

**CENTERS FOR MEDICARE AND MEDICAID SERVICES
HEARING OFFICER DECISION**

IN THE MATTER OF:

Provider Partners Health Plan of Missouri, Inc.

**Denial of Medicare Advantage-Prescription
Drug Initial Application**

DOCKET NO. 2019 MA-PD APP. 07

**Contract Year 2020
Contract No. H1970**

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I. JURISDICTION

This appeal is provided pursuant to 42 C.F.R. §§ 422.660 and 423.650. The Centers for Medicare and Medicaid Services (CMS) Hearing Officers designated to hear this case are the undersigned, Benjamin R. Cohen and Stephany Young.

II. ISSUE

Whether CMS properly denied the initial application submitted by Provider Partners Health Plan of Missouri, Inc. (PPHP-MO) to offer a Medicare Advantage – Prescription Drug (MA-PD) plan for contract year (CY) 2020.

III. DECISION

The Hearing Officers conclude that PPHP-MO has not met its burden of proving that CMS' denial of its MA-PD application was inconsistent with the regulatory requirements because it did not submit with its application an executed contract with one of the first tier, downstream or related entities which it listed as performing Part D functions on its behalf (or revise the subcontractor information to delete any reference to Provider Partners Health Plan of Illinois, Inc. (PPHP-IL)). Accordingly, the Hearing Officers affirm CMS' denial of PPHP-MO's MA-PD application.

IV. PROGRAM BACKGROUND

The Medicare Advantage (MA or Part C) program offers Medicare beneficiaries the option of receiving health care benefits through a privately-operated coordinated care delivery system.¹ The Social Security Act (the Act) authorizes the Secretary of the United States Department of Health & Human Services (the Secretary) to contract with entities seeking to offer MA and Medicare outpatient prescription drug (Part D) benefits to their plan enrollees.² Through regulation, the Secretary has delegated this contracting authority to CMS, which has established the general provisions for entities seeking to qualify as MA-PD plans.³ An organization may not offer MA or Part D benefits unless it has entered into a contract with CMS.⁴ An MA organization offering coordinated care plans (including Health Maintenance Organizations) must offer Part D benefits in the same service area.⁵ Entities seeking to offer a new MA product must demonstrate, through the submission of an application developed by CMS, that they meet the qualifications.⁶ CMS conducts a review of all submitted MA applications and issues determinations consistent with 42 C.F.R. § 422.502(c).

¹ See 42 U.S.C. §§ 1395w-21 *et seq.*; see also 42 C.F.R. § 422.4(a)(1) (“[a] coordinated care plan is a plan that includes a network of providers that are under contract or arrangement with the organization to deliver the benefit package approved by CMS.”).

² 42 U.S.C. § 1395w-27; see also § 1395w-112.

³ 42 C.F.R. §§ 422.400, 422.503(b).

⁴ 42 U.S.C. § 1395w-27(a); see also § 1395w-112(b)(1).

⁵ 42 C.F.R. § 422.4(c)(1).

⁶ *Id.* at § 422.501.

In order to meet the requirement that they offer a Part D plan, MA organizations must also meet the Part D application requirements to demonstrate their qualification as a Part D sponsor.⁷ Organizations intending to offer Part D benefits must complete a certified application in the form and manner required by CMS.⁸ Applicants must demonstrate that they meet all Part D program requirements to qualify as an MA-PD sponsor in their proposed service area. Furthermore, in order to ensure their compliance with the terms and conditions of its contract with CMS, an organization must enter into a contract with all first tier, downstream, and related entities who will perform Part D related functions on their behalf.⁹ CMS conducts a review of all submitted Part D applications and issues determinations consistent with 42 C.F.R. § 423.503(c). These determinations are based solely on information contained in the applications.¹⁰

After an organization timely submits its initial application, CMS affords applicants two opportunities to correct any deficiencies. Following the initial review, CMS issues an email notice to an applicant informing it of a courtesy opportunity to submit curing materials (courtesy notice).¹¹ Following a second round of review, CMS issues a Notice of Intent to Deny (NOID), pursuant to 42 C.F.R. § 423.503(c)(2), affording the applicant ten days to provide curing materials. If CMS does not receive a revised application or a revised application still does not demonstrate that the applicant is qualified to act as a Part D sponsor, CMS denies the application pursuant to 42 C.F.R. § 423.503(c)(2)(iii).¹² If CMS denies an MA-PD application, the applicant has a right to a hearing before a CMS Hearing Officer in accordance with 42 C.F.R. §§ 422.660 and 423.650. At the hearing, the applicant has the burden of proving by a preponderance of the evidence that CMS' determination was inconsistent with the MA-PD regulatory requirements.¹³

On January 9, 2019, CMS posted the final Solicitation for Applications for Medicare Prescription Drug Plan 2020 Contracts (Solicitation) on its website. The Solicitation required Part D contract applicants to provide responses to a series of attestations related to Part D requirements as well as documentation demonstrating their ability to meet program requirements. Organizations were to submit their applications through the Health Plan Management System (HPMS), CMS' electronic system of record for the administration of the MA and Part D programs. Organizations were to submit the applications under Contract identification (ID) numbers that HPMS assigned to each entity that provided a notice of intent to apply after October 2018. The applications were due to CMS by February 13, 2019.¹⁴

⁷ *Id.* at §§ 422.500(a), 423.500. 42 C.F.R. § 423.500 notes that, for purposes of that subpart, MA organizations offering Part D plans must follow the requirements for part 422 (Part C) for MA organizations, except in cases where additional requirements are mandated.

⁸ 42 C.F.R. § 423.502(c)(1).

⁹ *Id.* at § 423.505(i); final Solicitation for Applications for Medicare Prescription Drug Plan 2020 Contracts at 3.1.1.C.

¹⁰ 42 C.F.R. § 423.503(a)(1).

¹¹ CMS' June 18, 2019 Reply Brief and Motion for Summary Judgment at 2 and Exhibit A.

¹² *Id.* at 2-3.

¹³ 42 C.F.R. §§ 422.660(b), 423.650(b).

¹⁴ CMS' June 18, 2019 Reply Brief and Motion for Summary Judgment at 2.

V. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 13, 2019, PPHP-MO submitted both MA and Part D applications for a coordinated care plan contract under contract number H1970.¹⁵ On March 18, 2019, CMS issued a courtesy notice of deficiencies associated with PPHP-MO's Part D application. The March 18, 2019 courtesy notice identified several deficiencies, including an unexecuted contract between PPHP-MO and Envision Pharmaceutical Services, LLC (Envision) and missing contact information. Relevant to this appeal, the notice also included the following language:

CMS has completed its review of your pending 2020 Part D application. This notification is only in relation to your Part D application for contract number H1970. If your organization submitted an application for Medicare Part C under this contract number, the Division of Medicare Advantage Operations will notify you of the results of its review in a separate communication.

This review of your Part D application under H1970 identified certain deficiencies which are listed below.

....

-Your organization did not upload an executed contract with one of the first tier, downstream or related entities that is performing a Part D function on your behalf. The first tier, downstream or related entity referenced is Provider Partners Health Plan of IL, Inc[.]

....

CMS is providing your organization with an opportunity to correct the above noted deficiencies. For those issue areas that require an upload of a document in CMS' Health Plan Management System (HPMS) please note, you are required to resubmit ALL of the documents for that particular section

The HPMS gates will be open for your organization to make the appropriate changes. You must submit the materials via the Health Plan Management System (HPMS) no later than March 26, 2019, 8:00 PM Eastern. For all resubmissions, applicants MUST click the Final Submit button in HPMS. If you experience any technical problems with HPMS during this time period please contact the HPMS Help Desk at 1-800-220-2028.¹⁶

¹⁵ *Id.* at 3; PPHP-MO's June 11, 2019 Initial Brief at 2.

¹⁶ PPHP-MO's June 11, 2019 Initial Brief, Exhibit 2 at 2 (emphasis added).

Two CMS employees were also listed as points of contact and their email addresses were provided in the courtesy notice.

On March 25, 2019, PPHP-MO uploaded a signed contract between it and Envision.¹⁷ On April 15, 2019, CMS issued a NOID to PPHP-MO. The Notice, using the exact same language from the courtesy notice with regard to the deficiency, indicated the following:

Thank you for the application your organization submitted in response to the Medicare Prescription Drug Benefit-Solicitation for Applications for Part D Sponsors.

Unfortunately, after thorough review of your application, CMS has determined that your organization does not meet the qualifications set forth in the solicitation. CMS intends to deny your application and this letter provides you notice of the reasons for the intended denial in accordance with 42 CFR §423.503(c)(2).

You have ten (10) days after the date of this notice to submit materials that cure the identified deficiencies. You must submit the materials via the Health Plan Management System (HPMS) no later than April 25, 2019, 8:00 PM Eastern. You must follow instructions in Section 2 of the PDP [Prescription Drug Plans] or MA-PD Part D applications for submitting materials via HPMS.

If the material you submit during the ten (10) day period cures the identified deficiencies, CMS will issue a letter indicating conditional approval of the submitted application. If the material you submit does not cure the deficiencies, CMS may deny your application. CMS will notify you in writing of its decision.

....

CMS identified the following deficiencies in your application:

....

-Your organization did not upload an executed contract with one of the first tier, downstream or related entities that is performing a Part D function on your behalf. The first tier, downstream or related entity referenced is Provider Partners Health Plan of IL, Inc[.]¹⁸

¹⁷ *Id.*; June 27, 2019 Transcript of Proceedings (Tr.) at 83.

¹⁸ PPHP-MO's June 11, 2019 Initial Brief, Exhibit 3 at 2 (emphasis added).

The NOID also provided the email addresses and phone numbers of two CMS employees to contact with any questions.

PPHP-MO did not submit any materials to cure the identified deficiency in the NOID. Following the second deficiency notice, on May 22, 2019, CMS issued an MA-PD Drug Application Denial Notice to PPHP-MO using the exact same language from the prior deficiency notices. The Denial Notice stated the following with regard to the uncured deficiency:

CMS determined that you are not qualified to enter into a contract with CMS under Parts C and/or D of Title XVIII of the Social Security Act. . . .

CMS denied your application based on the following deficiencies:

Part D Deficiencies:

Contracting

-Your organization did not upload an executed contract with one of the first tier, downstream or related entities that is performing a Part D function on your behalf. The first tier, downstream or related entity referenced is Provider Partners Health Plan of IL, Inc[.]¹⁹

On June 3, 2019, PPHP-MO filed a Request for a Hearing with the CMS Office of Hearings appealing the May 22, 2019 Denial Notice. On June 5, 2019, the CMS Office of Hearings acknowledged receipt of PPHP-MO's Hearing Request and set briefing and witness list deadlines for the parties. On June 11, 2019, PPHP-MO submitted its Initial Brief. On June 18, 2019, CMS submitted its Reply Brief and Motion for Summary Judgment. On June 21, 2019, PPHP-MO submitted its Reply and Opposition to CMS' Motion for Summary Judgment and witness list. On June 21, 2019, the CMS Hearing Officers issued an Order denying CMS' Motion for Summary Judgment, noting that potentially material facts remained in dispute. On June 24, 2019, CMS submitted its witness list. A telephonic hearing was conducted on June 27, 2019. Benjamin R. Cohen and Stephany Young served as the CMS Hearing Officers. PPHP-MO was represented by Kelli Back of the Law Office of Kelli D. Back, LLC. CMS was represented by Scott Nelson of the Medicare Drug Benefit and C&D Data Group/Center for Medicare.

VI. PPHP-MO'S POSITION

PPHP-MO requests that the Hearing Officers determine that CMS' denial of its application was invalid.²⁰ PPHP-MO maintains because it had no intention of contracting with PPHP-IL to provide services to PPHP-MO, it did not understand why CMS had flagged as an issue the failure to upload an executed contract with PPHP-IL. PPHP-MO asserts that in reviewing the contracts it had

¹⁹ *Id.*, Exhibit 1 at 2 (emphasis added).

²⁰ *Id.* at 6.

uploaded into HPMS with its application, it realized that an error had been made. Rather than having uploaded the PPHP-MO contract with Envision, its pharmacy benefit manager, it believed it had inadvertently uploaded an unexecuted contract between PPHP-IL and Envision.²¹

PPHP-MO explains that after recognizing this error, it uploaded the correct signed contract between it and Envision and believed that it removed from HPMS a contract between PPHP-IL and Envision. PPHP-MO asserts in doing so, it believed that it had addressed the issue raised by CMS.²²

PPHP-MO maintains that when CMS issued the NOID, CMS repeated the same language used previously which referenced PPHP-IL. PPHP-MO asserts it did not understand the nature of the deficiency because it believed it had appropriately rectified the deficiency. PPHP-MO contends it reviewed all of the contracts it had uploaded as part of the application and found no reference to PPHP-IL. PPHP-MO maintains for this reason it assumed that CMS had made an error in its reference to PPHP-IL.²³ PPHP-MO asserts, as a result, it took no action to cure the deficiency nor did it contact the CMS employees listed in the NOID for clarification.²⁴ PPHP-MO contends that only as a result of communications with CMS after receiving the denial notice and through re-reviewing its application did it realize that it had identified PPHP-IL as performing a portion of two Part D functions identified on a chart in Section 3.1 of the Part D Solicitation; it corrected the deficiency by removing the references to PPHP-IL.

PPHP-MO maintains the two functions for which it identified PPHP-IL as performing Part D functions on its behalf are “[a] pharmacy benefit program that performs enrollment processing” and “[a] pharmacy benefit program that operates an enrollee grievance and appeals process.” PPHP-MO indicates that PPHP-IL was identified as the sole entity for the pharmacy benefit program that performs enrollment processing; PPHP-IL was identified as the second entity and Envision was identified as the first entity for the pharmacy benefit program that operates an enrollee grievance and appeals process. PPHP-MO argues it intended to include its own entity name and not PPHP-IL in these two places.

PPHP-MO contends that the two functions at issue, enrollment processing and enrollee grievances and appeals, are not permissible grounds for CMS to find a deficiency in its application; further, CMS’ actions materially prejudiced it.²⁵ PPHP-MO argues the Part D enrollment processing function applies only to prescription drug plans. PPHP-MO claims that there is no Part D enrollment processing function applicable to MA-PD sponsors. PPHP-MO asserts CMS’ Part D Prescription Drug Benefit Manual contains the rules that apply to the Part D program. Chapter 3 of that Manual contains the following language:

²¹ Neither an executed or unexecuted contract between PPHP-IL and Envision was actually submitted with PPHP-MO’s application. The unexecuted contract that was originally uploaded was between PPHP-MO and Envision. *See* CMS’ June 18, 2019 Reply Brief and Motion for Summary Judgment, Exhibit E; *see also* Tr. at 80-82.

²² PPHP-MO’s June 11, 2019 Initial Brief at 2; Tr. at 25-27.

²³ PPHP-MO’s June 11, 2019 Initial Brief at 3.

²⁴ Tr. at 42-43.

²⁵ PPHP-MO’s June 11, 2019 Initial Brief at 3; Tr. at 27, 43-45.

Instructions provided in this guidance apply to Medicare Prescription Drug Plans (PDPs) and to 1876 Cost plans offering an optional supplemental Part D benefit. Guidance for eligibility, enrollment and disenrollment procedures for Medicare Advantage (MA) plans is established in the MA Enrollment and Disenrollment Guidance (Chapter 2 of the Medicare Managed Care Manual).²⁶

Thus, PPHP-MO maintains the enrollment requirements applicable to MA-PD sponsors are governed by Part C, not Part D. PPHP-MO contends because there are no Part D enrollment requirements applicable to MA-PD sponsors, it is impermissible for CMS to find an application deficiency due to an MA-PD applicant failing to identify the organization performing this function in the Part D portion of its application.²⁷

PPHP-MO asserts that because it did not intend PPHP-IL to perform a portion of the appeals and grievance function, but rather it intended to perform the function itself, it is unnecessary and inappropriate to treat the failure to submit such a contract as a deficiency. CMS does not require an applicant to have a contract with itself to perform a Part D function. Thus, no contract needed to be uploaded and the grounds for denying the application, the failure to upload an executed contract, was inapplicable and not a valid ground for an application denial. PPHP-MO argues that providing CMS with a contract between it and PPHP-IL when it knew that PPHP-IL would not be providing the service would have had the effect of it potentially violating a number of federal statutes.²⁸

Citing *In the Matter of: Gateway Health Plan of Ohio, Inc.*,²⁹ PPHP-MO contends the ambiguity of CMS' language conveying the deficiency with reference to PPHP-IL materially prejudiced it because it was unable to discern the basis for CMS' finding. PPHP-MO suggests CMS should have specified in its communications that PPHP-IL was identified in the chart generated from the requested information in Section 3.1 of the Solicitation. If CMS had provided this explanation in this manner, it would have immediately understood the nature of the issue and would have corrected it. PPHP-MO asserts CMS' actions cannot prejudice an applicant in a material way that precludes the applicant from understanding the nature of the deficiency. PPHP-MO maintains in order for CMS to fulfill its obligation under 42 C.F.R. § 423.503(c)(2) to provide a summary of the basis for the preliminary finding that the applicant does not appear qualified to contract as a Part D sponsor when it issues the applicant a NOID, the basis for the preliminary finding needs to be sufficiently clear so that the applicant has the ability to understand and rectify the finding.³⁰

VII. CMS' POSITION

CMS asserts the Part D regulations at 42 C.F.R. § 423.505(i) acknowledge that sponsors may contract with other entities to perform Part D related functions on the sponsor's behalf. CMS

²⁶ Available at https://www.cms.gov/Medicare/Eligibility-and-Enrollment/MedicarePresDrugEligEnrol/Downloads/CY_2019_PDP_Enrollment_and_Disrollment_Guidance.pdf (original emphasis omitted).

²⁷ PPHP-MO's June 11, 2019 Initial Brief at 4.

²⁸ PPHP-MO's June 21, 2019 Reply and Opposition to CMS' Motion for Summary Judgment at 4.

²⁹ Docket Number 2013 MA-PD 6 (Aug. 9, 2013) ("Gateway").

³⁰ PPHP-MO's June 11, 2019 Initial Brief at 5-6.

maintains the regulation requires that all contracts with these first tier, downstream and related entities contain certain elements in order to insure that these entities comply with the requirements of the Part D program. CMS asserts the calendar year 2020 Part D Solicitation at Section 3.1.1.C provides:

Where an applicant has elected to use subcontractors to meet Part D requirements, it must demonstrate that it has binding contracts in place that reflect these relationships. These contracts serve as the legal links that form the applicant’s “chain of delegation,” extending from the applicant to the entities (first tier or downstream) that will actually perform the stated function on the applicant’s behalf. Where the function is to be performed by a downstream entity, there must be contracts in place through which the applicant has delegated a function to a first tier entity, which has in turn delegated that function to the downstream entity.

CMS contends the Solicitation requires applicants to identify the entities that will perform certain Part D functions on their behalf and to submit contracts that comply with requirements detailed in the regulation and the Solicitation.³¹ CMS maintains its review of PPHP-MO’s application was limited to the information PPHP-MO provided in response to the Solicitation and the subsequent deficiency notices. Its records indicate, and PPHP-MO acknowledged, that PPHP-MO reported in response to Section 3.1.1.C of its Part D application that PPHP-IL would perform enrollment services on its behalf as a first tier entity and appeals and grievances services as a downstream entity. CMS contends that in providing those responses to Section 3.1.1.C, PPHP-MO created an obligation to provide CMS with executed contracts documenting those relationships in order to receive CMS approval of their Part D application.

CMS contends it is reasonable for CMS to conclude that PPHP-MO’s Chief Executive Officer (CEO) was aware from the time PPHP-MO’s application was submitted that it contained statements that PPHP-IL would perform certain Part D functions on behalf of PPHP-MO and that such an arrangement accurately reflected PPHP-MO’s intentions, as its CEO submitted an executed certification statement as part of its submission. CMS maintains that it provided clear notice to PPHP-MO in both deficiency notices (the courtesy notice and the NOID) that it was required to submit an executed contract with PPHP-IL. CMS asserts since PPHP-MO had itself provided the information that PPHP-IL would act as a subcontractor to PPHP-MO for two categories of Part D functions, it was clear to PPHP-MO what documents CMS was seeking.

Moreover, CMS contends that after receiving the April 15, 2019 NOID, rather than act on the plain meaning of the deficiency notice by providing the PPHP-IL contract (or alternatively, revising the subcontractor information to delete any reference to PPHP-IL), PPHP-MO assumed CMS had made a mistake and took no action. CMS maintains it provided PPHP-MO the opportunity to ask questions of CMS staff if it was confused. Instead, PPHP-MO chose to guess at the meaning of CMS’ clear notice and ignore the direct route to getting its questions answered.

³¹ CMS’ June 18, 2019 Reply Brief and Motion for Summary Judgment at 3 and Exhibit B §§ 3.1.1.C, 3.1.1.D, and 3.1.1.E.

CMS maintains that HPMS records show that the unexecuted contract submitted by PPHP-MO was between PPHP-MO and Envision, not between PPHP-IL and Envision.³² CMS contends that despite PPHP-MO's claim that the deficiency was discovered after communicating with CMS, HPMS records demonstrate that after receiving the May 22, 2019 Denial Notice, PPHP-MO changed its list of subcontractors on May 23, 2019 to delete any reference to PPHP-IL.³³ CMS suggests PPHP-MO thus, was aware that it had listed PPHP-IL in its application prior to making its inquiry to CMS.³⁴

CMS contends that there are Part D enrollment requirements applicable to MA-PD sponsors. CMS cites to Section 3.13 of the Solicitation, 42 C.F.R. §§ 423.4, 423.800(a) and Chapter 4 of the Medicare Prescription Drug Benefit Manual as examples. CMS asserts it is legitimate and necessary for CMS to require that MA-PD applicants demonstrate that they can meet the enrollment requirements on the Part D application in addition to the responses on the subject they may have provided in an MA application. It is appropriate for CMS to require all Part D applicants, including those seeking MA-PD contracts, to provide copies of contracts with entities to which they have delegated responsibility for Part D enrollment functions and described such delegation as part of their applications.³⁵

CMS maintains that it reviewed PPHP-MO's Part D application and reached a decision to deny the application in a manner fully in accordance with the applicable statutes, regulations and guidance. PPHP-MO has not met its burden of proving beyond a preponderance of the evidence that CMS' decision to deny PPHP-MO's application was incorrect. CMS requests that the Hearing Officers deny PPHP-MO's request for relief.³⁶

VIII. DISCUSSION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Officers conclude that PPHP-MO has not met its burden of proving that CMS' determination was inconsistent with the MA-PD regulatory requirements. PPHP-MO was provided with two adequate written notices and an opportunity to correspond with CMS so that PPHP-MO could have timely rectified the deficiency at issue.

In summary, CMS issued a courtesy notice of deficiencies associated with PPHP-MO's Part D application notifying it of four deficiencies. One of these specifically listed PPHP-IL as the first tier, downstream or related entity for which no signed contract was uploaded. In response to the courtesy notice of deficiencies, PPHP-MO uploaded a signed contract between it and Envision, which was one of the identified deficiencies. PPHP-MO did not, however, address the other deficiency which concerned CMS. Specifically, there was still no signed contract between PPHP-MO and PPHP-IL as noted in the courtesy notice. Since PPHP-MO did not provide CMS with what it expected, CMS issued a NOID identifying the same deficiency, using identical language

³² *Id.* at 4-5.

³³ *Id.* at 6; *see also* Tr. at 27-28.

³⁴ CMS' June 18, 2019 Reply Brief and Motion for Summary Judgment at 6.

³⁵ *Id.* at 6-7; Tr. at 16-17, 98.

³⁶ CMS' June 18, 2019 Reply Brief and Motion for Summary Judgment at 8.

from the courtesy notice, related to a missing first tier, downstream or related entity contract with PPHP-IL.

This NOID provided PPHP-MO another opportunity to cure the identified deficiency and listed CMS representatives for it to contact if it had any questions. Although PPHP-MO maintains it did not respond to the NOID because it believed it had already cured its deficiency and that CMS' reference to PPHP-IL was an error,³⁷ the Hearing Officers find that the language in the courtesy notice and the NOID was technically accurate and sufficiently clear. The NOID, which used the exact same language found in the courtesy notice, expressly notified PPHP-MO that its application was deficient and additional action was required.

PPHP-MO cites to *Gateway* in support of its position, wherein the Hearing Officer found that CMS' actions cannot prejudice an applicant in a material way that precludes the applicant from understanding the nature of the deficiency. In *Gateway*, CMS intended to inform the Plan that its application did not contain a contract with a specific first tier, downstream or related entity. Due to a programming error on the part of CMS, CMS did not indicate who the first tier, downstream or related entity was in the initial deficiency notice. CMS left the section blank, effectively depriving the Plan of its first of two opportunities to cure its deficiencies. Moreover, when the Plan received the NOID from CMS, it reached out to and submitted questions to CMS regarding the deficiencies which had been identified. While the Plan provided responsive materials to the NOID, it was not the exact materials that CMS was expecting. The Hearing Officer found that the Plan and CMS would have timely bridged its understanding regarding the expected materials if the Plan received an initial error free notice. Moreover, the Hearing Officer found that the Plan proceeded reasonably throughout the application process in light of the circumstances.³⁸

In the instant case, however, the deficiency notices were accurate and adequate in identifying PPHP-IL as the entity for which no contract was uploaded. Moreover, had PPHP-MO taken action and reached out to CMS regarding the deficiency, it would have been informed that CMS was expecting a contract with PPHP-IL because PPHP-IL was listed as performing a portion of two Part D functions identified on the chart in Section 3.1 of the Part D Solicitation. CMS' actions did not prejudice PPHP-MO in a material way that prevented PPHP-MO from understanding the nature of the deficiency and timely correcting its application.

PPHP-MO argues it intended to include its own entity name, and not PPHP-IL, so no contract needed to be uploaded as CMS does not require applicants to have contracts with themselves to perform Part D functions. It also maintains, that providing CMS with a contract between it and PPHP-IL, when it knew that PPHP-IL would not be providing the service, would have had the effect of it potentially violating a number of federal statutes. Further, PPHP-MO contends the two functions at issue, enrollment processing and enrollee grievances and appeals, are not permissible grounds for CMS to find a deficiency in its application. First, because the Part D enrollment processing function applies only to prescription drug plans and not MA-PD sponsors. Second, because it did not intend PPHP-IL to perform a portion of the appeals and grievance function, thus,

³⁷ PPHP-MO June 11, 2019 Initial Brief at 2; *see also* Tr. at 26-27.

³⁸ *Gateway* at 13, 14.

it argues it is unnecessary and inappropriate to treat the failure to submit such a contract as a deficiency.

The CY 2020 Part D Solicitation at 3.1.1.C requires applicants to submit contracts where an applicant has elected to use subcontractors to meet Part D requirements. As PPHP-MO reported that PPHP-IL would perform Part D functions on its behalf as a first tier entity and downstream entity, CMS reasonably expected PPHP-MO to provide executed contracts documenting those relationships or to revise the subcontractor information to delete any reference to PPHP-IL. CMS is not requesting that PPHP-MO violate any federal statutes, only that it submit the required documents per the Solicitation in accordance with what it indicated in its application, or that it revise its application, if incorrect, to correct the inaccuracies. Finally, CMS' expectation that MA-PD organizations that complete Part D applications provide materials regarding entities to which they have delegated responsibility for Part D functions is appropriate and in accordance with the regulation at 42 C.F.R. § 423.505(i) and the Solicitation. Moreover, the Hearing Officers find that CMS' position that there are aspects of Part D enrollment requirements applicable to MA-PD sponsors is reasonable.³⁹

The Hearing Officers conclude that PPHP-MO has not established by a preponderance of the evidence that CMS' denial of its MA-PD application was inconsistent with the MA-PD regulatory requirements of §§ 422.501 and 422.502 (Part C) and §§ 423.502 and 423.503 (Part D) because it did not submit with its application an executed contract with one of the first tier, downstream or related entities which it listed as performing a Part D function on its behalf (or revise the subcontractor information to delete any reference to PPHP-IL). Accordingly, the Hearing Officers affirm CMS' denial of PPHP-MO's MA-PD application.

/Benjamin R. Cohen/

Benjamin R. Cohen, Esq.
CMS Hearing Officer

/Stephany Young/

Stephany Young, Esq.
CMS Hearing Officer

Date: August 8, 2010

³⁹ Tr. at 16-17, 98.