS THE CONTRACTING OFFICER TO SUSPEND PROGRESS PAYMENTS WHENEVER HE FINDS, UPON SUBSTANTIAL EVIDENCE, THAT THE CONTRACTOR HAS FAILED TO COMPLY WITH ANY MATERIAL REQUIREMENT OF THE CONTRACT. A CONTRACTOR'S COMPLIANCE OR NONCOMPLIANCE WITH MATERIAL REQUIREMENTS OF THE EQUAL OPPORTUNITY CLAUSE OF

HIS CONTRACT WOULD APPEAR TO BE A QUESTION OF FACT, AND THE DISPUTES CLAUSE IN GOVERNMENT CONTRACTS PROVIDES THAT ANY DISPUTE CONCERNING A QUESTION OF FACT ARISING UNDER THE CONTRACT WHICH IS NOT DISPOSED OF BY AGREEMENT SHALL BE DECIDED BY THE CONTRACTING OFFICER. THE DISPUTES CLAUSE ALSO PROVIDES FOR THE APPEAL OF SUCH A DECISION TO THE HEAD OF THE AGENCY, AND FOR THE RESOLUTION OF THE APPEAL BY THE HEAD OF THE AGENCY, OR HIS DULY AUTHORIZED REPRESENTATIVE FOR THE DETERMINATION OF SUCH APPEALS, GENERALLY, THE AGENCY'S BOARD OF CONTRACT APPEALS. THERE IS NO INDICATION IN THE STANDARD PROGRESS PAYMENT CLAUSES THAT THE USUAL PROCEDURES FOR RESOLVING FACTUAL DISPUTES ARE NOT FOR APPLICATION TO THE DECISIONS MADE BY THE CONTRACTING OFFICER UNDER PARAGRAPH (C) OF THOSE CLAUSES.

HOWEVER, AS POINTED OUT IN YOUR LETTER OF SEPTEMBER 25, DISPUTES CONCERNING A CONTRACTOR'S COMPLIANCE WITH HIS OBLIGATIONS UNDER THE EQUAL OPPORTUNITY CLAUSE OF HIS CONTRACT ARE NOT RESOLVED UNDER THE DISPUTES CLAUSE PROCEDURES, SINCE 41 CFR 60-1.1 SPECIFICALLY STATES THAT "THE PROCEDURES SET FORTH IN THE REGULATIONS IN THIS PART GOVERN ALL DISPUTES RELATIVE TO A CONTRACTOR'S COMPLIANCE WITH THIS OBLIGATIONS UNDER THE EQUAL OPPORTUNITY CLAUSE REGARDLESS OF WHETHER OR NOT HIS CONTRACT CONTAINS A 'DISPUTES' CLAUSE." THE PROCEDURES IN THAT PART (60-1) DO NOT INDICATE THAT REVIEWS, FINDINGS AND DECISIONS CONCERNING WHETHER A CONTRACTOR IS IN COMPLIANCE WITH HIS OBLIGATIONS UNDER THE EQUAL OPPORTUNITY CLAUSE ARE TO BE MADE BY THE CONTRACTING OFFICER. INSTEAD, SUCH RESPONSIBILITIES SEEM TO BE VESTED IN THE CONTRACT COMPLIANCE OFFICER OR OTHER OFFICIALS REGULARY INVOLVED IN EQUAL OPPORTUNITY PROGRAMS. THUS, SINCE THE REGULATIONS DO NOT APPEAR TO CONTEMPLATE THAT THE CONTRACTING OFFICER IS TO MAKE FACTUAL FINDINGS AND DECISIONS REGARDING A CONTRACTOR'S EQUAL OPPORTUNITY COMPLIANCE POSTURE; SINCE PARAGRAPH (C) OF THE STANDARD PROGRESS PAYMENT CLAUSES PERTAINS ONLY TO FINDINGS AND DECISIONS BY THE CONTRACTING OFFICER; AND SINCE 41 CFR 60-1.1 SPECIFICALLY EXCLUDES EQUAL OPPORTUNITY MATTERS FROM DETERMINATION UNDER THE DISPUTES CLAUSE, IT IS OUR VIEW THAT THE CONTRACTOR IS ENTITLED TO HAVE HIS COMPLIANCE POSTURE DECIDED UNDER THE PROCEDURES AND BY THE PERSONNEL DESIGNATED IN THE REGULATIONS, RATHER THAN BY THE CONTRACTING OFFICER UNDER THE PROVISIONS OF THE PROGRESS PAYMENT CLAUSE.

IN VIEW OF THE FOREGOING, WE CONCLUDE THAT, IN THE ABSENCE OF APPROPRIATE AMENDMENTS TO YOUR DEPARTMENT'S REGULATIONS (AND THE RESULTING CONTRACT PROVISIONS), PROGRESS PAYMENTS MAY NOT PROPERLY BE SUSPENDED, WITHOUT A HEARING, FOR NONCOMPLIANCE BY THE CONTRACTOR WITH HIS OBLIGATIONS UNDER THE EQUAL OPPORTUNITY CLAUSE OF HIS CONTRACT.

WE WILL, OF COURSE, BE GLAD TO DISCUSS OR CONSIDER YOUR FURTHER COMMENTS OR SUGGESTIONS IN THE MATTER.