

# HEALTH LAW

## Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

## New Competitive Bidding Programs for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies – CMS Narrows the Field of Suppliers

April 17, 2007

On April 2, 2007, the Centers for Medicare & Medicaid Services (CMS) issued a final rule establishing competitive bidding programs for certain durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS).<sup>1</sup> This final rule stems from a directive to CMS under the Medicare Prescription Drug, Improvement & Modernization Act of 2003 (MMA) to implement such programs as a means to provide quality DMEPOS items and services to Medicare beneficiaries at a reasonable cost to the Medicare program.

*Competitive Bidding Areas.* The final rule establishes a competitive bidding program that will initially be launched in the following 10 metropolitan statistical areas (MSAs) in 2007: (1) Charlotte - Gastonia - Concord, NC-SC; (2) Cincinnati - Middletown, OH-KY-IN; (3) Cleveland - Elyria - Mentor, OH; (4) Dallas - Fort Worth - Arlington, TX; (5) Kansas City, MO-KS; (6) Miami - Fort Lauderdale - Miami Beach, FL; (7) Orlando, FL; (8) Pittsburgh, PA; (9) Riverside - San Bernardino - Ontario, CA; and (10) San Juan - Caguas - Guaynabo, PR.<sup>2</sup> Each MSA in which a competitive bidding program will be established will constitute a separate competitive bidding area (CBA). In 2009, CMS will expand competitive bidding programs to include 80 of the largest MSAs. After 2009, CMS plans to expand the program further into additional areas.

*Product Categories.* Suppliers who wish to supply the following DMEPOS product categories in a CBA will have to submit bids and win contracts: (1) oxygen supplies and equipment; (2) standard power wheelchairs, scooters, and related accessories; (3) complex rehabilitative power wheelchairs and

<sup>1</sup> Competitive Acquisition for Certain Durable Medical Equipment, Prosthetics, Orthotics, and Supplies. 72 Fed. Reg. 17,992 (April 10, 2007) (to be codified at 42 C.F.R. pts. 411, 414).

<sup>2</sup> The CBAs were announced by CMS in conjunction with issuing the final rule. See [www.cms.hhs.gov/CompetitiveAcqforDMEPOS/](http://www.cms.hhs.gov/CompetitiveAcqforDMEPOS/). Maps of and listings of the zip codes included in each CBA are available at the CBIC Web site: [www.dmecompetitivebid.com](http://www.dmecompetitivebid.com).

related accessories; (4) mail-order diabetic supplies; (5) enteral nutrients, equipment, and supplies; (6) continuous positive airway pressure devices, respiratory assist devices, and related supplies and accessories; (7) hospital beds and related accessories; (8) negative pressure wound therapy pumps and related supplies and accessories; and (9) walkers and related accessories. In addition, two CBAs – Miami and San Juan – will also include support surfaces (group 2 and 3 mattresses and overlays) as part of their competitive bidding programs.

Submitting Bids. Suppliers interested in bidding must register with the Competitive Bidding Implementation Contractor (CBIC) at its Web site ([www.dmecompetitivebid.com](http://www.dmecompetitivebid.com)) to obtain a user ID and password. Registration is currently open. The bidding process will occur electronically through the CBIC Web site. CMS representatives indicated during an Open Door Forum conducted by CMS on April 11, 2007, that suppliers will be able to submit bids over a 60-day period, which CMS expects to begin at the end of April 2007.

Bidding is limited to those suppliers who are accredited by one of CMS's approved accrediting agencies or who have such accreditation pending. A supplier is not limited to submitting bids only for the CBA in which it is physically located. Suppliers must submit separate bids for each product category such supplier wishes to supply and must bid for all items within a given product category. The specific items included within each product category are listed on the CBIC Web site along with the items' HCPCS codes. The bids submitted for each item within a product category may not exceed the payment amount listed for that item on the current DMEPOS fee schedules. In addition, bids must include all costs related to furnishing an item, including all services directly related to providing that item. Suppliers will also have to submit their projected capacity to furnish the items in each category (i.e., the total volume of such items the supplier can provide to the CBA).

Selecting Winning Suppliers. Contracts will only be awarded to suppliers who meet the bidding requirements, which include compliance with DMEPOS supplier Medicare enrollment standards and disclosure of certain compliance-related issues, financial standards, quality standards, and accreditation standards. CMS will rank each qualifying supplier's bid according to a "composite bid" which CMS determines by taking the bid amount for each item multiplied by the CMS-established weight for that item.

After ranking the suppliers' bids, CMS will use the beneficiary demand within each CBA and the bidding suppliers' capacities to determine how many contract suppliers starting from the lowest bid in the ranking will be necessary to meet that demand. The point where the expected combined capacity of the bidders would be sufficient to meet the expected demand of the beneficiaries for items in a product category is the "pivotal bid" for that CBA. All eligible suppliers whose composite bid is below the pivotal bid for that product category will be selected as winning bids.<sup>3</sup> CMS plans to announce the winning suppliers in December 2007.<sup>4</sup>

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<sup>3</sup> Certain exceptions to this process apply as a means of ensuring that a sufficient number of small suppliers, i.e., suppliers that generate gross revenues of \$3.5 million or less in annual receipts, including both Medicare and non-Medicare revenue, are captured in the supplier pool.

<sup>4</sup> With the exception of skilled nursing facilities and nursing facilities, contract suppliers will be required to furnish the contracted items to all beneficiaries who maintain a permanent residence in the CBA, or who visit the CBA, and who request the items from them unless an exception applies. 72 Fed. Reg. at 18,026. Skilled nursing facilities and nursing facilities that submit winning bids will have the option to furnish competitively bid items only to their own residents.

Medicare Reimbursement for DMEPOS. The competitive bidding program will establish a single payment amount for each item in each product category for each CBA based on the bids submitted and accepted for that item. Medicare will reimburse competitively bid DMEPOS items at 80% of the single payment amount established for each CBA. Single payment amounts will not be adjusted annually for inflation during the contract period and will replace the payment amounts for such items in the DMEPOS fee schedules for each CBA. CMS indicated recently that the single payment amounts will become effective on April 1, 2008.<sup>5</sup>

Regardless of the reimbursement amount, only contract suppliers may furnish competitive bidding program items to a beneficiary within a CBA even if such beneficiary is visiting (i.e., permanently resides outside of a CBA) unless an exception applies. Medicare will not reimburse non-contract suppliers for supplying competitively bid items to a visiting beneficiary and the beneficiary will not be financially responsible for the items unless he or she signs an Advance Beneficiary Notice (ABN).

Beneficiaries who maintain a permanent residence within a CBA generally must obtain competitively bid items from a contract supplier. Medicare will not pay for items included in a competitive bidding program that are furnished by a non-contract supplier unless (1) the non-contract supplier is also a grandfathered supplier (discussed below); (2) the beneficiary receives a specifically authorized DMEPOS item from a physician, treating practitioner, or therapist (discussed below); (3) the beneficiary is outside of the CBA where he or she resides and that area is not a CBA, or the area is a CBA but the item required is not included within the competitive bidding program for that CBA; or (4) Medicare is the beneficiary's secondary insurer and the beneficiary is required by its primary insurer to use a certain non-contract supplier that has a valid Medicare billing number.<sup>6</sup>

Grandfathered Suppliers. The competitive bidding programs will allow some non-contracting suppliers to continue furnishing competitively bid items under a "grandfathering process." A non-contract supplier may continue to supply medically necessary covered durable medical equipment (DME) rental items and oxygen and oxygen equipment to beneficiaries who choose to continue receiving the items from the non-contract supplier, presuming the non-contract supplier wishes to continue furnishing such items, in either of two contexts: (1) where a beneficiary was receiving such items from the non-contract supplier prior to the start of a competitive bidding program; or (2) where the non-contract supplier established the rental or supply arrangement with a beneficiary while it was a contract supplier but lost its contract in a subsequent competitive bidding program. In addition, accessories and supplies used in conjunction with an item which is furnished under a grandfathering process may also be furnished by the grandfathered supplier.

Physicians, Treating Practitioners, and Therapists. The final rule creates specific exceptions for certain competitively bid DME items supplied by designated providers directly to their patients. Physicians, including podiatrists, and treating practitioners (physician assistants, clinical nursing

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<sup>5</sup> CMS indicated the single payment amounts would become effective on April 1, 2008, at a Special Open Door Forum: Competitive Acquisition for Certain Durable Medical Equipment, Prosthetics, Orthotics and Supplies, that CMS hosted on April 11, 2007. Additional time line information will be available shortly at the CBIC Web site: [www.dmecompetitivebid.com](http://www.dmecompetitivebid.com).

<sup>6</sup> Beneficiaries may also obtain new technology that receives an HCPCS code during the contract period from any supplier for the remainder of the contract period and the supplier will be paid the fee schedule amount for those items. In addition, repairs to and maintenance services for beneficiary-owned competitively bid items, including replacement parts, may be made by any supplier with a Medicare billing number.

specialists, and nurse practitioners) may supply their own patients with crutches, canes, walkers, folding manual wheelchairs, blood glucose monitors, and infusion pumps as part of such providers professional services as long as the items are billed using a billing number assigned to the physician, the treating practitioners (if possible), or a group practice to which the physician or treating practitioner has reassigned the right to receive Medicare payment. In addition, physical therapists in private practice and occupational therapists in private practice may similarly furnish their own patients with off-the-shelf orthotics without becoming contract suppliers as long as the items are furnished as part of the therapist's professional services. All of the competitively bid items supplied by physicians, treating practitioners, and therapists will be reimbursed by Medicare at the single payment amount for the applicable CBA. If these or any providers wish to supply patients with competitively bid items in a CBA other than those specifically authorized, and can otherwise legally do so, such provider may do so only by submitting a bid and winning a contract.

If you have any questions about the matters described in this *Health Law Update* please contact one of the Bass, Berry & Sims attorneys listed at the end of this Update.

Bass, Berry & Sims Healthcare Attorneys

**H. Stanford Adams, Jr.**  
(615) 742-7775  
sadams@bassberry.com

**Mary Beth Fortugno**  
(615) 742-7739  
mfortugno@bassberry.com

**Clevonne M. Gaillard**  
(615) 742-7769  
vgaillard@bassberry.com

**Angela Humphreys**  
(615) 742-7852  
ahumphreys@bassberry.com

**Seth A. Killingbeck**  
(615) 742-7707  
skillingbeck@bassberry.com

**Claire F. Miley**  
(615) 742-7847  
cmiley@bassberry.com

**Shannon Pinkston**  
(615) 742-7727  
spinkston@bassberry.com

**Catherine J.B. Sloan**  
(615) 742-7789  
csloan@bassberry.com

**Leigh Walton, Chair**  
(615) 742-6201  
lwalton@bassberry.com

**H. Lee Barfield, II**  
(615) 742-6202  
lbarfield@bassberry.com

**Renard François**  
(615) 742-7792  
rfrancois@bassberry.com

**Pooneh Ghiassi**  
(615) 742-7782  
pghiassi@bassberry.com

**J. James Jenkins, Jr.**  
(615) 742-6236  
jjenkins@bassberry.com

**David King**  
(615) 742-7890  
dking@bassberry.com

**T. Scott Noonan, Co-Chair**  
(615) 742-6273  
snoonan@bassberry.com

**Cynthia Y. Reisz**  
(615) 742-6283  
creisz@bassberry.com

**Danielle M. Sloane**  
(615) 742-7763  
dsloane@bassberry.com

**Elizabeth S. Warren**  
(615) 742-7719  
ewarren@bassberry.com

**Philip F. Berg**  
(615) 742-7908  
pberg@bassberry.com

**Valere B. Fulwider**  
(615) 742-7742  
vfulwider@bassberry.com

**Anna Grizzle**  
(615) 742-7732  
agrizzle@bassberry.com

**Nancy S. Jones**  
(615) 742-6239  
njones@bassberry.com

**Leslie Maclellan**  
(615) 742-7818  
lmaclellan@bassberry.com

**Brenda N. Phillips**  
(615) 742-6237  
bnphillips@bassberry.com

**Scott B. Shanker**  
(901) 543-5932  
sshanker@bassberry.com

**Krista L. Thornton**  
(615) 742-7734  
kthornton@bassberry.com

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**NASHVILLE Downtown**  
AmSouth Center  
315 Deaderick St. · Ste. 2700  
Nashville, TN 37238-3001  
(615) 742-6200

**KNOXVILLE**  
1700 Riverview Tower  
900 S. Gay St.  
Knoxville, TN 37902  
(865) 521-6200

**MEMPHIS**  
The Tower at Peabody Place  
100 Peabody Place · Ste. 900  
Memphis, TN 38103-3672  
(901) 543-5900

**NASHVILLE Music Row**  
29 Music Square East  
Nashville, TN 37203-4322  
(615) 255-6161