

# Dallas Oxygen Owner Speaks Out on Bidding Lawsuit

May 17, 2010 11:07 AM

DALLAS—“We have to abide by the laws that are set down by CMS, and CMS should also have to abide by the laws that are set down by the federal government,” said Dean Cheney. “If it takes filing a lawsuit to get them to abide by those laws, that’s what we have to do.”

And that’s why Cheney, the owner of Dallas Oxygen Corp., joined the Texas Alliance for Home Care Services to bring suit last week against the Department of Health and Human Services and the Centers for Medicare and Medicaid Services over CMS’ refusal to release financial standards for competitive bidding.

“They have to divulge it,” Cheney said bluntly. “If we have to abide by the law as the [durable medical equipment] industry, then CMS should also have to abide by the law. And the law says they have to make this transparent and they have to divulge how they are using our financial information.

“We have been asking for it and asking for it and asking for it, and they keep telling us it is none of our business,” added Cheney, who is a member of the TAHCS board of directors.

The lawsuit, filed May 10 in U.S. District Court for the District of Columbia, alleges that CMS and HHS have failed to specify financial standards that providers must meet under the DMEPOS competitive bidding program, and that public comment was not considered in crafting the bidding rule. The agency has repeatedly declined to release the standards, saying that to do so would invite fraud and give providers an unfair bidding advantage.

“We want the courts to stop competitive bidding until CMS releases that [financial] information to us,” Cheney said. “If they want to release it right now, I have no problem with that. But competitive bidding needs to be stopped, mainly because it doesn’t make sense.”

Since news of the lawsuit came as industry members were assembling for Medtrade Spring in Las Vegas, Cheney, who has been in the HME business for 39 years, said he has received an appreciative response from peers. “Everybody was slapping me across the back and saying, ‘We’re glad you did it,’” he said. “But someone has to do it. Someone has to stand up and say this is not right.

“It is wrong, downright wrong,” he continued. “The guidelines were put into place by Congress [for everyone] to follow. We want to hold them to the same guidelines that we are held to. That’s all we are asking for—follow the law.”

Industry stakeholders, while applauding the suit, said they are concerned about the tight timeline. CMS has said it will release bid rates in June and the winning suppliers in September.

“CMS has 60 days to respond, then we respond to them,” said Jim Tozzi of the Center for Regulatory Effectiveness, whose legal arm is handling the lawsuit. “We won’t get this by June 1. But maybe in September we could possibly get some movement. It’s hard to predict a timeline.”

Seth Johnson, vice president for government affairs for Exeter, Pa.-based Pride Mobility Products, said he supports the filing of the lawsuit “because it raises additional concerns about the competitive bidding process.”

However, he added, “I’m just concerned that [a resolution] could be too late ... Once the bid rates come out, the damage is largely going to be done.”

Industry stakeholders have been vocal about worries that some providers, especially those whose businesses are largely Medicare, have submitted “suicide” bids that are unsustainable and that will result in huge numbers of providers closing and severe problems with patient access.

Tozzi noted CMS has been resistant to the industry’s call to allow the continued participation in Medicare of any provider willing to accept competitive bidding rates. Currently, the program will eliminate all providers except those chosen as winning suppliers.

“You aren’t going to get rid of competitive bidding because of the law,” he said, referring to a congressional mandate to establish competitive bidding for DMEPOS. “But can it go on without the devastating results on the industry?”