

Center for Regulatory Effectiveness

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March 24, 2011

The Honorable Daniel R. Levinson
Inspector General
US Department of Health and Human Services
Room 5250
330 Independence Avenue, S.W
Washington, DC 20201

Re: CMS Failure to Disclose their Financial Qualification Standards for the DEMPOS Competitive Bidding Program

Dear Mr. Levinson:

Durable Medical Equipment suppliers participating in CMS' competitive bidding program are required by law to meet "applicable financial standards specified by the Secretary, taking into account the needs of small providers."¹ "Specified" is a transitive verb. If the standards are specified, they must be specified to someone, such as the bidders that are required to comply with them.

CMS has not, to date, disclosed its specific financial standards, *i.e.*, the algorithm it employs in determining if each bidder is financially qualified. It is not even clear that the agency has a specific, replicable methodology for deciding whether a given supplier meets the agency's financial standards. Although CMS has stated that they use standard financial ratios in computing a financial score, they have not explained: 1) how that score is calculated; and 2) the threshold that is considered as meeting minimum standards.² It should be noted that, under the Administrative Procedure Act (APA), the standards not only need to be disclosed but also put through a notice-and-comment process.

In short, it is not currently possible for a potential bidder to determine whether they meet the financial standards they are required to comply with in order to submit a bona fide bid. Requiring that suppliers meet certain standards without their being able to know what those specific standards are is a situation more appropriate for a Kafka story than a federal proceeding.

¹ Social Security Act, Section 1847(b)(2)(A)(ii); 42 USC § 1395w-3(b)(2)(A)(ii). (Emphasis added.)

² CMS, "Facts about the DMEPOS Competitive Bidding Program Round 1 Rebid Review of Supplier Capacity and Expansion Plans," found at [http://www.dmecompetitivebid.com/Palmetto/Cbic.nsf/files/Fact_Sheet_Capacity_and_Expansion_Plan.pdf/\\$File/Fact_Sheet_Capacity_and_Expansion_Plan.pdf](http://www.dmecompetitivebid.com/Palmetto/Cbic.nsf/files/Fact_Sheet_Capacity_and_Expansion_Plan.pdf/$File/Fact_Sheet_Capacity_and_Expansion_Plan.pdf)

The Harm From CMS' Non-Disclosure of "Specified" Financial Standards

CMS' ability to disqualify any bidder based on undisclosed standards impacts every DME supplier trying to decide whether to spend the resources necessary to prepare the necessary paperwork and develop a bid.

If companies which do not meet CMS' financial standards could determine so in advance, they could avoid wasting resources preparing and submitting a bid on an auction in which their not permitted to participate. Moreover, if the companies which will be required to participate in and win a competitively bid contract in order to remain within the Medicare program could know what financial standards they had to meet, they might take or avoid certain business actions to help ensure that they were financially qualified.

Evidence that CMS Does Not Apply Meaningful Financial Standards

There are preliminary indications that CMS' financial standards have not been effective at screening out financially unviable firms. For example, CMS announced on November 3, 2010 that Mid Florida Medical, Inc. won two bids in the Orlando-Kissimmee competitive bidding area (CBA). Unfortunately, Mid Florida Medical had filed for Chapter 7 (liquidation) bankruptcy a few days earlier on October 28th. Attachment 1 to this letter contains extracts from Mid Florida Medical's bankruptcy filing and pages from CMS' Competitive Bidding Contract Supplier List demonstrating that they were offered contracts.

Similarly, M. Davis Management, doing business as Proximed and CPAPSupply.com, which filed for Chapter 11 (reorganization) bankruptcy on February 24, 2009, also received contract awards from CMS in the Orlando-Kissimmee CBA. See Attachment 2 to this letter.

It is not known how many financially viable DME suppliers may have had their bids rejected based on the undisclosed financial standards that allowed bankrupt companies to participate in the bidding.

Action Taken by the Regulated Community

Members of regulated community advised CMS during the competitive bidding rulemaking to make public the specific financial standards that would be applied and criticized the agency's lack of transparency on this issue. In their final rule, CMS noted that a "commenter suggested that CMS also publish the criteria it will use to assess supplier's financial stability and how it will rank suppliers based on these criteria."³

Action Taken by CRE

On November 20, 2009, the Center for Regulatory Effectiveness (CRE) filed an administrative petition with CMS to compel disclosure of their algorithm/specific financial qualification standards. CRE filed the petition pursuant to 5 USC § 552 (a)(2) which requires agencies to make public "statements of policy

³ 72 Red. Reg. 18037, Tuesday, April 10, 2007, col. 3.

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and interpretations which have been adopted by the agency and are not published in the Federal Register;" A copy of the petition is attached to this letter.

On December 15, 2009, CMS sent an email to a CMS official requesting a meeting to discuss the petition. On February 25, 2010, CMS responded by email declining to meet and stating that they anticipate a response to "CRE's letter in the near future."

CRE has received no further communication from CMS on the petition.

Requested Action

- ▶ CRE requests that the Office of Inspector General investigate and report on the appropriateness of CMS not disclosing their specific financial standards/methodology for determining whether a DMEPOS bidder is financially qualified.

CRE respectfully requests that the Office of Inspector General provide at least a preliminary report prior to the initiation of Round 2 competitive bidding expected later this year.

About CRE

CRE is a regulatory watchdog founded by former senior career officials from the Office of Management and Budget. As a watchdog, CRE's mission is to ensure agency compliance with the "good government" laws that regulate the regulators including the APA, the Paperwork Reduction Act and the Data Quality Act.

To promote an open, informed discussion of CMS' DME competitive bidding program, CRE established an Interactive Public Docket (IPD) on the competitive bidding program. IPDs are defined in Wikipedia as "an eRulemaking tool...that seek to provide the public with the capability to: 1) publicly post data and other materials pertaining to federal proceedings on a continuous basis, including after the close of the Administrative Procedure Act comment period; and 2) post comments on already submitted materials."

CRE DME Competitive Bidding IPD may be found at <http://www.thecre.com/blog/>.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Tozzi", with a date "3/7" written to the right of the signature.

Jim Tozzi

Member, Board of Advisors

Attachments

cc: The Honorable Donald M. Berwick, M.D., Administrator, The Centers for Medicare and Medicaid Services