Antitrust Guidance

The Centers for Medicare and Medicaid Services (CMS) is implementing a competitive bidding process for durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS) for the Medicare program. This process is designed to improve the accuracy of Medicare DMEPOS payments and ensure that beneficiaries get quality items and services at fair prices. The competitive process only works, however, when suppliers set their bid prices independently. When competitors collude, prices are inflated and honest suppliers, Medicare beneficiaries, and the American public are cheated.

The antitrust laws protect competition and prohibit collusion. Price fixing, bid rigging, and other forms of collusion, including agreements to allocate customers or divide markets, are illegal.[1] A collusive agreement is illegal even if the agreed-upon prices were reasonable, the agreement was necessary to prevent price cutting or cut-throat competition, or the competitors were simply trying to ensure that each got a fair share of the Medicare business. Moreover, these types of agreements need not be formal or in writing to be unlawful. When competitors share competitively sensitive pricing information – for example, the price or level at which they intend to bid for a particular contract – or obtain that information from third parties, it can lead to express or tacit agreements on prices or bids that violate the antitrust laws. Price fixing, bid rigging, and customer or market allocation agreements are subject to criminal prosecution by the Antitrust Division of the United States Department of Justice, punishable by a fine of up to $100 million for corporations and a fine of up to $1 million or 10 years imprisonment (or both) for individuals. Under some circumstances, these maximum potential fines may be increased.

To minimize the likelihood of antitrust problems, suppliers that bid or intend to bid in the DMEPOS Competitive Bidding Program should determine whether to bid and their bid amounts, including any components that go into the bid amounts (for example, costs, discounts, or profit margins), **independently** of any competitors. Specifically, a DMEPOS supplier should **avoid:**

1. any agreement or understanding with competitors on the bid amounts or components of the bid amounts,
2. any agreement or understanding with competitors not to bid on a particular product category/competitive bidding area or to withdraw a previously submitted bid, so a competitor's bid will be accepted,
3. any agreement or understanding with competitors to submit a bid that likely is too high to win,
4. any agreement or understanding with competitors to rotate or allocate being the lowest bidder(s),
5. any agreement or understanding with competitors not to bid, to submit a losing bid, or to withdraw a bid in exchange for subcontracts or other payments from the successful low bidder(s),
6. any agreement or understanding with competitors to allocate or divide markets among themselves, including specific customers or types of customers, products or territories, and
7. sharing competitively sensitive pricing or bidding data with any competitors, including through a third party (for example, a consultant), with the intent to facilitate any agreement or understanding as described in 1 - 6 above.

[1] This guidance does not apply to participation in networks (as defined by CMS for the purpose of DMEPOS bidding) and other legitimate joint ventures.

- continued pg. 2 -

- continued from pg. 1 -

CMS has a zero-tolerance policy regarding violations of antitrust laws. We will monitor bidders, including bidders that choose to use consultants, for potential antitrust violations. Bidders that choose to use consultants should be aware that use of a consultant does not protect them from the need to comply with antitrust requirements. CMS will work with the Office of Inspector General and other appropriate law enforcement partners on any suspected violations, including referring such matters to the Department of Justice.