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CLIENT/MATTER NUMBER
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Via Email and U.S. Mail

Mr. Tom McGinnis
NREMT-P
Chief
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State of California – Health and Human Services Agency
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Re: April 13, 2018 Findings Sent to Contra Costa County

Dear Mr. McGinnis:

We represent American Medical Response West ("AMR"). We write regarding an April 13, 2018, letter you authored and sent to the EMS director of Contra Costa County. In that letter, your agency, the California Emergency Medical Services Agency ("EMSA"), made certain **findings**, including a finding that Contra Costa County's EMS Agency ("County EMS Agency") **colluded** with the Contra Costa County Fire Protection District ("Fire District") and AMR **to stifle competition due to bid-rigging**. Your agency concludes that these actions were anti-competitive due to "other factors related to the bid." Your agency then retroactively withdrew your agency's previous approval of the Contra Costa County RFP-2015-CCC for failure to ensure a fair, competitive process.

EMSA's withdrawal comes over two years after the California Ambulance Association ("CAA") sent your agency a letter asking questions about the "Alliance Model" and, as discussed below, seems to be a change of position by EMSA about the "Alliance Model."

These unfounded and inflammatory findings regarding AMR are of a severe legal nature. EMSA has damaged AMR's reputation and business by these findings, without first notifying AMR of the issues, without giving AMR an opportunity to be heard, and without following the basics of due process. We understand that your agency also has not interviewed the County EMS Agency or the Fire District regarding its findings. AMR strongly disagrees with these findings both on procedural grounds and factual grounds. Further, as you will see at the end of this letter, AMR is prepared to take any and all lawful actions in order to seek redress for these unlawful actions and for the harms caused to AMR.

AMR views this situation as a serious breach of the public trust and is surprised that your agency would make such findings without following the basics of due process of law first. Additionally, the timing of your letter one month after the Superior Court for Alameda County ruled against your agency regarding the "Alliance

Model" for the Alameda County ambulance RFP strongly suggests that your agency had other motivations. We note that the Alameda County Court specifically found that your agency's prohibition on the "Alliance Model" for Alameda County violated "the competitive process requirement under the EMS Act because this prohibition unduly restricts competition by denying [fire departments] and other bidders who are limited to a contractor-subcontractor model an equal opportunity to submit bids." The April 13th letter appears to be an attempt to undermine the Court's decision outside of the judicial process and implement a non-APA approved regulation. *County of Butte v. Emergency Medical Services Authority* (2010) 187 Cal.App.4th 1175, 1200 (finding an interpretive regulation was void due to its failure to comply with the APA).

BACKGROUND AND DISCUSSION

1. AMR has a Long and Successful History in Contra Costa County

Contra Costa County has used AMR as its emergency ambulance provider for many years. AMR knows the County, knows how to serve the residents successfully, and is a top-notch ambulance provider. This knowledge and experience makes AMR an obvious participant and strong competitor in whatever RFQ or RFP that a government entity puts forth. There is nothing unfair or anti-competitive about AMR's history and experience in the County – these are just facts.

2. The RFQ and RFP in 2015 Aimed to Improve Integration of EMS System Participants while Maintaining the EMS System's High Standard of Care

The primary goal of the RFQ by the Fire District and RFP by the County EMS Agency was to improve integration of the EMS system participants while maintaining the high standard of care that the County had received. From the beginning of the RFQ and RFP process, EMS system stakeholders wanted a more integrated EMS delivery system between public and private providers. Improved integration would include an integrated communication center, single dispatch platform, single medical direction, consolidated CQI, standardized continuing education, and the ability to better utilize fire resources and decrease unnecessary or duplicative responses. EMS system stakeholders also wanted to explore the possibility of additional funding for Medi-Cal transports under the California Medi-Cal Ground Emergency Medical Transportation program. The EMS system was evaluated over a lengthy period of time by EMS system stakeholders and several external consultants, *i.e.*, Gary Ludwig, Triton and Fitch & Associates.

The Fire District was not able, however, to run all the transports that would be necessary to support fully the county-wide ambulance and first responder program. This is one of the facts noted in the Fire District's contract. (Service Plan, page 5, para. C1 – the Fire District does not "have the infrastructure or personnel necessary to directly perform the ambulance services required").

Thus, EMS system stakeholders put forth the idea of a cooperative arrangement with a private ambulance company in order to improve the EMS system and maintain access to care. There are no prohibitions on public-private partnerships to provide an essential public safety service and to deliver the best possible care with sustainable funding. *See Osborn v. City of San Diego* (Sep. 20, 2002, D038413) ___Cal.App.4th___ at *1 (finding that a City of San Diego contract with a public-private partnership for the provision of emergency medical and ambulance services did not violate a city ordinance setting forth criteria for a paramedic transport

system); *see also from the California Public Utilities Commission:* "The Utilities can perform significant work that helps to ensure public safety. Given the appropriate resources, a significant public private partnership could be forged. We support timely completion of that work in the face of the extreme conditions presented by this drought." *Directs Inv'r Owned Elec. Utilities to Take Remedial Measures to Reduce the Likelihood of Fires Started by or Threatening Util. Facilities.*, R ESRB-4, 2014 WL 2875817, at *6 (June 12, 2014)).

3. The RFQ and RFP Used Open and Fair Processes

The Fire District ran an open and public process to find a private partner (the "RFQ" process), and there were two bidders for the opportunity to form an alliance with the Fire District. AMR was one. Falck Ambulance (a large provider in California and internationally) was another. Both submitted bids. AMR, with its past knowledge and history of serving this county, submitted the superior bid and won the chance to partner with the Fire District. There is no fact we see cited to in your April 13th letter that suggests that AMR did anything wrong or "colluded" in the RFQ process. If AMR had not won the RFQ, AMR would have still submitted a bid in the County EMS Agency RFP process.

After AMR was selected over Falck in the RFQ process, the joint Fire District – AMR team decided to bid on the County EMS Agency RFP. That joint team won the County EMS Agency contract. Although no one else chose to bid on the RFP, that does not negate the open and competitive nature of the public process. Many RFPs often have only a single bid. There is no prohibition on a joint bid (*see* original RFP from February 27, 2015, Section III(A) Minimum Qualifications, stating "there are no preclusions of multiple organizations forming an entity to respond to this RFP") and, contrary to your April 13th letter, joint bidders may prevent each other from leaving the other at the altar through a teaming agreement or joint bidding agreement. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (finding that an agreement eliminating competition is legal as long as it is ancillary to the main purpose of the agreement and is related to efficiency). In fact, the RFP and addenda to the RFP contained numerous references to joint bidders, multiple organizations, and contractor-subcontractor relationships. *See e.g.,* RFP, dated February 27, 2015, at pp. 23, 27, 53, and amended p. 53.

AMR acted fairly and followed the rules set forth in the RFP. Again, there is **no fact** we see cited to in your April 13th letter that suggests that AMR did anything wrong or "colluded" in the RFP process. It is clear from the legal opinion discussed below, the *California Fire Chiefs* opinion, that the Alliance Model was pre-approved by your agency; it is discussed as such in the opinion. Further, in your February 26, 2018, declaration in that action, you declared to the Court that, "[On May 16, 2017, after] the Authority (EMSA) completed its review of legal issues raised by ALCO EMS's draft 'Alliance Model' RFP, the Authority advised ALCO EMS officials that the Authority could consider a public-private partnership for the Alameda EOA, but would review the process to ensure that it preserved competition." (T. McGinnis Decl., at para. 15, 2/26/18). It is hard to see what changed between February 26 and April 13 to change your views. All AMR did was participate in the RFQ and RFP process that your agency had already approved, as far as AMR understood. Participation in government sponsored bidding processes cannot by itself mean that there was any collusion or bid-rigging. *See e.g. United States v. Mobile Materials*, 881 F.2d 866, 869-70 (10th Cir. 1989) (per curiam) (defining bid-rigging as "any agreement between competitors pursuant to which contract offers are to be submitted [to] or withheld from a third party" and finding that a prearranged complimentary

bidding system qualified); *Oakland-Alameda Cty. Builders' Exch. v. F. P. Lathrop Constr. Co.*, 4 Cal. 3d 354, 361-62 (1971) (finding that the use of a bid depository for "bid peddling" was per se illegal); *Morgan v. Gove*, 206 Cal. 627, 629-33 (1929) (explaining that while complimentary bids and cross-payments to losing bidders were illegal, legitimate joint-bidding arrangements were not per se illegal); *see also* U.S. Dep't of Justice, *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For, available at* http://www.usdoj.gov/atr/public/guidelines/211578.htm (listing various characteristics of bid-rigging schemes, none of which include mere participation in the bid process). As noted by the Court in the *California Fire Chiefs* case, neither the California EMS Act nor the EMSA Guidelines prohibits two entities from bidding on an RFP together. *California Fire Chiefs*, at p. 4. Your agency's findings that AMR colluded with these public entities are arbitrary, capricious and lack any factual support. It is unfair and unjustified. Additionally, EMSA's express permission in the April 13th letter to allow the contract to continue for two more years undercuts EMSA's findings that the contract was procured by collusion and bid-rigging.

4. EMSA Admitted in Court that an Alliance Model is Lawful and Appropriate

As you know, the California Fire Chiefs Association sued EMSA in state court in Alameda County about your agency's actions in the Alameda County RFP process. *California Fire Chiefs Association, Inc. v. California Emergency Medical Services Authority, et al.*, (RG 18890846). Specifically, the plaintiff in that lawsuit sued because EMSA prohibited Alameda County from using the "Alliance Model" because EMSA viewed that model as being anti-competitive. The Court ruled against EMSA and held that the provision barring a joint bidders model was void and unenforceable, that EMSA must approve the replacement RFP, that EMSA must not rescind its approval of the Alameda County EOA prior to completion of the bid process, that the Court would permit the plaintiff to petition the Court for attorney's fees and costs, and the Court would reserve jurisdiction over the case. It is no coincidence that the Court issued these findings on March 22, 2018 – less than a month before EMSA issued its April 13th "collusion" letter regarding Contra Costa. The timing is too perfect. The CAA asked two years ago in April 2016 for a review of the Alliance Model in Contra Costa. Two years passed. What changed between the time of your declaration and the April 13 findings was EMSA's loss in the Alameda case.

Then after EMSA was defeated in Court on the very same point – the viability and legality of the Alliance Model – EMSA struck back against a party not involved in that court case and made unfounded findings to strike down the Alliance Model. In the *California Fire Chiefs*' opinion, the Court noted that EMSA had previously admitted that the, "Alliance Model is a legal, valid model that EMSA has approved both before and after the issuance" of the Alameda County RFP. However, at oral argument in that case, "EMSA argued that neighboring Alliance Models are distinguishable, ALCO EMS stressed their similarities: Santa Clara County and Contra Costa County utilized EMSA-approved Alliance Models that expressly permitted bidders to subcontract 911 EMS services, much like the original Alliance Model ALCO EMS proposed." *California Fire Chiefs*, at p. 7. EMSA has admitted in Court that the Alliance Model is permissible, but now seeks to rescind that approval through its April 13th letter. Given that the Alameda Court retained jurisdiction over EMSA, EMSA's approach may violate the Court's order and further may be an improperly issued regulation. EMSA is bound by its statements and admissions in the *California Fire Chiefs* case and the Court's findings in that case.

CONCLUSION

AMR participated in public processes established by government agencies. The government agencies were thoughtful and lawful in their processes and sought the best possible ambulance system for their residents. AMR did not design those processes but simply participated in them. The CAA noted these points in its letter regarding the Alliance Model.

For a state agency to reverse its prior position on the Alliance Model, ignore a Court order and conclude that AMR "colluded" and "engaged in big-rigging" is unfounded, capricious, arbitrary and unfair. EMSA's findings will likely have far-ranging negative reputational and economic consequences on AMR. AMR therefore demands that EMSA correct its April 13th letter to remove the "collusion" and "bid-rigging" findings and to remove any negative discussion of AMR. In the event that EMSA fails to correct its April 13th letter, AMR expressly reserves all of its rights and further advises EMSA that AMR may take any and all lawful actions to protect its interests including, but not limited to, seeking a writ of mandamus.

You may contact me at pjohnston@foley.com or at (213) 972-4632.

Sincerely,

Pamela L. Johnston

cc: Thomas R. Wagner, AMR Region CEO