



[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: October 10, 2007

Posted: October 17, 2007

[Name and Address Redacted]

Re: OIG Advisory Opinion No. 07-12

Dear [name redacted]:

We are writing in response to your request for an advisory opinion regarding two proposals by [name redacted] to accept low or no-cost bids for the provision of therapy services at veterans' homes operated by [name redacted] (the "Proposed Arrangements"). Specifically, you have inquired whether the Proposed Arrangements 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, the Federal anti-kickback statute.

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 while 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, the Office of Inspector General ("OIG") would 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 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 [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

[Name redacted] (the “Requestor”) is responsible for the care and assistance of [State name redacted] (the “State’s”) veterans and their spouses. Requestor operates six veterans’ homes, including [name redacted] (“Home A”) and [name redacted] (“Home B”) (together, the “Veterans’ Homes”¹). The Veterans’ Homes are long-term care facilities that provide medical, clinical, and nursing services. By State statute, Requestor is solely responsible for the operation, financing, management, and general direction of the Veterans’ Homes. See [citation redacted]. The Veterans’ Homes are not joint ventures or otherwise partnered with private entities.

The Veterans’ Homes recently needed to hire contractors to provide physical therapy, occupational therapy, and speech pathology services (together, the “Services”). In accordance with State law, each of the Veterans’ Homes issued to prospective contractors an Invitation for Bid (“IFB”). As a general practice, [citation redacted] requires State agencies to award contracts through competitive sealed bidding, a process that requires adequate public notice be given prior to the bid opening date. [Citation redacted]. Requestor must award each contract to the lowest responsive and responsible bidder whose bid meets the requirements and criteria set forth in the IFB. Requestor has certified that it has and will comply with these bid requirements for the Proposed Arrangements.

The awarded bidder will receive the exclusive right to provide the Services at the Veterans’ Homes for the duration of the contracts. Only Veterans’ Homes’ physicians will be able to order the Services; the Services may not be ordered by the awarded bidder or its employees.

The Veterans’ Homes’ IFBs are substantially the same, although the language in each differs in some respects. Requestor has certified that the IFBs will be implemented in the same manner at both Veterans’ Homes. In particular, the IFBs’ payer conditions will operate as follows. With respect to uninsured residents, the awarded bidder may not bill the Veterans’ Homes for more than the bid price. With respect to services rendered to residents who are Medicare, Medicaid, or third-party insurer beneficiaries, the awarded bidder will bill the insurer. All bills for cost-sharing amounts must be sent directly to the Veterans’ Homes; they may not be sent to residents or their families. The Veterans’ Homes will reimburse without limitation the awarded bidder for all cost-sharing amounts owed by the residents.

¹ We refer collectively to the Veterans’ Homes for purposes of this opinion only.

Requestor estimated that twenty percent of the service hours for the Services would be provided to residents without Medicare or third party insurance, and incorporated that twenty percent uninsured figure into the IFBs as follows. Prior to issuing the IFBs, Requestor calculated twenty percent of each Service's service hours, and provided this information as a fixed number of hours in the IFBs. Requestor asked contractors to bid a unit price for each service. The product of a contractor's unit price bid multiplied by the number of hours listed in the IFB for the corresponding service yields a contractor's total bid. For example, if a contractor bid a unit price of \$25 for an hour of occupational therapy, and the IFB called for 100 service hours of occupational therapy, the contractor's bid would be \$2,500 ($\25×100 hours). Essentially, contractors were bidding on how much they would charge to provide the Services to the Veterans' Homes' uninsured residents.

In accordance with [citation redacted], Requestor determined which vendors were responsive (i.e., conform to the criteria in the IFBs) and responsible (i.e., possess the capability to fully perform the Services and the integrity and reliability to assure good faith performance), and then compared those vendors on the basis of which would charge the Veterans' Homes the least amount of money to perform the estimated twenty percent of hours per service for uninsured patients.

[Name redacted] (the "Low Bidder") submitted the lowest responsive and responsible bid at each of the Veterans' Homes: a no-cost bid (zero dollar) in response to the IFB at Home A and a low cost bid ([dollar amount redacted (less than \$25)]per hour) in response to the IFB at Home B. If the two contracts were awarded to the Low Bidder, the Low Bidder would be providing the Services for free or at low cost to uninsured residents, and the savings would inure to the State. Requestor has certified that, to the best of its knowledge, no Veterans' Homes' physicians who are in a position to order the Services have outside financial relationships or "side deals" with the Low Bidder. Under the Proposed Arrangements, Requestor would accept the bids of the Low Bidder, which, as determined by Requestor, is the lowest responsive and responsible bidder as required by [citation redacted].

Were the Low Bidder awarded the contract, the terms of the IFBs would operate as follows. Since the IFBs state that billing to the Veterans' Homes for services rendered to uninsured residents may not exceed the contract price, the Low Bidder could not bill Home A anything for such services because it bid zero dollars, and it could bill Home B up to its bid amount for such services. The Low Bidder would bill insurers to the extent of patients' insurance coverage, and the Veterans' Homes would reimburse without limitation the Low Bidder for all Medicare and third-party insurer deductibles and cost-sharing amounts.

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 Arrangements implicate the anti-kickback statute because Requestor could be giving the Low Bidder exclusive access to Federal health care program business in exchange for the Low Bidder providing the Services to uninsured residents for free or at discounted rates, which Services Requestor would otherwise have to fund. Based on the combination of the following factors, we conclude that the OIG would not subject the Proposed Arrangements to sanctions arising under the anti-kickback statute.

First, the Services and the bid that Requestor will accept for their provision are only one part of a comprehensive regulatory scheme to care for the State’s veterans and their spouses. State statutory law authorizes and directs Requestor to operate and manage the Veterans’ Homes. States should have sufficient flexibility to organize such veterans’ services in an efficient and economical manner. Issuing IFBs to fill open bids for the Services reasonably falls within Requestor’s statutory authority and appears calculated to meet Requestor’s statutory obligation to care for the Veterans’ Homes’ residents. Furthermore, the Proposed Arrangements flow from an open, competitive IFB process that Requestor conducted in accordance with [citation redacted].

Second, there is a low risk that the Proposed Arrangements will result in inappropriate utilization because the Services only may be ordered by Veterans' Homes' physicians – none of whom has outside financial relationships with the Low Bidder – and not by the Low Bidder or its employees. Since the Veterans' Homes must reimburse the Low Bidder for all Medicare and third-party insurer deductibles and cost-sharing amounts, they have an incentive to closely monitor utilization of the Services to keep the cost-sharing amounts for which they are responsible to a minimum.²

Third, the Proposed Arrangements are not likely to have a negative effect on patient care. The Low Bidder met all the terms of the IFBs, and the State determined that the Low Bidder is likely to fully and reliably render the Services.

Fourth, the Proposed Arrangements' exclusivity should not have an adverse impact on competition. Requestor held an open, competitive IFB process in accordance with [citation redacted], pursuant to which Requestor determined that the lowest responsive and responsible bidder was the Low Bidder. Under these circumstances, we believe it is within Requestor's discretion to conclude it would be an improvident use of the public fisc to select a bidder that would charge more for the Services.

Fifth, the State receives the full benefit of the discounted Services. One of the core evils addressed by the kickback and 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 Requestor is a state agency, and the benefit of the financial savings it would realize under the Proposed Arrangements will inure to the State's citizens in the form of conserved State resources. Importantly, we note that there is no ancillary or unrelated remuneration offered or paid by the Low Bidder to Requestor. We might have reached a different result if the Low Bidder had not competed solely on the basis of being the lowest responsive and responsible bidder for the Services, but by offering to Requestor some remuneration not directly related to the provision of the Services, such as free physical therapy services for Requestor's employees, or free durable medical equipment for the Veterans' Homes.

Finally, while we recognize that the terms of the IFBs would in some instances require the Veterans' Homes to pay cost-sharing amounts on behalf of certain residents who are Medicare or Medicaid beneficiaries, we conclude that in the context of the Proposed Arrangements, such payments would not amount to improper inducements to those residents. Generally speaking, where a provider agrees to give something of value to a

²We express no opinion regarding any billing or claims submission by the Low Bidder, nor do we express any opinion regarding the application of the exclusion authority at section 1128(b)(6)(A) of the Act if, as a result of the charges to the Veterans' Homes under the Proposed Arrangements, the Low Bidder bills Medicare or Medicaid substantially more than it usually bills other customers.

beneficiary, there is a risk that the gift is intended to induce the beneficiary to select that provider for Federally reimbursable services. However, the Proposed Arrangements' provisions for payment by the State of cost-sharing amounts for selected State residents who are veterans (i.e., that the Veterans' Homes pay all cost-sharing amounts owed by residents who are Medicare, Medicaid, or third-party insurer beneficiaries) are distinct. When the State would make cost-sharing amount payments on their behalf, the State would be fulfilling its statutory responsibility to provide for the care and assistance of its veterans and their spouses. It is within the State's discretion to determine that the State's veterans' cost-sharing amounts should be paid from the public fisc, and the State would be accountable through the political process for that decision. In the context of a State-operated system of specialized homes for State residents who are veterans, the incidental prospect of a State subsidy of cost-sharing amounts is unlikely to influence a veteran's choice of one of the Veterans' Homes as his or her nursing facility. In contrast, a private entity, such as a nursing home, paying cost-sharing amounts on behalf of its residents would raise fraud and abuse concerns not present in the Proposed Arrangements.

In light of these factors, the Proposed Arrangements pose 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 Proposed Arrangements 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 would 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 Proposed Arrangements.

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 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 arrangements 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 Proposed Arrangements 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 Arrangements in practice comport 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,

/s/

Lewis Morris
Chief Counsel to the Inspector General