Memorandum

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To: John Copeland III, Chair
and Members, Public Health Trust Board of Trustees

Eneida O. Roldan, M.D., President and CEO
Jackson Health System

From: Christopher Mazzella, Inspector General

Date: November 9, 2010

Subject: Memorandum of OIG Observations, Review, and Comments on the *Proposed Agreement between the Public Health Trust and MedAssets Supply Chain Systems, LLC, For Group Purchasing Organization Services Pursuant to RFP 10-5140,* Ref. IG10-50

As part of the Miami-Dade Office of the Inspector General's (OIG) continuing oversight of Public Health Trust (PHT) operations, the OIG reviewed the above-captioned proposed agreement between the Miami-Dade Public Health Trust and MedAssets Supply Chain, LLC (MedAssets) for Group Purchasing Organization (GPO) Services (hereinafter the "Agreement"). This memorandum sets forth the OIG's observations and comments with respect to our review of the "final" proposed agreement, which we received on Friday, October 29, 2010.

Foremost, we appreciate the cooperation and courtesies extended to us by Jackson Health System (JHS) personnel during our review process. In particular, the JHS Procurement Department ensured that the OIG was provided with copies of all relevant documentation and met with OIG staff to discuss the proposed Agreement and answer our many questions. JHS personnel were able to convey to us the complexities of hospital operations and the integration of the supply chain within.

CHRONOLOGY OF OIG REVIEW

On September 10, 2010, the OIG received an anonymous complaint alleging that the PHT was about to award a contract that would waste $39 million. OIG's initial inquiry revealed that the PHT was in the process of expediting the award of a $40+ million contract pursuant to RFP 10-5140 for Group Purchasing Organization services.

On September 16, 2010, the OIG, via email, informed the PHT President and CEO that we had initiated a review of the subject agreement. The OIG also requested that the subject agreement not be presented to the PHT Board of Trustees for approval until after we had an opportunity to complete our review.

Beginning September 17th and throughout the course of our review, the OIG requested, and was provided by the JHS Procurement Department, volumes of information relative to this procurement. This information included copies of the RFP and its amendments; vendor responses to the RFP; "Best and Final Offer" (BAFO) requests and responses; "Improved BAFO" requests and responses; progressive versions of draft agreements; meeting notices, schedules, and attendance listings; and an audio recording of a selected meeting.

On September 23, 2010, the OIG issued a short memorandum to the PHT formalizing our request that we have an opportunity to review the "final version" of the proposed contract. In this memorandum, the OIG outlined some of its major concerns with the proposed agreement. The OIG received a response from the PHT/JHS President & CEO, dated September 23, 2010, advising that she would delay presenting the subject agreement for approval until after the OIG had completed its review. Shortly, thereafter, we were advised that a Special PHT Board Meeting for September 30, 2010 was contemplated because the agreement was expected to be ready. Inferences were made that any delays (due to the OIG review) would cost JHS $2 million per month.

However, on October 12, 2010, it was reported to the PHT Purchasing Subcommittee that JHS was still negotiating the last few points and that an agreement would be soon forthcoming. On October 29, 2010, the OIG received a copy of the final negotiated agreement.

CURSORY COMPARISONS BETWEEN THE DRAFT AGREEMENT AND THE FINAL PROPOSED AGREEMENT

Upon initiating our review, we requested a copy of the proposed negotiated Agreement. We received versions in mid-September when we learned of a contemplated Special Board Meeting to be held on September 23, 2010 for the purpose of approving this contract. Obviously, this did not occur, and we learned that the meeting would be held the following week on September 30th, once the Agreement had been finalized. During a PHT Board meeting held on September 27th inferences were made about the OIG's review and that delay would cost JHS $2 million per month.

For the next several weeks, the OIG was informed that negotiations remained on-going. We received an initial "final" version of the Agreement on October 21, 2010. With some additional modifications, we received a "final final" version on October 29, 2010.

Comparisons between these versions show that much improvement was made in the six weeks since the OIG announced that it was conducting a review of the Agreement up until the Agreement was executed by MedAssets. The OIG is pleased to note that certain contractual provisions were improved for the benefit of JHS. Among them were:

- Reduction of $904,800 in the maximum contract value due to the elimination of travel expenses. These additional expenses were identified separately, but are now included as part of the monthly fee.
- A more objective approval process for crediting MedAssets with initiatives and financial improvements through the establishment of a high-level Executive Steering Committee.
- Clarification of "off-limits" areas that are not permissible for MedAssets Financial Improvement initiatives.

Most significantly, contract language that goes to the heart of this Agreement—the crediting of savings resulting from MedAssets initiatives—had been revised to a fairer definitional standard. The chart below depicts how the contract language went from heavily one-sided to fair.

Schedule 1 (of the Agreement) Monthly Service Fee and Guaranty Article 1. Definitions		
Initial Version	Intermediate	Final
Initiative or Initiatives shall be any commercially reasonable cost saving or revenue improving proposal recommended by MedAssets to Jackson or one of its Members.	Initiative or Initiatives shall be any commercially reasonable cost saving or revenue improving proposal recommended by MedAssets, an Affiliate, or a MedAssets business partner to the Trust or one of its Members.	Initiative or Initiatives shall be any commercially reasonable cost saving or revenue improving opportunity for financial improvement beneficial to Jackson identified by, and recovered primarily through the resources and efforts of, MedAssets, an Affiliate, or a MedAssets business partner (e.g. HAP-X) to the Trust or one of its Members.

As shown above, initially there was no requirement that initiatives actually result in actual benefit to Jackson. The intermediate contract version also did not contain such a requirement. The final version of this definition includes an actual "recovery" or benefit to the Trust.

Clearly, JHS would not have been able to negotiate these improvements had it succumbed to the time pressure of presenting an unfinished agreement to the Board on September 30, 2010.

SUMMARY OBSERVATIONS

This is an unprecedented contract that on its face (in its title) depicts it as an Agreement for Group Purchasing Organization (GPO) Services. This Agreement, while providing GPO services, is really a consulting services agreement. The fees paid to the vendor are in consideration for the vendor identifying initiatives and financial improvements that translate into "savings." The base service of belonging to a GPO and reaping the savings of being a GPO member[1] are only secondary to the consulting services to be provided by the GPO's wholly-owned subsidiary, Aspen Healthcare Metrics, LLC.

The subversion of the GPO component of the Agreement was rooted in the Request for Proposal (RFP), which contained an unprecedented expectation that would require the successful proposer to[2]:

> . . . achieve guaranteed savings, within 12 months of contract implementation of (See Financial Proforma Section 3.1): a. $38.3 million (including med surg distributor and pharmacy wholesaler savings maximization), OR b. $24.9 million (excluding primary med surg distributor and pharmacy wholesaler savings maximization, however still includes volumes for these vendors to be tracked through the GPO portfolio)

The OIG believes that this expectation, underlying the GPO request for proposals, clouded the true nature of this Agreement. According to the comments made by the former VP of Strategic Sourcing during a Special Meeting of the Selection Committee[3] with the JHS executive leadership, proposers responding to the RFP remarked that they have never seen an RFP so large that was expected to be completed this quickly. Indeed, the proposers were not approaching this RFP from a traditional GPO point of view (since JHS already receives pretty good pricing). Instead, the main focus of this GPO agreement was to find savings outside of the GPO arena.

The OIG believes that this transposition of emphasis and bundling of services under an exclusive long-term relationship is not in the best interest of the JHS. The OIG believes that JHS may be better served if the inherent benefits of a GPO component were permitted to continue and not be bundled with the consulting services. Our

The opinion of the OIG is based on the areas of concern, described as follows:

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[1] A GPO is an entity that is created to leverage the purchasing power of a group of businesses to obtain discounts from vendors based on the collective buying power of the GPO members.
[2] RFP 10-5140, Page 21, Section 2.3 Expectations
[3] A special meeting was held on July 26, 2010, between members of the Selection Committee and the executive leadership of JHS. This meeting occurred while the RFP process was still under the Cone of Silence. While the OIG was provided with a copy of a meeting notice and agenda (distributed to attendees), our review of the public notices webpage questions whether the meeting was publicly noticed. JHS Procurement advised that all public notices for meetings are posted on a bulletin board located in its office at Jackson Medical Towers, 1500 NW 12th Avenue, Suite No. 814, and posted on the Procurement Department's webpage. The OIG reviewed the archived meeting notices on the Procurement Department's webpage and did not find any notice for the July 26, 2010 Selection Committee meeting. This webpage is located at http://www.jhsmiami.org/body.cfm?id=10839. This matter will be separately referred to the Miami-Dade County Commission on Ethics and Public Trust for its independent review. We do note that the meeting was audio recorded and our comments regarding this meeting are derived from our review of the audio tape.

AREAS OF CONCERN

Issue 1 Bundled Services

The proposed bundling of multiple fee-based consulting services with a GPO component in a long-term relationship is unprecedented and is not in the best interest of JHS.

Traditionally, GPO services have focused on the purchasing power of its group members. To our knowledge, JHS has been a member of a GPO for over twenty years. JHS purchases its goods and commodities using the pricing schedules afforded by the GPO to its members. JHS, as a member to the GPO, also receives the benefits of discounts, rebates and sharebacks for those purchases that it makes through the GPO. The proposed Agreement, however, takes GPO services to another level—a fee based consulting services agreement. The proposed Agreement has very different scopes of work, and the bulk of the fee that JHS will pay to MedAssets will actually be for work performed by Aspen Healthcare Metrics, LLC (a separate legal entity, but a wholly-owned subsidiary of MedAssets).

As described to the OIG by the JHS Chief Operating Officer (COO) and the former VP of Strategic Sourcing, this GPO approach of combining pricing services and consulting services, at the level of projected savings, is unprecedented. When pressed for references where MedAssets has been successful with bundling its GPO member services with its Aspen consulting services, JHS officials advised that they would provide us with the results of their research. We are still waiting for a response on where this bundled approach has been successful.

In light of the guaranteed fee that JHS will pay for anticipated results, the OIG believes that until JHS has adequately researched MedAssets and Aspen's combined GPO and consulting services proposal, JHS should not be the test case for this bundled approach.

Issue 2 Guaranteed Savings

While the OIG is pleased with improvements made to the definition of "Initiatives," we are still concerned that Financial Initiatives and Guaranteed Savings could still include savings not directly attributable to MedAssets initiatives. Our concerns echo many of the same concerns expressed by the Miami-Dade County Department of Procurement Management in its November 5, 2010 letter to JHS (see Attachment 1).

Primarily, the OIG is concerned that MedAssets may unfairly benefit from financial initiatives and savings not directly attributable to its own endeavors. We note that:

- Financial Initiatives and savings that are developed internally through the efforts and determination of JHS employees may still be credited to MedAssets/Aspen.

- Monetary savings derived from prescription medications whose patent protections are scheduled to expire during the next sixty-six (66) months (i.e., conversion from name brand to generic) will likely be credited to MedAssets even though the monetary savings resulted from a patent expiration and not from the result of a MedAssets/Aspen initiative.
- Financial Initiatives by other consultants or other parties may be co-opted by MedAssets/Aspen for credit.

We also observe that Schedule 1, Attachment A of the proposed Agreement, entitled "Jackson Initiatives" identifies only six initiatives totaling $10.3 million that are off-limits to MedAssets. Of these six initiatives, four resulted from pending new contract awards and the remaining two resulted from internal operations. Utilizing this small sample of initiatives, the OIG believes that if JHS reviews more of its own contracts and operations, there may be a reduced need for seeking a consultant to perform these tasks.

Issue 3 Standardization of Physician's Preference Items (PPI)

Notwithstanding the definitional improvements to the term "Initiatives," the OIG remains concerned that if JHS is not able to achieve any savings through standardization of PPI, MedAssets/Aspen would, nevertheless, be credited with those savings as if the standardized program had been successful.

Schedule 1 – Monthly Service Fee and Guaranty, Article 3 states, in part:

> "(vi) implementation of a standardization model on all commodities, clinically sensitive items and physician preference items; ... In the event that Jackson fails to implement or comply with (vi) or (vii) set forth above, MedAssets may include the amount of Financial Improvement which would have otherwise been achieved but for Jackson's failure to implement or comply with such commitments for purposes of determining whether MedAssets met its Guaranteed Savings commitments ..."

In other words, MedAssets only has to provide the data to support its case for standardizing a particular PPI for it to be credited with achieving "Financial Improvements." Actual savings in this arena, according to presently proposed contract language, do not actually need to be achieved.

During the aforementioned July 26, 2010 meeting, the issue of standardizing PPI was raised to determine if JHS Executive Leadership would support such a radical cultural change; and, if so, when and how would it be introduced to the medical personnel. The PPI issue was openly discussed as perhaps the most challenging issue, and also the most critical, to the success of identifying the "Guaranteed Savings" as required by the Agreement.

While we, too, acknowledge that standardizing PPI must be a key component to JHS future cost containment goals, the criticality of this initiative suggests that it should be treated separately, and not as a part of this GPO Agreement.

Issue 4 Contract Term – No Termination for Convenience

The OIG could not find any sound economic or financial reason, or benefit to JHS, for it agreeing to a fixed term of 66 months without any clearly worded provision allowing the PHT/JHS to terminate the Agreement for convenience.

Originally, RFP 10-5140 provided that the Agreement would be for an initial term of three years with three successive options to renew for one year each. We acknowledge that the RFP did allow for modification of contract duration, and through the Best and Final Offer (BAFO) and Improved BAFO processes, the contract term did, in fact, change.

Moreover, the original RFP language provided that the PHT/JHS could terminate the Agreement for convenience upon ninety days notice. The negotiated termination provision provides very soft language for "termination for convenience." Article 4, Section 4.2 *Termination by Trust* reads:

> The Trust may terminate in the event of a default or breach by the Contractor pursuant to Article 23. In the event that it is **determined** that the contractor has not so breached or defaulted, the Trust may treat the termination as if had been a termination of convenience. (Emphasis added.)

We find this language very vague, and question whether this provision even meets legal sufficiency. The section does not provide the express, clear authority of the PHT/JHS to terminate the Agreement for convenience. It seemingly only allows for the PHT/JHS to terminate the agreement for breach or default. Thereafter, a legal determination is made, presumably only after legal findings and conclusions have been reached by a higher authority. Moreover, the Agreement's *Order of Precedence* delineates that in resolving ambiguities in interpreting the contract, the Contractor's proposal (including revised proposals) will be the secondary authority.

MedAssets Improved BAFO (last proposal submitted) clearly states: "There is no termination for convenience in any of [its proposed] three models." [proposed].

It is interesting to note that the PHT's Improved BAFO request to the proposers provided that their responses may consider "The possibility of a five year fixed contract term that may include exclusivity and/or the absence of termination for convenience language." While the OIG is troubled by the inclusion of such allowances, the OIG is more troubled that the resulting agreement contains such one-sided terms that may cause considerable legal implications prospectively. Not having a clear and express termination for convenience clause is not in the best interest of the PHT/JHS.

Issue 5 Primary or Exclusive Contractual Relationship

The proposed contract language is very ambiguous on whether MedAssets' contractual relationship with the PHT/JHS is as its primary or exclusive GPO. The proposed contract language states that "JHS agrees to utilize MedAssets on a preferred vendor basis, unless MedAssets cannot meet the provide [sic] a particular product or service."

We note that under the existing GPO agreements, University HealthCare Consortium (UHC) is designated as the primary GPO and MedAssets is designated as the secondary GPO. Utilization of a specific GPO service provider is at the discretion of the JHS Procurement Department.

Furthermore, in the proposed contract language, the OIG notes that in the Scope of Work for GPO Services, Section 5.2.4, it states that "MedAssets provides services for the purchase of construction materials. The Trust will use all commercially reasonable efforts to utilize these services when deemed to be in its best interests."

The OIG is concerned that this contract over-commits the JHS Purchasing Department to rely exclusively on MedAssets for all of its acquisition needs. Only if MedAssets cannot meet or provide a particular service may JHS look elsewhere. We find this language to be dangerously one-sided. Again, the OIG is mindful that the Agreement's Order of Precedence resolves ambiguities by resorting to the Contractor's proposal. MedAssets' Improved BAFO clearly states:

- "Exclusive relationship with MedAssets for GPO Contracting"
- "Exclusive relationship with MedAssets on all Supply Chain initiatives"

Again, the OIG questions the wisdom of a 66-month <u>exclusive contract</u> with no termination for convenience clause.

Elimination of this provision would not materially affect the Agreement and would provide JHS with the freedom and latitude to seek best pricing for goods, services, and construction-related materials through all available means.

Issue 6 Performance Bond

The OIG believes that if MedAssets is truly providing Guaranteed Savings, then a Performance Bond is warranted. The original RFP required "a *performance bond or an approved alternate form of financial security in the amount of the guaranteed savings will be required of the award firm as a condition of award.*"

During the aforementioned July 26, 2010 meeting, the former VP of Strategic Sourcing reported that the proposers invited to submit BAFOs were not receptive to the requirement of a performance bond. The fact that during the BAFO process the invited proposers did not offer performance bonds indicates their confidence in their ability to meet the goals.

Issue 7 Committed Purchase Requirements

With the exception of the first year, the proposed Agreement requires JHS to make purchases of at least $151 million per year during each of the next five years.[4] The OIG is concerned because the required dollar volume of purchases during year two through year six does not appear to take into consideration any of the savings that would inure as a result of participating in the GPO, nor from any of the $48 million in savings to be achieved as part of MedAssets' consulting services through Aspen for standardized PPI.

CONCLUSION & RECOMMENDATION

While the pressure of time is critical to identifying and realizing any savings that are anticipated and necessary towards balancing the current year's budget, the cash outlays required under the proposed Agreement ($45 million over 66 months) are too great to ignore the concerns noted herein and the concerns expressed in the attached letter from the County's Department of Procurement Management.

We strongly believe that JHS would be better served by severing the Agreement into two components: the GPO component and the Aspen consulting services component. Each contract would then have a term of years appropriate to the services being provided.

cc: Alina Hudak, Assistant County Manager
Miriam Singer, Director of Procurement Management
Charles Anderson, Commission Auditor

[4] Proposed Contract, Page 21 - Definitions

MIAMI-DADE COUNTY

Carlos Alvarez, Mayor

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November 5, 2010

Mr. David Small
Executive Vice-President and Chief Operating Officer
Jackson Health System
1611 N.W. 12 Avenue
Miami, Florida 33136

Dear Mr. Small:

Thank you for your correspondence regarding the GPO procurement. As you know, we committed to a prompt review of the executed contract once we received it on October 29th. County staff has met with you to understand the implications of this contract. Our concerns were raised during the November 3rd phone conference.

One of the greatest concerns is whether the $30 million in savings proposed in this contract is achievable in the first year, especially since $25 million of it is programmed into this year's budget. Inasmuch as the guaranteed savings is not supported on a dollar-for-dollar basis, there is no real value to the guarantee. A base fee is paid to the vendor even if the firm fails to produce the guaranteed savings. It is also concerning that the vendor has offered these guaranteed savings <u>only through the first three "savings periods"</u>, while JHS is committed to specific purchase amounts over the entire term of the 66-month contract.

JHS has already embarked upon significant change initiatives, and the award of this contract would require substantial additional changes in a very short time period. The proposed GPO initiatives place heavy reliance on JHS' ability to implement new business models that affect physician preference processes and depend heavily on clinical staff collaboration. These other, yet to be defined initiatives that would lead to financial improvement, could be examined through a parallel, competitive negotiation process with the highest ranked proposers. It does little good to base guaranteed savings on unknown initiatives or recommendations that may not be acceptable or feasible for the JHS environment.

It is not clear how much of the proposed savings are efficiencies versus a real dollar savings from the supply spend. The contract should clearly delineate the basis for the guaranteed savings, as well as the amount to be realized in recommended efficiencies that are not directly related to spend. The savings should be secured with a performance bond, or contract language that holds the firm accountable on a dollar-for-dollar basis if they do not meet the savings. This is especially relevant as the $25 million reduction is factored into the JHS budget for this fiscal year.

ATTACHMENT

The County holds the best interests of Jackson as a high priority, and shares these issues with you in that spirit. I hope our exchange of information proves to be useful in your efforts to improve the financial sustainability of the hospital. Should you have any questions or require additional information, please do not hesitate to contact me.

Sincerely,

Miriam Singer, CPPO
Director

c: Honorable Carlos Alvarez, Mayor
George M. Burgess, County Manager
Alina T. Hudak, Assistant County Manager
John Copeland, Chairman, Public Health Trust
Dr. Eneida Roldan, President & Chief Executive Officer