

B-257430

September 12, 1994

The Honorable Eleanor Holmes Norton
Chair, Subcommittee on Compensation
and Employee Benefits
Committee on Post Office and Civil Service
House of Representatives

Dear Madam Chairwoman:

This responds to your May 24, 1994, request for our opinion as to whether an agreement between the Office of Personnel Management (OPM) and the Center for the Study of Services (CSS), which provides for CSS to conduct a customer satisfaction survey and study of Federal Employee Health Benefits Plan (FEHBP) enrollees, constitutes a procurement for services within the application of federal procurement laws.

BACKGROUND

By letter dated June 9, 1994 (copy enclosed), OPM provided us with the following background information on its agreement with CSS. For a number of years CSS, a non-profit organization, has surveyed enrollee satisfaction with FEHBP carriers in the Washington, D.C., area. CSS surveyed enrollees who were subscribers to its magazine, Checkbook, and published the survey results in the magazine.

Early in 1994, CSS approached OPM for assistance in conducting a survey of enrollee satisfaction with all FEHBP carriers nationwide. On March 9, 1994, OPM entered into a memorandum of understanding (MOU) with CSS, agreeing to provide CSS with assistance in the survey and to act as a liaison between CSS and the 330 FEHBP carriers. OPM agreed to make contacts with the carriers to facilitate the survey, but, according to OPM, declined to order them to participate in the survey on the basis that it was not being performed under the control of or for the direct benefit of OPM. The MOU states that the survey and study are to be performed at no cost to the United States Government or to OPM, but it provides that CSS may contract with FEHBP carriers to carry out the survey for a fixed fee to cover its costs.

The MOU contains a number of provisions dealing with the use of the survey data collected by CSS. Under the agreement,

the raw data collected by CSS cannot be copyrighted and is to be released to the public on request at no cost, except for the cost of copying and shipping. The MOU specifies that CSS is to provide OPM with the raw survey data at no charge. In addition, the MOU requires CSS to provide OPM with tabulations of average scores (or percentages of respondents who have given particular responses) for each carrier and survey question, and provides that these tabulations are to be in the public domain. The agreement permits OPM to publish the data and tabulations it receives from CSS as well as findings and information it derives from the data and tabulations.

By FEHBP Letter No. 94-06, dated March 15, 1994 (copy enclosed), OPM notified FEHBP carriers of the survey. The FEHBP Letter states in part:

"Results of surveys of customer satisfaction of plans participating in the Federal Employees Health Benefits Program will help consumers select plans that meet their needs, will help OPM and other agencies administer the Program, and will help plans in their continuing quality improvement efforts.

"Plans participating in FEHBP should be able to provide OPM and current and potential enrollees customer satisfaction data that allow meaningful comparisons across plans.

"In order for comparisons to be meaningful, all plans must use a uniform instrument and uniform survey procedures. Since no program to produce such meaningful plan-by-plan customer satisfaction information across large numbers of health plans currently exists, OPM has taken appropriate steps to assure that the needed information becomes available."

The Letter advises the carriers that "CSS will very soon send you a contract for CSS to conduct the survey for a sample of your FEHBP enrollees." According to the Letter, each carrier's "obligations under the contract will be" to provide CSS a list of its FEHBP enrollees (from which CSS will draw a random sample to survey) and to pay CSS for the cost of the survey, which will be less than \$800 per plan. The Letter states that, in return, CSS will be obligated to conduct the survey and provide the results to the carrier and to OPM.

Consistent with the terms of the Letter, the standard contract between CSS and the carriers obligates CSS to survey the carrier's enrollees upon payment of a fee (\$798

for the basic survey services) and the carrier's delivery to CSS of a list of its enrollees. The contract does not permit CSS to abandon the survey.

Following a series of meetings between CSS and major carriers, at least one of which was attended by OPM, CSS modified and finalized the survey. The survey instrument bears the name and seal of OPM as well as CSS's logo, and is accompanied by an OPM cover letter that highlights the importance of the survey and encourages enrollees to respond. An OPM cover letter also accompanies additional mailings of the survey to non-responding enrollees, emphasizing the importance of their participation.

DISCUSSION

OPM maintains that it properly chose an MOU rather than a contract for services to support its arrangement with CSS because OPM is not in control of the survey and it is not being performed for OPM's direct benefit or use. OPM contends that CSS undertook the survey at its own initiative and maintained full control over it, while OPM's role was merely to facilitate arrangements between CSS and the carriers. In addition, OPM maintains that one of the main purposes of its agreement with CSS was to promote the dissemination of information to the FEHBP carriers, enrollees, and the public, allowing FEHBP enrollees to better compare FEHBP plans and providing the carriers with a tool to improve the quality of their services. According to OPM, its arrangement with CSS yields only incidental benefits to OPM and therefore the arrangement should be viewed as an "assistance relationship" under criteria set forth in the Federal Grant and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 630i-6308, discussed below.

OPM points to several factors as evidence that OPM did not intend to acquire CSS's services. As OPM notes, it did not approach CSS for survey services; rather, CSS undertook the survey at its own initiative in order to publish the results in Checkbook magazine. In addition, the MOU between OPM and CSS contains provisions that, on their face, reflect OPM's intention not to assume control over CSS's survey arrangements. In particular, the MOU states that participation by the carriers and the beneficiaries in the survey will be voluntary and it allows CSS to abandon the survey at any time. Finally, OPM points out that CSS is not entitled to any payments of cash or property from the government.

The lines between the types of arrangements that will require the use of a procurement contract and those that do

not are not always clear, and agencies often have considerable control over whether a procurement is called for by how an arrangement is structured. If the factors discussed above reflected the entire substance of OPM's relationship with CSS, we might agree that the relationship does not involve the acquisition of services by OPM. However, the nature of the relationship between a federal agency and another party must be determined by the substance of the agreement judged on the basis of all the surrounding circumstances. See, e.g., B-227084.6, Dec. 19, 1988. In our view, the circumstances surrounding OPM's agreement with CSS, on balance, indicate that OPM exercised significant influence over the survey arrangements in order to obtain information for its direct benefit and use in the performance of specific statutory responsibilities. Because of the particular role OPM elected to play in this case, we believe that a procurement contract would have been the proper instrument for OPM to use to support this arrangement.

As discussed above, it is true that the MOU does not obligate CSS to complete the survey and that CSS is not entitled to any payment directly from the government. However, CSS is required to perform those surveys it undertakes by contract with the individual plans and CSS is entitled to payment under its contracts with the plans. Clearly OPM played a pivotal role in enlisting the carriers' participation, in and funding for the survey through the FEHBP Letter.¹ In addition, OPM encouraged enrollees to participate in the survey through its cover letter (and follow-up letters) emphasizing the importance of their responses. In our view, these facts indicate that OPM exercised significant influence over the survey arrangements.

While OPM suggests that it is only an incidental beneficiary of the survey, it is clear that the survey results contribute directly to the accomplishment of several mandates imposed on OPM by the FEHBP program statute. In this regard, the statute requires OPM to make "a continuing

¹OPM's agreement with CSS states that carrier participation is voluntary, and we understand that OPM stated in a meeting with carriers that they were not required to participate. However, the FEHBP Letter gives no indication that carriers may decline to participate. Indeed, as indicated previously, the Letter emphasizes the importance of carrier participation and stresses the extensive use that OPM will make of the survey results.

study of the operation and administration of [the FEHBP] including surveys and reports on health benefit plans available to employees and on the experience of the plans." 5 U.S.C. § 8910(a). In addition, the statute provides that OPM "shall make available to each individual eligible to enroll in a health benefits plan [under FEHBP] such information, in a form acceptable to the Office after consultation with the carrier, as may be necessary to enable the individual to exercise an informed choice among the types of plans" 5 U.S.C. § 8907(a).

OPM's FEHBP Letter issued to the carriers, referred to above, confirms that OPM will make extensive use of the CSS survey results in conveying information to federal enrollees and in carrying out its other program responsibilities under the FEHBP statute. For example, the Letter states that "OPM will distribute the plan-by-plan results of the survey to federal employees and retirees as an important part of the Open Season process"; that "OPM will stress the importance of the survey" in the context of plan selection considerations; and that "OPM will consider survey results in its contracting and administration processes."

Based on these facts, we are inclined to view OPM's arrangement with CSS as an acquisition of CSS's services in support of OPM's statutory obligations. In analogous cases, we have viewed such arrangements as procurements. For example, in New York Telephone Company et al., 69 Comp. Gen. 61 (1989), 89-2 CPD ¶ 435, we held that the General Services Administration's (GSA) grant of licenses covering the furnishing, installation, maintenance, and operation of public pay phones on GSA-controlled property was a procurement of property or services. We noted that GSA had a responsibility to arrange for telephone services for the private use of federal employees and for the use of the visiting public in GSA-controlled buildings. We concluded that because the acquisition thus satisfied GSA's specific needs, it constituted a procurement for services for the purposes of our bid protest jurisdiction.

Similarly, in West Coast Copy, Inc.; Pacific Photocopy and Research Services, B-254044; B-254044.2, Nov. 16, 1993, 93-2 CPD ¶ 283, we held that a bankruptcy court's arrangement with a firm to provide the public with photocopying services at the court constituted a procurement for services. There, the record showed that the public needed to obtain copies of court documents, that the court's staff resources were strained, and that providing photocopying services furthered the mission of the court, benefiting the court as well as the public. We reached this result notwithstanding the fact that the arrangement did not make use of appropriated funds

and that the actual "buyers" of the firm's services were individuals and entities other than the court.

With respect to OPM's contention that its arrangement with CSS should instead be characterized as an "assistance relationship"--i.e., a grant or a cooperative agreement--within the meaning of the Federal Grant and Cooperative Agreement Act of 1977, supra, the substance of the arrangement indicates otherwise. Under the act, a procurement contract is the proper legal instrument to use "when . . . the principal purpose of the instrument is to acquire . . . property or services for the direct benefit or use of the United States Government." 31 U.S.C. § 6303. On the other hand, a grant or cooperative agreement is appropriate when the federal government is providing assistance to a non-federal entity in order to support the entity's own efforts in accomplishing a public purpose. See 31 U.S.C. §§ 6304 and 6305.

In applying these statutory criteria we have held:

"The decision as to the instrument to be selected turns on the primary purpose of the transaction. The key question is this: Is the principal purpose to serve the immediate needs of the federal government, or is it to provide assistance to a non-federal entity in serving a public purpose?"

67 Comp. Gen. 13, 15 (1987); see also 65 Comp. Gen. 605 (1986); 61 Comp. Gen. 637, 640 (1982).

As discussed previously, the CSS survey will aid OPM in carrying out its responsibilities under the FEHBP statute and therefore serves OPM's immediate needs. The "public purposes" cited by OPM--which center on the dissemination of information concerning enrollee satisfaction with the plans--are essentially the same purposes OPM is itself required to accomplish under the FEHBP statute. Therefore, we view the primary purpose of OPM's arrangement with CSS as obtaining services for OPM's direct benefit and use, rather than serving an independent public purpose.

In conclusion, because OPM elected to exercise significant influence over the survey arrangements in order to obtain information which would meet specific statutory obligations of the agency, we believe that the arrangement should have

been structured as a contract for services subject to the federal procurement laws.²

Sincerely yours,

/s/ James F. Hinchman
for Comptroller General
of the United States

Enclosures

²You also asked whether OPM's agreement with CSS, if subject to federal procurement rules, would have been exempt from competition requirements by virtue of 5 U.S.C. § 8902(a). That provision exempts from competitive bidding requirements only those OPM contracts that are made with qualified health benefits carriers, and therefore OPM's agreement with CSS would not be covered by the exemption. Further, we note that OPM's June 9 letter to us does not raise this argument.

DIGEST

In response to a congressional request, GAO examined the propriety of the Office of Personnel Management's (OPM) utilization of a memorandum of understanding to arrange for the Center for the Study of Services to conduct a customer satisfaction survey of enrollees in the Federal Employee Health Benefits Plans. GAO finds that the primary purpose of OPM'S arrangement with CSS was to enable OPM to obtain services in direct support of its statutory functions and therefore the arrangement should have been structured as a procurement contract.