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March 30, 2017

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The Honorable Steven B. Berlin
UNITED STATES DEPARTMENT OF LABOR
Office of Administrative Law Judges
90 Seventh Street, Suite 4-800
San Francisco, CA 94103-1516

Office of Administrative Law Judges
San Francisco, Ca

Re: *OFCCP v. Google Inc.*, Case No. 2017-OFC-00004, Prehearing Conference Matters

Your Honor:

I write to raise two issues OFCCP would like to discuss at the prehearing conference in this matter on either April 4th or 5th: (1) Google's refusal to agree to shorten the time for its response to properly served requests for admission and (2) limitations on Google's proposed witnesses. These matters are appropriate for consideration at the prehearing conference because their resolution will simplify issues, limit witnesses and "may tend to expedite the disposition of the proceedings." 41 C.F.R. 60-30.12.

I. Facts

On March 15, 2017, this Court denied summary judgment on the basis that the summary judgment process was not available in expedited proceedings. Order Denying Plaintiff's Motion for Summary Judgment ("Order"). Later, in a discussion of the merits of OFCCP's summary judgment motion, the Court indicated that it believed that the burden on Google in complying with its agreement to produce documents would be a key consideration at the hearing in this matter, scheduled for April 7, 2017. Order at 4-6. The Court indicated that it considered the dollar value of the contract with Google to be relevant to the consideration of burden, as well as the amount it would cost Google to comply with OFCCP's requests. Order at 5-6. The Court also suggested that Google's total resources might be less than the public value of its stock or the revenues of its parent. Order at 5.

On March 20 and 24, 2017, OFCCP timely served Google with sets of 32 requests for admission. Exhibits A ("2nd RFAs") and B ("3rd RFAs"). Those requests sought admissions from Google relating to (1) Google's business with the government through intermediary businesses (2nd RFAs 30-33), (2) the manner in which the information sought by OFCCP is stored by Google (2nd RFAs 34-35), (3) the legal costs associated with its resistance to OFCCP's lawful requests (3rd RFAs 36-43), (4) multi-million dollar expenditures by Google on other, non-litigation expenses (3rd RFAs 44-46), (5) actual income earned by Google (3rd RFAs 47-50), (6) previous compliance reviews of Google by OFCCP (3rd RFAs 51-54, 60-61), (7) Google's suit to force the government to allow it to bid on a contract (3rd RFAs 55, 62), and (8) the amount of money it has received from contracting with the federal government (3rd RFAs 56-59).

The Court's summary judgment order also held that this Court's review of the relevancy

of OFCCP's requests was "narrow and deferential" and that it was "persuaded that OFCCP need not engage in an iterative process with Google, explaining the status of the investigation when it requests further information." Order at 6-7. Accordingly, the Court suggested its focus would be on the burden on Google in complying with the requests, *not* on OFCCP's motivations for seeking information. *Id.* & n.8.

On March 28, 2017, Google provided OFCCP with its prehearing statement, exhibit list and witness list for the hearing set for April 7, 2017. In those documents, Google identified (for the first time) a variety of OFCCP personnel that it intends to call as witnesses. Defendant's Witness List ("Witness List"). Google indicated that it intends to call Compliance Officers Carolyn Mcham-Menchyk and Farah Haq, Assistant District Director Agnes Huang and Regional Director Janette Wipper to testify. *Id.*

II. The hearing will be streamlined if Google is ordered to submit its responses to the Department's Requests for Admissions prior to the hearing.

By rule, the parties are permitted to serve requests for admissions on one another no later than 14 days before a hearing. 41 C.F.R. 60-30.33(a) and 60-30.9. Here, OFCCP timely served Google with two sets of requests for admissions addressing issues raised by this Court in its Order denying OFCCP's motion for summary judgment on Monday, March 20 and on Friday, March 24, 2017. OFCCP served both requests fourteen days before the April 7, 2017 hearing in this matter. However, the rules provide Google 25 days to answer the requests. *Id.* On March 23rd, counsel for OFCCP conferred with counsel for Google seeking an agreement from Google to provide answers to OFCCP's Second Set of Requests for Admission by April 4. On March 27th, counsel for OFCCP followed up on the parties' March 23rd discussion and extended the agency's request to include the Third Set of Requests for Admission, served March 24th. Google would not agree to provide answers before the hearing. Google argued that, because the 25-day period ran beyond the hearing date, the requests were untimely.¹

Without expedited responses to these requests, OFCCP will be forced to present more witnesses to the Court, elicit longer testimony, and address issues that might otherwise be settled through Google's responses. Accordingly, this is an appropriate subject for a prehearing conference with the Court. 41 C.F.R. 60-30.12. Further, if Google is permitted 25 days to answer these straightforward requests, the Court would only have the benefit of the answers for a mere six days before its decision is due on April 24, 2017. 41 C.F.R. 60-30.35.

III. Google's witness list ignores this Court's Orders and seeks to compel agency witnesses to testify as to privileged matters.

Google intends to elicit testimony from Compliance Officer Mcham-Menchyk about OFCCP's compliance evaluation to date, the onsite visit, OFCCP's request for information and Google's requests for information. Witness List at 1-2. Google also intends to seek testimony as to "whether OFCCP conducted any compensation analyses prior to the issuance of the Subject Demands... factual information such as when [the analyses] were conducted, those involved, the results, the area(s) where potential indicators of compensation issues exist..." *Id.* Google also

¹ Google's argument was inconsistent with its own conduct. On February 24, 2017, Google served a set of requests for admission on OFCCP. Based on that service date, the 25-day period ran to March 21, 2017. However, at the time Google served its requests, the hearing in this matter had been set for March 10, 2017.

seeks testimony from Compliance Officer Haq about OFCCP's compliance evaluation to date, and requests for applicant flow data, limited to only certain job groups. *Id.* at 2. Google also seeks testimony from Assistant District Director Agnes Huang about her role in the compliance evaluation, oversight of the two compliance officers and non-privileged communications with the compliance officers about the compliance evaluation. *Id.* Finally, Google seeks testimony from Regional Director Wipper about OFCCP's compliance evaluation to date, and "non-privileged" communications with OFCCP's Los Angeles Regional Office and OFCCP's National Office about the compliance evaluation. *Id.* at 3.

The testimony that Google seeks from OFCCP personnel goes to issues that are simply outside the subject matter of this hearing. The Court made clear that OFCCP is not required to reveal the preliminary results of its ongoing investigation to support its requests in this matter. *See* Order at 7; *see also* Order to Apply Expedited Hearing Procedures at 5 (recognizing that "[a] requirement to conciliate does not open the door into OFCCP's internal evaluation process"). Therefore, testimony from Compliance Officers about the details of preliminary analyses or any indicators that OFCCP may or may not have found is unwarranted. Similarly, the contents of the ongoing investigation simply are not before the Court at this stage; rather it is the alleged burden on Google to comply with OFCCP's requests.

Further, even if the hearing somehow encompassed OFCCP's open, ongoing investigation, information about that investigation would be subject to the deliberative process and investigative files privileges and OFCCP personnel would be directed not to answer questions about the investigation. *See* OFCCP Pre-Hearing Stmt. at 22-24. This is also the case with all communications Assistant District Director Huang had about the compliance review with the compliance officers, and any role she played in the investigation. It is also the case for all communications Director Wipper may have had with field offices or OFCCP's national office about the open, ongoing investigation of Google. Appropriately limiting the witnesses called by Google would simplify the proceedings and is therefore an appropriate subject for the prehearing conference. 41 C.F.R. 60-30.12.

IV. Conclusion

Resolving Google's obligations to answer OFCCP's properly served Requests for Admission and limitations on witness testimony will certainly expedite the resolution of these proceedings. OFCCP respectfully requests that the Court entertain these issues at the prehearing conference in this matter on April 4th or 5th.

Respectfully submitted,



Jeremiah Miller
Senior Trial Attorney

Enclosures

Cc (w/encl.): Lisa Barnett Sween (via e-mail)