

Congress of the United States
House of Representatives

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

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<http://oversight.house.gov>

June 21, 2015

The Honorable Sylvia M. Burwell
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, D.C. 20201

Dear Madam Secretary:

The Committee is seeking information on the Department of Health and Human Services' use of outside experts to assist with the development of the Affordable Care Act (ACA). The Committee's investigation into the Department's relationship with Dr. Jonathan Gruber, an outside healthcare consultant who helped design the law and negotiate its passage through Congress, raised questions about the administration's process for contracting health care consultants.

The Department entered into a sole source contract to provide ACA consulting services with Dr. Gruber. Sole source contracts are reserved for cases where only one source is reasonably available to provide the services that a government agency requires. According to the solicitation notice for the contract, a sole source contract was necessary in this case because:

Dr. Gruber is uniquely positioned to provide the analytic work ASPE requires based on his experience and the fact that Dr. Gruber is a recognized expert in health policy in economics Dr. Gruber developed a proprietary statistically sophisticated micro-simulation model that has the flexibility to ascertain the distribution of changes in health care spending and public and private sector health care costs due to a large variety of changes in health insurance benefit design, public program eligibility criteria, and tax policy. Finally, Dr. Gruber's ongoing advisory role with the Office of Health Reform strongly positions him to meet HHS' requirements the most efficiently, which is a key requirement in order for well-developed legislative proposals to be put forth for Congressional consideration as soon as possible.¹

¹ Dep't of Health and Human Services Solicitation, "Technical Assistance in Evaluating Options for Health Reform," Solicitation No. AES2009 (Feb. 25, 2009), *available at*

Emails obtained by the Committee, however, create the appearance that the Department never considered whether it could obtain the services that Dr. Gruber provided from another source. On February 19, 2009—almost one week before the contract solicitation went online—Ezekiel Emanuel, the Special Advisor for Health Policy in the Office of Management and Budget, emailed Dr. Gruber. He stated: “I understand . . . there is going to be a contract with you that will allow us to work with you ‘guilt free.’”² Emanuel’s email raises questions as to whether HHS sincerely believed that Dr. Gruber was the only source reasonably available to provide technical assistance regarding the development of the ACA.

In a separate email obtained by the Committee, an HHS contracting officer wrote to Dr. Gruber on March 6, 2009: “If you have questions after receiving the official solicitation[,] just call me and we can discuss things so we increase the odds that what is initially submitted as a quote is something we can move straight to award on.”³

The solicitation for a sole source contract with Dr. Gruber was placed online just weeks before President Obama issued a memorandum calling for increased competition in federal contracting. On March 4, 2009, the President stated:

Excessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) and cost-reimbursement contracts creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government or the interests of the American taxpayer.⁴

Other emails raised serious doubts about the extent to which Dr. Gruber operated independently. For example, on January 8, 2010, Dr. Gruber wrote to Jeanne Lambrew, Deputy Director of HHS’s Office of Health Reform: “I’m independent until you guys get too mad at me . . .”⁵ When a reporter emailed Dr. Gruber to ask whether his work was independent, Dr. Gruber wrote a draft response emphatically asserting his independence—which he then sent to Dr. Lambrew for edits and approval.⁶

The nature of Dr. Gruber’s work with HHS is particularly important given his significant role in the drafting of the ACA. Jason Furman, then a Principal Deputy Director of the National Economic Council and Assistant to the President, wrote in a congratulatory email to Dr. Gruber

https://www.fbo.gov/index?s=opportunity&mode=form&id=239a1e94d4f22683c9cf64fd2ddcf9e0&tab=core&_cview=0 (last accessed June 18, 2015).

² Email from Ezekiel Emanuel, Senior Advisor for Health Policy, Office of Management and Budget, to Jonathan Gruber, Professor of Economics, Massachusetts Institute of Tech. (Feb. 19, 2010, 3:19 EST).

³ Email from Clint Druk, Contracting Officer, U.S. Dep’t of Health and Human Services, to Jonathan Gruber, Professor of Economics, Massachusetts Institute of Tech. (Mar. 6, 2009).

⁴ The President, Memorandum on Government Contracting (Mar. 4, 2009).

⁵ Email from Jonathan Gruber, Professor of Economics, Massachusetts Institute of Technology, to Jeanne Lambrew, Director, Office of Health Reform, U.S. Dep’t of Health and Human Services (Jan. 8, 2010, 7:59 EST).

⁶ Email from Jonathan Gruber, Professor of Economics, Massachusetts Institute of Tech., to Jeanne Lambrew, Director, Office of Health Reform, U.S. Dep’t of Health and Human Services (Jan. 8, 2010, 7:11 EST).

on March 22, 2010, “We were just following your model, in multiple sense[s]of the word, so congrats to you.”⁷

When Dr. Gruber planned to testify before the Committee on Health, Education, Labor, and Pensions, Dr. Lambrew reviewed his proposed testimony and wrote to him on November 2, 2009: “FYI, the WH folks love your testimony tomorrow and may push it too. Our hero.”⁸

Dr. Gruber also offered political advice to senior members of the administration who were charged with selling the health care plan. When Larry Summers, then Director of the National Economic Council, asked Dr. Gruber what he would do if he were President, Gruber told Summers in an email on August 26, 2009: “[The President] should include enough stuff to sound good on cost control but not do anything really fundamental—it just isn’t possible in this round.”⁹

On March 10, 2009, Dr. Gruber also advised Nancy-Ann DeParle, then-Director of the White House Office of Health Reform, to “Try as much to lay out principles and stay away from legislative debate on specifics,” noting that a “key feature” of the Massachusetts healthcare reform bill that he had advised on was “[v]ague legislation with key decisions made by [an] expert board.”¹⁰

These and other emails obtained by the Committee—many of which were heavily redacted—raise concerns about whether the Department complied with federal contracting regulations that limit the use of sole source contracts to cases where there is no alternative. The emails also show that Dr. Gruber’s work for the administration extended beyond the terms of his contract with the Department.

So that the Committee can better understand the process by which HHS chose to enter into a sole source contract with Dr. Gruber, and its use of outside experts in general, please provide the following documents as soon as possible, but by no later than June 30, 2015.

1. A list of all non-government employees HHS retained to help draft or analyze the various health reform proposals that ultimately became the ACA, including the period of their retention, and the terms of their work.
2. An explanation of Dr. Gruber’s employment status during the presidential transition from November 2008 to January 2009 and from January 2009 to February 2009, when Ezekiel Emanuel wrote that he could now work “guilt free.”

⁷ Email from Jason Furman, Principal Deputy Director and Assistant to the President, National Economic Council, to Jonathan Gruber, Professor of Economics, Massachusetts Institute of Tech. (Mar. 22, 2010, 12:00 AM EST).

⁸ Email from Jeanne Lambrew, Director, Office of Health Reform, U.S. Dep’t of Health and Human Services, to Jonathan Gruber, Professor of Economics, Massachusetts Institute of Technology (Nov. 2, 2009).

⁹ Email from Larry Summers, Director, National Economic Council, to Jonathan Gruber, Professor of Economics, Massachusetts Institute of Tech. (Aug. 26, 2009, 1:35 PM EST).

¹⁰ Email from to Jonathan Gruber, Professor of Economics, Massachusetts Institute of Tech., to Nancy-Ann DeParle, Director, White House Office of Health Reform (Mar. 10, 2009, 12:14 PM EST).

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3. Any documentation to support using the sole source award, including market research for health care consultant services and costs, and the signed justification and approval for the sole source contract with Dr. Gruber, as required by 10 U.S.C. §2304(f) and 41 U.S.C. §3304(e).
4. Any "statement of capabilities" submitted in response to solicitation no. AES2009 from anyone other than Dr. Gruber.
5. All communications between any HHS employee and Dr. Gruber referring or relating to the amount that Dr. Gruber would quote in his bid.
6. Unredacted versions of the following emails:
 - a. MIT-GRUBER-OGR-00009176;
 - b. MIT-GRUBER-OGR-00017289; and,
 - c. MIT-GRUBER-OGR-00011937.

An attachment to this letter provides additional information about responding to the Committee's request. When producing documents to the Committee, please deliver production sets to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building. The Committee prefers, if possible, to receive all documents in electronic format.

The Committee on Oversight and Government Reform is the principal investigative committee in the U.S. House of Representatives. Pursuant to House Rule X, the Committee has authority to investigate "any matter" at "any time."

If you have questions about this request, please contact Sean Hayes of the Majority staff at (202) 225-5074. Thank you for your attention to this matter.

Sincerely,



Jason Chaffetz
Chairman

Enclosure

cc: The Honorable Elijah E. Cummings, Ranking Member

Responding to Committee Document Requests

1. In complying with this request, you are required to produce all responsive documents that are in your possession, custody, or control, whether held by you or your past or present agents, employees, and representatives acting on your behalf. You should also produce documents that you have a legal right to obtain, that you have a right to copy or to which you have access, as well as documents that you have placed in the temporary possession, custody, or control of any third party. Requested records, documents, data or information should not be destroyed, modified, removed, transferred or otherwise made inaccessible to the Committee.
2. In the event that any entity, organization or individual denoted in this request has been, or is also known by any other name than that herein denoted, the request shall be read also to include that alternative identification.
3. The Committee's preference is to receive documents in electronic form (i.e., CD, memory stick, or thumb drive) in lieu of paper productions.
4. Documents produced in electronic format should also be organized, identified, and indexed electronically.
5. Electronic document productions should be prepared according to the following standards:
 - (a) The production should consist of single page Tagged Image File ("TIF"), files accompanied by a Concordance-format load file, an Opticon reference file, and a file defining the fields and character lengths of the load file.
 - (b) Document numbers in the load file should match document Bates numbers and TIF file names.
 - (c) If the production is completed through a series of multiple partial productions, field names and file order in all load files should match.
 - (d) All electronic documents produced to the Committee should include the following fields of metadata specific to each document;

BEGDOC, ENDDOC, TEXT, BEGATTACH, ENDATTACH,
PAGECOUNT, CUSTODIAN, RECORDTYPE, DATE, TIME, SENTDATE,
SENTTIME, BEGINDATE, BEGINTIME, ENDDATE, ENDTIME, AUTHOR, FROM,
CC, TO, BCC, SUBJECT, TITLE, FILENAME, FILEEXT, FILESIZE,
DATECREATED, TIMECREATED, DATELASTMOD, TIMELASTMOD,
INTMSGID, INTMSGHEADER, NATIVELINK, INTFILPATH, EXCEPTION,
BEGATTACH.
6. Documents produced to the Committee should include an index describing the contents of the production. To the extent more than one CD, hard drive, memory stick, thumb drive, box or folder is produced, each CD, hard drive, memory stick, thumb drive, box or folder should contain an index describing its contents.

7. Documents produced in response to this request shall be produced together with copies of file labels, dividers or identifying markers with which they were associated when the request was served.
8. When you produce documents, you should identify the paragraph in the Committee's schedule to which the documents respond.
9. It shall not be a basis for refusal to produce documents that any other person or entity also possesses non-identical or identical copies of the same documents.
10. If any of the requested information is only reasonably available in machine-readable form (such as on a computer server, hard drive, or computer backup tape), you should consult with the Committee staff to determine the appropriate format in which to produce the information.
11. If compliance with the request cannot be made in full by the specified return date, compliance shall be made to the extent possible by that date. An explanation of why full compliance is not possible shall be provided along with any partial production.
12. In the event that a document is withheld on the basis of privilege, provide a privilege log containing the following information concerning any such document: (a) the privilege asserted; (b) the type of document; (c) the general subject matter; (d) the date, author and addressee; and (e) the relationship of the author and addressee to each other.
13. If any document responsive to this request was, but no longer is, in your possession, custody, or control, identify the document (stating its date, author, subject and recipients) and explain the circumstances under which the document ceased to be in your possession, custody, or control.
14. If a date or other descriptive detail set forth in this request referring to a document is inaccurate, but the actual date or other descriptive detail is known to you or is otherwise apparent from the context of the request, you are required to produce all documents which would be responsive as if the date or other descriptive detail were correct.
15. Unless otherwise specified, the time period covered by this request is from January 1, 2009 to the present.
16. This request is continuing in nature and applies to any newly-discovered information. Any record, document, compilation of data or information, not produced because it has not been located or discovered by the return date, shall be produced immediately upon subsequent location or discovery.
17. All documents shall be Bates-stamped sequentially and produced sequentially.
18. Two sets of documents shall be delivered, one set to the Majority Staff and one set to the Minority Staff. When documents are produced to the Committee, production sets shall be delivered to the Majority Staff in Room 2157 of the Rayburn House Office Building and the Minority Staff in Room 2471 of the Rayburn House Office Building.

19. Upon completion of the document production, you should submit a written certification, signed by you or your counsel, stating that: (1) a diligent search has been completed of all documents in your possession, custody, or control which reasonably could contain responsive documents; and (2) all documents located during the search that are responsive have been produced to the Committee.

Definitions

1. The term "document" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records, notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, inter-office and intra-office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A document bearing any notation not a part of the original text is to be considered a separate document. A draft or non-identical copy is a separate document within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether in a meeting, by telephone, facsimile, email (desktop or mobile device), text message, instant message, MMS or SMS message, regular mail, telexes, releases, or otherwise.
3. The terms "and" and "or" shall be construed broadly and either conjunctively or disjunctively to bring within the scope of this request any information which might otherwise be construed to be outside its scope. The singular includes plural number, and vice versa. The masculine includes the feminine and neuter genders.
4. The terms "person" or "persons" mean natural persons, firms, partnerships, associations, corporations, subsidiaries, divisions, departments, joint ventures, proprietorships, syndicates, or other legal, business or government entities, and all subsidiaries, affiliates, divisions, departments, branches, or other units thereof.

5. The term "identify," when used in a question about individuals, means to provide the following information: (a) the individual's complete name and title; and (b) the individual's business address and phone number.
6. The term "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is pertinent to that subject in any manner whatsoever.
7. The term "employee" means agent, borrowed employee, casual employee, consultant, contractor, de facto employee, independent contractor, joint adventurer, loaned employee, part-time employee, permanent employee, provisional employee, subcontractor, or any other type of service provider.