

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

BEFORE THE SOUTH CAROLINA
PROCUREMENT REVIEW PANEL
CASE NO. 1991-6

In re:

Protest of Medical Arts Pharmacy, Inc.)
)
) O R D E R
)

This case came before the South Carolina Procurement Review Panel ("Panel") for hearing on August 28, 1991, on the appeal by Medical Arts Pharmacy, Inc., of a decision of the Chief Procurement Officer ("CPO") dismissing Medical Art's protest of the award of a contract to supply pharmacy services to the Department of Mental Retardation.

Present at the hearing before the Panel were Medical Arts, represented by John W. Bledsoe, III, Esq.; Winyah Dispensary, represented by Charles Baxley, Esq.; and the Division of General Services, represented by Helen T. Zeigler, Esquire. The Department of Mental Retardation was present but not represented by counsel and did not participate as a party.

FINDINGS OF FACT

The State issued an Invitation for Bids ("IFB") on August 28, 1990, soliciting pharmacy services for the South Carolina Department of Mental Retardation's Pee Dee Center.

The IFB provided:

The minimum amount of fees quoted must be at least "0". No credit or negative amounts will be considered.

(Record, p. 36). Bidders were required to bid a flat fee on four items - consultant services, chart services, pharmacy

services, and over-the-counter medications - plus a discount rate on all other noncovered medications. (Record, p. 36).

Three bidders responded to the IFB. Winyah Dispensary bid "0" on all five items. (Record, p. 48).¹ Pee Dee Pharmacy bid "0" on the first four items and a discount rate of 12%. (Record, p. 67). The Protestant Medical Arts Pharmacy bid \$233.60 per month on the first item, "0" on the second item, \$202.50 per month on the third item, \$1752.00 on the fourth item and a discount rate of 9 1/2%. (Record, p. 56). An Intent to Award the contract to Winyah Dispensary was issued on September 21, 1990.

The Department of Mental Retardation does not intend to seek from Medicaid any reimbursement for the over-the-counter medication provided the Pee Dee Center and intends to so notify the Health and Human Services Finance Commission ("HHSFC"), which is the Medicaid agency for South Carolina. HHSFC will not pay a reimbursement amount if the Department was not charged anything for the medication and so notifies HHSFC. Further, the Department will be routinely audited in the future and such audits will reveal that the Department is not charged for over-the-counter medications and is not entitled to reimbursement.

¹Mr. Cooper, the owner of Winyah Pharmacy, testified that, notwithstanding his zero bid on the over-the-counter medications and pharmacy services, Winyah would still make a satisfactory profit on the total contract because of the \$2.50 per prescription payment.

Medical Arts filed a protest with the CPO on September 25, 1991, contesting the award to Winyah and alleging that Winyah's bid violates Medicaid/Medicare anti-fraud laws. Relying on the Panel's decision in In re: Protest of Medical Arts Pharmacy, Inc., Case No. 1989-22, a case with nearly identical facts to this one, the CPO found that Medical Arts lacked standing to bring this action and that no violation of the Medicaid fraud laws had occurred.

CONCLUSIONS OF LAW

Medical Arts contends that Winyah's offer to provide over-the-counter medicines and pharmacy services for free amounts to an illegal rebate offered to induce the State to contract with Winyah. Medical Arts alleges that an illegal rebate occurs because the federal government reimburses the Pee Dee Center 22 cents per patient per day for over-the-counter medications. Likewise, Medical Arts contends that providing pharmacy services for free is offering an illegal payment in kind in violation of Medicaid fraud provisions.

The anti-fraud provisions cited by Medical Arts provide:

(b) Illegal Remunerations

* * *

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person -

* * *

1(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under subchapter XVIII of this chapter or a State health care program . . . shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

42 U.S.C.A. § 1320a-7b(b)(2)(B)(1990 Supp.).

General Services and Winyah initially contend that Medical Arts lacks standing to challenge Winyah's bid under the Medicaid/Medicare anti-fraud law because it is a criminal statute under which no private right of action lies. The Panel has previously affirmed this position in In re: Protest of Medical Arts Pharmacy, Case No. 1989-22, relying on West Allis Memorial Hospital, Inc., v. Bowen, 852 F.2d 251 (7th Cir. 1988).²

In West Allis, a hospital brought suit against a competitor, the Secretary of Health and Human Services, and the Attorney General of the United States seeking to apply the Medicaid fraud provisions to a program instituted by the competitor. The program induced patients to use the competitor's facilities by waiving deductible and co-insurance payments for Medicare patients. The Seventh Circuit Court of Appeals held that the legislative history

²At the hearing before the Panel, Medical Arts claimed, without citation, that the United States Supreme Court has overruled the principle set forth in West Allis. The Panel was unable to locate any such Supreme Court ruling.

of the Social Security Act (which contains the Medicare Fraud provisions) indicates that Congress intended for the Secretary of Health and Human Services and the United States Attorney General to enforce the Medicare program and did not intend to give private citizens the right to challenge each other over alleged Medicare fraud violations. 852 F.2d 251, at 255.

As in the previous Medical Arts case, the Panel finds the reasoning advanced by the Seventh Circuit Court of Appeals persuasive. In the case at bar, Medical Arts is asking the Panel to determine whether the criminal provisions of 42 U.S.C. § 1320a-7b(b)(2)(B) apply in order to make Pee Dee's bid illegal and, therefore, not acceptable to the State of South Carolina. A determination whether Pee Dee's conduct is a crime is left by the intent of Congress solely to the United States Attorney General and is not properly raised by a competitor, such as Medical Arts, in a civil administrative proceeding.

Even though the Panel holds that Medical Arts lacks standing, in order to avoid remand in the event that a higher court should decide that Medical Arts has standing, the Panel decides as follows on the merits of Medical Arts' claim.

The Panel finds that the offering of pharmacy services and over-the-counter medications by Winyah does not violate §1320a-7b(b)(2)(B)(2) because of the exception created by Paragraph (3) of the fraud law. Paragraph (3) provides:

(3) Paragraphs (1) and (2) shall not apply to --

(A) a discount or other reduction in price obtained by a provider of services or other entity under subchapter XVIII of this chapter or a State health care program if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under subchapter XVIII of this chapter or a State health care program

42 U.S.C.A. §1320a-7b(b)(3)(1989 Supp.).

In this case, Winyah offers a discount on its total package price by offering pharmacy services and over-the-counter medications for free and accepting the \$2.50 per prescription reimbursement as adequate profit. This reduction in price has been procured by the State in an arm's length competitive sealed bid procedure and disclosed by Winyah in its publicly opened bid. The Department of Mental Retardation cannot and will not claim any reimbursement for the free medication and will receive no reimbursement from the Medicaid program. The Panel fails to see where the "fraud" is in this arrangement.

Under Medical Arts' argument, bidders would always be required to bid the maximum reimbursement amount, which cost is ultimately passed on to federal taxpayers. The Panel is convinced that it was not the intent of Congress to penalize vendors who, in the open light of the public procurement

process, propose to save the taxpayers money. The Panel believes that Paragraph (3) is a reflection of that.³

Finally, Medical Arts claims that the effect of Winyah's bid in light of the per patient per day reimbursement is that it is a negative bid amount in violation of the IFB section which provides:

THE MINIMUM AMOUNT OF FEES QUOTED MUST
BE AT LEAST "0". NO CREDIT OR NEGATIVE
(-) AMOUNTS WILL BE CONSIDERED.

The "fees quoted" language is clearly concerned only with the face amount of bids and not what the legal effect might or might not be. The amount of fees quoted by Winyah is zero. This is in perfect conformity with the IFB.

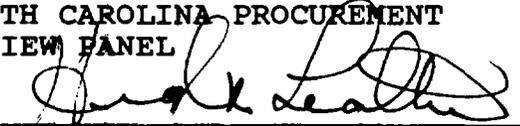
³On July 29, 1991, the Department of Health and Human Services passed new safe harbor regulations defining what conduct will automatically not be considered a kickback under the Medicaid fraud statutes. In discussing the "discount" exemption, the comments to 42 CFR Part 1001 note, "the fundamental analysis required of a trier of fact is to recognize that the substance rather than simply the form of a transaction should be controlling." 56 Fed. Reg. 35958.

Health and Human Services further notes that, "For purchasing practices involving the free provision of another type of item, we will examine the surrounding circumstances to determine the desirability of prosecuting that arrangement. Examples of potential factors which we may consider include: (1) The amount of the benefit that was reported and passed along to the programs; (2) whether the good is separately reimbursable and (3) the intent behind the arrangement. 56 Fed. Reg. 35978.

For the reasons stated above, the Panel affirms the March 4, 1991 decision of the Chief Procurement Officer and hereby dismisses the protest of Medical Arts Pharmacy.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL

By: 

Hugh K. Leatherman, Sr.
Chairman

Columbia, S.C.

9-26, 1991