



Review of Medical Consultative Contracts
Awarded by the
New York State Office
of Temporary and Disability Assistance

A Joint Report by
the New York State Inspector General
and the
Inspector General of the Office of the State Comptroller

April 2009

I. BACKGROUND

The Division of Disability Determinations of the New York State Office of Temporary and Disability Assistance (OTDA) is responsible for determining medical eligibility for applicants applying for or currently receiving Social Security disability benefits. An applicant for such benefits must provide medical documentation regarding his or her disability. If the provided medical information is either unavailable or insufficient for the agency to make a determination of medical eligibility, the applicant may be required to undergo a consultative medical examination and ancillary testing in order to complete his or her application. The cost of the examination or testing is paid by OTDA.

All consultative medical examinations must be performed by physicians who are currently licensed by, and registered in, New York State. The fees paid by OTDA to individual physicians or provider groups for examinations are limited by a pre-determined schedule of fees, which is capped at rates set under the Medicaid Program. In 12 metropolitan regions, OTDA contracts with provider groups to provide all consultative medical examination services in that region. The fees paid under these contracts may be at or below the pre-determined fee schedule, depending on the terms of the contract.

Contracts for consultative medical examination services are awarded pursuant to a competitive bidding process. Each OTDA contract spans three years, with an optional two-year renewal clause. The majority of the OTDA contracts are awarded to one provider per region, with the exception of the Manhattan contract which was awarded to two consultative examination providers. In choosing a bidder, OTDA considers the provider's facility, experience, staffing, service plan, rates, and financial stability. The contract is awarded by the OTDA commissioner based on recommendations from various review committees within OTDA. As with other large state contracts, the final contract is subject to review and certification by the Attorney General's Office and the Office of the State Comptroller to ensure a fair contract and evaluation process.

II. ALLEGATIONS

On April 19, 2007, OTDA informed the State Inspector General of allegations filed against the agency by Diagnostic Health Services,¹ an existing provider of consultative medical services. In substance, Diagnostic Health Services alleged that OTDA displays blatant favoritism towards Industrial Medicine Associates, a competing provider, in its awarding of contracts for consultative examinations.

¹ Diagnostic Health Services, Inc. was established in 1973 by Marie D'Esposito. In 2005, D'Esposito joined with Dr. Howard Finger to form DHS- Diagnostic Medical Services, PC. Finger is the head of DHS-Diagnostic Medical Services, PC, but subcontracts all non-medical functions to D'Esposito's company, Diagnostic Health Services, Inc. In August 2008, Finger formed a new company, Diagnostic Consultative Medical Services, PC, and submitted its latest bid to OTDA under this name. The company performs the same services as DHS-Diagnostic Medical Services, PC, and also subcontracts to Diagnostic Health Services for administrative support. For convenience, this report will refer to the entities operated by Finger and D'Esposito as "Diagnostic Health Services."

Several months later, on August 15, 2007, Diagnostic Health Services also alleged that Dr. David Pulver, President of Industrial Medicine Associates, sponsored a private cocktail reception and fundraiser in support of then-New York State Comptroller Alan Hevesi while the Comptroller's Office was reviewing OTDA's contracts for consultative examinations. Diagnostic Health Services alleged that contacts between Dr. Pulver and then Comptroller Hevesi during the pendency of a procurement review by the Office of the State Comptroller violated the Procurement Lobbying Law as well as Governor Pataki's Executive Order 127, the latter of which required vendors to provide a written certification indicating that the procurement has not been influenced by a prohibited contact between the vendor and an employee of the awarding agency.

Yet another allegation was raised on March 18, 2008. On this date Diagnostic Health Services alleged that Industrial Medicine Associates intentionally submitted to OTDA fraudulent forms indicating that doctors had agreed to work for Industrial Medicine Associates to give the appearance of a larger staffing roster and earn additional points in the proposal review process.

III. METHODOLOGY

The jurisdiction of the New York State Inspector General extends to all branches of the executive department, including OTDA, but excluding those agencies with their own statutorily-established Inspectors General. The State Inspector General's jurisdiction also extends to companies having business dealings with covered agencies.

The New York State Comptroller is a statewide elected official not subject to the State Inspector General's jurisdiction.² Because the allegations included a charge of a conflict of interest by then-Comptroller Hevesi, the State Inspector General and the Inspector General of the Office of the State Comptroller (Comptroller's Inspector General) conducted a joint investigation into the allegations.

Over the course of the investigation, Diagnostic Health Services sent voluminous correspondence and supporting documents to both investigating agencies. These documents were thoroughly examined for their legitimacy, accuracy, and relevance. In addition, investigators interviewed an individual that Diagnostic Health Services claimed could allegedly substantiate the allegations against Industrial Medicine Associates.

The State Inspector General and the Comptroller's Inspector General also interviewed a number of senior employees at both Diagnostic Health Services and Industrial Medicine Associates, including the Chief Medical Officer and the Director of Provider Relations at Industrial Medicine Associates, as well as the executive staff at Diagnostic Health Services. Interviews were conducted with physicians whose names allegedly had been submitted fraudulently by Industrial Medicine Associates in its bids.

² Executive Law § 51.

For relevant contracts, investigators reviewed the requests for proposals, the companies' submitted bid documents, and reviewed OTDA's evaluations of the bidders to ensure that the evaluations conformed with the guidelines set forth in the requests for proposals. Furthermore, the State Inspector General and the Comptroller's Inspector General interviewed OTDA personnel who are responsible for the administering, evaluating, and awarding of contracts for consultative medical examination services.

In response to the allegation of inappropriate contact between then-Comptroller Hevesi and Industrial Medicine Associates during the contract review process, the Comptroller's Inspector General interviewed both former and present employees at the State Comptroller's Office who directly supervised, reviewed, and approved of the pertinent contract during the time of the fund-raising. The Comptroller's Inspector General also spoke to former Comptroller Hevesi's scheduling and correspondence staff regarding this matter and reviewed applicable provisions of law.

IV. INVESTIGATION

The State Inspector General and the Comptroller's Inspector General determined that, in the contracts in which Industrial Medicine Associates bid against Diagnostic Health Services, OTDA properly documented that Industrial Medicine Associates was the superior candidate according to the standards put forth in the agency's request for proposals. No evidence of preferential treatment by OTDA towards Industrial Medicine Associates in the awarding of contracts for consultative medical services was identified. Further, although former State Comptroller Alan Hevesi did attend a fundraiser on December 14, 2005, while an Industrial Medicine Associates contract was pending review by his agency, the Comptroller's Inspector General determined that Hevesi's attendance at this event did not affect the agency's certification of the contract in question, and that neither Hevesi nor Industrial Medicine Associates violated any provision of law in effect at the time, although an agency head's attendance at a fundraiser sponsored by a company with a contract under review by the agency in question would be prohibited today under the Procurement Lobbying Act, which became effective on January 1, 2006.

However, the investigation revealed that Industrial Medicine Associates may have overstated the number of physicians that it employed or had agreed to employ under a potential contract when submitting bids. Industrial Medicine Associates was lax in tracking and updating its agreements with independent medical practitioners to provide examinations under the proposed contracts. As a result, Industrial Medicine Associates submitted forms to OTDA listing medical providers whose written agreements with Industrial Medicine Associates were out of date, or on which information had been altered or corrected by Industrial Medicine Associates employee Esther Muller. Despite these irregularities, the State Inspector General and the Comptroller's Inspector General found that Industrial Medicine Associates would have secured the bids even had it not listed the medical providers with outdated or altered agreements with the company. However, the State Inspector General and the Comptroller's Inspector General

recommend that OTDA consider the findings of this report when evaluating Industrial Medicine Associates for future contracts.

A. OTDA's Alleged Preferential Treatment Toward Industrial Medicine Associates

Industrial Medicine Associates currently holds 12 of the 13 regional contracts awarded by OTDA for consultative medical examinations.³ Despite Industrial Medicine Associates' success at obtaining OTDA contracts, the State Inspector General and the Comptroller's Inspector General found no evidence of preferential treatment toward Industrial Medicine Associates in the awarding of contracts.

The State Inspector General and the Comptroller's Inspector General identified four consultative examination contracts in which Diagnostic Health Services competed against Industrial Medicine Associates. In the first, Diagnostic Health Services successfully bid against Industrial Medicine Associates for a contract in Manhattan in 2003. This contract is currently in effect. Diagnostic Health Services also bid against Industrial Medicine Associates for a contract in Brooklyn in 2005. OTDA disqualified Diagnostic Health Services from bidding on this contract because it failed to meet a requirement that the company be operated by a medical professional.

The State Inspector General and the Comptroller's Inspector General reviewed the two remaining bids, which were awarded to Industrial Medicine Associates. Both bids were awarded in 2004, one covering Queens and the other covering the Bronx. The State Inspector General and the Comptroller's Inspector General determined that OTDA scored the two companies fairly according to the guidelines set forth in the relevant requests for proposals, and found no indication of preferential treatment towards Industrial Medicine Associates. In both cases, OTDA documents support its determination that Industrial Medicine Associates was the more professional, modern, and capable provider, and that Industrial Medicine Associates better met the qualifications set forth in the agency's request for proposals.

Diagnostic Health Services was first established in 1973 as a diagnostic and treatment center by Marie D'Esposito, who is not a medical professional. Diagnostic Health Services won its first contract with OTDA in 1987 to provide consultative examinations for the Manhattan region. As noted above, in 2005 Diagnostic Health Services was excluded from bidding on a contract because the company was not operated by a medical professional. Soon after, Dr. Howard Finger formed a new entity, DHS Diagnostic Medical Services, PC, which contracted with D'Esposito's company, Diagnostic Health Services, to perform administrative support to the new company. Dr. Finger assumed responsibility for identifying and employing physicians, overseeing all medical-related aspects of the company, and securing approval from OTDA. DHS Diagnostic Medical Services assumed responsibility for D'Esposito's ongoing contract with OTDA for the Manhattan region and future bids were submitted by DHS Diagnostic Medical Services. In 2008, Dr. Finger formed yet another company, Diagnostic

³ There are 13 contracts for 12 regions. Both Diagnostic Health Services and Industrial Medicine Associates contract with OTDA in the Manhattan region.

Consultative Medical Services, PC, which performs the same functions as DHS Diagnostic Medical Services and also contracts with D'Esposito's company for administrative support. Dr. Finger submitted his latest bid to OTDA under this new company's name, Diagnostic Consultative Medical Services.

Industrial Medicine Associates was established in 1990 and is operated by Dr. David C. Pulver and Dr. Aryeh L. Klahr, joint shareholders of the company. Industrial Medicine Associates' initial operations began in White Plains and Albany, but it has since expanded to such areas as Nassau, Suffolk, Buffalo, Rochester, Syracuse, Binghamton, and Poughkeepsie. In 1997, Industrial Medicine Associates expanded to the downstate region, bidding on the Manhattan contract and in subsequent years, Bronx, Queens, Brooklyn, and Staten Island.⁴ Industrial Medicine Associates currently holds the following 12 of the 13 OTDA contracts for consultative examinations: Rochester, Poughkeepsie, Syracuse, Binghamton, Nassau, Suffolk, Capital District, Buffalo, Manhattan, Bronx, Queens, and Brooklyn.

The two contracts that Diagnostic Health Services lost to Industrial Medicine Associates after submitting qualifying and competitive bids are the 2004 contracts for Bronx and Queens. Three viable bidders (Industrial Medicine Associates, Diagnostic Health Services, and HS Systems⁵) responded to requests for proposals for the two contracts. A review of the technical evaluations for the Bronx and Queens contracts indicate that Diagnostic Health Services scored lower in staffing capabilities than both Industrial Medicine Associates and HS Systems. Each bidder was scored according to its ability to secure sufficient staffing to provide the medical providers required for the contract. Review of the records revealed that OTDA's determination that Industrial Medicine Associates was better able to meet the staffing requirements as set forth in the request for proposals was appropriately based on the documents it reviewed.

In addition to a lower staffing score, Diagnostic Health Services obtained low scores for the appearance of its proposed facility, processing time, and overall quality of its work. The OTDA Technical Evaluation Committee reported that, "the [proposed Bronx] facility presented only an adequate appearance because of dirty chairs, some taped furniture, some broken tiles in one room and a hole in the wall of the treadmill room." Furthermore, the service plan outlined by Diagnostic Health Services, which includes factors like completeness, time standards, and optional examinations, was "cursory and lacked detail" for both contracts. Diagnostic Health Services did not score enough points in these areas to make its proposals competitive against the other bidders.

In contrast, Industrial Medicine Associates scored well in areas in which Diagnostic Health Services scored poorly. Industrial Medicine Associates employs a large statewide roster of physicians. Furthermore, OTDA officials informed investigators that Industrial Medicine Associates has technologically improved aspects of its company,

⁴ Although Industrial Medicine Associates was awarded the Staten Island contract over two other bidders, it subsequently withdrew its bid due to unexpected costs associated with its facility on Staten Island. Currently there is no contract in effect covering Staten Island.

⁵ HS Systems terminated operations in 2005.

resulting in a more up-to-date billing system and the ability to provide reports of examinations to OTDA in a timely manner. On the other hand, OTDA officials stated that Diagnostic Health Services has not kept up with Industrial Medicine Associates in meeting current business standards. According to the agency, Diagnostic Health Services continues to maintain and use an outdated bookkeeping system that has delayed the company's examination report production and billing time.

B. Other Allegations Related to Preferential Treatment

Throughout the pendency of the investigation, Diagnostic Health Services made a number of additional allegations against Industrial Medicine Associates that were unsupported by the evidence gathered. For example, although Diagnostic Health Services was not competing for either bid, the company alleged that Industrial Medicine Associates was ineligible to bid on contracts in Buffalo and Rochester in 2006 because it had received citations from the Occupational Safety and Health Administration (OSHA). The State Inspector General and the Comptroller's Inspector General determined that Industrial Medicine Associates did receive violations from OSHA, but the company resolved its violations in sufficient time to be eligible to bid on the contracts in question. Industrial Medicine Associates disclosed the violations in its bid documents submitted to OTDA for the two contracts in 2006, explaining that on February 7, 2006, the company entered into an informal settlement agreement with OSHA in which Industrial Medicine Associates agreed to pay the penalty, correct all specified violations, and comply with all the pertinent regulations.

Diagnostic Health Services also alleged that Industrial Medicine Associates employed a psychologist in 2004 in New Jersey who was not licensed to practice in that state.⁶ Although the doctor in question did not receive his New Jersey license until January 2005, the State Inspector General and the Comptroller's Inspector General determined that the doctor had obtained temporary permits beginning in 2002 from the New Jersey State Board of Psychological Examiners, which allowed him to practice in New Jersey pending the receipt of his license.

Further, Diagnostic Health Services identified a "whistleblower" who reportedly would provide specific information about the allegations against Industrial Medicine Associates. However, this individual was unable to provide any information to substantiate allegations that Industrial Medicine Associates received preferential treatment. In fact, investigators found that it was Diagnostic Health Services that had attempted to secure preferential treatment from OTDA. In a letter dated October 5, 2006, Diagnostic Health Services requested that OTDA refer Bronx residents to its site in Manhattan, rather than Industrial Medicine Associates' site in the Bronx, to help it "remain a viable entity."

⁶ The Social Security Administration has the authority to request that New York assist New Jersey with its reconsideration workload. New Jersey uses IMA as one of its independent consultative medical examination providers.

Diagnostic Health Services Medical Officer Howard Finger sent numerous records and multiple letters to both the State Inspector General and the Comptroller's Inspector General via e-mail during this investigation. Dr. Finger is an employee of Coler-Goldwater Hospital, a facility of the New York City Health and Hospitals Corporation. Almost all of the correspondence that Dr. Finger e-mailed to both state offices pertaining to Diagnostic Health Services originated from his Coler-Goldwater office e-mail account. The significant amount of documents received by both offices from the complainant indicates that Dr. Finger has been using substantial time and resources at his Health and Hospitals Corporation employment to conduct outside business matters that are unrelated to his position at the hospital. Accordingly, the State Inspector General and the Comptroller's Inspector General are referring Finger's use of public resources to further the interests of his private business to the Inspector General of the New York City Health and Hospitals Corporation for further investigation.

C. Industrial Medicine Associates' Alleged Submission of Fraudulent Documents

On March 18, 2008, Diagnostic Health Services raised an additional allegation against Industrial Medicine Associates regarding form DSS-4095, which demonstrates that a physician or other medical provider has agreed to work for the company, and provides information that allows OTDA to verify the medical provider's credentials and licensing. Diagnostic Health Services claimed that Industrial Medicine Associates obtained competitors' 4095 forms, redacted certain fields on the documents (such as corporate name, application date, date signed), completed them with Industrial Medicine Associates' information, and re-submitted the forms to OTDA as their own. The State Inspector General and the Comptroller's Inspector General determined that Industrial Medicine Associates did submit a competitor's 4095 form as its own on at least one occasion, after redacting the competitor's corporate information and inserting its own. In addition, the State Inspector General and the Comptroller's Inspector General identified at least five other instances regarding two physicians in which Industrial Medicine Associates may have submitted 4095 forms that were not authorized by the physicians in question.

Although the 4095 forms are not required during the bidding stage,⁷ the forms in question were submitted in support of Industrial Medicine Associates' bids for various contracts. The physicians referenced in the 4095 forms were listed on the required "Staffing Forms," on which the bidder is instructed to "describe the medical and administrative staff proposed to perform the work specified in this [request for proposals]."

In the first and most egregious instance, investigators identified a physician for whom both Diagnostic Health Services and Industrial Medicine Associates had submitted 4095 forms as part of their bid packages. Investigators obtained a 4095 form completed and signed by the physician in 1993. A photocopy of the Diagnostic Health Services

⁷ OTDA requires the contracting agency to submit forms DSS-4095 after the contract has been awarded so that the agency can verify the licensing and credentialing of the physicians employed by the winning bidder.

form was submitted as part of Industrial Medicine Associates' 2005 bid for the Brooklyn region, except that Diagnostic Health Services' company information had been redacted and replaced by Industrial Medicine Associates' company information. Most notably, investigators noted that the original form in which the doctor's corporate group read "Diagnostic Health Services Inc" was redacted to reflect "Industrial Medicine Assoc."

The State Inspector General and the Comptroller's Inspector General interviewed the doctor in question and showed him copies of the 4095 forms submitted by both Diagnostic Health Services and Industrial Medicine Associates. The doctor recognized his handwriting on both forms. He acknowledged that he was formerly employed by Diagnostic Health Services and completed the 1993 form for the company upon request. However, the doctor denied ever working for Industrial Medicine Associates, completing a 4095 for Industrial Medicine Associates, or providing Industrial Medicine Associates any verbal or written consent to use his name in association with the company. He informed investigators that while Industrial Medicine Associates actively tried to recruit his services, he never completed nor returned a 4095 form to Industrial Medicine Associates.

The State Inspector General and the Comptroller's Inspector General interviewed Esther Muller, Director of Industrial Medicine Associates' Provider Relations Department. Muller is the only full-time employee in Industrial Medicine Associates' Provider Relations Department and is responsible for gathering and submitting documents detailing the Industrial Medicine Associates' medical staff for its bid proposals.

Muller admitted to investigators that she regularly alters 4095 forms submitted to Industrial Medicine Associates by physicians. Muller stated that if a physician left certain sections of the form blank, she would complete the form herself. In fact, Muller stated that, when sending the 4095 form to a prospective physician employee, she instructs the physician to leave the corporate name and the federal employer ID number on the form blank so that she can complete the information herself on the signed form. If a physician did not follow her instructions to leave the form blank in places, Muller stated that she would redact the physician's form and fill in information herself if the form contained any errors. An examination of Industrial Medicine Associates' 4095 forms revealed a number of forms containing redactions and alterations consistent with Muller's practice of changing fields in signed forms after receiving them from the physicians. As Muller submitted photocopies of the 4095 forms to OTDA with her company's bids, it was not readily apparent to OTDA bid reviewers that the forms had been altered. Muller claimed that she notified and obtained consent from physicians before altering their 4095 forms, but did not keep records of this consent.

Muller also admitted that, like other bidders, she had obtained copies of competitors' bid documents at the conclusion of the bid process, including competitors' 4095 forms, through the state's Freedom of Information Law.⁸ Muller further stated that

⁸ The Freedom of Information Law (Public Officers Law Article 6) is New York State's principal statute on providing for public access to government records. Public Officers Law § 86(4) provides that "[r]ecord"

she contacts physicians listed in her competitors' bid packages and attempts to recruit physicians to her company. Despite admitting to having obtained competitors' bid documents, Muller claimed that she had never heard of Diagnostic Health Services prior to this investigation.

Muller denied knowingly submitting fraudulent documents or preparing documents in physicians' names without their consent or knowledge. Muller claimed that she had never heard of the physician whose form apparently was altered to replace Diagnostic Health Services' corporate information with Industrial Medicine Associates'. Muller speculated that the physician's 4095 form, and potentially other physicians' 4095 forms, were obtained by Industrial Medicine Associates through a Freedom of Information Law request, and that the documents may have become comingled with Industrial Medicine Associates' 4095 forms through mishandling by a temporary assistant. As noted above, Muller is in the practice of redacting company information on 4095 forms and replacing it with Industrial Medicine Associates' corporate information.

The State Inspector General and the Comptroller's Inspector General identified two other physicians who stated that Muller submitted unauthorized 4095 forms with their names. One doctor stated that Industrial Medicine Associates submitted unauthorized 4095 forms on his behalf on three occasions. The physician was also a previous employee of Diagnostic Health Services and had filled out a 4095 form for Diagnostic Health Services in 1999. A photocopy of a separate form, with similar handwriting and dated 2003, but with no company name listed, was submitted as part of Industrial Medicine Associates bid packages in 2003 and 2004. Although it appears that the physician did complete this form, it is unclear whether it was intended for Industrial Medicine Associates or Diagnostic Health Services, as no company name is listed on the form. A photocopy of a third form dated 2005 was submitted as part of a 2005 Industrial Medicine Associates bid package. The 2005 form clearly was not completed by the same person who filled out the first two forms. The handwriting and signature are different, and the form incorrectly states that the physician is a member of the American Board of Psychology, whereas he is actually a member of the American Board of Psychiatry and Neurology.

The physician denied ever preparing the documents for Industrial Medicine Associates or authorizing Industrial Medicine Associates to include his name as part of its staff. He explained that Industrial Medicine Associates tried to recruit him in the past but he never accepted the company's offer of employment.

Muller disputed this statement, claiming that the physician had expressed interest in Industrial Medicine Associates and voluntarily submitted enrollment documents to the company. Regarding the 2005 form that contained misinformation about the physician's

means any information kept, held, filed, produced or reproduced by, with or for an agency or the state legislature, in any physical form whatsoever including, but not limited to, reports, statements, examinations, memoranda, opinions, folders, files, books, manuals, pamphlets, forms, papers, designs, drawings, maps, photos, letters, microfilms, computer tapes or discs, rules, regulations or codes.

board certification, Muller stated that she received that document from the physician's office and therefore did not question its authenticity.

A third doctor stated that he had worked for Industrial Medicine Associates but had resigned in 2001. He stated that he had informed Industrial Medicine Associates management of his decision to terminate his employment. However, records show that enrollment forms were still submitted to OTDA in his name in 2003 and 2004. Muller also disputed this physician's account, stating that there were "employment issues" but the physician never officially resigned from Industrial Medicine Associates. Despite the stated resignation or "employment issues," Muller submitted the physician's name to OTDA as part of a bid as late as 2004.

OTDA's Acceptance of Unsupported Provider Lists

As discussed above, OTDA requires bidders for consultative examination contracts to provide a list of employees who will perform the required functions of the contract, both medical and administrative. The required "staffing form" allows the company to indicate whether the listed employee is a current or prospective employee. Based on the list, a bidder is scored on its ability to meet the staffing requirements set forth in the request for proposals. OTDA does not require, nor does it specify that the bidder should maintain, current agreements with the proposed employees indicating that they intend to work for the winning bidder should the contract be awarded. Although OTDA awards points to bidders based on the size and completeness of the staffing list, it allows the winning bidder to modify the list in any way it sees fit once the contract is awarded. Physicians' credentials and supporting documents such as the 4095 form are verified and reviewed by OTDA only after the contract is awarded to a provider.

Muller stated that she did not verify a doctor's continued interest or availability to work for Industrial Medicine Associates when submitting his name during the bid process. Rather, Muller relied on a list of doctors for whom she has obtained a signed 4095 form, regardless of the date on the form and regardless of whether the doctor has maintained a working relationship with the company during the intervening period. Muller submitted names of all the "available" physicians, even if she did not anticipate that that physician would actually perform services for the company in the event that Industrial Medicine Associates won the contract. In fact, Muller stated that she did not even refer to the doctors listed in the company's bid documents when preparing for OTDA the actual list of doctors who are to perform consultative examinations after a contract is awarded.

Since the period between a bid's submission and the contract's award can be several months, it is necessary to allow the winning bidder some flexibility with its staffing at the onset of the contract period. However, a staffing list provided during the bid stage should be a good-faith representation of the company's anticipated staff for the contract. Industrial Medicine Associates has taken advantage of OTDA's flexibility by inflating its list of employees during the bidding stage, and waiting until the contract stage to compile the actual list of doctors who will perform the company's services.

Although Industrial Medicine Associates has been able to meet the staffing requirements of the contracts, it may have received more points than deserved during the bidding process by inflating the staffing lists submitted as part of its bids.

Muller stated that, in response to a request from OTDA, she recently began requesting that physicians update their 4095 forms every three months.

Hevesi's Alleged Participation in Industrial Medicine Associates-Held Fundraiser

As noted above, the State Inspector General's jurisdiction is limited to the Executive Department. Accordingly, the following review of the allegation against former Comptroller Hevesi was conducted by the Comptroller's Inspector General.

Diagnostic Health Services alleged that Dr. David Pulver, President of Industrial Medicine Associates, sponsored a private cocktail reception and fundraiser in support of Alan Hevesi, then-New York State Comptroller, who was seeking re-election during the time the Office of the State Comptroller (OSC) was reviewing OTDA's procurement for the 2005 Brooklyn contract. Diagnostic Health Services alleged that this event violated the Procurement Lobbying Law as well as Governor Pataki's Executive Order 127. The Comptroller's Inspector General's investigation determined that Hevesi's attendance at the function did not violate any applicable state law.

In April 2005, OTDA issued a Request for Proposals (RFP) related to its procurement of consultative medical examination services for applicants for disability assistance. The services under this contract were to be rendered in Brooklyn. OTDA advertised the procurement through numerous public media sources, including an April 25, 2005, advertisement in the Contract Reporter.⁹

Responses to the RFP were due on June 29, 2005. Industrial Medicine Associates and Diagnostic Health Services submitted timely responses to the proposal.¹⁰ On July 26, 2005, OTDA advised Diagnostic Health Services in writing that its proposal was disqualified because it failed to meet several technical requirements of the RFP.¹¹ Thereafter, on December 2, 2005, OTDA awarded the Brooklyn contract to Industrial Medicine Associates. The contract was approved by the Office of the Attorney General

⁹ OTDA stated that it sent notification letters to 725 prospective bidders..

¹⁰ The OTDA Bureau of Contract Management received financial proposals from three bidders interested in providing medical examinations for clients in the disability determination process: DHS, HS Systems, Inc., and IMA.

¹¹ OTDA determined that DHS failed to comply with § I.K, Minimum Qualifications Required of Offerors, which provides, in relevant part, that "[o]fferors...must be in full compliance with federal, state and local operating requirements as appropriate, for providing a facility and services as specified in the RFP. Contractors providing medical consultative examination services must comply with those articles which regulate the admission to and practice of the professions, including medicine. All such entities must be in compliance with the requirements of Education Law § 6527 and in compliance with Article 15 of the New York State Business Corporation Law, or other corporate organization for physicians as authorized by law." At the time the bid was submitted, DHS was neither a Public Health Law Article 28 hospital nor a professional corporation, as required by Education Law § 6527.

on December 6, 2005 and forwarded to the Office of the State Comptroller for approval on December 8, 2005.

On December 14, 2005, while the contract was awaiting OSC approval, Pulver sponsored a private cocktail reception and fundraiser in support of Hevesi, who was seeking re-election. Hevesi attended the event.¹²

Diagnostic Health Services asserted without factual support that, at the time of his participation in the fundraising event, Hevesi must have been aware that the Brooklyn contract was under review by OSC staff. There have been no assertions made that Hevesi, Dr. Pulver, or any of the attendees at the fundraising event discussed the pending contract award.

Procurement contracts of State agencies are reviewed by the OSC Bureau of Contracts pursuant to State Finance Law (SFL) § 112.¹³ The investigation determined that during the contract review period, none of the staff in the OSC Bureau of Contracts or any other OSC staff involved in the contract review process had any knowledge of the fundraising event. In fact, there have been no assertions made that anyone on the OSC staff, other than Hevesi, was aware of, or participated in, the fundraising event.

In 2005, the State Legislature amended the State Finance Law by adding § 139-j, imposing restrictions on contacts during the procurement process and § 139-k, providing for disclosure of contacts and a new responsibility determination of offerors in governmental procurements.¹⁴ These provisions are part of the Procurement Lobbying Law, which provides guidelines and standards to be adhered to in the procurement process.¹⁵

The legislation is intended to prohibit entities that conduct business with governmental agencies through the procurement process from influencing the procurement decision-making. Under the law, each governmental entity that is engaged in a procurement is required to designate a contact person, and offerors are required to limit their agency contacts to that designated person during the restrictive period. The

¹² The invitation requested participants to join Pulver at a private cocktail reception in support of Hevesi on Wednesday, December 14, 2005, 6:00pm – 7:30pm at the Cornell Club, 6 East 44th Street, New York, NY 10017. Donation was \$1,000 for Sponsors and \$500 for Donors. Checks were to be made payable to “Hevesi for New York” c/o Dr. David Pulver, Industrial Medicine Associates PC, 280 Dobbs Ferry Road, White Plains, NY 10607.

¹³ SFL § 112 provides, in relevant part, that “[b]efore any contract made for or by any state agency...shall be executed or become effective, whenever such contract exceeds fifteen thousand [now fifty thousand] dollars in amount, it shall first be approved by the comptroller and filed in his or her office.”

¹⁴ Laws of 2005, Chapter 1.

¹⁵ The law, formally known as the Omnibus Lobbying Reform Act of 2005, providing for a comprehensive system to regulate and disclose attempts to influence state and local government procurement decisions, became effective upon enactment on August 23, 2005; however, the provisions of Section 13 [SFL § 139-j] and Section 14 [SFL § 139-k] of the Act did not become effective until January 1, 2006.

restrictive period extends from the issuance of a solicitation until the award of the contract and approval by OSC.¹⁶

The sections of the Law imposing restrictions on contacts during the procurement process and providing for disclosure of contacts did not take effect until January 1, 2006, and are applicable only to procurements initiated subsequent to its enactment date. Because the Brooklyn contract procurement was initiated in April 2005, it did not fall within the ambit of the Procurement Lobbying Law. Consequently, Hevesi's participation in a fundraising event sponsored by Dr. Pulver in December 2005 did not violate the provisions of the Law. Moreover, as noted, there have been no assertions made that Hevesi, Dr. Pulver or any of the attendees at the event discussed the pending contract award.¹⁷

Diagnostic Health Services also asserted that Hevesi's participation in a fundraising event sponsored by Dr. Pulver during the restrictive period violated Executive Order 127, which was in effect at the time of the Brooklyn contract procurement.¹⁸ The Executive Order required the awardee of a governmental procurement to provide a written certification indicating that the procurement has not been influenced by a prohibited contact. In this context, a prohibited contact would have been contact between Industrial Medicine Associates and an employee of OTDA. Industrial Medicine Associates signed a certification to that effect on September 29, 2005, and that certification is a part of the procurement record.

The Executive Order, however, did not govern contact between the award recipient and the State Comptroller. The Governor's Executive Order, while binding on OTDA, an executive branch agency, did not bind the State Comptroller, who is an independently elected State official. Consequently, Hevesi, in his role as State Comptroller, would not have been subject to the provisions of Executive Order 127. His attendance at a fundraising event sponsored by Dr. Pulver did not violate the provisions of the executive order.¹⁹

¹⁶ Section I.G of the RFP provides, in pertinent part: "From the release date of this RFP until the resultant contract is approved by the Office of the State Comptroller, all Offerer contacts related to this procurement with Office staff must be authorized by the Project Director, identified in Section I.D. of this RFP."

¹⁷ We note that "contacts," as used in the Procurement Lobbying Law, refer to communications that are intended to influence the governmental procurement.

¹⁸ 9 NYCRR § 5.127 Executive Order No. 127: Providing for Additional State Procurement Disclosure, dated June 16, 2003. Revoked and rescinded by Executive Order No. 127.1 (George E. Pataki), dated June 30, 2006.

¹⁹ It should be noted that DHS did not protest the awarding of the contract to IMA. DHS did, however, file a written complaint with OSC on July 18, 2005 in which it alleged that IMA was engaging in unfair trade practices in order to drive its competitors out of business. OSC treated this complaint as a bid protest and, by letter dated January 31, 2006, informed DHS that, while engaging in unfair trade practices could render IMA non-responsible, DHS had not "asserted that there has been any adjudication of such activity by a court or an appropriate governmental entity (or even that there is a pending investigation) and [that] the allegations set forth . . . concerning the activities of IMA do not provide sufficient documentation to support a finding of non-responsibility."

Section 74 of the Public Officers Law provides a code of ethics applicable to public officials.²⁰ In Advisory Opinion No. 98-12, the former New York State Ethics Commission, now Commission on Public Integrity²¹, issued formal, binding guidance on the application of Public Officers Law §74 to state employees who work on political campaigns, including fundraising. In that Opinion, the Commission held that a state employee may not solicit funds from any individual or business entity (1) which currently has matters before him or before the units he supervises, (2) which he has substantial reason to believe will have matters before him or such units in the foreseeable future or (3) which had matters before him or such units in the last twelve months.²²

The Commission noted that it had not previously issued a formal opinion describing the political activities in which a State officer or employee may engage, stating that the opinion, therefore, offered guidance on this important subject. The Commission went on to state:

This opinion is applicable to State officers and employees **but not to statewide elected officials running for re-election. Such officials are in a unique position, as they both hold elected office and are simultaneously engaged in political activities. Their fundraising activities are subject to the Election Law** (Advisory Opinion No. 98-12 [emphasis added]).

Consequently, we cannot conclude that Hevesi knowingly engaged in activities in violation of his public trust.

In light of Public Integrity's opinion cited above, the Comptroller's Inspector General reviewed applicable provisions of the Election Law, including § 17-128, relating to

²⁰ Public Officers Law § 74 (3)(d) provides that “[n]o officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.”

Public Officers Law § 74(3)(f) provides that “[a]n officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.”

Public Officers Law § 74(3)(h) provides further that “[a]n officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.”

²¹ The Public Employee Ethics Reform Act of 2007 (Chapter 14 of the Laws of 2007) dissolved the New York State Ethics Commission and the Temporary Commission on Lobbying and created the New York State Commission on Public Integrity. All opinions made by the former State Ethics Commission are applicable at least until the new Commission completes its review of existing opinions.

²² The Opinion further provides that a State employee may participate in mass mailings, even if some of the letters will reach individuals or business entities from which he otherwise could not solicit funds. If an entity properly solicited by him makes a contribution and then has a matter before him or a unit he supervises, he should recuse himself if the matter arises within one year of the contribution, although the length of the period may vary depending upon the circumstances. Finally, the employee may not use his official title, position or authority in his fundraising efforts or solicit from subordinates in his units, nor may he use State resources for political purposes, engage in political activities in a State office, or engage in such activities during business hours unless leave is taken.

violations of the Election Law by a public officer or employee and 17-158, relating to the corrupt use of position or authority by a person holding public office. The review did not find any violation of the Election Law. In accordance to Election Law § 14-114, the invitation to the Industrial Medicine Associates-sponsored fundraiser listed the contribution limits for statewide office. Records obtained from the State Board of Elections also indicate that a financial disclosure report was filed with the Board pursuant to Election Law § 14-102.

V. FINDINGS AND RECOMMENDATIONS

The State Inspector General and the Comptroller's Inspector General found no preferential treatment afforded by OTDA towards any bidder. However, the investigation did reveal that Industrial Medicine Associates engaged in a practice of improperly altering and submitting 4095 forms to OTDA as part of its bids for contracts to perform consultative medical examinations. Industrial Medicine Associates did not confirm that physicians were available to fulfill a contract prior to including their names in the company's bid documents, and as a result, submitted lists of proposed staff that were unreliable indicators of the actual staff that would be performing services under the contract. In addition, at least one physician who was never an employee of Industrial Medicine Associates was listed as part of the company's staff in a 2005 bid. Despite these findings, the State Inspector General and the Comptroller's Inspector General determined that, in the contracts for which Industrial Medicine Associates competed against Diagnostic Health Services, ODTA properly determined the IMA was the superior provider. The scores that Industrial Medicine Associates received for staffing were not the determining factors in the awards of the contracts. However, the State Inspector General and the Comptroller's Inspector General recommend that OTDA consider the findings of this report when evaluating Industrial Medicine Associates for future contract awards.

Since the events covered by this investigation, Director of Provider Relations at Industrial Medicine Associates Esther Muller was instructed by OTDA to update OTDA's 4095 forms every three months. The State Inspector General and the Comptroller's Inspector General further recommend that OTDA ensure that its guidelines for scoring bidders provide the most accurate assessment of each bidder's ability to meet the staffing requirements at the contract's award. If the bidders cannot provide a reliable list of proposed staff during the bid stage, then OTDA should devise a new method to assess the provider's capability to meet this requirement. For example, when submitting a bid for an OTDA contract, the provider could include a certification indicating that it has the staffing capability to meet the required number of hours per specialty as outlined in the RFP. This certification could be used as the basis for awarding staffing points.

In reviewing its scoring guidelines, OTDA should ensure that smaller providers are not unfairly disadvantaged in the bid process. Except for one soon-to-expire contract held by Diagnostic Health Services, Industrial Medicine Services is the sole contractor with ODTA. ODTA should make efforts to ensure that its consultative examination contracts do not become closed to competitors.

OTDA requires the winning bidder of a consultative examination contract to provide a 4095 form for each physician who will be providing services under the contract. The 4095 form indicates the physician's agreement to work for the contractor, and provides evidence of required licensing and certifications. This investigation revealed that OTDA was accepting photocopies of forms that had been altered by Industrial Medicine Associates. The 4095 form should be completed only by the medical provider. The medical provider should complete, sign, and date the 4095 form in accordance with OTDA requirements. Only the original 4095 form with the consultant's original signature should be submitted to OTDA for review at the time of the contract award. The contractor should not be allowed to make any changes, additions, or deletions to a medical provider's 4095 form. By requesting original forms, OTDA can ensure that the forms are not altered and that new forms are submitted with each new contract.

During the investigation, Industrial Medicine Associates' Esther Muller admitted that she uses the Freedom of Information Law to obtain the names of the physicians working for her competitors and to recruit them to work for her company. The Freedom of Information Law permits state agencies to withhold certain information "which if disclosed would cause substantial injury to the competitive position of the subject enterprise."²³ As a company's ability to provide medical professionals in certain specific specialties is a factor in the award of a contract, Industrial Medicine Associates' use of this information to recruit other companies' physicians may be causing such injury to its competitors. Accordingly, the State Inspector General and the Comptroller's Inspector General recommend that OTDA seek an opinion from the New York State Committee on Open Government²⁴ regarding its ability to redact names of physicians or other related information when granting Freedom of Information Law requests to bidders at the close of the contract process.

Regarding the allegations against former Comptroller Hevesi, the Comptroller's Inspector General determined that Hevesi did not violate any laws in effect at the time of his attendance at a fundraiser sponsored by Industrial Medicine Associates President Dr. David Pulver on December 14, 2005. In fact, there is no indication that Hevesi was aware that a contract between OTDA and Industrial Medicine Associates was awaiting review and approval of the Comptroller's office at the time he attended the fundraiser. Notably, an agency head's attendance at such an event while a contract was pending at the agency would be prohibited today under the Procurement Lobbying Law, enacted January 1, 2006.

Although the investigation did uncover some improprieties at Industrial Medicine Associates, the State Inspector General and the Comptroller's Inspector General determined that many of the allegations made by Diagnostic Health Services' Dr. Finger were wholly unsupported by any evidence. In addition, Dr. Finger's numerous contacts with investigators from his New York City e-mail account indicate that Dr. Finger has been performing work in support of his private company during the work day. This

²³ Public Officers Law § 87(2)(d).

²⁴ Public Officers Law § 89(1)(b)(i).

finding is referred to the Inspector General of the Health and Hospitals Corporation for investigation.

Response of the Office of Temporary and Disability Assistance

OTDA Commissioner David Hansell advised the State Inspector General that his office accepted and will implement all of the report's recommendations. Hansell stated OTDA will take the following specific actions:

- The report's findings will be considered when OTDA evaluates IMA for future contract awards.
- New methods for assessing a bidder's capability to meet staffing requirements will be devised to ensure both the accuracy and truthfulness of information provided during the bidding process.
- Steps will be taken to modify the contracting process to further OTDA's desire to increase competition and to ensure a level playing field for all bidders.
- OTDA will require that physicians sign the 4095 form that establishes their willingness and qualifications to provide services. Only original forms will be accepted and newly executed forms will be required for each contract. Contractors will not be allowed to make any changes to a 4095 form after it has been signed by a physician.
- An opinion will be sought from the New York State Committee on Open Government regarding OTDA's ability to redact names of physicians or other personal identifying information when disclosing records under the Freedom of Information Law.