



[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 6, 2010

Posted: October 14, 2010

[Name and address redacted]

Re: OIG Advisory Opinion No. 10-22

Dear [Name redacted]:

We are writing in response to your request for an advisory opinion regarding an exclusive three-year contract for basic life support ambulance transport services between a municipality and an ambulance company that reimburses the municipality for the costs of providing emergency dispatch services (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

[Town name redacted] (the “Town”) is a municipal corporation duly organized and existing under the laws of the Commonwealth of [state name redacted] (the “Commonwealth”). The Town is charged with providing essential governmental and public safety services within its limits. The Town 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”).

For nine years the Town maintained an exclusive basic life support ambulance transport services contract with [name redacted] (the “Ambulance Company”).¹ In 2010, the Town issued a Request for Proposal (“RFP”) for an exclusive three-year contract for basic life support ambulance transport services. The RFP included performance standards, criteria, and other standard procurement methodologies.

The Town undertook procedures to ensure an open, transparent, and competitive bidding process, which was conducted in a manner consistent with applicable contracting laws. At the conclusion of the RFP, a new three-year contract (the “New Contract”) was awarded to the Ambulance Company.² The Ambulance Company certified that the RFP was initiated and conducted, and the New Contract was awarded, in a manner consistent with relevant government contracting laws. The Ambulance Company has certified that the RFP and the scheme underlying the Arrangement were developed at the initiative of the Town (in

¹ The Town was one of three municipalities that participated in this original nine-year contract with the Ambulance Company.

² The RFP included a neighboring town as a co-signer. That other town has since decided to contract with another ambulance company.

collaboration with a neighboring town), and not by the Ambulance Company or any other ambulance company.

Under the terms of the Arrangement, the Ambulance Company has agreed to remit an annual dispatch fee of [figure in excess of \$10,000 redacted] to the Town for the first contract year, payable in monthly installments. The remittance formula, which is set out in the contract, arrives at the fee based on the percentage of the total staffing and building space costs for the Communication Center calculated to be devoted to EMS calls in 2009,³ based on historical call volumes. The Ambulance Company certified that the purpose of the dispatch fee is to offset the cost to the Town of call dispatch connected with the Ambulance Company's basic life support ambulance transport services.

Many recipients of the Ambulance Company's services are Medicare and Medicaid beneficiaries. The Town does not pay the Ambulance Company any fee for services; rather, the Ambulance Company bills patients and payers, including the Federal health care programs. The Ambulance Company provides no remuneration to the Town other than the annual dispatch fee. The Ambulance Company certified that the New 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 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. 1985), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a

³ In the second and third years of the contract, the dispatch fee is subject to annual adjustment for inflation as determined by the U.S. Department of Labor, Bureau of Labor Statistics Consumer Price Index for the [City name redacted] Metropolitan Area.

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 as part of the exclusive contract to provide basic life support ambulance transport services in the Town, some of which will 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 scheme 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, 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 has certified that the Town chose to enter the Arrangement with the Ambulance Company in a manner consistent with the relevant government contracting laws.

Second, the Ambulance Company has certified that the Arrangement provides compensation for the approximate costs of the Town's call dispatch services connected with the Ambulance Company's basic life support ambulance transport services. 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 Town 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 dispatch fee will not be tied directly or indirectly to the volume or value of referrals between the parties. The amount of the annual remittance will, subject to an objectively determined inflation-adjustment, be the same over the course of the three-year

contract regardless of the volume or value of business that accrues to the Ambulance Company.

Fourth, because the Arrangement is limited to EMS and involves no substantive change in the dispatch procedures already utilized by the Town, the Arrangement 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 does not increase Federal health care program costs. Neither the number of Federal program beneficiaries requiring emergency transport in the Town, nor the treatment these patients will require or receive is related to, or impacted by, the Arrangement. Furthermore, we believe it is within the Town'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 has certified that the Town undertook procedures to ensure an open, transparent, and competitive bidding process and that the Town chose to contract with the Ambulance Company in a manner consistent with the relevant government contracting laws.

Sixth, the remuneration in question (i.e., the annual dispatch fee) 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 Town to receive reimbursement for the costs of emergency ambulance dispatch services.

Seventh, the Arrangement does not represent a fundamental change in the delivery of emergency ambulance services in the Town. The Town maintained an exclusive contract with the Ambulance Company for the preceding nine years. 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 initiative of the Town, and not by the Ambulance Company or any other ambulance company.

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 contract including, by way of example, by providing the Town with free or reduced cost equipment.

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