

STATE OF SOUTH CAROLINA }  
COUNTY OF RICHLAND }

BEFORE THE SOUTH CAROLINA  
PROCUREMENT REVIEW PANEL  
CASE NO. 1989-22

IN RE:

PROTEST OF MEDICAL ARTS PHARMACY, INC. }

O R D E R

This case came before the South Carolina Procurement Review Panel (the "Panel") for hearing on October 23, 1990, on the merits of a protest by Medical Arts Pharmacy, Inc. ("MAP") of the award of a contract for pharmaceutical services to Pee Dee Pharmacy ("Pee Dee").<sup>1</sup>

Present at the hearing before the Panel were MAP, represented by John W. Bledsoe, III, Esq.; Pee Dee represented by Jack Lawson, Esq., and the Division of General Services, represented by Helen T. Zeigler, Esquire. The Department of Mental Retardation was present but did not participate as a party.

FACTS

On September 6, 1989, an Invitation for Bids ("IFB") was issued for a one-year contract to provide pharmacy services to the South Carolina Department of Mental

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<sup>1</sup>This is the third time that this case has come before the Panel. The Panel's January 10, 1990 order found Medical Art's first two grounds of protest untimely. That decision was overturned and the case remanded to the Panel by the circuit court in an order dated July 27, 1990. The Panel's order dated April 10, 1990 found no merit to Medical Art's third ground of protest. That decision was upheld by the circuit court in its July 27 order. The merits of Medical Arts' first and second grounds of protest are before the Panel today.

Retardation's Thad E. Saleeby Center in Hartsville. The IFB contained the following provision:

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

Two bidders responded to the IFB - Medical Arts Pharmacy ("MAP") and Pee Dee Pharmacy.

State Procurement included the prohibition against negative amounts in the bid solicitation documents because its tabulation system was unable to count negative numbers. The State was not aware of any possible violations of federal law at the time the bid solicitation was prepared.

On September 28, at the bid opening, Pee Dee's bid was erroneously announced as a "no bid." In fact, Pee Dee had proposed to provide chart services, consulting services, pharmacy services and over-the-counter medications to the State for \$0. Pee Dee proposed to provide all noncovered medications and supplies at a wholesale discount rate of 13.5%. (Record, p. 27).

On October 2, State Procurement Officer Joe Fraley called MAP's president, Mike Rast, and in the course of the conversation advised that MAP would not get the contract because Pee Dee was low bidder. On October 3, Mr. Rast called Mr. Fraley and claimed that the State could not award the contract to Pee Dee because it was against federal law. Mr. Rast faxed a copy of the federal law to Fraley that afternoon.

On November 13, MAP learned that Pee Dee had been awarded the contract on November 9th. MAP hand-delivered its protest of the award of the contract to Pee Dee to the Chief Procurement Officer on November 20, 1990.

At issue before the Panel today are MAP's first two grounds of protest, summarized by MAP's attorney as follows:

1. Pee Dee's bid violates Medicare/Medicaid fraud law because it makes no charge to the State for over-the-counter medications. Because of federal payments, this is in effect a negative bid prohibited by federal law and the IFB in this case.

2. Pee Dee's bid violates Medicare/Medicaid fraud law because there is no charge for consultant services under Item 1 of the IFB.

The actual cost of the services which Pee Dee is offering for free approximates \$750 per month and the actual cost of the over-the-counter medications is \$1200 to \$1400 per month. Even though it bid zero for these items, Pee Dee is making more than its usual profit on this contract. Pee Dee's intent was to include the costs of supplying the services and over-the-counter medication in the fees quoted to supply noncovered prescription medication and supplies. Pee Dee bid as low as it did in order to receive the contract.

Ordinarily, the Department of Mental Retardation would receive a 21¢ per patient per day reimbursement from Medicaid for the over-the-counter medications. (See Plf.'s Ex. 1). However, Mental Retardation does not intend to claim reimbursement for the over-the-counter medication which it receives for free from Pee Dee and will notify the

state Medicaid agency that it had no outlay for over-the-counter medications at this facility. The state Medicaid agency, the Health and Human Services Finance Commission, does not intend to pay the Department of Mental Retardation any reimbursement for over-the-counter medications if the Department paid nothing for them.

#### CONCLUSIONS OF LAW

MAP contends that Pee Dee's offer to provide over-the-counter medicines and consultant services for free amounts to an illegal rebate offered to induce the State to contract with Pee Dee. MAP alleges that an illegal rebate occurs because the federal government reimburses the Saleeby Center 21 cents per patient per day for over-the-counter medication. Therefore, a zero bid by Pee Dee results in a cash payment to the Department of Mental Retardation of \$700 per month.

Likewise, MAP contends that providing consultant services worth \$1200-1400 for free is offering an illegal payment in kind in violation of Medicaid fraud provisions.

The fraud provisions, cited by MAP, provide:

#### **(b) Illegal Remunerations**

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(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)(1989 Supp.).

General Services and Pee Dee initially contend that MAP lacks standing to raise Pee Dee's alleged violation of the Medicaid/Medicare fraud statute because it is a criminal statute under which no private right of action lies. This argument is based on West Allis Memorial Hospital, Inc., v. Bowen, 852 F.2d 251 (7th Cir. 1988).

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 challenging the applicability of 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 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.

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 MAP lacks standing, in order to avoid remand in the event that a higher court should decide that MAP has standing, the Panel offers the following opinion on the merits of MAP's claim. The Panel holds that the offering of consultant services and over-the-counter medications by Pee Dee 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, Pee Dee has offered a discount on its total price by offering consultant services and over-the-counter medications for free. This reduction in price has been disclosed by Pee Dee in its public bid. The Department of Mental Retardation will not claim any reimbursement for the free medication and will not receive and reimbursement from the Medicaid program.

Under MAP's argument, bidders would always be required to bid the maximum reimbursement amount, which would ultimately be passed on to federal taxpayers. The Panel is convinced that it was not the intent of Congress to penalize vendors who save the taxpayers money. The Panel believes that Paragraph (3) is a reflection of that.<sup>2</sup>

Finally, MAP claims that the effect of Pee Dee's bid in light of the per patient per day reimbursement is that it is a negative bid in violation of the Invitation For Bid section which provides:

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

As noted earlier, the "no negative amount" language in the bid was put in because the State had no mechanism to

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<sup>2</sup>By law, the Secretary of Health and Human Services was to have promulgated "safe harbor" regulations under Paragraph (3), setting forth certain conduct which was pre-determined to be exempt from the fraud provisions, by August, 1989. The proposed regulations, published at 54 Fed. Reg. 3088 (1989), were withdrawn. As of the date of this opinion, no "safe harbor" regulations have been published or approved.

record negative numbers in its accounting system. General Services points to the "fees quoted" language as evidence that this section was concerned only with the face amount of bids and not what the legal effect might or might not be.

The Panel agrees. The amount of fees quoted by Pee Dee was zero. This was in perfect conformity with the IFB.

For the reasons stated above, the Panel dismisses the protest of Medical Art's Pharmacy and upholds the award of the contract to Pee Dee Pharmacy.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT  
REVIEW PANEL



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Hugh K. Leatherman, Sr.  
Chairman

Dec. 13, 1990  
Columbia, South Carolina