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Authority to Make Advance Payments for Technical Support Associated with Computer Software Packages

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Under the authority of 31 U.S.C. Sec. 3324(d)(2), an exception to the advance payment prohibition for publications, the Centers for Disease Control and Prevention (CDC) may make advance payment for certain technical support associated with computer software, including a subscription to a CD-ROM technical database, an online database that includes technical articles updated daily, and a newsletter. CDC, however, may not pay in advance for a telephonic support service for the software, offered as part of the technical support package. Telephone support services do not constitute a publication under the terms of section 3324(d)(2); and, because they have significant value independent of the three publications in the package, the telephone support services cannot be classified as so necessary to the publications that the advance payment authority is available.

DECISION

By letter dated May 4, 1994, the Director, Financial Management Office, Centers for Disease Control and Prevention (CDC), Department of Health and Human Services, asked whether CDC may pay in advance for technical support packages, including a magazine, online database, newsletter and telephonic advice, associated with computer software products. While agencies are generally prohibited from making advance payments for goods and services, the advance payment statute contains an exception for the purchase of publications. 31 U.S.C. Sec. 3324(d).

Under this statutory exception, CDC is authorized to make advance payment for a monthly subscription to a CD-ROM technical database, an online database that includes technical articles updated daily, and a newsletter. CDC, however, may not make advance payment for the telephone support services. The telephonic support does not constitute a publication under the terms of section 3324(d)(2); and, because it has significant value to CDC independent of the three publications in the package, it cannot be classified as so necessary to the publications that the advance payment authority is available.

Background

CDC has had three vendors request advance payment for technical support associated with computer software products: Microsoft, Novell, and Powersoft. Microsoft, for example, has contracted with CDC for its electronic mail system. The technical support for this system, which Microsoft calls its "Premier

Support" package, includes a monthly subscription to Technet, which contains a database of resolutions to software issues; Knowledgebase, an online technical database; and a newsletter listing information on current Microsoft products. Also part of the package is access to the Microsoft telephone technical support line. If users are unable to solve their problems otherwise, "they are encouraged to contact Microsoft support engineers by phone." According to CDC, its staff use this telephonic support line virtually everyday. The technical support provided by the other two companies is similar to that provided by Microsoft.

CDC offered to pay in advance for Technet, Knowledgebase and the newsletter. CDC views these three parts of the Premier Support package as subscriptions for publications for which advance payment is allowed under section 3324(d). CDC questions whether the telephonic support constitutes a publication. Microsoft, however, considers all four to be pieces of an integrated package, and has refused to price Technet, Knowledgebase and the newsletter separately for advance payment. According to Microsoft's description of the product, the utility of Premier Support is the availability of all four parts together, each providing information at different levels of detail.

Analysis

Advance payments to government contractors for goods and services are generally prohibited unless authorized by a specific appropriation or other law or the President. 31 U.S.C. Sec. 3324. The purpose of this prohibition is to avoid losses to the government which would result if contractors failed to perform the services or provide the goods which had been paid for. See 65 Comp.Gen. 806, 809 (1986); B-180713, Apr. 10, 1974. However, the head of an agency may pay in advance from available appropriations for "a publication printed or recorded in any way for the auditory or visual use of the agency." [1] 31 U.S.C. Sec. 3324(d)(2). One purpose of this exception was to eliminate "the added costs of premium charges" often related to such purchases and allow "greater flexibility in the procurement of materials needed to maintain an adequate library service." H.R. Rep. No. 560, 87th Cong., 1st Sess. 2 (1961). See 57 Comp.Gen. 583 (1978).

Standing alone, Technet, Knowledgebase and the newsletter clearly would constitute publications under section 3324(d). The newsletter is a publication in the traditional sense. Technet and Knowledgebase, however, are published using electronic technology. Technet is published on CD- ROM; Knowledgebase is an online database of articles. Nevertheless, we conclude that they constitute publications for purposes of section 3324(d) as well. We believe that it is sensible to interpret federal law to accommodate technological advancements unless the law by its own terms expressly precludes such an interpretation, or sound policy reasons exist to do otherwise. 71 Comp.Gen. 109, 114 (1991). In this regard, for example, section 3324(d) covers materials printed on microfilm and microcards. 41 Comp.Gen. 211 (1961). Section 3324(d)(2) refers to materials "printed or recorded in any way for the auditory or visual use of the agency." We see no reason why it should not apply to electronic materials.

Telephonic support, however, would not fall within the purview of section 3324(d)(2). Although that section refers to materials for the auditory use of the agency and also contemplates recorded materials, Microsoft's telephonic support is not recorded; it is a dialogue between CDC staff and Microsoft engineers. Nevertheless, we do not object to advance payment for materials that we would not ordinarily classify as a "publication" so long as the agency can

demonstrate that such materials are necessary for the effective use of a publication and the materials have no independent value so as to be useful without the publication. In a 1969 decision, for example, we concluded that the Veterans Administration could pay in advance for "slide photographs of X-ray film, electrocardiograms, gross specimens and photomicrographs" that related to, and were to be used in connection with, case studies in the New England Journal of Medicine. 48 Comp.Gen. 784 (1969). The slides, it was explained, were "illustrative of the materials presented in the journal and . . . necessary for effective use of the journal." Id. at 785. We reasoned that "since the slides will be used in conjunction with printed matter and are said to be necessary for the effective use thereof, we believe the slides properly may be classed as publications." Id. at 786. There was no indication that the slides had significant value independent of the publications.

However in this situation, the telephone service, unlike the slides in our 1969 decision, has significant value independent of the publications. Microsoft's description of its Premier Support package notes that each part of the package provides information at varying levels of detail. While Microsoft's engineers, responding to a telephone inquiry from CDC, might elaborate on information or guidance available in one of the publications, the telephonic support aspect of the package fails the independent value test. The telephone support is available, and has significant value, to CDC with regard to any electronic mail problem or question CDC might have, whether or not such problem or question has been addressed in one of the publications, and, indeed, without reference to the publications. The telephonic support services are connected to the publications only in that they are all sold by Microsoft together, as a package. We therefore conclude that CDC may not make advance payment for the telephonic support services offered as part of the technical support packages.

1. Before title 31 was recodified in 1982, this exception authorized advance payments "for subscriptions or other charges for newspapers, magazines, periodicals," and for "any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage." 31 U.S.C. Secs. 530a, 530b. One purpose of the recodification was to eliminate unnecessary words. See 31 U.S.C. Sec. 3324 note.