



TRANSMITTAL

**U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Federal Contract Compliance Programs
Washington, D.C. 20210**

NUMBER: 262

DATE: March 17, 2003

ADM Notice/JUR

1. **SUBJECT:** Coverage of health care providers based on their relationship with participants in the Federal Employees Health Benefits Program (FEHBP).

2. **PURPOSE:** To confirm that health care providers having a relationship with FEHBP participants are not covered under OFCCP's programs based solely on that relationship.

3. **BACKGROUND:** On January 31, 2003, the Administrative Review Board (ARB) issued a final decision unfavorable to OFCCP and ordered that the agency's Administrative Complaint be dismissed. The ARB upheld an earlier ruling by the Administrative Law Judge concluding that the contract between OPM and Blue Cross did not obligate Blue Cross to provide medical services and supplies to government employees. Rather, the contract obligated Blue Cross to provide health insurance. A copy of the ARB's decision is attached.

In October 1996, OFCCP filed an administrative complaint against Bridgeport with the Office of Administrative Law Judges (ALJ) alleging that Bridgeport had violated its contractual obligations under OFCCP regulations when it refused to maintain and submit to OFCCP affirmative action plans (AAPs). Bridgeport asserted that it was not required to maintain AAPs because it was not a covered Federal subcontractor. OFCCP argued that Bridgeport was a covered Federal subcontractor when Bridgeport provided medical services and/or supplies to persons receiving health care benefits under a Blue Cross plan. Blue Cross held a prime contract with the OPM under the Federal Employees Health Benefits Program (FEHBP).

OFCCP regulations define a covered subcontract as an agreement (1) between a prime contractor and a person for the purchase, sale or use of personal property or nonpersonal services which are *necessary in whole or in part to the performance of the Government contract*, or (2) under which *any portion of the contractor's obligation to the Government is performed, undertaken or assumed*. 41 CFR 60-1.3.

On cross motions for summary judgment, the ALJ, on January 21, 2000, ruled in favor of Bridgeport, holding that the hospital was not a covered Federal subcontractor. Specifically, the ALJ found that Bridgeport was not covered under either OFCCP definition of subcontractor under 41 CFR 60-1.3. Bridgeport held a reimbursement agreement with Blue Cross. Blue Cross was to pay Bridgeport a predetermined fee when it supplied particular medical services and/or supplies to Federal employees covered by Blue Cross health insurance. The ALJ held that this type of reimbursement agreement between Bridgeport and Blue Cross was not necessary for Blue Cross to fulfill its contractual obligations to OPM to provide medical insurance to Federal employees, nor did Bridgeport perform any portion of the Blue Cross/OPM prime contract. OFCCP filed exceptions to the ALJ's decision.

On appeal, the ARB upheld the ALJ's recommended decision that OFCCP's administrative complaint should be dismissed.

The ARB ruled that the prime contract between Blue Cross and OPM did not obligate Blue Cross to provide medical services to Blue Cross policyholders, but rather, that Blue Cross contracted with OPM to reimburse the policyholders for medical care costs. The ARB did not, however, specifically address whether Bridgeport's obligation to provide medical services to Blue Cross enrollees was "necessary" to the performance of the Blue Cross/OPM contract (to provide medical insurance), or whether it constituted partial performance by Bridgeport of that prime contract. Unlike the ALJ, the ARB expressly declined to address either subcontractor coverage issue, ruling instead that those two questions did not have to be addressed on appeal, not because OFCCP's first argument had failed, but because Blue Cross was not obligated to OPM to provide its enrollees with medical care.

Based on the ARB decision, the Office of the Solicitor (NSOL) has advised that OFCCP cannot establish subcontractor coverage of hospitals, pharmacies or other medical care providers based on the existence of prime contracts with Blue Cross or other FEHBP providers. Accordingly, NSOL, by memorandum dated February 5, 2003, has instructed its regional offices to close twelve pending agency enforcement referrals raising the Bridgeport coverage issue and to return those files to OFCCP.

4. **POLICY:** Based on the ARB decision, OFCCP cannot use FEHBP coverage as a basis to assert jurisdiction over a health care provider. Coverage over such a provider may be established by other means such as a contractual relationship with the U.S. Department of Veterans' Affairs or the Department of Defense. Coverage may also be established for a teaching hospital doing research for a university that has a contract with the Federal government. If you have questions regarding coverage of a medical care provider during the scheduling process you may contact the Division of Program Operations (DPO) for further guidance and assistance.
5. **INSTRUCTIONS:** File this Notice, including the transmittal page, behind the "JUR" (Jurisdiction) in your Administrative Practices Binder.
6. **OBSOLETE DATA:** None
7. **ATTACHMENTS:** Copy of the ARB Decision
8. **DISTRIBUTION:** A, B (both hard copy and electronically)

CHARLES E. JAMES, SR.
Deputy Assistant Secretary
for Federal Contract Compliance

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