



**Legal Opinion L-2005-13**  
**May 4, 2005**

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TO : Michael S. Schwartz  
Chairman

FROM : Steven A. Bartholow  
General Counsel

SUBJECT : Medicare Contracting Reform – Contracting Authority

This is in reference to your request for a legal opinion regarding the authority to contract with Medicare Administrative Contractors (MACs) for services presently performed by fiscal intermediaries.

Currently, there is a distinction in the Social Security Act between Part A contractors, known as fiscal intermediaries, and Part B contractors, known as carriers. The Secretary of the U.S. Department of Health and Human Services (hereafter, Secretary) has the sole authority to contract with Part A contractors. In accordance with the provisions in section 1842(g) of the Social Security Act (42 U.S.C. § 1395u(g)), the Railroad Retirement Board presently has the authority to contract with carriers with respect to Part B services for individuals entitled to benefits as qualified railroad retirement beneficiaries. See also section 7(d) of the Railroad Retirement Act. The Railroad Retirement Board does not have the authority to contract with fiscal intermediaries, or Part A contractors.

Beginning October 1, 2005, the Medicare Modernization Act (MMA) eliminates fiscal intermediaries and carriers, and merges them into a single entity known as Medicare Administrative Contractors (MAC's). An issue is whether the Board now has the authority to contract with a MAC with respect to both Part A and Part B services for individuals entitled to benefits as qualified railroad retirement beneficiaries. If the Board does not have such authority, the question next presented is whether the Secretary may delegate such authority to the Board.

As outlined below, it is my opinion that the Board's contract authority remains limited to Part B services only. However, should the Secretary choose to do so, the authority to contract for Part A services may be delegated to the Board.

In accordance with section 911(b) of the MMA, effective October 1, 2005, the heading of section 1816 (42 U.S.C. § 1395h) is amended to read "Provisions Relating to the Administration of Part A." Furthermore, 1816(a) is amended to read as follows: "(a) The administration of this part shall be conducted through contracts with medicare administrative contractors under section 1874A." The MMA includes conforming amendments for section 1842 (42 U.S.C. § 1395u) similar to those noted above for section 1816. For example, the MMA revises the heading for section 1842 to read as follows: "Provisions Relating to the Administration of Part B" and subsection 1842(a) is amended to read as follows: "(a) The administration of this part shall be conducted through contracts with medicare administrative contractors under section 1874A." Finally, effective October 1, 2005 the MMA adds section 1874A, entitled "Contracts with Medicare Administrative Contractors." That section provides, in relevant part: "(a) Authority — (1) Authority to Enter into Contracts.— The Secretary may enter into contracts with any eligible entity to serve as a medicare administrative contractor with respect to the performance of any or all of the functions described in paragraph (4) or parts of those functions (or, to the extent provided in a contract, to secure performance thereof by other entities)."

As noted above, section 1842(g) of the Social Security Act presently gives to the Railroad Retirement Board the authority to contract with carriers with respect to Part B services for individuals entitled to benefits as qualified railroad retirement beneficiaries. The MMA essentially leaves section 1842(g) intact, so that effective October 1, 2005, it reads as follows:



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(g) The Railroad Retirement Board shall, in accordance with such regulations as the Secretary may prescribe, contract with medicare administrative contractor or contractors to perform the functions set out in this section with respect to individuals entitled to benefits as qualified railroad retirement beneficiaries pursuant to section 226(a) of this Act and section 7(d) of the Railroad Retirement Act.

The above provision is evidence of the congressional intent that the Board should retain, at a minimum, its present contracting authority. Furthermore, use of the word "shall" suggests that such contracting authority is mandatory, subject only to regulations prescribed by the Secretary. Although the MMA replaced the phrase "carrier or carriers" with "medicare administrative contractor or contractors," I do not believe such action can be properly interpreted to reflect a congressional intent to expand the Board's statutory contracting authority to include Part A services. The Board's contracting authority remains in section 1842, which the MMA entitles "Provisions Relating to the Administration of Part B." Furthermore, the language in subsection (g) specifically refers to a contracting authority "to perform functions set out in this section" (i.e., Part B functions). These facts support the position that Congress did not intend to expand the Board's statutory contract authority when it amended section 1842(g). However, I could find no language in the MMA precluding the Secretary from delegating to the Board Part A contracting authority.

Section 1874A, added by the MMA effective October 1, 2005, provides that the Secretary "may enter into contracts with any eligible entity to serve as a medicare administrative contractor with respect to the performance of any or all of the functions described in paragraph (4) or parts of those functions (or, to the extent provided in a contract, to secure performance thereof by other entities.)" The parenthetical text in the preceding sentence lends itself to two possible interpretations: 1) the Secretary may enter into a contract with an entity eligible to serve as a MAC, who in turn, may enter into a contract with a third party to perform the services of a MAC; or 2) the Secretary may enter into a contract with another party, such as the Railroad Retirement Board which is not an eligible entity, where the contract provides that the other party, rather than the Secretary, has the responsibility to secure the performance of a MAC. While arguments can be made supporting both interpretations, I do not believe it is necessary to resolve the congressional intent of the parenthetical text in order to address the question of whether the Secretary may delegate the authority to contract with a MAC for part A services.

As noted above, section 1874A provides that the Secretary "may enter into contracts..." (emphasis added). Use of the word "may" in section 1874A suggests permissive authority, thereby indicating that, should the Secretary wish to do so, such contracting authority can indeed be delegated. It is indisputable that the Board retains its statutory authority in section 1842 to contract for Part B services. Presumably, replacement of the two entities (fiscal intermediaries and carriers) with the newly created MAC was for the purpose of streamlining processing. An argument can be made that delegating to the Board the authority to contract for Part A services for qualified railroad retirement beneficiaries would be consistent with the contracting reform envisioned by the MMA. Without delegating such authority, qualified railroad retirement beneficiaries will continue to have two contracting authorities for Medicare purposes, rather than the single entity envisioned by the introduction of the MACs and the elimination of fiscal intermediaries and carriers.

The Board has contracted with Palmetto to act as the carrier for the Board's Part B Medicare program. The Board's contract with Palmetto is not presently required to be competitively bid and is automatically renewable from term to term. In accordance with the MMA, the Board's contract with Palmetto for Part B services will be subject to competitive bidding effective October 1, 2011. Based on previous discussions with personnel from the Centers for Medicare and Medicaid Services, it is the agency's understanding that options are being developed by that agency regarding MACs and qualified railroad retirement beneficiaries. Those options have not yet been received and the Director of Administration recently sent a tracer inquiry on the possible options.