

Loaded Letter: CRE Takes New Aim at Competitive Bidding

Mar 1, 2011 4:22 PM

WASHINGTON — The Center for Regulatory Effectiveness fired another shot against [competitive bidding](#) last month, sending a [letter](#) to the Department of Health and Human Services that asks for a retrospective review of the CMS program.

In the Feb. 15 letter, addressed to HHS acting General Counsel Sally Howard, the CRE, a regulatory watchdog organization, cited President Obama's Jan. 18 executive order calling for a new regulatory strategy as the catalyst for such a review. In his order, the president directed federal agencies to submit plans for [review of existing regulations](#) to the Office of Information and Regulatory Affairs (OIRA) within 120 days.

"The Retrospective Review Plan developed by HHS needs to provide highest priority to conducting a retrospective review of CMS' durable medical equipment (DME) competitive bidding regulations because they are poorly designed, contradicting the president's regulatory goals by needlessly sacrificing thousands of small businesses and tens of thousands of jobs," read the letter, which was copied to Cass Sunstein, OIRA administrator.

"We have three guns pointed at CMS' head," said the CRE's Jim Tozzi, the letter's author and a former regulatory official in the White House Office of Management and Budget. "One gun is the litigation, the second gun is the letter on the executive order and the third gun is the [auction design] theory."

Last year, the [CRE sued CMS](#) for refusing to release the financial standards to which it was holding bidders in its DMEPOS bidding project. The case is still before the courts, Tozzi said.

President Obama's executive order, he said, provides a foundation for more immediate action.

"Every president I knew — and I worked for five presidents — always went out and said we have to get rid of all the bad regulations," Tozzi recalled. "The thing that is different now from other administrations is that there is this huge jobs issue. If there is anything that is going to lose jobs, it is [competitive bidding]."

According to the CRE letter, "Protecting jobs is the focal point of the president's new regulatory strategy. CMS' competitive bidding rule stands squarely in the way of saving tens of thousands of small business and their jobs" and is "antithetical to the president's regulatory and economic agenda."

The letter said the program "imposes needless burdens on Medicare beneficiaries and on companies that have a proven track record of reliably, efficiently and honestly meeting beneficiary needs," in addition to denying beneficiaries' freedom of choice since it forces them to find new providers.

Tozzi also brought up CMS' program design and its [violation of accepted auction principles](#),

challenging the agency's refusal to either seek or accept advice from experts in the field.

"Competitive bidding is an extensively analyzed academic discipline. When agencies have had questions and concerns regarding current or planned auctions, they have sought expert advice from scientists and other academicians," he wrote. "For example, the Federal Communications Commission held a series of conferences on combinatorial auctions in conjunction with the National Science Foundation and other outside experts.

"CMS, by contrast, has refused outside advice on how to improve their competitive bidding system."

Tozzi said that is another violation of the president's order, which requires that agencies "ensure the objectivity of any scientific and technological information and processes used to support the agency's regulatory actions."

A retrospective review would allow HHS the opportunity — "and duty," he said — to correct those mistakes.

Tozzi said he purposely did not send the letter to CMS Administrator Donald Berwick. "If I had sent it to CMS, it would never have seen the light of day," he said. "They would toss that in a minute." Tozzi added he believes the letter will make its way to Congress.

"The letter has a weight of its own," he said. "They are going to pick that up with hot tongs. That's one they aren't going to just toss away."

Read the [entire letter](#) on the CRE website.