

a competitive bidding program, or a particular mode of delivery for an item, if he or she determines that the particular brand or mode of delivery would avoid an adverse medical outcome for the beneficiary.

(2) When a physician or treating practitioner prescribes a particular brand or mode of delivery of an item under paragraph (a)(1) of this section, the physician or treating practitioner must document the reason in the beneficiary's medical record why the particular brand or mode of delivery is medically necessary to avoid an adverse medical outcome.

(b) *Furnishing of a prescribed particular brand item or mode of delivery.* If a physician or treating practitioner prescribes a particular brand of an item or mode of delivery, the contract supplier must—

(1) Furnish the particular brand or mode of delivery as prescribed by the physician or treating practitioner;

(2) Consult with the physician or treating practitioner to find an appropriate alternative brand of item or mode of delivery for the beneficiary and obtain a revised written prescription from the physician or treating practitioner; or

(3) Assist the beneficiary in locating a contract supplier that can furnish the particular brand of item or mode of delivery prescribed by the physician or treating practitioner.

(c) *Payment for a particular brand of item or mode of delivery.* Medicare does not make an additional payment to a contract supplier that furnishes a particular brand or mode of delivery for an item, as directed by a prescription written by the beneficiary's physician or treating practitioner.

(d) *Prohibition on billing for an item different from the particular brand of item or mode of delivery prescribed.* A contract supplier is prohibited from submitting a claim to Medicare if it furnishes an item different from that specified in the written prescription received from the beneficiary's physician or treating practitioner. Payment will not be made to a contract supplier that submits a claim prohibited by this paragraph.

[72 FR 18085, Apr. 10, 2007]

#### § 414.422 Terms of contracts.

(a) *Basic rule.* CMS specifies the terms and conditions of the contracts entered into with contract suppliers under this subpart. A contract supplier must comply with all terms of its contract, including any option exercised by CMS, for the full duration of the contract period.

(b) *Recompeting competitive bidding contracts.* CMS recompetes competitive bidding contracts at least once every 3 years.

(c) *Nondiscrimination.* The items furnished by a contract supplier under this subpart must be the same items that the contract supplier makes available to other customers.

(d) *Change of ownership.* (1) A contract supplier must notify CMS if it is negotiating a change in ownership 60 days before the anticipated date of the change.

(2) CMS may award a contract to an entity that merges with, or acquires, a contract supplier if—

(i) The successor entity meets all requirements applicable to contract suppliers for the applicable competitive bidding program;

(ii) The successor entity submits to CMS the documentation described under § 414.414(b) through (d) if that documentation has not previously been submitted by the successor entity or the contract supplier that is being acquired, or is no longer current. This documentation must be submitted within 30 days prior to the anticipated effective date of the change of ownership. A successor entity is not required to duplicate previously submitted information if the previously submitted information is still current;

(iii) The successor entity is acquiring the assets of the existing contract supplier, it submits to CMS, at least 30 days before the anticipated effective date of the change of ownership, a signed novation agreement acceptable to CMS stating that it will assume all obligations under the contract; or

(iv) A new entity will be formed as a result of the merger or acquisition, the existing contract supplier submits to CMS, at least 30 days before the anticipated effective date of the change of ownership, its final draft of a novation agreement as described in paragraph

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(d)(2)(iii) of this section for CMS review. The successor entity must submit to CMS, within 30 days after the effective date of the change of ownership and executed novation agreement acceptable to CMS.

(e) *Furnishing of items.* Except as otherwise prohibited under section 1877 of the Act, or any other applicable law or regulation:

(1) A contract supplier must agree to furnish items under its contract to any beneficiary who maintains a permanent residence in, or who visits, the CBA and who requests those items from that contract supplier.

(2) A skilled nursing facility defined under section 1819(a) of the Act or a nursing facility defined under section 1919(a) of the Act that has elected to furnish items only to its own residents and that is also a contract supplier may furnish items under a competitive bidding program to its own patients to whom it would otherwise furnish Part B services.

(3) Contract suppliers for diabetic testing supplies must furnish the brand of diabetic testing supplies that work with the home blood glucose monitor selected by the beneficiary. The contract supplier is prohibited from influencing or incentivizing the beneficiary by persuading, pressuring, or advising them to switch from their current brand or for new beneficiaries from their preferred brand of glucose monitor and testing supplies. The contract supplier may not furnish information about alternative brands to the beneficiary unless the beneficiary requests such information.

(f) *Disclosure of subcontracting arrangements*—(1) *Initial disclosure.* Not later than 10 days after the date a supplier enters into a contract under this section the supplier must disclose information on both of the following:

(i) Each subcontracting arrangement that the supplier has in furnishing items and services under the contract.

(ii) Whether each subcontractor meets the requirement of section 1834(a)(20)(F)(i) of the Act if applicable to such subcontractor.

(2) *Subsequent disclosure.* Not later than 10 days after the date a supplier enters into a subcontracting arrangement subsequent to contract award

with CMS, the supplier must disclose information on both of the following:

(i) The subcontracting arrangement that the supplier has in furnishing items and services under the contract.

(ii) Whether the subcontractor meets the requirement of section 1834(a)(20)(F)(i) of the Act, if applicable to such subcontractor.

(g) *Breach of contract.* (1) Any deviation from contract requirements, including a failure to comply with governmental agency or licensing organization requirements, constitutes a breach of contract.

(2) In the event a contract supplier breaches its contract, CMS may take one or more of the following actions:

(i) Require the contract supplier to submit a corrective action plan;

(ii) Suspend the contract supplier's contract;

(iii) Terminate the contract;

(iv) Preclude the contract supplier from participating in the competitive bidding program;

(v) Revoke the supplier number of the contract supplier; or

(vi) Avail itself of other remedies allowed by law.

[72 FR 18085, Apr. 10, 2007, as amended at 74 FR 2881, Jan. 16, 2009; 75 FR 73623, Nov. 29, 2010]

§ 414.423 Appeals Process for Termination of Competitive Bidding Contract.

This section implements an appeals process for suppliers that CMS has determined are in breach of their Medicare DMEPOS Competitive Bidding Program contracts and where CMS has taken action to terminate the supplier's contract. Except as specified in this regulation termination decisions made under this section are final and binding.

(a) *Terminations for breach of contract.* CMS may terminate a supplier's DMEPOS Competitive Bidding Program contract when it determines that the supplier has violated any of the terms of its contract.

(b) *Notice of termination.* (1) *CMS notification.* If CMS determines a supplier to be in breach of its contract either in part or in whole, it will notify the Medicare DMEPOS supplier of the termination by certified mail.