Dear Purchaser:

Attached is a Microsoft Word Subcontract Template that has been created specifically to address CMS’s particular rules and requirements for HME competitive bidding. This Template is for use by medical equipment suppliers who wish to get involved in the competitive bidding process, but who will need assistance in order to supply fully the entire Competitive Bidding Area (“CBA”). These suppliers either prefer not to form a network or cannot qualify to form a network, because they do not fall under the definition of small supplier (“a company which earns $3.5 million in gross revenue or less”) or because they prefer maintaining complete control over their operations. Suppliers who prefer to pursue subcontracting arrangements will have direct control over their subcontractors. Also, suppliers who enter into a subcontracting arrangement may also compete for the “bid” and may serve as both a subcontractor and a contractor if they win the bid.

Note that each bid winner must notify the CBIC about each subcontracting arrangement within ten (10) days of signing a contract with CMS, and must disclose whether each subcontractor satisfies the requirements set forth in Regulation 414.422.

1. **Reasons for Subcontracting.**

   In order to comply with federal and state health care and antitrust laws, rules and regulations, including but not limited to the Federal Anti-Kickback Statute (42 U.S.C. §§1320a-7b), a supplier should not enter into a subcontract without being able to provide a legitimate business purpose. Suppliers will choose from one of three options in subcontracting agreements: (1) product line support and (2) geographic access support, and (3) personnel support.

   The product line support option is for those suppliers who can deliver product to the entire geographic area of the CBA, but may not be able to supply the amount of product to cover all of its customers needs. This option would also apply if the subcontractor has special vendor relationships that affect the cost of selection of equipment or supplies. The geographic support option is for suppliers who do not have the capacity to deliver items throughout the entire CBA. The personnel support option is for suppliers who do not have the administrative personnel to handle the volume of business in the CBA.
A supplier may have more than one reason for having a subcontract and some may choose more than one option.

2. **Options.**

The Subcontract Template has several options which have been highlighted throughout the subcontracts. If an option is not accepted then it should be deleted. The deletion of some options will lead to the deletion of others. Also, some of the options are dependent on how much client contact the contractor envisions for the subcontractor.

Be sure to remove the instructional text for the final version. Also fix the italicized and emboldened text once you have chosen your textual options.

3. **Preamble.**

In the preamble to the Contract, there are several blanks to be filled in: the name of the company (be careful about trade names and business structure -- LLC or corporation), the product category for which a Contractor has bid upon, and the CBA for the bid. The Contractor should list all products and services encompassed in the product category ("Product") on "Exhibit A." The “effective date” of the Agreement goes on page one. The “signing date” goes on the last page. These dates typically will be different.

In the final "WHEREAS" paragraph in the preamble, Contractors should choose either the product line support, geographic access support or personnel support option depending on the reason for his subcontracting agreement. A Contractor may choose more than one option.

4. **Details.**

Details concerning specific provisions and options are discussed below.

1.1.2. **Training.** A Contractor may wish for the Subcontractor to provide equipment set-up and demonstrations, and patient instruction.

1.6. **Subcontractor Warrants Eligibility.** In 1.6.1 of this Section the Subcontractor must warrant that it meets all of the preconditions required by CMS for participation as a Medicare supplier. Also, this paragraph requires the Subcontractor to provide to the Contractor immediately upon request all evidence of compliance, including proof of accreditation, etc. The Subcontractor also must notify the Contractor immediately of any status changes. Accreditation is required unless the Subcontractor falls into a statutory exception or unless the Subcontractor’s role is limited to
purchasing inventory, repairing rented equipment or delivery of items via FedEx, UPS, etc. Also, a surety bond is required only if the Subcontractor is enrolled in the Medicare program as a DMEPOS supplier.

It is strongly recommended that the Contractor obtain and evaluate this information prior to signing this Agreement.

In 1.6.2 of this Section, the Subcontractor must warrant about past legal problems which may affect eligibility. In Option 2, Subcontractor must warrant and represent that it has never been excluded from the Medicare program, any state health program, or any other government executive procurement or nonprocurement activity. Option 1 is a more broad representation that Subcontractor has never had legal action taken against it, nor has it been subject to any sanctions. Ideally all Subcontractors would agree to Option 1.

It is clear in the commentary to the Competitive Bidding Rules that a subcontractor or contractor who has been excluded from Medicare will not be eligible, but the mere existence of a former legal action or sanction does not automatically exclude a subcontractor. But 42 C.F.R. § 414.414 requires all bidders to disclose any legal actions or sanctions by government agencies against themselves or their subcontractors.

If a Subcontractor cannot choose Option 1, a Contractor should fully examine the reasons why Subcontractor was investigated in the past and assess whether the Contractor feels comfortable entering into a business relationship with Subcontractor. The Contractor should also be aware that depending on the nature of Subcontractor’s prior conduct which led to legal actions, CMS may have an unfavorable view of Subcontractor unfavorably and therefore be biased against Contractor’s bid.

1.8. **Subcontractor Agreement Not to Compete.** Contractors should be prepared for some Subcontractors to refuse to enter into a non-compete. Under the current rules a supplier may be both a subcontractor and a contractor, so Subcontractors may not want to limit themselves since there is a possibility that both Contractor and Subcontractor could win the bid. If a Subcontractor will not enter into a non-compete, Option 1 should be deleted. Evaluate the competition risks carefully.

**Article II Billing and Collection Activities.** This article is entirely optional. Contractors should keep in mind that they will be ultimately responsible for any billing errors made by their Subcontractors, and any errors could potentially lead to a loss of the bid.

3.2. **Fees.** Contractor must fill out “Exhibit B” and set forth the fees that Subcontractor will be paid for both the items and services that appear on “Exhibit A.”
3.3 **Contractor Sole Liable Party.** If Contractor opted to keep Article II, Contractor should keep “for billing and collection services, and” within the body of the paragraph.

3.5. **Insurance.** Subcontractor is required to provide Contractor with proof of insurance. Contractor may add the optional statement which requires Contractor to provide proof of insurance to Subcontractor. Insurance limits must be set in an amount that either equals or exceeds the requirements for durable medical equipment suppliers. Presently, Medicare supplier standard 10 requires all DME companies to maintain comprehensive liability insurance of $300,000.00 that covers a DME’s place of business, all of its employees and customers. In addition, a DME must maintain product liability insurance if it manufactures any products. In the contract template, the requirements have been set at $1,000,000.00; however, these limits may be adjusted. Contractors are advised to require subcontractors to maintain an amount equal to or greater than the insurance they carry.

4.2 **Indemnification by Contractor.** In Section 4.1 Subcontractor agrees to indemnify the other party in the event that a lawsuit arises as a result of Subcontractor’s negligence. Contractor may add a reciprocal indemnification provision with the caveat that it will not indemnify Subcontractor for any damages associated with Contractor’s loss of the Bid.

5.1 **Effective Date.** This provision provides an option for the Subcontractor to void the contract if the Subcontractor wins its own competitive bid. The Agreement terminates should Contractor fail to win the bid.

5.2 **Term.** The term of this agreement will be for no more than three (3) years, which is the term of the bid.

5.3(a) **Termination without cause.** This provision allows either party to terminate the agreement upon 90 days notice. Contractor may want to consider adding an option whereby Contractor can terminate the Agreement immediately upon notice even if Contractor wins the Bid.

Article VI **Notice.** The parties should fill in their appropriate notice addresses.

9.7 **Governing Law.** Contractor should fill in its home state.

9.16 **Competitive Bidding Rules.** Subcontractor agrees to cooperate fully in the Competitive Bidding process. It is not know precisely what type of documentation CMS will be looking for from Subcontractors, which is why it is important that a Subcontractor agrees to cooperate fully.
9.17. **Arbitration.** If Contractor wishes to add an arbitration provision, this provision must be reviewed by an attorney, since arbitration provisions are state law specific.

5. **Notice to CBIC.**

Note that each bid winner must notify the CBIC about each subcontracting arrangement within ten (10) days of signing a contract with CMS, and must disclose whether each subcontractor satisfies the requirements set forth in Regulation 414.422. These requirements (accreditation, etc.) are identified are on Pages 2-3 of this letter, in the discussion of Section 1.6 of the Template.

6. **Not Legal Documents.**

The Subcontract Template is not a legal document and should not be used without consulting an attorney. Our presentation of this Template and your acceptance of it does not establish an attorney-client relationship.

This Template is based on an analysis of CMS rules and regulations governing Competitive Bidding as of January 16, 2009. This Template should be modified by a health law attorney in order to accommodate your particular needs. You may engage the Health Law Center for advice or any other competent health care attorney.

Please be advised that all sales are final.

If you wish to engage the Health Law Center’s services, please feel free to call us at (864) 676-9075, or write or e-mail us at the addresses listed above.

Very truly yours,

THE HEALTH LAW CENTER

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