



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



[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: April 23, 2012

Posted: April 30, 2012

[Name and address redacted]

Re: OIG Advisory Opinion No. 12-04

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding certain aspects of an exclusive contract for emergency transport services between a municipality and an ambulance company that reimburses the municipality for dispatch services and for certain costs incurred when municipal firefighters drive transports (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, although 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

[Town name redacted] (the “Town”) is a municipal corporation under the laws of the [State name redacted] (the “State”). The Town is charged with providing essential governmental and public safety services within its own municipal limits. The Town operates its own fire department (the “Fire Department”). It also operates an emergency 911 communication center (the “Dispatch Center”) to monitor and dispatch calls for police and fire assistance and for emergency medical services (“EMS”).

For about eight years, the Town maintained an exclusive advanced life support (“ALS”) ambulance transport services contract (the “Original Contract”) with the requestor of this opinion, [name redacted] (the “Ambulance Company”).¹ Prior to entering into the Original Contract, the Town issued a request for proposals (the “Original RFP”) for these services. As the conclusion of the Original Contract neared, the Town issued a second request for proposals (the “Second RFP”) for exclusive ALS ambulance transport services. The Ambulance Company certified that the Second RFP process included performance standards, criteria, and other standard procurement methodologies, and that the Town undertook procedures to ensure an open, transparent, and competitive bidding process. At the conclusion of the Second RFP, the Town and the Ambulance Company signed a three-

¹ The Town requires the Ambulance Company to respond to all emergency calls with an ALS ambulance. If it is determined at the emergency scene that only basic life support services are required for the patient, the Ambulance Company team only renders those basic life support services. In such circumstances, the Ambulance Company bills only for the provided basic life support services.

year extension and modification of the Original Contract (the “Modified Contract”). The Ambulance Company certified that the Modified Contract was agreed to, and executed by, the Town and the Ambulance Company in a manner consistent with relevant local government contracting laws. The Ambulance Company certified that the Second RFP and the plan underlying the Modified Contract were developed at the sole initiative of the Town, and not by the Ambulance Company, or any other ambulance company.

The Modified Contract requires the Ambulance Company to remit an annual call dispatch fee of \$23,684.67 to the Town, payable in monthly installments (the “Call Dispatch Fee”). The Call Dispatch Fee was calculated using a formula that multiplied the Dispatch Center’s staffing and building overhead costs for a recent year by the historical percentage of the total calls received that were dispatched to the Ambulance Company, and then dividing that result in half. The Ambulance Company certified that the purpose of the Call Dispatch Fee is to partially offset the cost to the Town of call dispatch directly related to the Ambulance Company’s EMS.

The Modified Contract contains another provision under which the Ambulance Company pays remittances to the Town (the “Backfill Reimbursement Provision”). By way of background, the Ambulance Company indicates that the Town is within the State’s EMS [region name redacted] and under the authority of the EMS [region name redacted] Regional Council. This entity was designated by the State to coordinate and improve the delivery of EMS across the State’s most densely populated areas. The EMS [region name redacted] ALS service protocol requires the Ambulance Company to staff two paramedics on each ALS transport.² In compliance with the protocol, during ALS transports in the Town, ordinarily one paramedic drives the ambulance to the hospital while the other attends to the patient in the rear of the vehicle. Critically-ill or -injured patients, however, sometimes require simultaneous administration of ALS by two paramedics en route to the hospital.³ In such circumstances, which occur infrequently, Town guidelines allow the paramedic-in-charge discretion to request that the Fire Department allow an on-duty firefighter present at the emergency scene⁴ to assist the paramedics by driving the

² We have not been asked to opine on, and we express no opinion regarding, the State’s EMS [region name redacted] transport protocol.

³ According to the Ambulance Company, simultaneous treatment efforts by both paramedics greatly benefit the patient in some critical care situations. Often in such situations, the second paramedic performs crucial stabilizing interventions while the first paramedic performs vital air way management, intravenous drug administration, chest compression, and defibrillation.

⁴ The Fire Department sends firefighter crews to the scenes of all local calls for medical aid and motor vehicle accidents. In many instances, the firefighters are the first responders to

ambulance to the nearest appropriate facility. If the Fire Department consents, the firefighter will drive the ambulance, allowing both paramedics to treat the critical care patient simultaneously.

The Ambulance Company certified that safety rules arising out of the local firefighters' union's bargaining agreement require the Fire Department to maintain a minimum contingent of six firefighters. When a firefighter drives a critical care transport as a result of the sort of exigency described above, the Town may be temporarily deprived of its requisite sixth firefighter. The Fire Department must then "backfill" the sixth position by calling another firefighter back to work. The Ambulance Company certified that firefighters who are called back to work in these circumstances are paid by the Town for a block of 3.5 hours of work at an overtime pay rate, in accordance with the terms of the local firefighters' union's bargaining agreement. For this reason, the Backfill Reimbursement Provision requires the Ambulance Company to remit to the Town \$199.86 in connection with each call back (*i.e.*, payment for a 3.5 hour interval of firefighter services at an overtime rate).

The Ambulance Company certified that, in connection with firefighters driving critical care ALS transports, the Fire Department had to backfill firefighter positions seventeen times in the past year to maintain its minimum contingent of six. By comparison, the Ambulance Company provided a total of 1,331 ALS transports for the Town over the same period. On the basis of these figures, the Ambulance Company calculates that 1.27% of its total ALS transports during the year triggered the Backfill Reimbursement Provision. The Ambulance Company certified that it does not anticipate that the proportion of transports triggering the Backfill Reimbursement Provision will change substantially over the term of the Modified Contract. Should the number of backfilling incidents remain essentially constant, as expected, the Ambulance Company would remit to the Town roughly \$3,400 under the Backfill Reimbursement Provision in each of the three years of the Modified Contract's term (resulting in an approximate total of \$10,200 in such remittances).

The Ambulance Company certified that its paramedics request that firefighters drive transports only in the context of critical care situations that require simultaneous administration of ALS by two paramedics. It certified that fees under the Backfill Reimbursement Provision accrue only when use of a firefighter driver actually results in the Fire Department's staffing dropping below its minimum contingent of six. The Ambulance Company certified that it will not claim the amounts paid under the Backfill Reimbursement

arrive on scene. These first responders include emergency medical technicians who are part of the Fire Department crew and who administer basic life support services before the arrival of the Ambulance Company's paramedics.

Provision as bad debt or otherwise shift the burden to the Medicare or Medicaid programs or other third party payers or individuals.

Recipients of the Ambulance Company’s services in the Town under the Modified Contract include many Medicare and Medicaid beneficiaries. Under the Modified Contract, the Town does not pay the Ambulance Company any fee for services; rather, the Ambulance Company bills patients and payers directly, including the Federal health care programs. The Call Dispatch Fee and the remittance of funds under the Backfill Reimbursement Provision constitute the Arrangement.⁵ The Ambulance Company certified that the Modified Contract does not represent a fundamental change in the delivery of emergency ambulance services in the Town, nor has it involved any substantive changes in the Town’s dispatch procedures.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense to knowingly and willfully 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. See, e.g., United States v. Borrası, 639 F.3d 774 (7th Cir. 2011); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985), 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

⁵ We have not been asked to opine on, and we offer no opinion on, any other aspect of the Modified Contract or the Original Contract.

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 the Ambulance Company—which is a potential referral recipient—to bear a portion of the costs of providing emergency call dispatch services, as well as the costs of backfilling firefighter positions when the Fire Department consents to its firefighters driving critical care transports, as a condition of being the exclusive ALS ambulance transport supplier in the Town. Some EMS would be reimbursable under the Federal health care programs. Notwithstanding this fact, we conclude that a number of factors are present in the Arrangement that, in combination, mitigate the risk of Federal health care program fraud or abuse.

First, the Arrangement is part of a comprehensive regulatory plan by the Town to manage the delivery of EMS. The Arrangement was established by the Town, a valid governmental entity legally empowered to regulate the provision of EMS within its boundaries. The organization of a local emergency medical transportation system 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 EMS transport systems efficiently and economically.

Second, the Ambulance Company certified that the Call Dispatch Fee will only partially offset the actual costs of the Town’s dispatch operations attributable to the Ambulance Company’s services. It also certified that the Backfill Reimbursement Provision compensates the Town for its costs of backfilling firefighter positions in accordance with safety rules arising out of the local firefighters’ union’s bargaining agreement when the provision is triggered. As a result, the Ambulance Company will not be overpaying the source of the referrals, which is the typical anti-kickback concern. Moreover, it is reasonable to expect that the Town would seek reimbursement for services it provides to the Ambulance Company where those services relate directly to the EMS that are the subject of the Modified Contract (*i.e.*, partial reimbursement of the Town’s costs for call dispatch services, and the reimbursement of costs incurred by the Town to backfill a firefighter position when the Backfill Reimbursement Provision is triggered.)

Third, the Call Dispatch Fee will not be tied directly or indirectly to the volume or value of referrals between the parties. The Call Dispatch Fee will remain the same over the term of the Modified Contract, regardless of the volume or value of business that accrues to the Ambulance Company. Total payments under the Backfill Reimbursement Provision will

match the actual costs incurred by the Town to maintain the minimum firefighter contingent required by safety rules arising out of the firefighters’ union bargaining agreements. Thus, while total payments under the Backfill Reimbursement Provision will vary from year to year during the three-year term, these payments will not be tied to the volume or value of referrals between the parties.

Fourth, the contract exclusivity is unlikely to adversely impact competition. The Ambulance Company certified that the Town implemented procedures to ensure an open, transparent, and competitive bidding process in connection with the development of the Modified Contract and that the Town entered the Modified Contract in a manner consistent with the relevant government contracting laws.

In light of the totality of these factors, we conclude that the Arrangement poses minimal risk of Federal health care program fraud or abuse. We might have reached a different result if the Ambulance Company had paid the Town remuneration not directly related to the Ambulance Company’s provision of the emergency medical transports covered by the Modified Contract.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that, although 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 by a person or entity other than [name redacted] to prove that the person or entity did not

violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.

- 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 (or that provision's application to the Medicaid program at section 1903(s) 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 that is part of the Arrangement 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,

/Gregory E. Demske/

Gregory E. Demske
Chief Counsel to the Inspector General