



April 25, 2012

Marilyn B. Tavenner
Administrator (Acting)
Centers for Medicare and Medicaid Services
U.S. Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

Dear Ms. Tavenner:

On behalf of the Professional Services Council (PSC), I am writing to reaffirm our opposition to efforts by the Centers for Medicare and Medicaid Services (CMS) within the Department of Health and Human Services (HHS) to create and sponsor a new Federally Funded Research and Development Center (FFRDC) to encompass all of CMS' needs, including those associated with the Affordable Care Act (P.L. 111-148) and other "current and future statutorily driven requirements." For the reasons outlined in this letter, PSC does not believe that CMS has met all of the new requirements imposed on CMS by law or by the Federal Acquisition Regulation (FAR).

Founded 40 years ago, PSC is the voice of the government professional and technical services industry. PSC's 350 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states. A number of our members contract with CMS to provide a variety of services.

PSC recognizes that the Affordable Care Act imposes significant substantive and administrative requirements on CMS and other parts of HHS, with tight implementation deadlines. While we have not participated in the policy debate over the enactment or implementation of the Affordable Care Act, CMS must be provided with appropriate resources to fairly and fully implement the statutory requirements imposed on it. In our view, those resources can be obtained through a variety of methods, including hiring new federal employees and retaining appropriately competed contractor support. Even if an FFRDC is the only approach to obtain certain resources, CMS has failed to narrowly define the scope of work for any new FFRDC and thus creates an open-ended organization that will benefit from the non-competitive, no-bid assignment of work that is contrary to statutory requirements and presidential direction.

Statutory requirement

On March 29, 2012, CMS published an “announcement” in the *Federal Register* regarding CMS’ intent to establish an FFRDC to facilitate the modernization of business processes and supporting systems and their operations.¹ This announcement derives from the congressional mandate in Section 219 of the fiscal year 2012 Health and Human Services Appropriations Act² that requires CMS to outline (1) how a CMS FFRDC would meet the specific requirements of section 35.017-2 of the Federal Acquisition Regulation (FAR); (2) CMS’ agency procedures that ensure that small business competitiveness is maintained; and (3) a transparent award and governance program to be employed by CMS. In our view, the CMS notice fails to provide adequate information responding to the first two of the required elements.

Compliance with FAR 35.017-2

FAR 35.017-2 provides that, before an agency may create a new FFRDC, it must comply with both procedural and substantive requirements to ensure:

- (a) Existing alternative sources for satisfying agency requirements cannot effectively meet the special research or development needs.
- (b) The notices for publication (see FAR 5.205(b)) are placed as required.
- (c) There is sufficient Government expertise available to adequately and objectively evaluate the work to be performed by the FFRDC.
- (d) The Executive Office of the President, Office of Science and Technology Policy, is notified.
- (e) Controls are established to ensure that the costs of the services being provided to the Government are reasonable.
- (f) The basic purpose and mission of the FFRDC is stated clearly enough to enable differentiation between work which should be performed by the FFRDC and that which should be performed by non-FFRDCs.
- (g) A reasonable continuity in the level of support to the FFRDC is maintained, consistent with the agency’s need for the FFRDC and the terms of the sponsoring agreement.
- (h) The FFRDC is operated, managed, or administered by an autonomous organization or as an identifiably separate operating unit of a parent organization, and is required to operate in the public interest, free from organizational conflict of interest, and to disclose its affairs (as an FFRDC) to the primary sponsor.
- (i) Quantity production or manufacturing is not performed unless authorized by legislation.
- (j) Approval is received from the head of the sponsoring agency.

¹ 77 F.R. 19019, March 29, 2012, available at <http://www.gpo.gov/fdsys/pkg/FR-2012-03-29/pdf/2012-7495.pdf>

² DEPARTMENTS OF LABOR, HEALTH AND HUMAN SERVICES, EDUCATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2012, included as Division F of the Consolidated Appropriations Act, 2012 (P.L. 112-74), enacted December 23, 2011. Section 219 provides: “None of the funds appropriated or otherwise made available in this Act may be expended to advance the creation of a Federally Funded Research and Development Center at the Centers for Medicare and Medicaid Services, prior to a Federal Register notice being issued that outlines: how this proposal would meet the specific requirements identified in FAR 35.017-2; agency procedures that ensure small business competitiveness is maintained; and the outline of a transparent award and governance process to be employed.”

In 2011, CMS published three notices in the *Federal Register*, as required by the FAR, stating the agency's intent to establish and sponsor a new FFRDC.³ To its credit, CMS complied fully with this procedural requirement.

PSC responded quickly and fully to those notices and raised concerns about CMS' compliance with the substantive requirements of the FAR before an agency may create a new FFRDC.⁴ In our view, CMS has failed to substantively address the issues and concerns PSC raised in our letters, notwithstanding the assertion in the March 29, 2012 *Federal Register* notice that "CMS has considered the concerns and interest expressed by many federal contractors and contractor organizations to ensure the establishment of the FFRDC is operated within the parameters of the original intent," or the additional statements included in this or prior notices.

In the March 29 notice, CMS describes its need for "assistance in developing requirements, identifying strategies for meeting statutory and programmatic requirements, analyzing existing CMS systems and approaches to meeting needs and developing metrics and measures for assessing agency performance." While these requirements are daunting, we believe that CMS has foreclosed all but one alternative—creating a new FFRDC — to accomplish these requirements. First, CMS indicated that it surveyed existing FFRDCs and concluded that none of them could "effectively meet all of its requirements" (emphasis added). Next, CMS concluded from its market research of existing government-wide contracts or GSA schedules that "there is not a single source to fit CMS' unique need" (emphasis added). Finally, CMS finds that the "contractors on those contracts" have other government contracts and compete for business that "may interfere with the ability to maintain objectivity and independence."

Having arbitrarily set up the premise that the CMS current and future needs can only be fulfilled by a single entity that has the ability to maintain objectivity and independence, but then looking at only a limited set of current multiple-award contracts, it is not surprising that CMS concludes that the appropriate approach is the one they have been advocating for more than a year—creating a new FFRDC.⁵ To the best of our knowledge, CMS never conducted any public "request for information" to solicit information from the public whether there are any firms with the requisite capabilities that are not a current holder of one of the multiple award contracts CMS evaluated. [To the best of our knowledge, CMS never solicited information from the public to determine whether more than one contract with entities that have some, but not all, of the requisite skills at this time, but that are capable of developing or appropriately obtaining the additional required skills, could fulfill its needs, particularly since CMS acknowledges that the work of the FFRDC will evolve over time.] Finally, since CMS' intended FFRDC sponsoring agreement is explicitly and intentionally broad enough to accommodate work that

³ Those CMS notices were published on April 13, 2011 (available at <http://www.gpo.gov/fdsys/pkg/FR-2011-04-13/pdf/2011-8942.pdf>); May 13, 2011 (available at <http://www.gpo.gov/fdsys/pkg/FR-2011-05-13/pdf/2011-11708.pdf>); and June 14, 2011 (available at <http://www.gpo.gov/fdsys/pkg/FR-2011-06-14/pdf/2011-14706.pdf>).

⁴ PSC's letters to CMS were submitted on April 11, 2011 (available at http://www.pscouncil.org/PolicyIssues/ServicesIndustrialBaseCompetitiveness/ServicesIndustrialBaseCompetitivenessIssue/Comments_on_Creatio.aspx) and on June 27, 2011 (available at http://www.pscouncil.org/PolicyIssues/ServicesIndustrialBaseCompetitiveness/ServicesIndustrialBaseCompetitivenessIssue/Comments_on_Creation.aspx).

⁵ Interestingly, the March 29, 2012 announcement acknowledges that the Secretary of Health and Human Services approved the establishment of an FFRDC on March 17, 2011, even before public notice of the intent to create such an FFRDC was first published on April 13, 2011. There is no indication from CMS that the public comments or congressional requirement had any impact on the predetermined outcome.

may be required by other components of the department unrelated to the implementation of the Affordable Care Act,⁶ we believe CMS focused too narrowly on the capabilities of the private sector to meet CMS or HHS needs without creating an FFRDC (or by significantly narrowing the core responsibility of work to be performed by any FFRDC).

We welcome the CMS commitment stated in the March 29 *Federal Register* announcement to conduct a competition for the establishment and award of the basic FFRDC contract, but the announcement is silent on any CMS commitment to carefully and continuously assess whether the assignment of specific tasks to any such FFRDC beyond the initial task orders will be appropriate or can be better accomplished through alternative means. Interestingly, the CMS March 29 announcement merely commits CMS to “maintain a reasonable continuity in the level of support to the FFRDC,” as called for in the FAR, apparently as an over-arching priority rather than to ensure that the work assigned is consistent with the FFRDC mission, complies with the restriction on work that should be performed by non-FFRDC firms, or even should be done at all.

Furthermore, we see no evidence of how CMS will be able to fulfill its commitment to “clearly define FFRDC responsibilities to enable differentiation between the work that the FFRDC can perform and the work that should be performed by non-FFRDCs.” For example, included among the seven major areas for tasking under the FFRDC agreement listed in the CMS-published statement of work are a number of broad functions which are clearly not unique to the need for any special arrangement, such as:

- Strategic/Tactical Planning and Analysis: Collaborate on the development and advancement of new legislative initiatives and improvements;
- Acquisition Assistance: Serve on technical evaluation panels;
- Continuous Process Improvement: Designs, develops and conducts presentations across the CMS organization. Evaluates and critiques demonstrations given by other entities.

In addition, among the additional discretionary tasks under the statement of work are: (1) developing and conducting training for government as necessary in support of the contract scope, or (2) conduct[ing] various studies for the government as required (emphasis added) but only as expressly authorized.

Finally, CMS fails to explain how its approach of a single-award indefinite-delivery, indefinite quantity (ID/IQ) contract complies with the statutory preference for the award of a multi-award contract.

Small Business Competitiveness

Section 219 of the fiscal year 2012 appropriations act requires CMS to specifically describe how the creation of and no-bid assignment of sole-source work to the FFRDC will still ensure that small businesses are not adversely affected. We compliment CMS for making the commitment in the March 29 announcement that “every requirement, as part of the governance process, will be reviewed by the department small business specialist before initiating any contracting action under the FFRDC” (emphasis added). It is also encouraging that senior executive performance plans include a component based on achieving small business goals. However, while CMS

⁶ While CMS has never publicly released the sponsoring agreement, the April 13, 2011 *Federal Register* notice explains that CMS intends to permit the FFRDC to perform work for other components of HHS and such work will not be limited to the tasks associated exclusively with implementation of the Affordable Care Act.

has exceeded its overall small business goals, the agency has not been so successful over the past several years in meeting several of the subcomponent small business goals, such as for small disadvantaged businesses or service-disabled veteran-owned (SDVO) firms. The scope of work created for the FFRDC, and the ease of making non-competitive assignments of work to the FFRDC, put a premium on the effectiveness of these small business reviews. Since there is no indication that CMS will make public information about the work assigned to the FFRDC, we strongly encourage CMS and the department's small business office to develop a mechanism for providing information on the nature of these reviews and the actions taken.⁷ We also recommend that CMS (and HHS) make the 2012 (and subsequent) Small Business Strategic Plan public.

Award and Governance Process

The third component of the statutory direction was to address a transparent award and governance process for the FFRDC. According to the March 29 CMS announcement, CMS intends to conduct a "full and open" competition using the negotiated procedures outlined in Part 15 of the FAR. To its credit, in November 2011, CMS published a draft solicitation with request for comments and will, of course, publicly post the final solicitation for competition. Once the FFRDC award is made, CMS notes that it has already created an executive steering committee to provide guidelines and procedures for ensuring compliance, for using established controls to ensure the costs of services under the FFRDC are reasonable, and by establishing a quality performance plan to monitor performance of the FFRDC. We have no reason to doubt the CMS commitment but many of these tasks have never been performed by CMS or any component of HHS.

Conclusion

PSC recognizes the importance of CMS fulfilling its statutory mandates under the Affordable Care Act and other statutes and the challenges that these laws impose on CMS. Yet for more than a year, CMS has been singularly focused on one and only one solution—the creation of an FFRDC to provide CMS and other components of HHS with an unconstrained source of staff augmentation and program support across a wide scope of work with an opportunity to perform additional undefined functions to meet current or even unknown future requirements. In our view, CMS has not adequately evaluated alternative mechanisms to meet its known current needs, even if that includes creating a properly constrained FFRDC. The limited governance structure CMS identifies may not be sufficient to ensure that the FFRDC work is narrowly focused and does not inappropriately compete with work properly done by other current and future contractors, including small business. As such, PSC continues our opposition to the CMS initiative.

⁷ In the section of our comments titled "Award and Governance Process" we note that CMS commits to include in the publicly available Federal Procurement Data System and the USASpending.gov website information on task orders; we welcome such transparency but this action does not provide information about the opportunities that were reviewed and the actions taken to ensure small business is not unfairly affected.

Thank you for your attention to these comments. If PSC can provide any additional information, please do not hesitate to contact Alan Chvotkin, PSC's Executive Vice President and Counsel, or me.

Sincerely,

A handwritten signature in black ink, appearing to read "Stan Soloway". The signature is stylized with a large, looped initial "S" and a cursive "Soloway".

Stan Soloway
President & CEO

Cc: Daniel Kane, Director, Office of Acquisition and Grants Management, CMS
Candice Savoy, Contract Specialist, CMS