

## Center for Regulatory Effectiveness

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May 9, 2012

The Honorable John P. Holdren, Ph.D.  
Assistant to the President for Science and Technology  
Director, Office of Science and Technology Policy  
725 17<sup>th</sup> Street, NW  
Washington, DC 20502

*The CMS competitive bidding program violates all of the principles [of Executive Order 13563], especially the principles of transparency and of basing regulations on the best available science. Indeed, the current program is the antithesis of science and contradicts all that is known about proper market design.*

Dear Dr. Holdren:

The above quote is from a letter signed by over 240 academicians including several Nobel laureates to President Obama evaluating a Centers for Medicare and Medicaid Services (CMS) program for the competitive acquisition of Durable Medical Equipment.<sup>1</sup>

The letter writers were not alone in their criticism of the science underlying implementation of CMS' DME competitive bidding program. The Congressional Budget Office's (CBO's) Chief of Medicare Cost Estimates, speaking at a Medicare Auction Conference co-sponsored by the University of Maryland and the National Science Foundation<sup>2</sup> summarized the program's problems more bluntly,

*If they don't change the mechanism they use, I think there is a high probability of failure in the near future. There is near certainty of failure sometime down the road.<sup>3</sup>*

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<sup>1</sup> Letter from 244 Concerned Auction Experts, 17 June 2011, p. 1, *available at* [http://thecre.com/pdf/Letter\\_from\\_244\\_Concerned\\_Auction\\_Experts.pdf](http://thecre.com/pdf/Letter_from_244_Concerned_Auction_Experts.pdf).

<sup>2</sup> Medicare Auction Conference, 1 April 2011, Agenda *available at* <http://www.cramton.umd.edu/papers2010-2014/medicare-auction-conference-program.pdf>.

<sup>3</sup> Transcript, Medicare Auction Conference, University of Maryland, Final Panel: "What Have We Learned?" April 1, 2011, p. 5, *available at* <http://www.cramton.umd.edu/papers2010-2014/medicare-auction-conference-final-panel-562.rtf>.

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When over two-hundred professors describe a federal program as “the antithesis of science” and when a senior CBO official warns that there is the “near certainty of failure” for a major Medicare program, White House oversight and intervention is a necessity. I say this as someone who has served five presidents and who recently authored a law review article providing the history of Presidential regulatory review.<sup>4</sup>

I am attaching a paper which analyzes the CMS competitive bidding program from a game theory perspective. The paper also contrasts the CMS program with the excellent work done by the Federal Communications Commission (FCC) in developing an auction system which has taken advantage of modern scientific techniques to test and improve their processes.

The attached paper notes that EO 13563, in discussing the White House’s Scientific Integrity memorandum, states that “each agency shall ensure the objectivity of any scientific and technological information and processes used to support the agency’s regulatory actions.” The President’s Scientific Integrity directive itself requires that agencies use “well-established scientific processes, including peer review where appropriate....” Developing an efficient auction is a scientific exercise. The Center for Regulatory Effectiveness, acting in its capacity as a regulatory watchdog, is working to ensure that agencies adhere to the “good government laws” including the Scientific Integrity Memorandum.

The paper’s recommendation is that:

- ▶ The federal government conduct a federally-sponsored laboratory simulation of CMS’ DME bidding rules to assess their efficiency and determine how they can be reformed to the benefit of the nation’s taxpayers and Medicare beneficiaries.

The purpose of conducting a clinical trial would be to allow a fair comparison of how the CMS bidding rules affect the price to taxpayers of durable medical equipment and services. The clinical test could also address the differentiation between the quality of the services received by a beneficiary through the CMS competitive bidding program relative to the quality of services beneficiaries receive paid for under a price schedule. The clinical test also needs to evaluate the sustainability of the auction process relative to other sets of rules. On this point, I reiterate the Congressional Budget Office’s warning that CMS’s current bidding system has a “near certainty of failure.”

Auction failure would mean that life-saving home medical equipment and services would either be cut-off or provided at an increased cost to millions of Medicare beneficiaries resulting in an enormous human toll and in a financial toll for taxpayers from increased emergency room visits, hospitalizations and nursing home care.

The warnings by everyone from CBO to hundreds of distinguished economists have been made. The dots have been connected.

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<sup>4</sup> Jim Tozzi, “OIRA’s Formative Years: The Historical Record of Centralized Regulatory Review Preceding OIRA’s Founding,” 63 Admin. L. Rev. (Special Edition) 37 (2011), *available at* [http://www.thecre.com/pdf/20111211\\_ALR\\_Tozzi\\_Final.pdf](http://www.thecre.com/pdf/20111211_ALR_Tozzi_Final.pdf).

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The President's Scientific Integrity Memorandum assigns the Director of the Office of Science and Technology Policy "the responsibility for ensuring the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes." Consequently, I will be contacting your office to arrange a meeting with yourself or a designated appointee to discuss the paper and agency adherence to the Scientific Integrity directive.

Sincerely,

A handwritten signature in black ink, appearing to read "Jim Tozzi". The signature is written in a cursive style with a large, stylized initial "J".

Jim Tozzi  
Member, Board of Advisors

cc: The Honorable Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs

Attachment – "Auctioning Healthcare: The Need for a Clinical Trial of CMS' Competitive Bidding Program for Durable Medical Equipment"

<http://www.thecre.com/pdf/AuctioningHealthcare.2012.CRE.pdf>