



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]

Issued: November 3, 2010

Posted: November 10, 2010

[Name and address redacted]

Re: OIG Advisory Opinion No. 10-25

Ladies and Gentlemen:

We are writing in response to your request for an advisory opinion regarding amendment of an exclusive contract for emergency ambulance transport services between a municipality and an ambulance company, pursuant to which the ambulance company reimburses the municipality for the costs of providing emergency dispatch services and for monitoring the quality of the ambulance operation (the "Arrangement"). Specifically, you have inquired whether the Arrangement constitutes grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the "Act") or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that while the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, the Office of Inspector General (“OIG”) will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

This opinion may not be relied on by any persons other than [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

The City of [city name redacted] (the “City”) is a municipal corporation duly organized and existing under the laws of the Commonwealth of [state name redacted] (the “Commonwealth”). The City is charged with providing essential governmental and public safety services within its limits. The City operates an emergency 911 communication center (the “Communication Center”) to monitor and manage calls requesting assistance from local police, fire, and emergency medical services (“EMS”).

In 2002, the City issued a Request for Information (“RFI”) from interested potential contractors to provide local emergency ambulance services.¹ The RFI included performance standards, criteria, and other standard procurement methodology. [Name redacted] (the “Ambulance Company”) has certified that the procedures undertaken by the City in the information gathering were open, transparent, and competitive, and otherwise conducted in a manner consistent with local contracting laws. At the time the City issued the RFI, the Ambulance Company had been a private vendor serving the City’s emergency ambulance transport needs for more than a decade.

After review of the responses to the RFI, the City selected the Ambulance Company, and the two parties entered into a three-year agreement. The initial three-year agreement was later extended by an exclusive five-year agreement. Prior to the expiration of the five-year

¹ The RFI was initiated for the purpose of obtaining the necessary data for the City to determine an appropriate contractor with which to negotiate a three-year exclusive ambulance service agreement. Ambulance services are specifically excluded from public bidding requirements codified in the law of the Commonwealth.

agreement, the parties entered the Arrangement by amending and extending that agreement for another five years. The City chose to enter the initial contract with the Ambulance Company and has subsequently acted, each time when amending and extending it, in a manner consistent with relevant government contracting laws.

At the time when the Arrangement was entered into, approximately \$228,156 of the Communication Center's annual operating costs was calculated to derive from handling ambulance transport calls.² The Arrangement established an annual remittance to be paid by the Ambulance Company, initially set at \$228,156. The purpose of the annual remittance is to offset the City's cost of operation of dispatch services and the expenses of monitoring the performance of the Ambulance Company's services. Each subsequent annual remittance after the first is increased by approximately 6.5% under an escalator clause, to reflect anticipated cost increases (e.g., in wages and benefits) in services directly associated with monitoring and managing EMS calls. The Ambulance Company has certified that the 6.5% annual escalator represents anticipated cost increases based on historical trends in the local Consumer Price Index adjustment.

Under the Arrangement, the Ambulance Company provides exclusive primary response for emergency calls in the City. Many recipients of the Ambulance Company's services are Medicare and Medicaid beneficiaries. The City does not pay the Ambulance Company any fee for the response services. The Ambulance Company is entirely responsible for the housing and maintenance of its own vehicles and equipment and the City does not supply personnel, equipment, or public facilities for use in the Ambulance Company's operations. The Ambulance Company notes that the Arrangement has not resulted in any substantial change to dispatch costs for ambulance calls, nor does it involve any substantive change in the dispatch procedures already utilized by the City.

The Ambulance Company has certified that the scheme for the Arrangement was developed at the City's sole initiative. The Arrangement was not initiated by the Ambulance Company or another ambulance company.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services

² Ambulance transport calls to the Communication's Center represent 14.365% of all calls. \$228,156 represents the same portion of the Communication Center's annual budget, including wages, benefits, and other costs.

reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. For purposes of the anti-kickback statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration was to obtain money for the referral of services or to induce further referrals. United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

B. Analysis

The Arrangement implicates the anti-kickback statute, as it requires that the Ambulance Company bear the costs of ambulance dispatch and monitoring the quality of the emergency ambulance operation as part of the exclusive contract to provide emergency ambulance transport services in the City, some of which will be reimbursable under the Federal health care programs. Notwithstanding this fact, we conclude that a number of factors, in combination, are present in the Arrangement that mitigate the risk of Federal health care program fraud or abuse.

First, the Arrangement is part of a comprehensive regulatory scheme by the City to manage the delivery of EMS. The Arrangement was established by a valid governmental entity legally empowered to regulate the provision of EMS in the City. The organization of a local emergency medical transportation system, including a local government’s decision whether to provide EMS directly or indirectly through the selection of a private supplier, is within the police powers traditionally delegated to local government. As with the exercise of any police power, the local government is ultimately responsible for the quality of the services delivered and is accountable to the public through the political process. Municipalities should have sufficient flexibility to organize local emergency medical transport systems efficiently and economically. The Ambulance Company certified that the City chose to enter the contract with the Ambulance Company and has made all subsequent amendments, in a manner consistent with the relevant government contracting laws.

Second, the Ambulance Company certified that the Arrangement provides compensation for the approximate costs of the City's emergency ambulance dispatch services and the expense of monitoring ambulance performance. As a result, the Ambulance Company is not overpaying the sources of the referrals, which represents the typical anti-kickback concern. It is reasonable to expect the City to seek reimbursement for services it provides to the Ambulance Company where those services relate directly to the EMS that are the subject of the contractual arrangement.

Third, the annual remittance will not be tied directly or indirectly to the volume or value of referrals between the parties. Aside from a 6.5% annual escalator reflecting anticipated cost increases based on trends in the local Consumer Price Index, the amount of the annual remittance will be the same over the course of the five-year Arrangement regardless of the volume or value of business that accrues to the Ambulance Company.

Fourth, because the Arrangement is limited to emergency medical services and involves no substantive change in the dispatch procedures already utilized by the City, it is unlikely to increase the risk of overutilization and is also unlikely to lead to increased costs to the Federal health care programs. In addition, the exclusivity of the contract is not likely to increase Federal health care program costs under these specific facts. Neither the number of Federal program beneficiaries requiring emergency transport in the City, nor the treatment these patients will require or receive are related to, or impacted by, the Arrangement. Furthermore, we believe it is within the City's discretion to conclude that, for administrative and system efficiencies, the contract should be awarded to one ambulance company.

Fifth, the contract exclusivity should not have an adverse impact on competition. The Ambulance Company certified that the City undertook procedures to ensure an open, transparent, and competitive process and that the City chose to maintain its contract with the Ambulance Company in a manner consistent with the relevant government contracting laws.

Sixth, the putative prohibited remuneration (i.e., the remittance) inures to the public, and not private, benefit. One of the core evils addressed by kickback or bribery statutes, whether involving public or private business, is the abuse of a position of trust, such as the ability to award contracts or business on behalf of a principal for personal financial gain. Here, the public receives the financial benefit of the Arrangement by enabling the City to receive reimbursement for the costs of emergency ambulance dispatch services and monitoring of ambulance performance.

Seventh, the Arrangement does not represent a fundamental change in the delivery of emergency ambulance services in the City. The City has maintained an exclusive contract with the Ambulance Company for the better part of the last decade. Further, the

Arrangement was not initiated by the Ambulance Company or another ambulance company. The Ambulance Company certified that the plan for the Arrangement was developed at the City's sole initiative.

We might have reached a different result if the Ambulance Company had paid the City remuneration not directly related to the provision of the emergency medical transports covered by the contract including, by way of example, free or reduced cost equipment. In light of the totality of these factors, we conclude that the Arrangement poses minimal risk of Federal health care program fraud or abuse.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that while the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute, if the requisite intent to induce or reward referrals of Federal health care program business were present, the OIG will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Arrangement. This opinion is limited to the Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request for an advisory opinion or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence in any matter involving an entity or individual that is not a requestor of this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied herein with respect to the application of any other Federal, state, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act.

- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against [name redacted] with respect to any action that is part of the Arrangement taken in good faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against [name redacted] with respect to any action taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General