



[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: May 1, 2006

Posted: May 8, 2006

[Name and address redacted]

Re: OIG Advisory Opinion No. 06-06

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding [city's name redacted]'s proposed exclusive arrangement for emergency ambulance services (the "Proposed Arrangement"). Specifically, you have inquired whether the Proposed Arrangement would constitute 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.

You have certified that all of the information provided in your request, including all supplementary letters, 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 the Proposed 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, but that the Office of Inspector General (“OIG”) would not impose administrative sanctions on [city 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 Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

This opinion may not be relied on by any persons other than [city 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

[City name redacted] (the “City”), a political subdivision of the State of [state redacted], operates fire and emergency response systems that provide advanced life support (“ALS”) services for fire, rescue, and medical emergencies through the City Fire Department (the “Paramedic Units”). The City is licensed as a “nontransport prehospital life support operator” under [state redacted] law, meaning that the Paramedic Units are licensed to provide advanced life support at the scene of an emergency but not to transport patients.¹ The City also operates a 911 system that receives and dispatches calls for assistance from police, fire, and emergency medical services.

In the event of a medical emergency, the 911 dispatcher will dispatch both a Paramedic Unit and an ambulance vehicle owned by a private company (the “Ambulance Service”) that has been a longstanding provider of emergency ambulance and transport services in the City. The City has operated its Paramedic Units for more than a decade. The City has represented that its Paramedic Units arrive on the scene of a medical emergency more than 95% of the time and, in the vast majority of those cases, provide the initial ALS assessment and services prior to the arrival of the Ambulance Service (collectively “First Responder Services”). The Ambulance Service then provides any necessary supplemental ALS, basic life support (“BLS”), and transport services (collectively “Second Responder Services”) pursuant to county protocols.

Under the Centers for Medicare & Medicaid Services (“CMS”) payment regulations, Medicare pays for ambulance services in one payment to the entity that furnished the transportation, with the expectation that suppliers furnishing services other than the

¹ See [state law citation redacted].

transport will look to the transporting supplier for payment for such other services.² Similarly, under [state redacted]'s Medicaid program, payment may only be made to an "ambulance provider," which is licensed to provide emergency medical services and patient transport, and not to a nontransport prehospital life support operator.³

On June 8, 2005, the City issued a request for proposals ("RFP") from ambulance companies (the "Bidders") to provide emergency ambulance and transportation services to the City in connection with its emergency response system.⁴ The RFP is limited to Second Responder Services provided in response to 911 calls and would not restrict other ambulance companies from operating in the City to provide other types of transports, including non-emergency ambulance transports. As part of the bid, each Bidder is required to propose a per-response payment amount to the City for each call in which the City provides First Responder Services, with the minimum payment amount being the difference between the Medicare fee schedule BLS rate and the applicable ALS rate.⁵ The successful Bidder will bill any applicable payors, including Medicare and Medicaid, and retain all collections. The successful Bidder shall agree to charge uninsured City residents for BLS and transportation services only (i.e. the successful Bidder shall agree not to charge uninsured City residents for ALS services). In exchange, the City will agree to forego any payment otherwise owed under the contract by the successful Bidder for First Responder Services provided by the Paramedic Units to such uninsured City residents.⁶ Finally, the successful Bidder shall agree to replenish without charge certain drugs and medical supplies used by the Paramedic Units in providing First Responder Services, consistent with the contract terms and county protocols.

² See 67 Fed. Reg. 9100, 9113-9114 (Feb. 27, 2002).

³ See [state law citation redacted].

⁴ The City has certified that it is employing an open competitive bidding process consistent with relevant government contracting laws. We express no opinion, and no opinion has been sought, regarding the bidding process.

⁵ There are two ALS rates, ALS-1 and ALS-2, based on the type of services provided.

⁶ Under the current arrangement, the Ambulance Service bills uninsured patients directly for all services rendered and bears the risk of collection. The City does not compensate the Ambulance Service for such services.

The City has certified that the RFP's minimum payment and the expected payment proposed by the Bidders, plus the value of the replenished supplies, will be less than the City's costs of operating the 911 system and the Paramedic Units, responding to emergency calls, and providing First Responder Services. The City plans to award an exclusive two-year contract, with an option for the City to renew the contract for an additional year, to the successful Bidder.

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 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 Proposed Arrangement implicates the anti-kickback statute, as the City is soliciting payment for First Responder Services and supply replenishment as part of an exclusive

contract to provide all emergency ambulance transport services in the City, some of which will be reimbursable under the Federal health care programs.⁷

Notwithstanding, we conclude that a number of factors are present in the Proposed Arrangement that mitigate the risk of Federal health care program fraud or abuse.

First, the Proposed Arrangement is only one part of a comprehensive regulatory scheme by the City to manage the delivery of emergency medical services (“EMS”), including both First Responder Services and Second Responder Services. The Proposed Arrangement was established by a valid governmental entity legally empowered to regulate the provision of EMS in the City pursuant to an open, competitive bidding process. 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 provider, 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.

Second, the City certified that the Proposed Arrangement will only provide partial compensation for the actual costs of the City’s delivery of First Responder Services (including dispatch services). As such, the successful Bidder will not be overpaying the

⁷ The Proposed Arrangement’s requirement that the successful Bidder provide discounts to uninsured City residents also potentially implicates the anti-kickback statute, as the City is tying such discounts to the exclusive contract to provide all emergency ambulance transport services in the City, some of which will be reimbursable under the Federal health care programs. However, neither the anti-kickback statute nor our administrative exclusion authorities under sections 1128(b)(6)(A) and 1128A(a)(5) of the Act prevents providers or suppliers from offering free or substantially discounted services to uninsured individuals. See, e.g., Hospital Discounts Offered to Patients Who Cannot Afford to Pay Their Hospital Bills, available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/2004/FA021904hospitaldiscounts.pdf> (Feb. 2, 2004); see also Hearing Before House Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce, 109TH Cong. (2004) (statement of Lewis Morris, Chief Counsel to the Inspector General), available at <http://oig.hhs.gov/testimony/docs/2004/40624oig.pdf>. Furthermore, contractually requiring the successful Bidder to limit its charges to uninsured City residents does not provide value to the City other than the public benefit of securing low cost emergency ambulance services for its uninsured residents. The City does not presently, and will not under the Proposed Arrangement, assume responsibility for paying for emergency ambulance services rendered to its uninsured residents.

source of the referrals, which is the typical anti-kickback concern. Moreover, because Medicare expressly contemplates that suppliers furnishing services other than transportation would look to the transporting provider for payment for these other services, it is reasonable to expect that the City would seek reimbursement for its services from the successful Bidder that is submitting the claims.

Third, although the aggregate payment to the City will necessarily vary with the volume of referrals from the City, in the context of emergency response services and in consideration of the facts of the Proposed Arrangement, we do not believe that the per-response fees or the supply replenishment pose an increased risk of overutilization or increased costs to the Federal health care programs. Neither the City nor the successful Bidder has significant ability to affect the utilization of “911” services among the City’s population. Ambulance services are paid by Medicare and Medicaid on a fee schedule, and the successful Bidder remains obligated to bill for such services in accordance with the applicable Federal health care program payment and coverage rules.

Fourth, the contract exclusivity should not have an adverse impact on competition. The City has represented that it is employing an open, competitive bidding process consistent with the relevant government contracting laws. Public policy favors open and legitimate price competition. Furthermore, we believe that it is within the City’s discretion to conclude that, for administrative and system efficiencies and risk spreading, the contract should be awarded to one ambulance company pursuant to an open, competitive bidding process.

Fifth, the putative prohibited remuneration (i.e., the City’s receipt of the per-response fees and the replenishment of supplies used by the Paramedic Units) 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 Proposed Arrangement by enabling the City to receive some reimbursement for its First Responder Services and by ensuring that the Paramedic Units are fully stocked with the supplies necessary to be ready for the next emergency call.

Sixth, the Proposed Arrangement does not represent a fundamental change in the delivery of emergency response services in the City. The City has operated the Paramedic Units and has contracted for Second Responder Services for many years. Further, the Proposed Arrangement was not initiated by the Ambulance Service or another ambulance company. Upon the City’s sole initiative, it issued the RFP containing the terms of the Proposed Arrangement in an open, competitive bidding process.

In light of these factors, the Proposed 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 the Proposed 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, but that the OIG would not impose administrative sanctions on the City 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 Proposed Arrangement. This opinion is limited to the Proposed Arrangement and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to the City, 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 Proposed 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 the City with respect to any action that is part of the Proposed 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 Proposed 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 the City 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,

/s/

Lewis Morris
Chief Counsel to the Inspector General