ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
CareFirst BlueCross BlueShield	)	ASBCA Nos. 52849, 52850
	)	52851
Under OPM Contract Nos. CS 2276, CS 1876, CS 1164	)	
	)	

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OPINION BY ADMINISTRATIVE JUDGE DICUS

These appeals involve disputes between the Office of Personnel Management (OPM or government) and appellant, CareFirst BlueCross BlueShield (CareFirst or NCA) (formerly known as Blue Cross and Blue Shield of the National Capital Area). NCA served as underwriter for federal employee health plans set up by the Secret Service Employees Health Association (SSEHA), the National Association of Postmasters of the United States (NAPUS), and the National Alliance of Postal and Federal Employees (the Alliance). The government has asserted claims against NCA based on its work as underwriter for the health plans established by these organizations. ASBCA No. 52849 involves SSEHA. ASBCA No. 52850 involves NAPUS. ASBCA No. 52851 involves the Alliance. Presently before the Board in these appeals are cross motions for summary judgment. A core issue is whether there is privity between NCA and the government. This decision addresses all of the pending motions.[1]

[1] Each of the appeals has a separate record and set of stipulated facts. References to the record or the stipulated facts will include the appropriate appeal number unless the record item or stipulated fact is the same in each appeal.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. The Federal Employees Health Benefits Act (FEHBA or Act), 5 U.S.C. §§ 8901-8914, established a program to provide health benefits insurance for federal employees and annuitants (stip., ¶ 1). OPM administers the Federal Employees Health Benefits Program (FEHBP or Program) (stip., ¶ 2).

2. Pursuant to its authority under the Act, OPM has promulgated substantive regulations governing the FEHBP. 5 C.F.R. Part 890. OPM has also issued acquisition regulations for the Program. 48 C.F.R. Parts 1601-1653. The acquisition regulations are referred to as the FEHBAR. 48 C.F.R. § 1601.101(a). The FEHBP Acquisition Regulations implement and supplement the Federal Acquisition Regulations (FAR) which are also generally applicable to contracts negotiated in the FEHBP. 48 C.F.R. § 1601.103.

3. The FEHBA authorizes OPM to contract with health insurance "Carriers" to provide benefits under the FEHBP (stip., ¶ 3). OPM contracts with "Employee Organization" carriers to provide "Employee Organization Plans." Some employee organizations then contract with an underwriter to provide or to obtain benefits for members of the Employee Organization Plan. An underwriter is an insurance company that bears the risk that the premiums or rates paid by members of the Employee Organization Plan will not be sufficient to cover the liabilities incurred by the underwriter on behalf of the Plan's members. (Stip., ¶ 5)

4. The SSEHA is an employee organization/carrier under the FEHBA (52849/stip., ¶ 6). Effective 1 January 1987, SSEHA entered into Contract No. CS 2276 (Contract 2276) with OPM for the provision of an Employee Organization Plan. Contract 2276 was renewed for each year thereafter. (52849/stip., ¶ 7, and attach. B)

5. NAPUS is an employee organization/carrier under the FEHBA (52850/stip., ¶ 6). Effective 1 January 1980, NAPUS entered into Contract No. CS 1876 (Contract 1876) with OPM for the provision of an Employee Organization Plan. Contract 1876 was renewed for each year thereafter. (52850/stip., ¶ 7, and attach. B)

6. The Alliance is an employee organization/carrier under the FEHBA (52851/stip., ¶ 6). Effective 1 March 1965 the Alliance entered into Contract No. CS 1164 (Contract 1164) with OPM for the provision of an Employee Organization Plan. Contract 1164 was renewed for each year thereafter. (52851/stip., ¶ 7, and attach. B)

7. The Contract 2276 signature page states that it is a contract between "THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT *hereinafter called the*

OPM, the Agency, or the Government" and "The U.S. Secret Service Employees Health Association . . . *hereinafter also called the Carrier*" which is also described as the "Contractor." There were two signature lines, one for the carrier (David C. Lee, Executive Director SSEHA) and one for the government (Robert E. Sprouse, Chief, Health Benefits Contracts Division II, acting as the contracting officer). There were no other listed parties or signatures to the contract. (52849/stip., attach. B at signature page) The contract was described as an experience-rated price-redeterminable contract for a fee-for-service plan (*id.* at (i)).

8. The Contract 1876 signature page states that it is a contract between "THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT *hereinafter called the OPM, the Agency, or the Government*" and "The National Association of Postmasters of the United States . . . *hereinafter also called the Carrier*" which is also described as the "Contractor." There were two signature lines, one for the carrier (Kenneth Vlietstra, Executive Director NAPUS) and one for the government (Robert E. Sprouse, Chief, Health Benefits Contracts Division II, acting as the contracting officer). There were no other listed parties or signatures to the contract. (52850/stip., attach. B at signature page) The contract was described as an experience-rated price-redeterminable contract for a fee-for-service plan (*id.* at (i)).

9. The Contract 1164 signature page states that it is a contract between "THE UNITED STATES OFFICE OF PERSONNEL MANAGEMENT *hereinafter called the OPM, the Agency, or the Government*" and "National Alliance of Postal and Federal Employees . . . *hereinafter also called the Carrier*" which is also described as the "Contractor." There were two signature lines, one for the carrier (James M. McGee, National President of the Alliance) and one for the government (Robert E. Sprouse, acting as the contracting officer). There were no other listed parties or signatures to the contract. (52851/stip., attach. B at signature page) The contract was described as an experience-rated price-redeterminable contract for a fee-for-service plan (*id.* at (i)).

10. Contracts 2276, 1876, and 1164 included, in Section 1.16, the January 1991 FEHBAR version of the SUBCONTRACTS clause.[2] The clause required SSEHA, NAPUS, and the Alliance to notify, and obtain the written consent of, the contracting officer before entering into any subcontract, or modifying any subcontract, where the amount of the subcontract or the modification exceeded $100,000 and was 25 percent of the total cost of the subcontract. Under certain circumstances, the contracting officer was allowed to ratify a subcontract or waive the advance notice and written consent requirement. Unless it provided otherwise, the contracting officer's consent did not constitute: a

[2] The parties have focused on 1991 provisions. They have not argued that any differences in the provisions in 1987-1990 would affect the result.

determination of the acceptability of any subcontract term or condition; a determination of the allowability of any cost under the contract; or, a determination to relieve SSEHA, NAPUS, or the Alliance of any responsibility for performing the contract. (Stip., attach. B) The contracts referred to "subcontracts for underwriting" at paragraph (b) section 1.11, and to "subcontracts with its underwriter" at paragraph (f) of section 114 in conjunction with incorporation of those sections into subcontracts. Those sections also directed use of the term "Contractor or other appropriate reference" for the term "carrier." (*Id.* at 1-5)

11. Section 3.1 of Contracts 2276, 1876, and 1164 contained the FEHBAR clause PAYMENTS (JAN 1991). In subsection (a), OPM promised to pay the carrier, "in full settlement of its obligations under this contract, subject to adjustment for error or fraud, the subscription charges received for the Plan by the Employees Health Benefits Fund (hereinafter called the Fund) less the amounts set aside by OPM for the Contingency Reserve and for the administrative expenses of OPM, plus any payments made by OPM from the Contingency Reserve." Subsection (d) provided that if the contract was terminated or not renewed, "the Contingency Reserve of the Carrier held by OPM shall be available to the Carrier to pay the necessary and proper charges against this contract to the extent that the reserves held by the Carrier are insufficient for that purpose." (Stip., attach. B)

12. The FEHBAR clause ACCOUNTING AND ALLOWABLE COST (JAN 1991) was set out in Section 3.2 of Contracts 2276, 1876, and 1164. Subsection (a) required SSEHA, NAPUS, and the Alliance to provide OPM with an annual accounting statement including a Summary Statement of FEHBP Financial Operations. The Summary Statement was to set out, for each option provided by the contract: (i) subscription income received and accrued (including amounts received from the Contingency Reserve); (ii) health benefits charges paid and accrued; (iii) administrative expenses and other charges paid and accrued; (iv) income on investments; (v) other adjustments; (vi) the sum of items (i) minus (ii) minus (iii) plus (iv) plus or minus (v). Each Health Plan's annual accounting statement could be adjusted, based on an independent or government audit, by amounts found not to constitute allowable costs or for prior overpayments or underpayments. Section 3.2(a)(3). Allowable costs were defined as actual, necessary, and reasonable amounts incurred determined in accordance with the terms of the contract, FAR subpart 31.2, and FEHBAR, subpart 1631.2. Section 3.2(b)(1). SSEHA, NAPUS, and the Alliance were required to certify the annual accounting statement. Section 3.2(c)(1). Among other things, the three Health Plans had to certify that "[i]ncome, rebates, allowances, refunds and other credits made or owed in accordance with the terms of the contract and applicable cost principles have been included in the statement." Section 3.2(c)(3), ¶ 3. (Stip., attach. B)

13. In Section 3.3, Contracts 2276, 1876, and 1164 included the FEHBAR clause SPECIAL RESERVE (JAN 1991). Subsection (a) provided that "[t]he cumulative gain or loss on operations under this contract [item (a)(1)(vi) in Section 3.2, *Accounting and Allowable Cost*] constitutes the Special Reserve held by or on behalf of the Carrier to be used only for payment of charges against this contract." If the contract was terminated or not renewed, a positive balance in the SSEHA, NAPUS, or Alliance Special Reserves, after all allowable costs and agreed-upon administrative expenses had been paid, was to be paid to OPM for credit to SSEHA's, NAPUS's, or the Alliance's Contingency Reserve. Section 3.3(b). This clause was to be incorporated into all agreements with underwriters of the three employee Organizations' FEHB plans. Section 3.3(c). (Stip., attach. B)

14. Section 3.4 of Contracts 2276, 1876, and 1164 consisted of the FEHBAR clause INVESTMENT INCOME (JAN 1991). In pertinent part, this clause stated the following:

> (a) The Carrier shall invest and reinvest all FEHB funds on hand that are in excess of the funds needed to promptly discharge the obligations incurred under this contract. . . .
>
> (b) All investment income earned on FEHB funds shall be credited to the Special Reserve on behalf of the FEHBP.
>
> (c) When the Contracting Officer concludes that the Carrier failed to comply with paragraphs (a) or (b) of this clause, the Carrier shall credit the Special Reserve with investment income that would have been earned, at the rate(s) specified in paragraph (f) of this clause, had it not been for the Carrier's noncompliance. "Failed to comply with paragraphs (a) or (b)" means: (1) making any charges against the contract which are not allowable, allocable, or reasonable; or (2) failing to credit any income due the contract and/or failing to place excess funds including subscription income and payments from OPM not needed to discharge promptly the obligations incurred under the contract, refunds, credits, payments, deposits, investment income earned, uncashed checks, or other amounts owed the Special Reserve, in income producing investments and accounts.

> (d) Investment income lost as a result of unallowable, unallocable, or unreasonable charges against the contract shall be paid from the first day of the contract term following the contract term in which the unallowable charge was made and shall end of [sic] the earlier of: (1) the date the amounts are returned to the Special Reserve (or the Office of Personnel Management); (2) the date specified by the Contracting Officer; or (3) the date of the Contracting Officer's Final Decision.

(Stip., attach. B)

15. The FEHBAR clause NON-COMMINGLING OF FUNDS (JAN 1991) was set out in Section 3.5 of Contracts 2276, 1876, and 1164. This clause required the "Carrier and/or its underwriter" to keep FEHBP funds (cash and investments) physically separate from funds obtained from other sources unless a waiver was obtained from the contracting officer. Section 3.5(a), (b). This clause was to be incorporated into all subcontracts exceeding $25,000 substituting "'contractor' or other appropriate reference for 'Carrier and/or its underwriter.'" Section 3.5(c). (Stip., attach. B)

16. FAR 52.215-2, AUDIT AND RECORDS – NEGOTIATION (DEC 1989) was included in Section 5.7 of Contracts 2276, 1876, and 1164. Among other things, the clause required the contractor to maintain, and the contracting officer or representative to examine and audit, records and books "sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred in performing this contract." Section 5.7(a). The contractor was to insert the clause in all subcontracts over $10,000. Section 5.7(f). (Stip., attach. B)

17. Section 4.2 of Contracts 2276, 1876, and 1164 contained the clause UNDERWRITER (JAN 1991). Subsection (a) provided that if the Plan were underwritten, SSEHA, NAPUS, or the Alliance would not modify or terminate the policy issued by the underwriter without the prior express approval of the contracting officer. If the Plan was underwritten, the policy issued by the underwriter was made a part of Contract 2276 or Contract 1876 and was incorporated by reference in the contract. Section 4.2(b). Contract 1164 did not contain that subsection (b). If there was any inconsistency between the terms of the contracts and the policy issued by the underwriter, the terms of the contract would prevail. Contracts 2276 and 1876, section 4.2(c); Contract 1164, section 4.2(b). Subsection (c) of Contract 2276 and Contract 1876 was to be included in the contract between SSEHA or NAPUS and the underwriter. Section 4.2(d). Subsection (b) of Contract 1164 was to be included in the contract between the Alliance and the underwriter. Section 4.2(c). (Stip., attach. B)

18. Section 5.36 of Contracts 2276, 1876, and 1164 contained FAR 52.233-1, DISPUTES (APR 1984). In this clause, the contracts were made subject to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, *as amended*. Section 5.36(a). All disputes arising under or relating to the contracts were to be resolved under this clause, except as provided in the CDA. Section 5.36(b). Contractor claims were to be made in writing and submitted to the contracting officer for a written decision. Section 5.36(d)(1). Government claims against the contractor were to be the subject of a written decision by the contracting officer. *Id*. (Stip., attach. B)

19. FAR 52.242-1, NOTICE OF INTENT TO DISALLOW COSTS (APR 1984) was included in Section 5.37 of Contracts 2276, 1876, and 1164. This clause authorized the contracting officer to issue a written notice of intent to disallow specified contractor costs that were determined not to be allowable. Section 5.37(a)(1). Following a response or a failure to respond from the contractor, the contracting officer was to either make a written withdrawal of the notice or issue a written decision. Section 5.37(a)(2). (Stip., attach. B.)

20. Various clauses were required by the government to be included in carrier contracts with underwriters or other subcontractors. Sometimes the carriers were required to "insert," "incorporate," or "include" the clauses in subcontracts. When this was done, "contractor," or "underwriter," or other appropriate reference was to be substituted for "Carrier." (Stip, attach. B, *see, e.g.*, §§ 1.10, 1.11, 1.12, 1.14, 3.3, 3.5, 5.7, 5.18, 5.19)

21. Group Hospitalization and Medical Services, Inc. (GHMSI) is a federally-chartered, not-for-profit insurance company with its principal place of business in Washington, D.C. The Blue Cross and Blue Shield Association (Association) has licensed GHMSI to use the Blue Cross and Blue Shield service marks in the District of Columbia and parts of Maryland and Virginia. Under the licensing agreement, GHMSI did business as Blue Cross and Blue Shield of the National Capital Area until 29 December 1998. Since then, GHMSI has done business as CareFirst BlueCross BlueShield (CareFirst or NCA). (Stip., ¶ 8)

22. Starting 1 January 1987, NCA functioned as the underwriter for the SSEHA Health Plan. NCA provided health benefits, or arranged for the provision of health benefits, for members of the SSEHA Health Plan. When NCA began functioning as underwriter for the SSEHA Health Plan in January 1987, there was no written subcontract between NCA and SSEHA. NCA did not propose a written subcontract that year because NCA understood that OPM intended to revise its prime contracts with SSEHA and other employee organizations for whom NCA was serving as underwriter.

NCA decided to wait until the revision was made before proposing an SSEHA subcontract. (52849/stip., ¶¶ 9, 40, 41)

23. Starting 1 January 1989, NCA functioned as the underwriter for the NAPUS Health Plan. NCA provided health benefits, or arranged for the provision of health benefits, for members of the NAPUS Health Plan. When NCA began functioning as underwriter for the NAPUS Health Plan in January 1989, there was no written subcontract between NCA and NAPUS. NCA did not propose a written subcontract that year because NCA understood that OPM intended to revise its prime contracts with NAPUS and other employee organizations for whom NCA was serving as underwriter. NCA decided to wait until the revision was made before proposing a NAPUS subcontract. (52850/stip., ¶¶ 9, 40, 41)

24. Starting 1 January 1989, NCA functioned as the underwriter for the Alliance Health Plan. NCA provided health benefits, or arranged for the provision of health benefits, for members of the Alliance Health Plan. When NCA began functioning as underwriter for the Alliance Health Plan in January 1989, there was no written subcontract between NCA and the Alliance. NCA's contracts department began drafting an underwriting subcontract for submission to Alliance during 1989. NCA did not propose a written subcontract that year because NCA understood that OPM intended to revise its prime contracts with the Alliance and other employee organizations for whom NCA was serving as underwriter. NCA decided to wait until the revision was made before proposing an Alliance subcontract. (52851/stip., ¶¶ 9, 41, 42)

25. Later, NCA learned that OPM no longer intended to issue a new prime contract to SSEHA, NAPUS, the Alliance, and other employee organizations. OPM did, however, make several changes that required revisions to NCA's draft subcontract with the SSEHA, NAPUS, and Alliance Health Plans. NCA decided to develop a prototype subcontract for its employee organization accounts that would reflect these changes. The subcontract was to be based on a proposed subcontract between NCA and the Beneficial Association of Capital Employees (BACE). In 1990, NCA decided to prepare subcontracts for the SSEHA, NAPUS, and Alliance Health Plans and other employee organizations even though the BACE subcontract had not been accepted or approved. (52849/52850/stip., ¶¶ 42, 43; 52851/stip., ¶¶ 43, 44)

26. On 27 July 1992, SSEHA and NCA entered into written Contract X590 dealing with NCA's role as underwriter for the SSEHA Health Plan. The contract stated that it was effective 1 January 1987. (52849/stip., ¶¶ 9, 10, 45, and attach. C) NCA functioned as underwriter for the SSEHA Health Plan during the years 1987-1993, and continues to do so (52849/stip., ¶ 11).

27. On 19 April 1991, NAPUS and NCA entered into written Contract D001 dealing with NCA's role as underwriter for the NAPUS Health Plan. The contract, which was not signed by OPM, stated that it was effective 1 January 1989. (52850/stip., ¶¶ 9, 10, 45, and attach. C) NCA functioned as underwriter for the NAPUS Health Plan during the years 1989-1993 (52850/stip., ¶ 11).

28. In late 1990 and early 1991, NCA's Contracts Department, Major Accounts Departments and Legal Counsel developed a revised draft subcontract for the Alliance Health Plan. NCA proposed the subcontract, which was presented as such and identified NCA as a subcontractor, to Alliance in April 1991. Alliance did not execute the proposed subcontract. NCA notified Alliance that NCA would not continue to function as an underwriter for the Alliance Health Plan beyond 1992 and that it was withdrawing its benefit and rate proposal for 1993. NCA stated that it would pay claims during 1993 and later years (the run-out period) for liabilities incurred on behalf of members of the Alliance Health Plan during 1989-1992. NCA further stated that its willingness to continue paying for Alliance Health Plan members during the run-out period was contingent upon Alliance paying NCA's expenses from the Alliance Health Plan's letter of credit agreement and the contingency reserve. NCA warned that any delay in such payments may result in NCA suspending fulfillment of its obligations until all outstanding payments are received. NCA asked that Alliance countersign its letter and obtain a signed concurrence from OPM. Neither Alliance nor OPM countersigned the letter. (52851/stip., ¶¶ 9, 10, 46, 47, and attachs. I, J) NCA functioned as underwriter for the Alliance Health Plan during the years 1989-1992. NCA terminated its underwriting relationship with Alliance effective 31 December 1992. NCA continued to pay claims during 1993-1995 for liabilities incurred on behalf of the Alliance Health Plan members during 1989-1992. (52851/stip., ¶ 11) In an exchange of letters in January 1993 NCA requested that OPM disclose the balance of funds in Alliance's letter of credit account. OPM denied the request, stating its contract was with Alliance only and that "[a]ll arrangements especially financial, [sic] between a plan and its underwriter must be resolved between them." (52851/app. appendix, tabs 5, 7)

29. The Contract X590 cover page states that it is a contract between "BLUE CROSS AND BLUE SHIELD OF THE NATIONAL CAPITAL AREA a division of GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC. and UNITED STATES SECRET SERVICE EMPLOYEES HEALTH ASSOCIATION" (52849/stip., attach. C).

30. The Contract D001 cover page states that it is a contract between "BLUE CROSS AND BLUE SHIELD OF THE NATIONAL CAPITAL AREA a division of GROUP HOSPITALIZATION AND MEDICAL SERVICES, INC. and THE

NATIONAL ASSOCIATION OF POSTMASTERS OF THE UNITED STATES" (52850/stip., attach. C).

31. The first two pages of Contract X590 contained "WHEREAS" clauses, other introductory statements, and signatures. The third clause in each contract stated "WHEREAS this Contract X590 is considered a part of Contract No. CS 2276 to appropriately effect the terms and conditions of this Contract." Among other things, the introductory provisions stated that the contract was subject to the terms and provisions of the applicable provisions of 5 U.S.C. Ch. 89, and the regulations issued thereunder. In the event of any inconsistency between Contract 2276 and Contract X590, the terms of Contract 2276 would prevail if NCA, as underwriter, had reviewed and agreed to the terms of such SSEHA-OPM contract and any amendments thereto. Contract X590 was signed by the President and Chief Executive Officer of NCA and by the Chairman of SSEHA. No one else signed the contract. (52849/stip., attach. C)

32. The first two pages of Contract D001 contained "WHEREAS" clauses, other introductory statements, and signatures. The third clause in each contract stated "WHEREAS this Contract D001 is considered a part of Contract No. CS 1876 to appropriately effect the terms and provisions of this Contract." Among other things, the introductory provisions stated that the contract was subject to the terms and provisions of the applicable provisions of 5 U.S.C. Ch. 89, and the regulations issued thereunder. Contract D001 was signed by the President and Chief Executive Officer of NCA and by the President of NAPUS. No one else signed the contract. (52850/stip., attach. C)

33. Article VII of Contracts X590 and D001 contained a clause entitled "PAYMENT OF CHARGES." Subsection 1 stated that the Group (SSEHA or NAPUS) or OPM "on behalf of the Group" shall pay NCA or make available to NCA via letter of credit account all "net-to-carrier subscription charges" forwarded to the FEHB Fund for participants under this contract. "Subject to adjustment for error or fraud" the subscription charges paid to NCA would be considered payment in full of all amounts due from the Group under the contract. (52849/52850/stip., attach. C at 8)

34. In Article VIII, the contracts included a clause entitled "ACCOUNTING AND REPORTING." This clause required NCA to prepare an annual accounting statement for SSEHA or NAPUS in the form required of the Group as prescribed by OPM (art. VIII.1.). The statement was to include: a. subscription charges received and accrued; b. health benefit charges; c. administrative expense limit; d. taxes; e. service charge; f. mandatory statutory reserves; g. investment income; h. other adjustments (art. VIII.1.a-h). Subsection 2 provided that if the amount in Article VIII.a. exceeded the sum of the amounts in Article VIII.b-h., the excess would accrue to the Special Reserve "which, notwithstanding Article III, Section 3.3(a) of the contract between the Group and

OPM [Contract 2276 or Contract 1876], shall be held by BCBSNCA in accordance with the provisions of this Article" (art. VIII.2.a). If the amount in Article VIII.a. was less than the sum of the amounts in Article VIII.b-h., the difference was recoverable from the Special Reserve (art. VIII.3). Any difference remaining after the Special Reserve was expended, constituted a proper charge against the Contingency Reserve or could be recovered in subsequent contract years against the Special Reserve (*id*). If the contract was cancelled and all proper charges and expenses were paid, and a balance remained in the Special Reserve, the balance would be paid to SSEHA or NAPUS "for credit to OPM" (art.VIII.10). Entries in the accounting statement were considered closed and not subject to adjustment by either party if they agreed that the amounts were correct and entered into a "Closing Agreement" (art. VIII.12). (52849/52850/stip., attach. C)

35. Subsection 1.g. of Article VIII, ACCOUNTING AND REPORTING, contained the "Investment Income" clause which stated in pertinent part:

> (1) BCBSNCA will invest and reinvest all funds on hand, including any in the Special Reserve or any attributable to the reserve for incurred but unpaid claims, which are in excess of the funds needed to discharge promptly the obligations incurred under this Contract. . . .
>
> (2) All investment income earned on FEHBP funds shall be credited to the Special Reserve on behalf of the FEHBP[.]
>
> (3) When the Contracting Officer as identified in Contract No. CS [2276 or 1876] ("Contracting Officer") concludes that BCBSNCA has failed to comply with sections (1) and (2) of this clause, the Contracting Officer may direct BCBSNCA to credit the Special Reserve with investment income that would have been earned, at the rate(s) specified in section (5) [of this clause] had it not been for BCBSNCA's noncompliance. "Failed to comply with sections (1) or (2)" includes failure to place excess funds, . . . refunds, credits, payments, deposits, investment income earned, uncashed checks, or other amounts owed the Special Reserve, in income producing investments and accounts. Interest income shall be due for the period from the date BCBSNCA failed to invest the funds until the date BCBSNCA invests such funds.
>
> (4) On charges for benefits, administrative expenses, and other items made by BCBSNCA that are subsequently

> determined to be unallowable, interest shall be charged from the date of the Contracting Officer's notification of disallowance of the charge to the date the funds are credited to the Special Reserve.

(52849/52850/stip., attach. C)[3]

36. A clause entitled "PAYMENT OF BENEFITS" was set out in Article XII of Contacts X590 and D001. Under this clause, payment to participating facilities and participating providers for services rendered in accordance with the Health Plans' Brochures constituted a complete discharge of NCA's or a Participating Plan's obligations under the contract. (52849/52850/stip., attach. C, art. XII.1)

37. Article XIII of the contracts and Article XIV of the Alliance-NCA draft contract contained a clause entitled "DISPUTES" that provided as follows.

> 1. Any dispute arising at any time under this Contract, which is not disposed of by agreement between BCBSNCA and the Group, shall be settled as provided in Paragraphs 2 or 3 below as applicable.
>
> 2. In the event that a dispute arises between the Office of Personnel Management (OPM) and BCBSNCA in its role as a subcontractor out of an alleged act or omission of OPM cognizable under the clause entitled "Disputes" of the Group's contract with OPM, the Group shall sponsor BCBSNCA's submission of such dispute to the Contracting Officer, including any appeals therefrom, under procedures of such Disputes clause, and BCBSNCA agrees to be bound by the result thereof, including the results of any appeal, without further recourse against the Group.
>
> 3. In the event a dispute arises between the Group and BCBSNCA out of an alleged act or omission of the Group which is not cognizable under the Disputes clause of the Group's contract with OPM, such dispute shall be settled by

[3] Subsections (3) and (4) of Art. VIII.1.g. of the NAPUS Contract were slightly different from the same subsections in the SSEHA Contract. Where the latter Contract simply referred to "BCBSNCA," the NAPUS Contract referred to "Group or BCBSNCA" or the "Group or underwriter".

> arbitration in accordance with commercial arbitration Rules of the American Arbitration Association then in effect, and judgment upon the award may be entered in any court having jurisdiction thereof. In the event of arbitration, BCBSNCA and the Group shall each appoint one arbitrator and the arbitrators so chosen shall elect a third arbitrator who shall act as chairperson of the arbitral tribunal. If either party fails to select an arbitrator within 45 days of having received a demand for arbitration of the other party, the latter may petition the American Arbitration Association to appoint an arbitrator on behalf of the forum.

(52849/52850/stip., attach. C.; 52851/stip., attach. I) (Emphasis added)

38. Article XIV of Contracts X590 and D001 and Article XV of the Alliance-NCA draft contract contained a clause entitled "STANDARD CLAUSES." This clause listed, or set out in full, FAR and FEHBAR contract clauses included in Contracts 2276 or 1876 which were to apply to the contracts "to the extent that such clauses apply to subcontractors of the Group." Article XIV also stated: "[t]hose standard clauses which are required to be set forth in this Contract in their entirety have been adapted to reflect this subcontracting arrangement." The FAR clauses listed included 52.233-1, DISPUTES (APR 1984). FAR 52.215-2, AUDIT AND RECORDS – NEGOTIATION (APR 1984) was set out in full. This clause required the Group to maintain, and gave the government contracting officer the right to examine and audit, books and records "sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred in performing this Contract." FAR 52.215-2(a). The Group was required to insert the same clause, with appropriate changes to the contracting parties, in all subcontracts over $10,000. FAR 52.215-2(e). FAR 52.242-1, NOTICE OF INTENT TO DISALLOW COSTS (APR 1984) was listed but not set out in full. The latter clause was not required to be included in carrier subcontracts. Article XIV.1.b. set out or listed FEHBAR clauses and deviations. FEHBAR 1652.215-71, INVESTMENT INCOME (JAN 1987) (DEVIATION) was listed and it was noted that the narrative was set out at Article VIII. FEHBAR 1652.216-71 ACCOUNTING AND ALLOWABLE COST (JAN 1987) (DEVIATION) was listed but not set out in full. The latter clause was not required to be included in carrier subcontracts. (52849/52850/stip., attach. C; 52851/stip., attach. I)

39. During 1987-1993, NCA treated the SSEHA, NAPUS, and Alliance Health Plans as "national" accounts. A national account is a health plan or group that has its headquarters in one geographic area and members in other geographic areas throughout the country. The SSEHA, NAPUS, and Alliance national headquarters are located in Washington, D.C. They have members in many other areas of the country. (Stip., ¶ 12)

40. As a member of the Association, NCA was licensed to use the BlueCross mark in the District of Columbia and parts of Maryland and Northern Virginia, and was able to contract with hospitals and other institutional providers located in those areas to provide benefits to SSEHA, NAPUS, and Alliance Health Plan members. NCA's License Agreement precluded it from contracting with institutional providers or with non-Blue third parties for the provision of institutional benefits outside of those areas because other Blue Cross and/or Blue Shield Plans were granted exclusive (with limited exceptions) licenses by the Association to use the Blue Cross and/or Blue Shield service marks in those areas. (Stip., ¶ 13) As to SSEHA and NAPUS, NCA's License Agreement required it to use Blue Cross Plans to provide benefits for SSEHA Health Plan members who lived or worked outside NCA's geographic service area. (52849/52850/stip., ¶ 13).

41. NCA used the Association's National Account structure to provide benefits to SSEHA, NAPUS, and Alliance Health Plan members who lived or worked outside NCA's service areas. The structure allowed a Blue Cross and/or Blue Shield Plan that had a national account (a Control Plan) to obtain the assistance of BlueCross BlueShield Plans in other geographic areas (Participating Plans or Par Plans) in processing and paying claims submitted by or for members of the Control Plan's national account. (Stip., ¶ 14)

42. NCA was the Control Plan for the SSEHA, NAPUS, and Alliance Health Plan accounts. Sixty-seven Blue Cross and/or Blue Shield entities outside the NCA geographic areas served as Par Plans on that account. Using the Association's National Account structure, NCA was able to provide benefits for members of the three Health Plans throughout the country. (Stip., ¶ 15)

43. At or around January 1987, the NCA National Accounts Center sent a National Account Enrolled Group Summary (NAEGS) to each Par Plan on the SSEHA Health Plan Account. At or around January 1989, the NCA National Accounts Center sent a NAEGS to each Par Plan on the NAPUS and Alliance Health Plan Accounts. The NAEGS set out the benefits and eligibility requirements applicable to the SSEHA, NAPUS, and Alliance Health Plans. This information allowed the Par Plans to process and pay hospital and other institutional claims submitted by or for Health Plan members in their service areas. (Stip., ¶ 19)

44. The NCA contracts department did not send proposed Par Plan Agreements to the Par Plans on the SSEHA, NAPUS, or Alliance Health Plan accounts at the time that NCA began operating as the underwriter on those accounts. NCA had a "boilerplate" Par Plan Agreement used for national accounts, but it did not send it to the Par Plans on the

Health Plan accounts. NCA understood that the Association planned to recommend a model Par Plan Agreement for use by Control Plans and Par Plans on national accounts, and it planned to wait until the model agreement was available before proposing a Par Plan Agreement to the Par Plans on the SSEHA, NAPUS, and Alliance Health Plan accounts. (Stip., ¶ 20)

45. In January 1991, the Association entered into a new license agreement with the Blue Cross and Blue Shield Plans, including NCA. The license agreement included guidelines with respect to the use of licensed names and marks in connection with national accounts. The guidelines addressed the pass through of "provider discounts and differentials" on national accounts. The guidelines stated that "Participating Plans are strongly encouraged, but not required, to pass along to the Control Plan part or all of local provider discounts and differentials for use by the Control Plan in negotiating financial arrangements with National Accounts" and that "the degree and form of any discount or differential passed along to the Control Plan shall be strictly a matter of negotiated contractual agreement between a Participating Plan and the Control Plan and may also vary from one National Account to another." They further provided that "[d]isputes among Plans and/or the [Association] as to the interpretation or implementation of these Guidelines or as to other National Accounts issues shall be submitted to mediation and mandatory dispute resolution as provided in the License Agreement. For two years from the effective date of the License Agreement, however, such disputes shall be subject to mediation only." (52849/52850/stip., ¶ 21, and attach. E; 52851/stip., ¶ 21, and attach. D)

46. "Provider discounts and differentials" generally refer to negotiated agreements between Par Plans and hospitals or other institutional providers in a Par Plan's service area under which the provider agrees to accept less than its billed charge as full payment or pursuant to which the provider credits or returns monies to the Par Plan. A Par Plan generally receives a provider discount at the time it pays the claim submitted by the provider or group member. A Par Plan generally receives a provider differential after it pays the claim. Examples of provider differentials are hospital year-end settlement payments and refunds of uncashed checks. (Stip., ¶ 22)

47. The existing NCA Par Plan agreement did not address the pass through of provider discounts or differentials by Par Plans. The Association did not propose a model Par Plan agreement addressing the pass through of provider discounts or differentials. NCA decided to develop a Standard Par Plan agreement for use on its Employee Organization accounts that covered, among other things, the pass through of provider discounts and differentials by a Par Plan. (Stip., ¶ 23)

48. The NCA contracts department drafted a Standard Par Plan Participating Agreement during 1991 and 1992 (52849/52850/stip., ¶ 24 and attach. F; 52852/stip., ¶ 24 and attach. E). In pertinent part, Article VII of the Standard Par Plan Agreement stated the following:

> ARTICLE VII -- NET PROVIDER DISCOUNTS
>
> It is understood and agreed that the amount of the Net Provider Discount, if any, passed along to the Group shall be strictly a matter of negotiated contractual agreement between the Participating Plan and the Control Plan. This provision does not apply to federal accounts because under Federal Acquisition Regulations the contractor is required to pass on to the federal agency the Full Provider Discount. The Control Plan requests that the Participating Plan pass on to all federal accounts the Full Provider Discount. For all other accounts, the Control Plan requests that the Participating Plan pass on the Full Provider Discount or as much of the Full Provider Discount as permitted by the current policy of the Participating Plan or as determined through negotiations between the Control Plan and the Participating Plan. The amount of the Net Provider Discount, that the Participating Plan has agreed to pass on to the Group, shall be expressed as (1) a percentage of the Claims Charges or (2) a percentage of the Full Provider Discount. Such percentage(s) is indicated on the Agreement Summary page of this Agreement (see item #8) and may be changed only on the anniversary date of this Agreement provided the Participating Plan gives the Control Plan at least 90 days' prior written notice of such change.

(52849/52850/stip., ¶ 25, and attach. F; 52851/stip., ¶ 25, and attach. E)

49. The statement in Article VII that the pass through of provider discounts "shall be strictly a matter of negotiated contractual agreement between the Participating Plan and the Control Plan" was taken by NCA verbatim from the Association's January 1991 guidelines. The statement that Article VII "does not apply to federal accounts because under Federal Acquisition Regulations the contractor is required to pass on to the federal agency the Full Provider Discount" was developed by the Director of the NCA Contracts Department, Mr. Leon Sample, in consultation with others at NCA. Under a separate FEHBP health plan, the Service Benefit Plan, Par Plans are contractors with the government through the Association, which enters into the Service Benefit Plan Contract

on their behalf, and are required by that contract to pass through to the government all discounts and differentials that they receive from providers in connection with services provided to Service Benefit Plan members. According to the testimony of Mr. Sample, NCA deliberately chose not to identify "the contractor" in Article VII in the hopes that each Par Plan would assume that it was "the contractor" as it was in the case of the Service Benefit Plan. According to Mr. Sample, NCA hoped that this assumption might lead the Par Plan to conclude that it was required to pass through its provider discounts and differentials to NCA. (Stip., ¶ 26)

50. The "Agreement Summary" referred to in Article VII was a one-page document that appeared at the front of the Standard Par Plan Agreement. The Agreement Summary set out several items including the parties (the Control Plan and the Par Plan), the name of the national account, the effective date, and other items. Item #7 dealt with Net Provider Discounts. The Agreement Summary stated that, as to institutional providers, the Net Provider Discount to be passed on by the Par Plan was the Full Provider Discount. (Stip., ¶ 27)

51. The Full Provider Discount was defined in the Standard Par Plan Agreement as the "total discount that the Participating Plan has negotiated with its institutional and non-institutional Providers." The Full Provider Discount did "not include discounts on deductibles, copayments, coinsurance, maintenance of benefits (MOB) provisions or partial adjustments to Claims previously billed to the Control Plan." (Stip., ¶ 28)

52. The NCA Standard Par Plan Agreement addressed "ADJUSTMENTS FROM INSTITUTIONAL SETTLEMENTS" in Article VIII.

> Adjustments from annual settlements with institutional Providers shall mean the amounts allocated to the Program and billed or credited to the Control Plan by a Participating Plan as a result of periodic accountings between institutional Providers and the Participating Plan, regardless of when such accounting occurred. Not all Participating Plans bill or credit the Control Plan for these adjustments. Item #9 on the Summary page of this Agreement indicates if, for purposes of this Agreement, the Participating Plan bills or credits such adjustments to the Control Plan.

(Stip., ¶ 29) Item #9 of the Agreement Summary asked "Will adjustments from annual institutional settlements be charged or credited to the Group?" The Agreement contained an "X" in the box next to "Yes." (Stip., ¶ 30)

53. The NCA contracts department sent the Standard Par Plan Agreement to Par Plans on the SSEHA Health Plan account in late 1992 and early 1993. The Agreement Summaries accompanying the Agreements provided for a 1 January 1989 effective date once the Agreement Summary was initialed or the Agreement was executed by a Par Plan. (Stip., ¶ 31)

54. Blue Cross of California, Blue Cross and Blue Shield of Colorado, Blue Cross and Blue Shield of Florida, Blue Cross and Blue Shield of Georgia, Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Maryland, and Blue Cross and Blue Shield of Massachusetts declined to initial the Agreement Summary or to execute the Standard Par Plan Agreement sent by NCA (stip., ¶ 33).

55. While most did not, a few Par Plans corresponded with NCA during 1989-1992 about the pass through of provider discounts and/or differentials (52849/52850/stip., ¶ 46; 52851/stip., ¶ 48).

56. Blue Cross and Blue Shield of Illinois (BCBSI) sent a "SERVICING PLAN AGREEMENT FOR NATIONAL ACCOUNTS" to NCA in 1990. Article X of the Servicing Plan Agreement stated that BCBSI received payments, discounts, and allowances from certain providers and that "[n]either the Control Plan, the Group, nor covered persons under the Benefit Program are entitled to receive any portion of any such payments, discounts and/or other allowances as part of any claims settlement or otherwise except as specifically reflected in the charges specified in this Agreement." Following correspondence between BCBSI and NCA, NCA sent BCBSI a copy of NCA's proposed Par Plan Agreement. BCBSI did not initial NCA's Agreement Summary nor execute the Standard Par Plan Agreement. (52849/52850/stip., ¶¶ 47-51, and attachs. J, L, M; 52851/stip., ¶¶ 49-53, and attachs. K, M, N)

57. In October 1990, Blue Cross and Blue Shield of Florida (BCBSF) wrote to NCA about a new program under which BCBSF would pay hospitals "prospectively determined allowances" for certain Blue Cross and Blue Shield patients and pay NCA an 8% differential for covered services. In 1991, BCBSF increased the differential to 10% on claims processed after 1 January 1991. The differential was later changed to 12%, and, later, to 15%. NCA sent BCBSF a copy of NCA's proposed Par Plan Agreement in 1992. BCBSF did not initial NCA's Agreement Summary nor execute the Standard Par Plan Agreement. (52849/52850/stip., ¶¶ 52-56, and attachs. N, O, P, Q; 52851/ stip., ¶¶ 54-58, and attachs. O, P, Q, R)

58. In 1990, Blue Cross of California (BCCA) advised NCA that it would be passing along a guaranteed differential of seven percent on covered services at

contracting hospitals. BCCA sent NCA a proposed "HOSPITAL DISCOUNT CREDIT AGREEMENT NATIONAL ACCOUNTS." NCA did not sign the proposed Agreement by BCCA. BCCA did not initial NCA's Agreement Summary nor execute the Standard Par Plan Agreement. (52849/52850/stip., ¶¶ 57-59, and attachs. S, T; 52851/stip., ¶¶ 59-61, and attachs. T, U)

59. In 1992 Blue Cross and Blue Shield of Georgia (BCBSG) told NCA that it intended to implement an "access fee" to offset the cost of supporting National Account business. The access fee was to be applied against reductions in hospital charges. NCA sent its Standard Par Plan Agreement and Agreement Summary to BCBSG on the SSEHA Health Plan account. BCBSG did not initial NCA's Agreement Summary nor execute the Standard Par Plan Agreement. (52849/52850/stip., ¶¶ 60-61, and attach. U; 52851/stip., ¶¶ 62-63, and attach. V)

60. Based on a 1993 survey, NCA determined that the large majority of Par Plans had passed through their full provider discounts and differentials to NCA on the SSEHA Health Plan account. As a result of the pass throughs, the SSEHA Health Plan received savings in the amount of $1,110,581, the NAPUS Health Plan received savings in the amount of $7,370,735, and the Alliance Health Plan received savings in the amount of $15,228,504. (Stip.. ¶ 34)

61. The NCA survey identified several Par Plans on the SSEHA, NAPUS, and Alliance Health Plans that had not passed through their full provider discounts and differentials. BCBSI did not pass through to NCA adjustments that it received in hospital year-end settlements. BCBSF passed through a guaranteed provider discount that was sometimes less (and sometimes more) than the savings realized by the Par Plan under the Diagnostic-Related Group reimbursement arrangement that the Par Plan had negotiated with its institutional providers. Blue Cross and Blue Shield of Colorado did not pass through a provider discount applicable to its preferred provider networks on the ground that members of the SSEHA, NAPUS, and Alliance Health Plans were not eligible for that discount. BCBSC passed through a provider discount of a guaranteed percentage that was sometimes less (and sometimes more) than the provider discount actually obtained by the Par Plan from the provider in connection with a particular claim. Blue Cross and Blue Shield of Georgia, Blue Cross and Blue Shield of Maryland, and Blue Cross and Blue Shield of Massachusetts did not pass through their full provider discounts and differentials to NCA on the three Health Plan accounts. (Stip., ¶¶ 35, 36)

62. The Association's license agreement with NCA provided that disputes between Plans regarding the interpretation or implementation of the guidelines were subject to mediation for two years following the effective date of the license agreement followed thereafter by mediation and mandatory dispute resolution. NCA did not submit

the issue of Par Plan provider discounts and differentials for national accounts under the FEHBP for mediation or mandatory dispute resolution by the Association. (Stip., ¶ 37)

63. In September 1991, the OPM Office of Inspector General (OPM OIG) notified NCA that it was scheduling an audit of NCA's underwriting activities for the SSEHA, NAPUS, and Alliance Health Plans and other Employee Organization health plans. The audit would cover contract years 1986 through 1990 (52849/52850/stip., ¶ 62; 52851/stip., ¶ 64).

64. OPM OIG sent questionnaires to Par Plans on the SSEHA, NAPUS, and Alliance Health Plan accounts. The questionnaires asked each Par Plan whether it had negotiated agreements with hospitals that produced provider discounts and whether it passed the discounts through to NCA on the three accounts. The questionnaires also asked each Par Plan whether it had retroactive hospital settlements and how the settlements were treated for pass through purposes. OPM OIG used the responses it received to select certain Par Plans for additional review. (52849/52850/stip., ¶ 63, and attach. V; 52851/stip., ¶ 63, and attach. W)

65. The OPM OIG auditors had an exit conference with NCA in May 1992. In October 1992, the OPM OIG auditors provided NCA with Informal Audit Inquiry Number B-18. The inquiry stated that the auditors "observed instances where provider discounts were taken by participating plans, [but] not credited to FEHBP." The inquiry identified over $1,049,208 in Par Plan charges that were being questioned and requested NCA's comments. (52849/52850/stip., ¶¶ 64-65, and attach. W; 52851/stip., ¶¶ 66-67, and attach. X)

66. NCA sent a memorandum to all Par Plans in March 1993. NCA asked the Par Plans: whether they had passed all of the hospital discount to the Control Plan, NCA; if not, how much had been retained; if discounts were being retained, why that was being done; when discounts were credited to the account; and if the account was being credited retroactively, whether interest was being credited to the account. (52849/52850/stip., ¶ 66, and attach. X; 52851/stip., ¶ 68, and attach. Y)

67. BCBSI wrote to NCA in March 1993 sending marked-up copies of NCA's proposed Standard Par Plan Agreement and Agreement Summary and addendums to the Standard Par Plan Agreement for the SSEHA and NAPUS accounts. BCBSI drew a line through Article VII of the Standard Par Plan Agreement, "NET PROVIDER DISCOUNTS" and indicated that it would continue to operate as a Servicing Plan only on the assumption that BCBSI's Servicing Plan Agreement was in full force and effect. BCBSI repeated that sentiment in May and June 1993 letters to NCA. (52849/52850/stip., ¶¶ 67-70, and attachs. Y, Z, AA; 52851/stip., ¶¶ 69-72, and attachs.

X, AA, BB) BCBSI did not enclose an Addendum for the Alliance account because the account had been cancelled 1 January 1993 (52851/stip., ¶ 69).

68. NCA responded to the OPM OIG audit inquiry in June 1993. NCA stated that 47 of the 51 Par Plans that had responded to NCA said they were crediting full or partial provider discounts, 2 did not receive provider discounts, and 2 did not credit provider discounts they received. NCA went on to say that the extent to which Par Plans passed through discounts to Employee Organization health plans was a matter of negotiation between the Control Plan, NCA, and each Par Plan. Although NCA had asked the Par Plans to pass through the total provider discounts, not all of the Plans had agreed to do so. Despite that, the FEHBP had received substantial discounts. In July 1993, NCA submitted a further response stating that the 17 remaining Par Plans were passing back either full or partial discounts. (52849/52850/stip., ¶¶ 71-72, and attachs. BB, CC; 52851/stip., ¶¶ 73-74, and attachs. CC, DD)

69. OPM OIG wrote to NCA in late July 1993. It said that it continued to study the provider discount issue and asked NCA for copies of the Par Plan Agreements and any applicable NCA national account agreement. In response, NCA said it could not compel the Par Plans to pass through their provider discounts. In a later letter to OPM OIG, NCA said that the SSEHA had saved more than $1,110,581 because of hospital discounts and refunds through 30 June 1993, NAPUS had saved more than $7,370,735, and the Alliance had saved more than $15,228,504. (52849/52850/stip., ¶¶ 73-75, and attachs. DD, EE, FF; 52851/stip., ¶ 75-77, and attachs. EE, FF, GG)

70. Two former OPM auditors filed *qui tam* suit, under seal, against NCA and most of the SSEHA, NAPUS, and Alliance Par Plans in November 1993. The suit asserted that NCA and the Par Plans had violated the False Claims Act by failing to pass through provider discounts and differentials to these Health Plans and NCA's other Employee Organization accounts. The *qui tam* suit delayed the issuance of OPM OIG's draft audit report on Audit Inquiry No. B-18. (52849/52850/stip., ¶¶ 76-78; 52851/stip., ¶¶ 78-80)

71. OPM OIG informed NCA in May 1994 that additional work was necessary to satisfy OPM OIG's concerns relating to provider discounts and hospital settlements, that the audit had been expanded to include the years 1988 through 1993, and that the objective of the audit would be to obtain reasonable assurances that NCA and its Par Plans had passed provider discounts and hospital settlements to the FEHBP. OPM OIG conducted an on-site audit at NCA's offices in June 1994. Based on that audit, OPM OIG decided to conduct on-site audits at BCBSI, BCBSF, BCCA, Blue Cross and Blue Shield of Colorado (BCBSCO), and Blue Cross and Blue Shield of Texas (BCBST). (52849/52850/stip., ¶¶ 79-80, and attach. GG; 52851/stip., ¶¶ 81-82, and attach. HH)

72. In preparing for the on-site audits, an OPM OIG auditor, Ms. Donna Yamka, reviewed the work papers from the 1992 audit of NCA. The auditor reviewed and summarized a legal opinion from OPM OIG attorneys. She summarized the attorneys' conclusions as follows:

- BCBSNCA IS REQUIRED TO CREDIT FEHBP WITH ANY DISCOUNTS RECEIVED BY PARTICIPATING PLANS
- UNLESS THE CONTRACT BETWEEN BCBSNCA AND THE PARTICIPATING PLAN REQUIRES THE PLAN PASS THROUGH PROVIDER DISCOUNTS, NCA HAS NOT RECEIVED ANY DISCOUNT AND IS NOT REQUIRED TO CREDIT FEHBP 48 C.F.R. 1631.201-70 COVERS DISCOUNTS RECEIVED BY NCA: "..RECEIVED BY OR ACCRUING TO THE CONTRACTOR..."
- PARTICIPATING PLANS ARE SUBCONTRACTORS AND ARE ONLY REQUIRED TO PASS ON DISCOUNTS IF THERE IS AN EXPRESS AGREEMENT BETWEEN BCBSNCA AND THE PARTICIPATING PLAN TO DO SO. IF THIS AGREEMENT EXISTS THE DISCOUNTS ACCRUE TO BCBSNCA AND ARE REQUIRED TO BE CREDITED TO FEHBP.
- ANALYSIS SHOULD FOCUS ON THE TERMS OF THE CONTRACT BETWEEN BCBSNCA AND EACH PLAN.
    - CONTRACTS WITH AGREEMENTS STIPULATING THAT DISCOUNTS WILL BE PASSED THROUGH SHOULD BE REVIEWED TO RECOVER MONIES NOT PROPERLY CREDITED[.]
    - CONTRACTS WHERE SUCH AN AGREEMENT DOES NOT EXIST SHOULD ADD THE APPROPRIATE CONTRACT PROVISION TO FUTURE CONTRACTS.

(52849/52850/stip., ¶ 81, and attach. HH; 52851/stip., ¶ 83, and attach. II)

73. The OPM OIG is an independent office and the legal position of its attorneys do not bind OPM and do not constitute legal opinions of OPM, which may be issued only by OPM's Office of the General Counsel. The OPM OIG Auditor-in-Charge, Ms. Kelly Parker, decided to ignore the OIG attorney's position in conducting the on-site audits of the Par Plans. In a memorandum, Ms. Yamka and another auditor stated that, after discussing the matter with Ms. Parker, it was decided to "ignore any such contract language and audit discounts and settlements assuming that these amounts, if any, should be credited to the Federal Plans." (52849/52850/stip., ¶ 82, and attach. II; 52851/stip., ¶ 84, and attach. JJ)

74. OPM OIG conducted an on-site audit of BCBSI in October 1994. In response to a pre-audit request for information from Ms. Yamka, BCBSI provided OPM OIG with its Servicing Plan Agreement and its correspondence with NCA. BCBSI said that its participation as a Par Plan for Employee Organization accounts was based on a clear understanding that no institutional discount would be passed through to NCA unless that was specifically negotiated with NCA. In response to a later question from OPM OIG, BCBSI stated that its Servicing Plan Agreements governed BCBSI's rights and obligations and set out the terms and conditions of its relationship with NCA. The agreements made clear, BCBSI said, that its separate financial relationships with providers would not be passed on to NCA, "barring specific agreement to do so." (52849/52850/stip., ¶¶ 83-85, and attachs. JJ, KK; 52851/stip., ¶¶ 85-87, and attachs. KK, LL)

75. BCBSCO advised OPM OIG that it passed some provider discounts to NCA, but not others. The auditors focused solely on quantifying the provider discounts that BCBSCO did not pass through to NCA. The auditors did not attempt to quantify the provider discounts that BCBSCO passed through to NCA. (52849/52850/stip., ¶ 86; 52851/stip., ¶ 88)

76. BCCA advised OPM OIG that its guaranteed hospital discount program had resulted in savings to NCA on Employee Organization accounts where the guaranteed discount was greater than the discount negotiated with a particular hospital. The auditors did not attempt to quantify the savings realized by NCA and the Employee Organizations as a result of BCCA's guaranteed discount. The auditors focused solely on quantifying the provider discounts that BCCA did not pass through to NCA as a result of its guaranteed discount. (52849/52850/stip., ¶ 87; 52851/stip., ¶ 89)

77. BCBSF advised OPM OIG that its use of a guaranteed hospital discount had resulted in savings to NCA on Employee Organization accounts where the guaranteed discount exceeded the discount negotiated with a particular hospital. The auditors did not attempt to quantify the savings realized by NCA and the Employee Organizations as a

result of BCBSF's guaranteed discount. The auditors focused solely on quantifying the instances in which BCBSF's guaranteed hospital discount was less than the discount negotiated with a particular hospital. (52849/52850/stip., ¶ 88; 52851/stip., ¶ 90)

78. In auditing BCBST, OPM OIG auditors determined that BCBST had passed through its full provider discounts and differentials to NCA (52849/52850/stip., ¶ 89; 52851/stip., ¶ 91).

79. OPM OIG auditors conducted a written survey of 18 other Par Plans. Blue Cross and Blue Shield of Georgia, Blue Cross and Blue Shield of Maryland, and Blue Cross and Blue Shield of Massachusetts disclosed that they had passed through some, but not all, of their provider discounts and/or differentials to NCA. The auditors did not attempt to quantify the provider discounts and/or differentials passed through to NCA on the Employee Organizations accounts. The auditors focused solely on quantifying the provider discounts and/or differentials that the three Par Plans did not pass through to NCA. (52849/52850/stip., ¶ 90; 52851/stip., ¶ 92)

80. The OPM OIG auditors provided the results of their audit to the Department of Justice attorneys investigating the *qui tam* suit against NCA and the Par Plans, which was still under seal. The Department of Justice attorneys obtained an order from the district court allowing them to disclose the complaint and audit results to NCA. The purpose of the disclosure was to obtain information relevant to the Department of Justice's decision whether to intervene in the *qui tam* suit and to determine whether the case could be settled. The complaint and audit results were disclosed to NCA in January 1996. The audit documents included calculations by OPM OIG auditors on the amount of refunds and year-end hospital settlement payments NCA had received from hospitals in its own service area. (52849/52850/stip., ¶¶ 91-92; 52851/stip., ¶¶ 93-94)

81. NCA provided extensive factual information and legal analysis to the Department of Justice and OPM OIG during 1996. NCA representatives also met with the Department of Justice and OPM OIG during 1996 (52849/52850/stip., ¶ 93; 52851/stip., ¶ 95).

82. In November 1996, the Department of Justice announced its decision to intervene as to the *qui tam* complaint's allegations regarding NCA's failure to pass through year-end hospital settlement payments and refunds that it received from its own hospitals. The Department of Justice decided not to intervene as to the complaint's allegations regarding the pass through of Par Plan provider discounts and differentials to NCA. The Department of Justice filed an amended complaint in late November 1996 covering the allegations as to which it had decided to intervene. In mid December 1996, the *qui tam* relators filed an amended complaint covering their allegations regarding the

pass through of provider discounts and differentials by Par Plans. The amended complaints were served on NCA and the Par Plan defendants. (52849/52850/stip., ¶ 94; 52851/stip., ¶ 96)

83. In April 1997, NCA moved to dismiss the relators' amended complaint on the ground that their allegations regarding the Par Plans had been the subject of "public disclosures" and that the relators were not an "original source" of the information within the meaning of 31 U.S.C. § 3730(e)(4) (52849/52850/stip., ¶ 95; 52851/stip., ¶ 97).

84. In September 1997, the Department of Justice filed a motion to dismiss the relators on the same grounds. In its memorandum in support of the motion, the Department stated that:

> . . . Relators thus must admit that the discount problem, if one existed, was not universally applicable to all participating Blue Cross Blue Shield plans; whether any particular plan was appropriately crediting discounts could be determined only by investigating the practices of that particular participating plan and its contractual obligations to the control plan. . . . Indeed, as relator Foust readily admits, Foust Dec. ¶¶ 13-14, whether discounts are properly creditable depends on the individual contracts at issue and individual methods of setting rates, and relators would not have had access to that information in the course of performing a Service Benefit Plan audit.

(52849/52850/stip., ¶ 96, and attach. LL; 52851/stip., ¶ 98, and attach. MM)

85. The district court granted the Department of Justice's motion in September 1997 and dismissed the relators from the portion of the case in which the Department had intervened. The district court also dismissed the relators' amended complaint. As a result of these decisions, the pass through of provider discounts and differentials by Par Plans was no longer part of the *qui tam* case. (52849/52850/stip., ¶ 97; 52851/stip., ¶ 99)

86. NCA and the Department of Justice subsequently reached a settlement in principle regarding allegations that NCA failed to pass through its own hospital refunds and settlements to employee organization accounts. NCA and the Department of Justice jointly reported the settlement in principle to the district court in March 1999. (52849/52850/stip., ¶ 98; 52851/stip., ¶ 100)

87. Once the Department of Justice decided not to intervene as to the relators' allegations concerning the failure of Par Plans to pass through their provider discounts and differentials to NCA, the OPM OIG auditors were free to issue a draft audit report concerning the Par Plans. The auditors issued a draft audit report to NCA in October 1997 on the failure of certain Par Plans to pass through their provider discounts and differentials on the SSEHA, NAPUS, and Alliance Health Plans and other employee organization accounts. OPM OIG requested comments from NCA. NCA responded to the draft audit report in February 1998. (52849/52850/stip., ¶¶ 99-100, and attachs. MM, NN; 52851/stip., ¶¶ 101-102, and attachs. NN, OO)

88. In August 1999 OPM OIG sent a supplemental audit report to NCA. The supplemental report asserted that certain Par Plans had failed to pass through $252,611 of their provider discounts and differentials to NCA on the SSEHA Health Plan account and that NCA owed $136,812 in lost investment income. The supplemental report asserted that certain Par Plans had failed to pass through $958,894 of their provider discounts and differentials to NCA on the NAPUS Health Plan account and that NCA owed $505,874 in lost investment income. The supplemental report asserted that certain Par Plans had failed to pass through $3,591,955 of their provider discounts and differentials to NCA on the Alliance Health Plan account and that NCA owed $2,150,597 in lost investment income. (52849/52850/stip., ¶¶ 101, and attach. OO; 52851/stip., ¶¶ 103, and attach. PP)

89. CareFirst, NCA's successor, responded to the supplemental audit report in October 1999. It stated that the seven Par Plans identified in the report "had no obligation, contractual or otherwise, to pass through credits to [NCA]." CareFirst further asserted that NCA had no obligation, contractual or otherwise, to pass through provider discounts or differentials that it did not receive. Finally, CareFirst argued that it could not owe lost investment income on funds that it never had. (52849/52850/stip., ¶ 102; and attach. PP; 52851/stip., ¶¶ 104, and attach. QQ)

90. The OPM Assistant Director for Insurance Programs, functioning as the contracting officer for Contract 2276, issued a final decision to CareFirst in March 2000. The final decision referred to the OPM OIG audit finding that certain Par Plans had not passed through $252,611 in provider discounts and differentials to NCA on the SSEHA Health Plan account during 1988-1993, and stated that NCA had not fulfilled its contractual obligations and fiduciary duty by failing to recover these "overpayments" from the Par Plans. The amounts not passed through, per the final decision, are set out below.

Provider Discounts	
Blue Cross and Blue Shield of Colorado	$ 6,752
Blue Cross of California	47,330
Blue Cross and Blue Shield of Florida	65,874
Blue Cross and Blue Shield of Georgia	24,739
Hospital Settlements	
Blue Cross and Blue Shield of Illinois	$90,848
Blue Cross and Blue Shield of Massachusetts	1,031
Prompt Payment Discounts	
Blue Cross and Blue Shield of Maryland	$16,037
Total	$252,611

The final decision also asserted that CareFirst owed $159,251 in lost investment income through 31 December 1999, and that lost investment income would continue to accrue "until all amounts are returned to the FEHB Program." The final decision requested CareFirst to remit $411,862, plus additional accrued interest from 31 December 1999, to the FEHBP. (52849/stip., ¶¶ 38, 103, and attach. G)

91. By its terms, the SSEHA-NCA final decision was based on the OPM OIG audits. There was, however, no statement in the final decision explaining the basis for the government's authority to directly disallow NCA costs. An NCA "contractual obligation" and "fiduciary duty" were mentioned, but not further elucidated. In finding that NCA was also liable for lost investment income, the government cited FEHBAR 1652.215-71. The appeal rights paragraph stated that the decision was made "in accordance with the Disputes Clause of the contract." The contract referred to was not specified. (52849/stip., attach. G)

92. The OPM Assistant Director for Insurance Programs, functioning as the contracting officer for Contract 1876, issued a final decision to CareFirst in March 2000. The final decision referred to the OPM OIG audit finding that certain Par Plans had not passed through $958,894 in provider discounts and differentials to NCA on the NAPUS Health Plan account during 1989-1993, and stated that NCA had not fulfilled its contractual obligations and fiduciary duty by failing to recover these "overpayments" from the Par Plans. The amounts not passed through, per the final decision, are set out below.

Provider Discounts	
Blue Cross and Blue Shield of Colorado	$ 61,306
Blue Cross of California	289,879
Blue Cross and Blue Shield of Florida	128,622
Blue Cross and Blue Shield of Georgia	49,777
Unidentified Cash Receipts	
Blue Cross and Blue Shield of Colorado	$1,508
Hospital Settlements	
Blue Cross and Blue Shield of Illinois	$412,051
Blue Cross and Blue Shield of Massachusetts	6,920
Prompt Payment Discounts	
Blue Cross and Blue Shield of Maryland	$8,831
Total	$958,894

The final decision also asserted that CareFirst owed $590,731 in lost investment income through 31 December 1999, and that lost investment income would continue to accrue "until all amounts are returned to the FEHB Program." The final decision requested CareFirst to remit $1,549,625, plus additional accrued interest from 31 December 1999, to the FEHBP. (52850/stip., ¶¶ 38, 103, and attach. G)

93. The OPM Assistant Director for Insurance Programs, functioning as the contracting officer for Contract 1164, issued a final decision to CareFirst in March 2000. The final decision referred to the OPM OIG audit finding that certain Par Plans had not passed through $3,591,955 in provider discounts and differentials to NCA on the Alliance Health Plan account during 1989-1993, and stated that NCA had not fulfilled its contractual obligations and fiduciary duty by failing to recover these "overpayments" from the Par Plans. The amounts not passed through, per the final decision, are set out below.

Provider Discounts	
Blue Cross and Blue Shield of Colorado	$ 150,215
Blue Cross of California	1,584,039
Blue Cross and Blue Shield of Florida	874,766
Blue Cross and Blue Shield of Georgia	25,286
Unidentified Cash Receipts	
Blue Cross and Blue Shield of Colorado	$3,511
Hospital Settlements	
Blue Cross and Blue Shield of Illinois	$907,642
Blue Cross and Blue Shield of Massachusetts	18,698
Prompt Payment Discounts	
Blue Cross and Blue Shield of Maryland	$27,798
Total	$3,591,955

The final decision also asserted that CareFirst owed $2,483,527 in lost investment income through 31 December 1999, and that lost investment income would continue to accrue "until all amounts are returned to the FEHB Program." The final decision requested CareFirst to remit $6,075,482, plus additional accrued interest from 31 December 1999, to the FEHBP. (52851/stip., ¶¶ 38, 105, and attach. F)

94. NCA did not receive any of the provider discounts or differentials from the above (findings 90, 92, 93) Par Plans (stip., ¶ 39).

95. CareFirst timely appealed the contracting officer's decisions directly in June 2000. There is no evidence the appeals were sponsored. The parties have filed cross-motions for summary judgment raising *inter alia* the issue of privity.

96. The record contains no evidence of a contract provision making the government directly liable for goods and services procured on its behalf by SSEHA, NAPUS, and the Alliance.

DECISION

The parties here are in the reverse of the roles the government and appellants usually play in jurisdictional disputes. Most often our jurisdiction over an appeal is challenged by the government. We perceive the reversal of positions here to be, at least in part, because the appeals are from "claims" initiated by the government contracting officer. In each of the final decisions, the contracting officer made two separate rulings. He initially disallowed NCA costs to the extent that NCA had not reimbursed the government where NCA Par Plans had received discounts, hospital settlements, or other credits, but had not passed the reimbursements back to NCA. He then ordered NCA to pay lost investment income on the disallowed costs. (Findings 90-93) Appellant has moved for summary judgment asserting that because there was no privity of contract between the government and NCA, the contracting officer's final decisions were nullities. In its opposition, it also raised an interpretation issue that goes to the merits by asserting that, since it never received certain funds that are in dispute, the funds were not "on hand" (*see* findings 14, 35, 94). The direction to invest funds not actually received was, according to appellant, beyond the purview of the Investment Income clauses. In response, the government has moved for summary judgment claiming that it had, for purposes of the disallowed costs and lost investment income, either express or implied-in-fact contracts with NCA. Thus, the government says, it was in privity of contract with NCA and the contracting officer was authorized to issue the final decisions.

In the main, the parties' motions go to the subject-matter jurisdiction of the Board. We informed the parties in a 7 January 2004 order that, since we considered the motions to address our jurisdiction or lack thereof, they were more in the nature of dismissal actions than motions for judgment. Because, however, appellant has raised a substantive legal issue on the merits of the dispute, and because an implied contract is alleged, the jurisdictional issues and the substantive issues are related. *Ortiz Enterprises, Inc.*, ASBCA No. 52049, 01-1 BCA ¶ 31,155; *see also* FED. R. CIV. P. 12(b)(6). Therefore, we review the jurisdictional issues as we would on summary judgment. *See, e.g., Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). One side will succeed if the material jurisdictional facts are not in dispute and that party is entitled to prevail as a matter of law. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983). The parties have diligently and professionally worked to provide us with comprehensive factual stipulations. In so doing, they have not only made our job easier, they have made the existence of material factual disputes most unlikely. Accordingly, based on our review of the stipulated facts and the record in these appeals, we find that there are no disputes as to the material jurisdictional facts and dismiss the appeals. There were no contracts, express or implied-in-fact, between the government and NCA cognizable under the CDA. Accordingly, we conclude we have no jurisdiction in these appeals.

Claims Made Directly to a Subcontractor and Appeals by Subcontractors

In order for the Board to have CDA jurisdiction over an appeal, there must be an underlying contract that fits within the confines of the CDA. The contracts between OPM and the carriers arise under FEHBA and are governed by the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended (CDA). *Texas Health Choice v. OPM*, 400 F.3d 895, 898-99 (Fed. Cir. 2005). Thus, if OPM's actions had been against a carrier, our jurisdiction would not be an issue. Because an underwriter is the appellant here, however, a jurisdictional issue arises. In the statutory[4] and regulatory[5] scheme of FEHBA, the references to underwriters are as subcontractors. Therefore, the contractual relationship that OPM seeks to persuade us of is not one that falls within the parameters of the CDA.

NCA's primary role was as an underwriter to the carriers/employee organizations under the contracts at issue. This matter initiated with a contracting officer's decision directing NCA to return a sum certain to the FEHB program. This was not, on its face, a "claim by the government against a contractor" as set forth at 41 U.S.C. § 605(a) and, as such, it was not a government claim as contemplated by the CDA. Therefore, unless an exception can be found, the contracting officer's decision here is a nullity under the CDA and we have no jurisdiction (*see Harney County Gypsum Co.*, AGBCA No. 93-190-1, 94-1 BCA ¶ 26,455, holding that a contracting officer's decision was a nullity because the appellant was not a contractor within the meaning of the CDA).

Perhaps the most significant case on direct subcontractor appeals in the government contracts literature is *United States v. Johnson Controls, Inc.*, 713 F.2d 1541 (Fed. Cir. 1983). Appellant relies heavily on its analysis of that decision to persuade us that its position is correct. OPM concedes that NCA does not qualify as a CDA contractor under any of the exceptions in *Johnson Controls* (oral argument at tr. 49). Nonetheless, the importance of *Johnson Controls* is such that we are compelled to do our own analysis. In that case, the Court affirmed both its strict construction of sovereign immunity and the "no privity" rule, which declaims that an express or implied-in-fact contract must exist between the government and a party before the party may pursue a claim under the CDA. *Id.* at 1550-51, 1556. Thus, the Court acknowledged an imperative of the CDA - that boards of contract appeals may not exercise jurisdiction over appeals by subcontractors because they (subcontractors) are not in privity with the

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[4] "No tax [or] fee . . . may be imposed, directly or indirectly, on a carrier or an underwriting or plan administration subcontractor . . . ." 5 U.S.C. 8909(f)(1).

[5] "In a subcontract for enrollment and eligibility determinations . . . and/or assumption of insurance risk or underwriting . . . . any amount that exceeds the allowable cost of the subcontract . . . is not allowable under the contract." 48 C.F.R 1631.205-80.

government. We have acknowledged the counterpart to that imperative - that we similarly lack jurisdiction over government actions against a subcontractor. *Astronautics Corporation of America*, ASBCA No. 49691, 99-1 BCA ¶ 30,390 at 150,213.[6]

The Court in *Johnson Controls* declined to rule on the government's argument there that *all* subcontractor appeals are barred by the CDA. 713 F.2d at 1550. Instead, it examined the exceptions to the rule that pre-existed the CDA, assuming *arguendo* those exceptions still applied. *Id.* In its analysis of the fundamental jurisdictional scheme set forth in the CDA, the Court quoted extensively, and with apparent approval, from portions of the CDA's legislative history. The quoted segment articulates clearly the Congressional intention that the CDA continue the sponsorship of subcontractor claims by the prime contractor, as opposed to direct subcontractor appeals, in part because it created a "single point of contact approach" that is very much in the government's interest for a variety of reasons. *Id.* at 1548-49. The Court then proceeded to review the privity of contract doctrine ("[it] is synonomous with a finding that there is no express or implied contract between the government and a subcontractor." *Id.* at 1550). It addressed specifically the "purchasing agent" exception that this Board recognized in *Turner Construction Co.*, ASBCA No. 25171, 81-1 BCA ¶ 15,070 (referred to in *Johnson Controls* as "*Bristol,*" which was the name of the subcontractor). The Court placed great reliance on the lack of "clear contractual consent" making the government directly liable to subcontractors who supplied goods or services to Turner in finding no privity between the government and Johnson. *Johnson Controls* at 1551. The parties have not identified, and we cannot find, a contract provision making the government directly liable to suppliers of goods and services obtained on its behalf (finding 96). Indeed, such a provision would be inimical to NCA's role as an underwriter to the employee organizations and OPM makes no such contention. Moreover, OPM's actions and statements evince a contrary intent (finding 28).

Appellant paraphrases four factors articulated in *Johnson Controls* at 1552-53 (which appellant calls collectively the "otherwise in privity" exception), as follows:

> (1) Whether the government and the subcontractor ever entered into a direct contractual relationship;
>
> (2) Whether the prime contract and/or subcontract contains an "ABC" clause, *i.e.*, an express disclaimer of any

[6] We also lack jurisdiction over claims involving the insurer of a contractor. *See e.g., American States Insurance Co.,* ASBCA No. 49686, 96-2 BCA ¶ 28,417. Underwriters fit that definition. *Webster's II New Riverside University Dictionary*, s.v "insurer," "underwriter."

> contractual relationship between the government and the subcontractor;
>
> (3) Whether the prime contractor was required to obtain a Miller Act payment bond, which provided a recourse by the subcontractor other than a direct appeal; and
>
> (4) Whether any provision in any of the contract documents clearly authorizes a direct appeal by the subcontractor.

(App. mem. at 9)

As to the first factor, OPM never signed the contracts between NCA and the carriers and NCA did not sign any of the contracts between the carriers and OPM (findings 7-9, 27, 28, 31, 32). On that most obvious level, the first factor is not met. In this regard, it may be argued that equitable considerations dictate that where, as here, the contracting officer is given the right to order certain actions by a subcontractor, the subcontractor is implicitly afforded appeal rights with respect to the contracting officer's actions. We think not. First, the subcontract expressly requires sponsorship of appeals. Secondly, sovereign immunity is strictly construed in favor of the sovereign. *McMahon v. United States*, 342 U.S. 25, 27 (1951).

NCA focuses its arguments not so much on the direct appeal aspect of our CDA jurisdiction as on whether the contracting officer's actions in directing payment under the Investment Income clause fall within the CDA (finding 35). As stated above, we do not believe the contracting officer's actions constituted a "claim against a contractor" under the CDA. In addition to referring to NCA as a subcontractor in the subcontracts' Disputes clauses (finding 37), referral to underwriters as subcontractors occurs at two other places in the prime contracts (finding 10). Because clauses in the prime contracts identified NCA as a subcontractor, it seems reasonably clear that the contracting officer was not making a "claim against a contractor." We think an apt analogy lies with direct appeals by sureties where it has been held that, notwithstanding the government's requirement of performance and payment bonds in the prime contract, a surety providing the bonds did not come into privity with the government through the prime contract's requirement for the bonds, the bonds, or an indemnity agreement with the prime contractor assigning all the prime's rights to the surety in case of government breach. *Admiralty Construction, Inc.*, 156 F.3d 1217, 1220-22 (Fed. Cir. 1998). In such circumstances, a surety is not a CDA contractor. *Id.* Neither is NCA in its role as an underwriter. The first factor in *Johnson Controls* is not met.

As to the second factor, there are no "ABC" clauses, *i.e.*, clauses that state no contractual relationship shall exist between the government and the subcontractor, in the contracts. However, as there are the references outlined above that manifest the intention that NCA be treated as a subcontractor, we do not interpret this to mean OPM intended to allow NCA to take a direct appeal. *Lockheed Martin Corp. v. United States*, 50 Fed. Cl. 550, 565-66 (2001), *aff'd*, *Lockheed Martin Corp. v. United States*, 48 Fed. Appx. 752 (Fed. Cir. 2002). Similarly, the lack of Miller Act bonds cannot be given weight in the resolution of privity since, *inter alia*, this is not a construction contract. *Id.*

The final *Johnson Controls* factor is the absence of a clear contractual consent for direct subcontractor appeals. No such consent is present. The contracts contained conventional FAR Disputes clauses and the subcontracts provided that NCA's appeals had to be sponsored by the prime. Accordingly, we conclude there is no basis for privity under *Johnson Controls*.

The Government's Express or Implied Contract Argument[7]

Direct privity with the sovereign giving standing to sue cannot generally be established with a party who is not a signatory to the contractual documents. *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003). The government did not sign the contracts between NCA and the carriers and thus privity, and our jurisdiction, cannot be established in the conventional way. The government nevertheless argues that it had either express or implied contracts with NCA. As the fundamental elements are the same in both cases, the government must demonstrate a mutual intent to contract that includes offer, acceptance and consideration. *Fincke v. United States*, 675 F.2d 289, 295 (Ct. Cl.

[7] Among the limited circumstances in which parties not in direct privity have been allowed to assert claims against the government are third party beneficiary claims. *See, e.g., D & H Distributing Co. v. United States*, 102 F.3d 542 (Fed. Cir. 1996); *FloorPro, Inc.*, ASBCA No. 54143, 04-1 BCA ¶ 32,571. Presumably, it would also be possible for the government to assert claims against subcontractors in such circumstances. We need not address that possibility, however, because the government specifically disclaims any attempt to argue that it is a third party beneficiary under the subcontracts. (Gov't supp. memorandum at 2) Indeed, we specifically asked for supplemental briefs on whether there was a third-party beneficiary relationship that arose from the subcontracts' Investment Income clauses, but the government argued that any basis for a contract arising from the Investment Income clause in the subcontracts would not be between NCA and OPM and thus not a contract with an executive agency. As such, it would not be covered by the CDA. *Id. See also Admiralty Construction Inc. v. Dalton*, 156 F.3d 1217, 1220-21 (Fed. Cir. 1998).

1982). Moreover, the offer and acceptance must be unambiguous. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1380 (Fed. Cir. 2003). Assuming, *arguendo*, there was offer and acceptance, it was ambiguous.

The Investment Income clauses in the NCA-employee organization contracts in ASBCA Nos. 52849 and 52850 do give the contracting officer certain authority with respect to FEHBP funds and funds "on hand" (finding 35) and NCA consented to that clause. However, even if there was agreement on that clause, the NCA-employee organization contracts were "considered a part of [the OPM-employee organization contracts in ASBCA Nos. 52849 and 52850] to appropriately effect the terms and conditions of [the NCA-employee organization contracts]" (findings 31, 32). In order to "appropriately effect" the terms and conditions of the contracts, the Disputes clauses therein must be given effect. The Disputes clauses that identified NCA as a subcontractor and provided that any dispute that arises between OPM and NCA must be sponsored by the employee organization before an appeal may be taken (finding 37) were thus "considered a part" of the prime contracts. The implication of those clauses is that OPM, the employee organizations, and NCA intended for NCA to be treated as a subcontractor. As with any other subcontractor, the CDA bars direct appeal rights, and the Disputes clauses in the NCA-employee organization contracts incorporate that principle in unambiguous terms. In addition, the clauses are inconsistent with the government's argument that the parties mutually and unambiguously assented to direct contractual obligations cognizable under the CDA with respect to NCA's handling of FEHBP funds and funds "on hand." Thus, even if the parties' actions with respect to offer and acceptance regarding the Investment Income clauses can be interpreted as a basis for a direct but limited contractual relationship, there was no corresponding assent to CDA appeal rights for NCA in the Disputes clauses, which had the ambiguous effect of manifesting the opposite intention, *i.e.*, to keep NCA in a subcontractor's role under the CDA.

Viewed from another perspective, it is inescapable that NCA agreed to forego direct appeal rights when it signed the contracts with the employee organizations. The clause is couched in terminology broad enough to cover government claims ("alleged act or omission of OPM cognizable under the clause entitled "Disputes" of the Group's contract with OPM . . . .") (finding 37). It is not contended that a government claim is not "an act . . . cognizable under the clause entitled "Disputes" of the [prime contract]," and we interpret the relevant language as including disputes arising from government claims.

Further, under the government's express contract argument, we see no way around those clauses and their unequivocal requirement for sponsorship, a concept embodied in the CDA "to prevent fraudulent or frivolous claims by the subcontractor." *Arnold M.*

Diamond, Inc. v. Dalton, 25 F.3d 1006, 1009 (Fed. Cir. 1994). Given the well-established CDA limitations on privity, which affirm sovereign immunity, and the implementation of that policy under the FAR Disputes clauses, we believe the NCA-employee organization clauses do no more than articulate with particularity the policy towards subcontractor privity and direct appeal rights. As to its implied-in-fact contract argument, "It is elementary that one cannot imply a term or promise . . . which is inconsistent with an express term of the contract itself." *United States v. Croft-Mullins Electric Co.*, 333 F.2d 772, 776 (1964). The "express term" here requires sponsorship before an appeal can be taken. There was, therefore, no unambiguous mutual assent to offer and acceptance that formed a CDA contract, but there was an unambiguous requirement for sponsorship which was not met here. On balance, we hold the parties intended for NCA to be a subcontractor and that there was no express or implied contract. The contracting officers' decisions were against a subcontractor and thus a CDA nullity. We, therefore, have no jurisdiction in ASBCA Nos. 52849 and 52850.

The situation of the Alliance in ASBCA No. 52851 was somewhat different from the situations of the other two carriers. Although NCA served as an underwriter for the Alliance, those parties did not enter into a written agreement regarding the underwriting services (finding 28). That fact does not change, with respect to the Alliance, our analysis leading to the conclusion that no CDA contract was assented to by NCA and the government. As with SSEHA and NAPUS, there was no contract, in the Alliance situation, between the government and NCA. There was, therefore, no consent to inclusion of the subcontract into the prime contract. Moreover, OPM's actions toward NCA evince an intention to keep NCA in a subcontract role (finding 28). Indeed, OPM denied that it had a contract with NCA. Accordingly, we find no special circumstances in conjunction with NCA's relationship with OPM under OPM's contract with Alliance that establish a basis for privity. We hold we have no jurisdiction in ASBCA No. 52851.

We are fully aware that our holding here does not address a number of issues raised by the parties. As we hold that we are without jurisdiction, and we believe the jurisdictional impediments identified above are insurmountable, we consider it imprudent to offer any opinion on those issues. Accordingly, we grant appellant's motions and deny the government's motions. The appeals are dismissed.

Dated: 22 June 2005

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 52849, 52850, 52851, Appeals of CareFirst BlueCross BlueShield, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals