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After Another Loss, OFCCP Vows to Continue Its Pursuit of Jurisdiction Over TRICARE Providers

BY DAVID GOLDSTEIN

Ignoring repeated setbacks, the Office of Federal Contract Compliance Programs (OFCCP) is continuing its four-year quest to obtain jurisdiction over health care providers based on the theory that participants in the Department of Defense's TRICARE program qualify as federal government subcontractors who are required to comply with the agency's regulations. On Nov. 13, the OFCCP indicated that it ''intends to continue to schedule and attempt to review hospitals because they are TRICARE network providers.''

TRICARE is the Department of Defense (DOD) program that pays for the medical benefits of active duty and retired military personnel and their families. The DOD has three direct contractors that administer the TRICARE program. These three contractors, in turn, enter into contracts with hospitals and other medical providers to provide medical care and supplies to military personnel and their family members under TRICARE.

The DOD consistently has taken the position that TRICARE contracts should not be treated as covered government contracts for purposes of subjecting health care providers to federal affirmative action obligations and the jurisdiction of OFCCP. In the OFCCP's view, however, the existence of a covered contract must be determined as a matter of law without taking into account the contracting agency's expressed intentions. The OFCCP's position on this issue currently is being tested in *OFCCP v. UPMC Braddock*, which is pending in the U.S. District Court for the District of Columbia.

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In *Braddock*, the Department of Labor's Administrative Review Board (ARB) found that medical providers and hospitals—such as Braddock Hospital—that provide medical services to U.S. government employees under a health plan that contracts with the Office of Personnel Management (OPM) to provide such services are federal subcontractors subject to OFCCP jurisdiction and regulations. In reaching this decision, the ARB refused to enforce Federal Acquisition Regulations governing OPM's contracts with health plans, hospitals, and medical suppliers to the extent that such regulations excluded hospitals and medical suppliers from the definition of a covered subcontractor, finding that OFCCP's jurisdiction could not be circumscribed by other executive agencies.

Based on its victory before the ARB in *Braddock*, the OFCCP takes the position that the DOD's opinions regarding TRICARE and OFCCP jurisdiction likewise are irrelevant.

Disagreement between executive branch agencies in this way makes life difficult for the contractors who are caught in the middle. However, it is not particularly surprising to see executive agencies engaging in such battles over turf. On the other hand, it is extremely surprising that, when Congress subsequently attempted to resolve this battle in favor of the DOD, the OFCCP still refused to stand down.

In December 2011, Congress passed legislation that appeared explicitly to reject the OFCCP's position that it had jurisdiction over TRICARE providers. Remarkably, the response from the OFCCP's director, Patricia Shiu, was: ''this is not over yet.''

Florida Hospital of Orlando

In order to discuss the current standoff between the OFCCP and Congress, it is important to review some additional history.

As noted above, TRICARE is a DOD program that pays for the medical benefits of active duty and retired military personnel and their families. The DOD has three direct contractors that administer the TRICARE program: (1) Humana Military Health System; (2) TriWest; and (3) Health Net. These three contractors, in turn, enter into contracts with hospitals and other medical providers to provide medical care and supplies to

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military personnel and their family members covered by TRICARE.

One of the providers with which the Humana Military Health System (HMHS) entered into an agreement was the Florida Hospital of Orlando (Florida Hospital). The OFCCP subsequently sought to audit Florida Hospital, asserting jurisdiction based on the TRICARE arrangement.

Florida Hospital objected to the OFCCP's assertion of jurisdiction and ultimately the dispute came before a Department of Labor administrative law judge (ALJ). The issues before the ALJ were:

> (A) Whether the hospital's contract with HMHS under the TRICARE program was a federal subcontract, thereby subjecting the hospital to OFCCP jurisdiction because the hospital's contract was either (1) necessary to the performance of HMHS's direct contract with TRICARE; or (2) required the hospital to perform any portion of HMHS's obligation under its direct contract with TRICARE; and
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> (B) Whether the DOD's assertion that TRICARE payments were federal financial assistance (not contract payments) trumped the DOL's opinion that the payments were pursuant to a federal contract.

The ALJ concluded that hospitals that participate in the TRICARE program are subcontractors because they assume the performance of part of HMHS's obligations in its contract with the DOD. The ALJ also concluded that TRICARE payments were not federal financial assistance and were, therefore, subject to regulatory obligations applicable to federal contracts and subcontracts.

On Nov. 1, 2010, Florida Hospital appealed the ALJ's decision to the ARB.

On Dec. 31, 2011, while the *Florida Hospital* case still was pending before the ARB, President Obama signed into law the National Defense Authorization Act for fiscal year 2012 (NDAA), which included a provision intended by Congress to address the OFCCP's assertion of jurisdiction over TRICARE providers.

In particular, Section 715 of the NDAA states that

> (3) In establishing rates and procedure for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall, to the extent practicable, maintain adequate networks of providers, including institutional, professional, and pharmacy. *For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.*

Although Section 715 was widely viewed as clearly intended to foreclose further assertions of OFCCP jurisdiction based solely on TRICARE, the agency interpreted the provision differently.

Following the enactment of the NDAA, on Jan. 13, the ARB ordered further briefing on the impact of the law on the *Florida Hospital* case. On Oct. 19, the ARB issued its decision (*OFCCP v. Florida Hospital of Orlando*, ARB No. 11-011, ALJ No. 2009-OFC-2 (ARB Oct. 19, 2012) (21 HLR 1487, 10/25/12).

To support its continued assertion of jurisdiction over Florida Hospital, in the proceedings before the ARB, the OFCCP first noted that there is a two-pronged definition of ''subcontract'' in its regulations. The first prong of the applicable regulation defines a subcontract as ''any agreement or arrangement between a contractor and any person . . . (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more [covered government] contracts. . .'' 41 C.F.R. § 60-1.3.

The second prong of the applicable regulation defines a subcontract as ''any agreement or arrangement between a contractor and any person . . . (2) Under which any portion of the contractor's obligations under any one or more [covered government] contracts is performed or undertaken or assumed.'' *Id*.

The OFCCP acknowledged that Section 715 precluded it from arguing that a provider has entered into a covered ''subcontract'' based on the second prong of the definition of a subcontract. Instead, the OFCCP argued that Section 715 does not bar the agency from asserting jurisdiction over a TRICARE participant based on the first prong of the definition. As explained in the ARB opinion, the OFCCP admitted:

> that it ''can no longer assert . . . that HMHS's obligation to create a network of healthcare providers encompasses the obligation to deliver medical services and that by providing such medical services as a subcontractor to HMHS, Florida Hospital performed, undertook, or assumed HMHS's obligations under the prime contract.'' OFCCP contends, however, that Section 715 does not address the first prong of the subcontract (41 C.F.R. § 60-1.3) definition that ''TRICARE contracting with HMHS to set up a network of providers and ensure access to care for TRICARE beneficiaries [and] HMHS discharged this obligation in part by contracting with Florida Hospital to become a network provider.'' OFCCP argues that Florida Hospital's services as a participant in the network were ''necessary to the performance of the TRICARE–HMHS prime contact and met the first prong of the subcontractor definition. . . .''

(*OFCCP v. Florida Hospital of Orlando*, ARB No. 11-011 at 9).

In their plurality decision, two members of the ARB—Chief Administrative Appeals Judge Paul Igasaki and Judge Lisa Wilson Edwards, found that the purpose of the prime contract between HMHS and TRICARE was to maintain a network of health care providers to serve TRICARE beneficiaries and ''the express language of the HMHS/Florida Hospital subcontract [was] designed to incorporate Florida Hospital as a part of the network of provider services. . .[for] beneficiaries of TRICARE.'' Thus, Igasaki and Edwards concluded, because Florida Hospital's agreement ''involves the provision of health care providers pursuant to a managed care prime contract between TRICARE and HMHS that includes the requirement to maintain a network of providers,'' in ac-

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cordance with Section 715 of the NDAA, the agreement cannot be considered to be a covered ''subcontract'' under either prong of the definition of a subcontract in the OFCCP's regulations. *Id.* at 23. Accordingly, they reversed the ALJ decision and order, and dismissed the OFCCP's complaint.

Unfortunately, however, in addition to the plurality decision, three other judges wrote separately, leaving a question as to whether the OFCCP might be able to prevail on its ''Prong One'' argument in some other context.

First, while concurring that Section 715 barred the OFCCP's jurisdiction over Florida Hospital under Prong Two of its regulatory definition of subcontractor, Judge E. Cooper Brown argued that the OFCCP's Prong One argument was not properly before the ARB and therefore the ARB should not have ruled on the issue. Judge Brown acknowledged that the OFCCP had asserted jurisdictional coverage under Prong One of the regulatory definition in its arguments before the ALJ, but its arguments had been premised upon its construction of the TRICARE/HMHS prime contract as a contract for the delivery of health care services. In other words, Judge Brown thought that OFCCP's Prong One argument before the ALJ was different from its Prong One argument before the ARB. As a result, Judge Brown found that the ARB could neither entertain OFCCP's argument now raised for the first time on appeal nor order that the matter be remanded for consideration of the argument by the ALJ. Accordingly, Judge Brown concurred with the plurality's holding that the OFCCP does not have jurisdiction over Florida Hospital under Prong Two of the OFCCP's regulatory definition of subcontractor, but dissented ''with respect to my colleagues' conclusions regarding the OFCCP's jurisdiction under Prong One to the extent that I do not consider that issue properly before the Board at this time.'' *Id.* at 29.In a second separate opinion, Judge Luis Corchado took an entirely different approach, reading Section 715 as not resolving the relevant question under Prong One. According to Judge Corchado:

> Because Prong One applies to any kind of a government contract, Section 715 does not resolve the relevant question under Prong One. As explained earlier, Section 715 prevents the OFCCP from using certain words in a TRICARE managed care support contract to label the TRICARE/HMHS contract as a contract to perform healthcare services. But the relevant question under Prong One is whether Florida Hospital provides supplies or non-personal services that HMHS needs to be able to perform its contact with TRICARE.

Id. at 35. Judge Corchado concluded that the OFCCP's Prong One argument had nothing to do with Section 715, noting that ''[i]n its Complaint, citing Prong One, the OFCCP asserted that Florida Hospital provided 'nonpersonal services, which, in whole or in part, were necessary to the performance of Humana's contract or contracts with TRICARE.'" Thus, Judge Corchado expressly dissented from the plurality's opinion that Section 715 precludes the OFCCP from asserting jurisdiction under Prong One.

Although Judge Corchado's position regarding the interpretation of Section 715 appears to lean the OFCCP's way, the judge also wrote at length regarding another issue that was not touched upon in the plurality decision and that appears to favor Florida Hospital's position—whether TRICARE is a federal financial assistance program. It is well established that entities that receive federal financial assistance (often referred to as grants) through programs like Medicare, are not subject to the OFCCP's jurisdiction. One of the arguments that Florida Hospital made in opposing the OFCCP's assertion of jurisdiction was that TRICARE is federal financial assistance program and not a government contractor. The OFCCP argued, in response, that TRICARE was established to ensure or optimize the delivery of quality medical services to military personnel and, therefore, is different from Medicare and not a federal financial assistance program. The ALJ agreed concluding that Medicare is an insurance program that ''does not provide medical services to its beneficiaries, it simply pays for such services,'' whereas the purpose of TRICARE is to provide or ensure the provision of medical services. TRICARE is *not* a federal financial assistance program.

In his separate opinion, Judge Corchado criticized the ALJ's reasoning with regard to this issue and stated that if the ARB otherwise had agreed with the agency's jurisdictional arguments, he would have remanded the case for reconsideration of this issue.

Finally, Judge Joanne Royce not only agreed with Judge Corchado's opinion regarding OFCCP's Prong One argument, but also questioned whether the OFCCP also could assert jurisdiction over Florida Hospital under Prong Two for reasons other than those prohibited by Section 715.

OFCCP'S REQUEST FOR RECONSIDERATION

An agency that is willing to challenge Congress is not likely to admit easily to a defeat before an administrative body. Therefore, it was not entirely unexpected when, on Nov. 13, the OFCCP filed a motion before the ARB asking it to reconsider its decision. Notably, however, in its brief in support of its motion for reconsideration, the OFCCP explicitly stated that, notwithstanding the ARB's decision in *Florida Hospital*, it ''intends to continue to schedule and attempt to review hospitals because they are TRICARE network providers.'' Thus, if the ARB denies the motion for reconsideration, it appears that the OFCCP will be looking for a new test case to litigate. This is bad news for health care providers that had audits placed on hold by the OFCCP pending the resolution of the *Florida Hospital* case. The OFCCP may seek to re-open at least some of these audits leaving the providers to face the tough choice of conceding jurisdiction in spite of the shaky basis for OFCCP's assertion of authority, or engaging in expensive litigation over the issue.

Whether the ARB will grant reconsideration is unclear. Equally unclear is whether Congress will again act in an attempt to end the confusion. The Senate version of the NDAA included language that even OFCCP appears to agree would have resolved this issue against the agency. The OFCCP's attempt to retain jurisdiction in spite of the NDAA is based upon an argument that changes to the language of the NDAA by the Republican-controlled House of Representatives actually were intended to expand the OFCCP's jurisdiction. It seems unlikely that this was really the intent of the Congress.

If its motion for reconsideration is granted, the OFCCP may yet be able to convince a majority of the ARB's members to accept its interpretation of the NDAA. However, in the event of such a decision, Florida Hospital likely would exercise its right to seek federal court review of the issue. The federal courts, in turn, may view the OFCCP's position with some skepticism. As a result, the extent to which TRICARE providers must comply with federal affirmative action requirements is likely to remain uncertain for the foreseeable future.

PRACTICAL IDEAS FOR UNCERTAIN TIMES

Given the continuing uncertainty in this area, health care providers with pending inactive audits who either: (1) are not certain why the OFCCP believes it has jurisdiction; or (2) understand that the audit originally was based on the provider's TRICARE participation, may want to do nothing pending further OFCCP activity. Should the OFCCP resume audit activity (or if the audit currently is active), the provider should consider inquiring as to the agency's asserted basis for jurisdiction and, depending on the answer, may consider asserting objections. Providers facing this decision should consult legal counsel, however, rather than simply refusing to cooperate with the OFCCP. Litigation with the OFCCP can be expensive and should not be pursued lightly without considering the costs involved and the potential risks should it turn out the agency does have jurisdiction.

Entities that already have entered into agreements with the OFCCP to implement affirmative action programs based solely on the OFCCP's claim of jurisdiction arising out of TRICARE participation may want to review those arrangements to determine whether they remain binding.

Providers who receive notices from the OFCCP regarding the scheduling of new audits should ask the agency to provide the basis for its jurisdiction if that is not clear to the provider. In situations where the OFCCP recognizes that it has been clearly wrong in its initial assertion of jurisdiction, it usually will agree to close the audit when the employer raises the objection. If the OFCCP has correctly asserted jurisdiction, about which a provider had been unaware, the provider may be able to negotiate with the OFCCP regarding a plan for coming into compliance.

In conclusion, there is enough continuing confusion regarding the OFCCP's assertions of jurisdiction over hospitals to warrant careful attention to this issue. Hospitals and health care systems should assess their contractual arrangements to determine whether they have federal contract compliance obligations. If they do, they should, of course take appropriate steps to comply with those requirements. When a hospital or health care provider, however, believes that the OFCCP does not have any such contractual arrangements, it should be careful to preserve its objections to unsupported claims of OFCCP jurisdiction.

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