

CLIENT ALERT

Hospital Not A Subcontractor Under Federal Employees Health Benefit Program

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The Department of Labor's Administrative Review Board ("ARB") has rejected the Office of Federal Contract Compliance Programs' ("OFCCP's") most recent attempt to extend its jurisdiction to hospitals that provide medical services to Blue Cross Blue Shield plan enrollees in the Federal Health Benefits Program ("FEHBP"). *Office of Federal Contract Compliance Programs v. Bridgeport Hospital*, ABC Case No. 00-034 (Jan. 31, 2003).

The OFCCP had argued that Bridgeport Hospital was a federal subcontractor to the prime Federal Employees Health Benefits Program ("FEHBP") contract between the Blue Cross and Blue Shield Association ("Association") and the Office of Personnel Management ("OPM"), and thus was required to comply with the anti-discrimination provisions of Executive Order 11246 ("the Executive Order"), Section 503 of the Rehabilitation Act ("Section 503"), and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"). The ARB rejected the OFCCP's claim and found that the Association was not obligated by its federal FEHBP contract to provide medical care to its policyholders. Since that was not an obligation under the prime contract, the contract with the hospital could not be a "subcontract," the Board ruled. The ARB did not reach the issue of whether the Hospital's provision of medical care to Association enrollees would otherwise met the definition of a "subcontract" as set forth by the DOL's regulations.

This case originated with the OFCCP notifying Bridgeport Hospital that it had been selected for a compliance review pursuant to the Executive Order, Section 503, and VEVRAA, and requesting certain information for the audit. When Bridgeport Hospital refused to provide OFCCP with the requested information, on the basis that it was not a federal "subcontractor," the OFCCP filed an administrative complaint. The OFCCP alleged that the Hospital was a federal subcontractor under the Executive Order and other non-discrimination statutes, and that the Hospital was subject to its jurisdiction.

The contract at issue was Bridgeport Hospital's agreement with Blue Cross/Blue Shield of Connecticut, Inc., a contractor to BCBSA. That contract set forth certain terms of payment from Connecticut Blue Cross/Blue Shield to Bridgeport Hospital for the provision of covered services to persons eligible to receive health care benefits under any Blue Cross plan or member contract. This agreement resulted in lower costs of medical treatment to Association members and lower cost to the health plan. Concurrent with this agreement, the Association had a contract with OPM on behalf of its member Blue Cross/Blue Shield plans to provide federal employees with a fee-for-service health benefits insurance benefits, under the FEHBP. See OPM Contract No. C.S. 1039. The Association's contract with OPM made the Association a federal contractor for purposes of the federal anti-discrimination provisions. Bridgeport Hospital received \$361,340 from Connecticut Blue Cross/Blue Shield in 1995 as payment for services the Hospital provided to FEHBP members the preceding year.

In response to OFCCP's administrative complaint, Bridgeport Hospital argued that it was not subject to OFCCP's jurisdiction because it was not a federal subcontractor. The Hospital argued that it was neither providing goods or services that were "necessary to the performance of" the prime federal contract nor performing "any portion" of the Association's obligations under the OPM contract. See 41 CF.R. § 60-1.3 (definition of "subcontract"). OFCCP, by contrast, argued that the Association's

contract with OPM committed the Association to provide or ensure that others provide medical care and services to its enrollees, and therefore, that Bridgeport Hospital was a federal subcontractor because, by providing medical services to Association policyholders at a discounted rate, the Hospital was either providing a service "necessary to" effectuate the Association's contract with OPM or performing a "portion" of the Association's obligation on the Association's behalf.

An administrative law judge ("ALJ") of the DOL rejected the OFCCP's jurisdictional argument and the ARB upheld the ALJ's decision, holding that the contract between the Association and OPM did not obligate the Association to provide medical services and supplies, but instead only required the Association to provide health insurance. In particular, the ARB relied on an express statement in the contract which provided that the Association made no commitment to assure hospital care or services to FEHBP enrollees. *See* OPM Contract No. C.S. 1039 at § 4.2(d). According to the ARB, this determination defeated the OFCCP's argument that Bridgeport Hospital was a federal subcontractor subject to the Executive Order, Section 503 and VEVRAA.

This decision is notable because, once again, the OFCCP's attempt to expand its jurisdiction has been rebuffed. Providers of medical services to FEHBP patients that receive reimbursement for such services from a Blue Cross/Blue Shield entity under the master BCBSA agreement will not, at this time, be required to comply with the affirmative action and non-discrimination obligations set forth in the Executive Order, Section 503, and VEVRAA. However, this decision does not address whether a provider could be deemed a federal subcontractor, and therefore subject to OFCCP's jurisdiction, if a prime contract did require a health plan to provide medical services, or guarantee the provision of medical services, to FEHBP enrollees.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade

Partner – Washington, D.C.

Phone: +1 202.624.2854

Email: kmeade@crowell.com