



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:** November 21, 2013

**Posted:** November 27, 2013

[Name and address redacted]

**Re: OIG Advisory Opinion No. 13-18**

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an ambulance supplier's response to a request for proposals ("RFP") for the provision of all emergency ambulance services in [city redacted] (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, 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 the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute and that the Office of Inspector General ("OIG") could potentially 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. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

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"), a [state redacted] non-profit corporation, is a licensed supplier of emergency and non-emergency ambulance services. In addition, the Requestor provides executive management services, including compliance oversight, consulting services, human resources support, training, and IT services.<sup>1</sup>

[City redacted] (the "City") issued an RFP for the provision of all emergency ambulance services in the City, as well as the provision of certain equipment and related services, for a two-year period.<sup>2</sup> The Requestor submitted a bid to the City in response to the RFP.

The RFP sets forth a number of performance standards and specifications to which each bidder must agree or note an exception. Among these, the RFP requires the successful bidder to provide the following:

- Free emergency ambulance services to individuals insured by the City's insurance plans (the "Services")
- Two complete suction units, including chargers and 1200cc disposable bottles, pursuant to a nominal value lease not to exceed \$1.00 for the two-year contract term; and two automated external defibrillators ("AED") and two pulse oxygenators, pursuant to a nominal value lease not to exceed \$1.00 for the two-year contract term (collectively, the "Equipment")
- Free EMS training and classes for City personnel (the "Training")
- 20 percent discounts on emergency ambulance services provided to uninsured senior citizens (the "Uninsured Discounts")

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<sup>1</sup> The Requestor provides these services directly, as well as through its subsidiary, [name redacted].

<sup>2</sup> During the contract term, the successful bidder will bill patients and their respective third-party payors, including Federal health care programs, for emergency ambulance services rendered.

- Replenishment of disposable medical supplies used by the City during delivery of care prior to the patient’s transfer to the ambulance, including AED pads, heart monitor supplies, and consumable electrodes and cables (the “Replenished Supplies”)

In its bid, the Requestor accepted some of the above provisions and noted exceptions for others, citing particular concerns with items and services that the City would require the successful bidder to provide at no charge or pursuant to a nominal value lease.<sup>3</sup>

Under the Proposed Arrangement, the Requestor would not provide free Services, but it would agree to bill the City directly for the fair market value of emergency ambulance services provided to City-insured individuals. The Requestor would not lease the Equipment below cost or provide it free of charge, but would defer to its compliance officer’s decision on donating the Equipment to the City, consistent with how the Requestor handles all requests for corporate charity donations. The Requestor would not provide free Training, but notes that one of its affiliates offers annual free EMS classes open for anyone to attend. The Requestor would not provide the Uninsured Discounts, but would instead continue its practice of offering charity care to uninsured patients based on individualized determinations of financial need. Lastly, the Requestor would agree to provide the Replenished Supplies.

## 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. Borrasi, 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

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<sup>3</sup> The Requestor’s bid, as described to us in its request for an advisory opinion, is the Proposed Arrangement. Except as it relates to the Proposed Arrangement, we do not opine on the City’s RFP.

(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 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 items and services that the City would require the successful bidder to provide at no charge or pursuant to a nominal value lease—the Services, the Equipment, and the Training—are particularly suspect. These items and services are, and would remain, solely the City’s expenses to incur, regardless of its decision to contract with a private ambulance supplier for the provision of emergency ambulance services in the City. Thus, the provision of these items and services at nominal or no cost to the City in exchange for the opportunity to be the City’s exclusive supplier of emergency ambulance services, including those payable by Federal health care programs, would fit squarely within the language of the anti-kickback statute. Under the Proposed Arrangement, however, the Requestor has not agreed to the City’s terms of these “pay to play” provisions in the RFP.

The Requestor certified that it would not provide free Services under the Proposed Arrangement. Rather, it would agree to bill the City directly for the fair market value of services provided to City-insured individuals. We find this aspect of the Proposed Arrangement—regarding direct billing to the City in lieu of direct billing to City-insured individuals—would not implicate the anti-kickback statute.

The Requestor would not provide free Training, but noted that one of its affiliates offers annual free EMS classes open for anyone to attend. The free EMS classes offered by the Requestor’s affiliate are freestanding classes for public benefit that run independent of the City’s RFP. This offering of free, open, pre-existing training by an affiliate would present a minimal risk under the anti-kickback statute.

In addition, the Requestor would not provide the Uninsured Discounts, but would instead continue its policy of offering charity care to uninsured patients based on individualized

determinations of financial need.<sup>4</sup> We find that this aspect of the Proposed Arrangement would present a minimal risk of fraud and abuse under the anti-kickback statute.

With regard to the Replenished Supplies, Medicare payment rules state that such supplies are considered part of the general ambulance service and that payment for them is included in the Medicare payment rate for the transport. See Medicare Benefit Policy Manual, Chapter 10, Sections 10.1.1 and 10.1.5. In these circumstances, it is reasonable for the City to request replenishment of disposable medical supplies used in the delivery of care by the City prior to the patient's transfer to an ambulance, for which the successful bidder is reimbursed under Medicare rules. Moreover, providing Replenished Supplies would be distinguishable from problematic general stocking of the City's inventory, as providing Replenished Supplies would involve replacement of supplies administered to a patient by the City's first responders before the patient is transferred to an ambulance and delivered to the receiving facility. Accordingly, we find the Requestor's proposal to provide the Replenished Supplies would present a minimal risk of fraud and abuse under the anti-kickback statute.

Given all of this, our primary concern under the Proposed Arrangement involves the Requestor's proposal to defer to its compliance officer's decision on donating the Equipment to the City. Notwithstanding our favorable predisposition towards bona fide charitable donations, we caution that the substance of an arrangement—and not its characterization—ultimately determines its propriety under the anti-kickback statute. Unfortunately, in some circumstances, payments characterized as “donations” or “grants” are kickbacks intended in part to induce or reward referrals, directly or indirectly. The Requestor relies on its compliance officer to evaluate requests received on a case-by-case basis. In the absence of established, objective criteria and any other safeguards against potential fraud and abuse, there is significant risk that donation of the Equipment by the Requestor would be tied to the contract award under the RFP. This is particularly the case where the City has demanded the Equipment as part of the RFP. Thus, we cannot conclude that this aspect of the Proposed Arrangement would present a minimal risk of fraud and abuse under the anti-kickback statute.

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<sup>4</sup> With regard to the Uninsured Discounts, the anti-kickback statute does not prevent suppliers from offering free or substantially discounted services to uninsured individuals who are unable to pay their medical bills; however, the discounts may not be linked in any manner to the generation of business payable by a Federal health care program. 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).

Because we consider the Proposed Arrangement as a whole, we cannot conclude that the Proposed Arrangement would present a minimal risk of fraud and abuse in connection with the anti-kickback statute.

### **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 and that the OIG could potentially 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. Any definitive conclusion regarding the existence of an anti-kickback violation requires a determination of the parties' intent, which determination is beyond the scope of the advisory opinion process.

### **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 Proposed 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 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.

Sincerely,

/Gregory E. Demske/

Gregory E. Demske  
Chief Counsel to the Inspector General