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Mr. White

Comptroller General
of the United States
Washington, D.C. 20548

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Decision

Matter of: King County Medical Blue Shield

File: B-253648

Date: October 12, 1993

William G. Kopit, Esq., Epstein Becker & Green, P.C., for the protester.
Mike Colvin, Department of Health & Human Services, for the agency.
Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Health Care Financing Administration is not barred from awarding a Medicare Part B carrier contract without competition where: (1) the Social Security Act expressly provides such authority; (2) the agency's failure to comply with a provision of the Act requiring that guidance to carriers be published in the Federal Register has no effect on the agency's authority to award such contracts without competition; and (3) a test program to competitively award a limited number of carrier contracts in no way removes the agency's continuing authority to award such contracts without competition.

DECISION

King County Medical Blue Shield (Blue Shield) protests the selection of Aetna Life Insurance Company to be the Medicare Part B carrier for the State of Washington by the Health Care Financing Administration (HCFA) within the Department of Health & Human Services. Blue Shield argues that HCFA improperly selected Aetna without holding a competition, or otherwise soliciting offers from potential providers of these services.

We deny the protest.

Since October 1, 1990, Blue Shield has provided insurance claim services as the Medicare Part B carrier for the State of Washington under the terms of a cost-reimbursement contract with HCFA, pursuant to HCFA's authority under section 1842(a) of the Social Security Act (classified at 42 U.S.C. § 1395u(a) (1988)). Medicare carriers process claims from physicians, other medical practitioners,

independent clinical laboratories and medical equipment suppliers. Medicare carrier contracts are automatically renewed each year unless one of the parties gives notice, within certain timeframes, of its intent not to renew. See 42 U.S.C. § 1395u(b)(5) (1988); 42 C.F.R. § 421.5(f) (1992).

By letter dated April 16, 1993, HCFA notified Blue Shield of certain deficiencies identified in the company's performance. HCFA's letter also advised that the agency was deleting the automatic renewal clause in Blue Shield's contract pending further evaluation of the company's performance problems. After the April 16 letter, HCFA evaluated the results of a mid-year review of Blue Shield's performance and decided not to renew the contract when it expired on September 30. By letter dated May 27, HCFA informed Blue Shield of its decision, and requested assistance with the orderly transition of the contract to a successor contractor. Although the May 27 letter does not name a successor, HCFA announced on June 2 that Aetna would take over Medicare Part B claims processing in the State of Washington on January 1, 1994. This protest followed.

In its protest, Blue Shield argues that HCFA may not properly award a contract to Aetna without requesting proposals from other potential Medicare carriers. Specifically, Blue Shield contends that HCFA may not rely on its traditional statutory authority to award such contracts without competition--i.e., the authority granted under section 1842(b)(1) of the Social Security Act (classified at 42 U.S.C. § 1395u(b)(1) (1988))--because HCFA failed to comply with certain requirements set forth at section 1842(c) of the Act (classified at 42 U.S.C. § 1395u(c) (1988 and Supp. III 1991)). According to Blue Shield, HCFA's actions have deprived the agency of the noncompetitive contracting authority provided by the Social Security Act, and have left HCFA subject to other statutory requirements to award contracts competitively. These requirements include supplemental authority granted HCFA under section 2326 of the Deficit Reduction Act of 1984, as amended,[1] and the general requirements for full and open competition in government procurements found in the

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[1]The Deficit Reduction Act of 1984, as amended, provides supplemental authority to HCFA to award a very limited number of Medicare carrier contracts competitively--i.e., two per year--to replace carriers who are terminated for poor performance. Pub. L. No. 98-369, 98 Stat. 494, 1087, as amended by the Omnibus Reconciliation Act of 1986, Pub. L. No. 99-509, and by the Omnibus Reconciliation Act of 1989, Pub. L. No. 101-239. See also 42 U.S.C. § 1395h, note; and 42 U.S.C. § 1395u, note.

Competition in Contracting Act of 1984, 31 U.S.C. §§ 3551 et seq. (1988).

As Blue Shield correctly points out, HCFA is generally not required to competitively select its Medicare Part B carriers. The Act expressly provides that carrier contracts "may be entered into without regard to section 5 of Title 41 or any other provision of law requiring competitive bidding." 42 U.S.C. § 1395u(b)(1) (emphasis added). The principle limitation on HCFA's contracting authority is that no contract can be entered into with a carrier unless it is determined that the carrier can be expected to perform its obligations under the contract efficiently and effectively. 42 U.S.C. § 1395u(b)(2)(A) (1988); 42 C.F.R. § 421.202(a) (1992).

In Blue Shield's view, however, the nominating process envisioned by the Act--together with the clear exemption in the Act from any provision requiring competitive bidding--is not available to HCFA, because the agency failed to comply with the requirements of 42 U.S.C. § 1395u(c)(1)(A) (1988 and Supp. III 1991). This provision recognizes that the agency must advance funds to carriers for making Medicare payments, plus reimburse the carriers their "necessary and proper cost[s] of administration." To this end, the statute requires that:

> "The Secretary shall cause to have published in the Federal Register, by not later than September 1 before each fiscal year, data, standards, and methodology to be used to establish budgets for carriers under this section for that fiscal year, and shall cause to be published in the Federal Register for public comment, at least 90 days before such data, standards, and methodology are published, the data, standards, and methodology to be used."

42 U.S.C. § 1395u(c)(1)(A).

In its report on the protest, HCFA concedes that it has failed to publish in the Federal Register the data, standards and methodologies used to establish budgets for carriers in fiscal year 1994. However, HCFA explains that it instead issued detailed proposed budget guidelines, called Budget and Performance Requirements, on April 19, and issued a final version of these guidelines on June 18. According to HCFA, these guidelines, in excess of 100 pages in length, are much more detailed than the Federal Register notice, and provide much greater guidance to carrier contractors than the information that would be provided in such a notice.

In our view, there is no basis to conclude that HCFA's failure to comply with the statutory requirement to publish a Federal Register notice deprives the agency of its authority to award carrier contracts without competition. There is nothing in the statutory framework to suggest that the agency's failure to comply with the 1395u(c)(1)(A) Federal Register notice requirement bars an award under the 1395u(b)(1) exemption from any statutory competitive procurement requirements. While we agree that HCFA's Budget and Performance Requirements document does not meet the statutory requirement for a Federal Register notice, it does satisfy the intent of the requirement--i.e., to provide guidance to carrier contractors on the advancement of funds and reimbursement of administrative costs. Blue Cross does not suggest that this document is inadequate in this regard, or in any way fails to provide carriers with the needed guidance.[2]

With respect to Blue Shield's contention that HCFA must award this contract under the terms of the test program in the Deficit Reduction Act, we disagree. As mentioned above, the test program to competitively award carrier contracts when replacing poor performers is of limited application. Specifically, in order to replace a terminated carrier competitively, the statute provides that "[s]uch procedure may be used only for the purpose of replacing . . . [a] carrier which over a period of time has been in the lowest 20th percentile of . . . carriers having agreements or contracts under the respective section, as measured by the Secretary's cost and performance criteria." 98 Stat. 494, 1087. The provision authorizes the competitive award of two such contracts each year. Id.

In our view, this authority in no way replaces the existing process for selecting carrier contracts, does not override the clear statutory exception from competition found in 1395u(b)(1), and is not mandatory in any given procurement. Rather, the program is an entirely supplemental authority to test the results of using competition to select carriers when an existing carrier is terminated for poor performance.

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[2]For example, there is no suggestion in the record that Blue Shield would have been unable to perform its carrier contract with only the Budget and Performance Requirements document as guidance, rather than the Federal Register notice, had its contract not been permitted to expire. Nor is there any suggestion that any of the other Medicare carriers throughout the country are in any way prevented from performing carrier services because they must use the more detailed Budget and Performance Requirements document, rather than a Federal Register notice, to prepare their upcoming budgets.

Since the agency explains that it is not using this authority here, and is instead using the authority provided under the Social Security Act, we have no basis to review HCFA's selection of Aetna to provide Medicare carrier services for the State of Washington without competition.

The protest is denied.

James F. Hinchman
General Counsel