

STATE OF OHIO
OFFICE OF THE INSPECTOR GENERAL

RANDALL J. MEYER, INSPECTOR GENERAL

REPORT OF
INVESTIGATION



AGENCY: OHIO DEPARTMENT OF TRANSPORTATION
FILE ID NO.: 2008-238
DATE OF REPORT: June 9, 2011

The Office of the Ohio Inspector General..... The State Watchdog

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REPORT OF INVESTIGATION

FILE ID NUMBER: 2008-238

SUBJECT NAME: Possitivity

POSITION: Contractor

AGENCY: Ohio Department of Transportation

BASIS FOR INVESTIGATION: Confidential Complaint

ALLEGATIONS: Contract Non-Performance
Improper Influence

INITIATED: August 14, 2008

DATE OF REPORT: June 9, 2011

Initial Allegation and Complaint Summary

In June 2008, a confidential complainant approached the Office of the Ohio Inspector General with concerns regarding the not-for-profit, privately held organization known as Possitivity (formerly Ohio Industries for the Handicapped). The complainant alleged Possitivity was acting as an agent for the Ohio Department of Transportation (ODOT) and serving the interests of ODOT by contracting for goods and services from Ohio community rehabilitation programs (CRPs), which primarily provide janitorial services at ODOT facilities. While acting in the capacity as ODOT's agent, Possitivity was simultaneously acting as an agent for the CRPs, and serving the interests of the CRPs by negotiating contracts for the CRPs to provide goods and services to ODOT. The complainant further alleged Possitivity was failing to meet the terms of the property management contract with ODOT by not providing adequate oversight of the CRPs. An investigation was opened on August 14, 2008.

During the course of the investigation, the Office of the Ohio Inspector General also identified a misinterpretation of Ohio Revised Code (ORC) §125.609 by ODOT and the Ohio Department of Administrative Services (ODAS). This section of the law permits agencies of state government to seek a waiver when the costs for services from a community rehabilitation program are "not advantageous" to the State.

Background

In the late 1970s, the Ohio General Assembly enacted legislation creating Ohio's State Use Program, under which governmental agencies are encouraged, and in some cases required, to procure certain types of goods and services from vocational rehabilitation programs for the handicapped. This law also created a designated central non-profit agency (CNA) to act as a broker between Ohio's community rehabilitation programs (CRPs) and governmental agencies seeking to procure goods and services from these programs. Ohio Industries for the Handicapped (OIH) was formed to act as the central non-profit agency for the State Use Committee.

The State Use law was amended in 2005 which abolished the State Use Committee and created the Office of Procurement for Community Rehabilitation Programs (OPCRP) within the Ohio

Department of Administrative Services.¹ The amendments to the law also abolished the central non-profit agency as it was originally established, and instead allowed for the certification of approved agents. These certified agents could contract with the Office of Procurement for Community Rehabilitation Programs to provide centralized business functions to the local community rehabilitation programs. The CRPs could either directly contract with government agencies or work through a certified agent acting as the community rehabilitation program representative to contract with government agencies. Ohio Industries for the Handicapped became the only certified agent with ODAS after the law was changed, and many CRPs agreed to have OIH serve as their agent.

With the enactment of the new law, ODOT agreed to a pilot program which created a property management company to act as ODOT's agent and oversee the department's janitorial service contracts with the community rehabilitation programs.² In 2006, ODOT issued a Request for Proposal (RFP) through ODAS to contract for these janitorial services. The original RFP was issued on February 24, 2006, and was amended several times through April 4, 2006. Final responses were due by April 21, 2006. Ohio Industries for the Handicapped was the only organization to officially respond to the RFP and was awarded the property management company contract with ODOT. **(Exhibit 1)**

The original contract with ODOT was signed on May 22, 2006, and several amendments soon followed. Listed below are the dates and changes made through the closing of the contract:

- June 26, 2007 – Amendment #1 changed the terms relating to non-CRP providers. It also added the Office of Procurement for the Community Rehabilitation Programs to the terms and conditions;
- November 23, 2007 – Amendment #2 changed the processing terms related to the implementation of the new State of Ohio accounting system and changed the name of the property management company from Ohio Industries for the Handicapped to Possitivity;³

¹ See ORC §125.60 – 125.6012.

² This was pursuant to ORC §125.603(B) that allowed pilot programs to further the objectives of the Community Rehabilitation Programs.

³ Ohio Industries for the Handicapped changed its name to Possitivity in 2007. Both names are used interchangeably throughout this report.

- June 18, 2008 – Amendment #3 renewed the contract through June 30, 2009, and changed the cost summary due to changes in contract requirements.

In 2009, the ODOT contract with Possitivity was renewed for a 90-day period as ODOT worked through re-issuing the RFP for the property management company services. However, this RFP was not released as ODOT decided to bring these services in-house. The contract with Possitivity was closed on September 30, 2009.

Investigative Results

Allegation #1 – A conflict of interest was created when Possitivity agreed to serve as an agent representing the interests of ODOT in negotiating with the community rehabilitation programs (CRPs) while at the same time serving as the agent representing the interests of the CRPs in negotiations with ODOT.

ORC §125.605 defines the functions of an approved agent for community rehabilitation programs, contracting with the Office of Procurement for Community Rehabilitation Services to:

1. Provide centralized business facilitation or other assistance to qualified non-profit agencies;
2. Act as a distributor of supplies and services registered on the procurement list maintained by the office under ORC §125.603; and
3. Provide marketing, administrative and other services related to sales. **(Exhibit 2)**

Addendum #2 to the property management company RFP included a new section in Attachment 1 which stated, “The [property management company] acting as ODOT’s agent will deal directly with the CRPs on all matters relating to the provision of agreed-upon contracted services at all ODOT properties.” **(Exhibit 3)** This language clearly stated that the property management company (Possitivity) was ODOT’s agent in all matters relating to the community rehabilitation programs. However, Possitivity was also the only registered agent for the CRPs with the Office of Procurement for Community Rehabilitation Services. The possibility of Possitivity serving in these dual roles created a conflict from the start of the pilot program.

Possitivity's involvement in the program was of concern to the Ohio Department of Administrative Services (ODAS) from the beginning of the RFP process. Addendum #4 to the RFP included an additional attachment that listed contract totals by district for fiscal year 2006. The reason ODAS found it necessary to add this attachment to the RFP was because Possitivity already had access to the information, while other prospective bidders did not. To avoid an unfair advantage for Possitivity, ODAS provided this information on the RFP for other prospective bidders. **(Exhibit 4)**

During the question-and-answer period for the RFP, a prospective bidder — Infrastructure Corporation of America — was concerned about the involvement of Ohio Industries for the Handicapped (OIH), later known as Possitivity. OIH was listed as the central non-profit agency under the State Use program, and yet was in attendance as a prospective bidder at the pre-bid conference. ODAS responded that, “as originally stated in the RFP, changes in the State Use Law ‘disband’ the concept of a ‘Central Non-profit Agency’, but does permit OIH to function in that role if needed through XXXXXX XX, 2007 OIH’s attendance at the pre-proposal conference was that of a private, perspective offeror and not as the program or CRP CNA.” **(Exhibit 5)**

In a letter to Vicki Ashley, Facilities Manager for ODOT, Connie Chwan, CEO of Possitivity/OIH stated, “. . . as an agent representing the CRPs, OIH has a dual responsibility to insure both ODOT and the CRPs are equitably represented.” **(Exhibit 6)** This may have led Possitivity to contact ODAS regarding the issue. According to a May 29, 2007, email to CEO Chwan from Peter A.J. Gunnell, Manager for the Office of Procurement Services at ODAS, Gunnell stated that Possitivity could not act as the agent and contractor-of-record for the community rehabilitation programs while performing the duties of a property management company for ODOT. Gunnell wrote, “I know that this is contrary to your stated position,” indicating Possitivity did not view this dual agency as an issue. **(Exhibit 7)**

Even after this email, Possitivity continued to act on the community rehabilitation programs' behalf in matters related to ODOT. In a letter from Possitivity addressed to the CRPs dated August 29, 2007, Chwan indicated that Possitivity would be working on behalf of the community

rehabilitation programs to resolve billing issues in an upcoming meeting with ODAS and ODOT. **(Exhibit 8)** In another letter to rehabilitation programs dated October 15, 2007, Possitivity clearly stated, “we are and continue to be your advocates.” **(Exhibit 9)** Finally, in a memo from Chwan to the CRPs dated February 6, 2008, she asked the CRPs to provide information to prepare for a meeting with ODOT in which Possitivity planned to address CRP concerns regarding late payment of invoices. **(Exhibit 10** – Note: While the date of the memo is 2007, other dates in the body of the memo indicate the actual date was in 2008.) It is clear in the RFP that Possitivity was to act as ODOT’s agent and not in the best interest of the community rehabilitation programs, and yet these communications indicate Possitivity was representing both sides.

In interviews conducted by the Office of the Ohio Inspector General with employees at Ohio’s Department of Administrative Services and Possitivity, the issues mentioned above were addressed:

- Chwan stated in her February 9, 2009, interview, “. . .we’re really representing both sides of the equation.”
- Dana King of the Office of Procurement for ODAS stated in her May 13, 2009, interview that she had discussed this conflict with Chwan before and informed her that Possitivity represented ODOT — not the CRPs.
- Ron Rowland of the Office of Procurement for Community Rehabilitation Programs at ODAS stated in his May 22, 2009, interview that he did not believe representing both ODOT and the CRPs was the proper thing to do.

Another conflict arose when Possitivity had several outstanding loans to the CRPs. According to the fiscal year 2006 and 2007 audit issued by the Auditor of State’s Office and performed by an independent public accountant, Possitivity loaned a total of \$90,339 to three CRPs, with final payment due by May 2010. Possitivity, therefore, would have had a vested interest in making sure that these three CRPs continued to receive State work to ensure their ability to repay the loans. **(Exhibit 11)**

ODAS also received an email regarding a golf course supply business's connection with Possitivity. The writer stated that several CRPs borrowed money – some from Possitivity – to be a part of the business venture. Possitivity abruptly canceled the program, leaving several groups with outstanding loans. It is not clear if the three loans mentioned above are related to this business. **(Exhibit 12)**

Accordingly, there is an appearance of impropriety in this instance.

Allegation #2 – Possitivity's absence of oversight as required in the property management company contract.

Early in the program, Ohio Department of Transportation had concerns regarding Possitivity's oversight of the contract. On July 13, 2006, Julie Ray, Deputy Director of Finance & Forecasting at ODOT, sent a letter to the Auditor of State's Office requesting a special audit of Possitivity. In the letter, Ray stated that Possitivity refused to comply with their initial audit request, asserting ODOT had no authority to conduct the audit. **(Exhibit 13)** However, the RFP contract contained a provision granting ODOT the authority to perform an audit. **(Exhibit 14)** Possitivity suggested the provision did not apply because the subject was not addressed in Possitivity's response approving the RFP contract. A copy of the contract was provided and was in contradiction of Possitivity's assertion. The language in the contract stated, “. . . in conflicting provisions between the documents that make up the contract, the order of precedence for the documents is as follows:

1. This RFP, as amended.
2. The documents and materials incorporated by reference in the RFP.
3. The Contractor's proposal, as amended, clarified, and accepted by the State.
4. The documents and materials incorporated by reference in the Contractor's proposal.”

A copy of this contract was signed by Possitivity and was included in their RFP response. **(Exhibit 15)** ODOT and Possitivity came to an agreement on the audit several months later **(Exhibit 16)**, and the request to the Auditor of State for a special audit request was withdrawn on October 3, 2006.

ODOT conducted agreed-upon procedures in reviewing the financial statements for two community rehabilitation programs — Youngstown Area Goodwill Industries Inc., and the Burdman Group Inc. ODOT issued their findings in a November 22, 2006, letter to Possitivity which uncovered various issues, including overbillings by the two CRPs totaling \$29,449.

(Exhibit 17) At Possitivity’s request, ODOT also conducted a review of their Janitorial Compliance Program procedures and found several deficiencies, including the following:

- Possitivity received payroll data from 70-75 percent of the CRPs instead of the required 100 percent;
- Possitivity did not have a policy establishing a time when payroll data was to be received, and therefore data was received in an untimely manner;
- Possitivity reviewed billing variances on an annual, rather than monthly, basis. **(Exhibit 18)**

In an additional lapse of management oversight, Possitivity failed to require and verify criminal background checks of employees of the community rehabilitation programs. In July 2008, ODOT received an email alleging a CRP was not performing background checks of workers, and Possitivity was failing to verify the checks as required. ODOT’s review led to the discovery of a worker with an “extensive criminal background” and that, “many of the checks have returned with major hits.” **(Exhibit 19)**

Finally, ODOT found Possitivity failed to provide adequate management oversight of workers’ completion of timekeeping documents, allowing employees to keep their own record of work times at the beginning or end of daily work periods. These documents were completed manually and could be easily falsified. A co-worker or other person could complete a timesheet for a worker who was not present, or someone could falsify beginning and end times to inflate work hours. ODOT expressed concerns with Possitivity’s failure to verify timekeeping documents and removed this provision from the amended contract in June 2008. Under the new agreement, ODOT district offices were required to review the timesheets. Even when the process was moved in-house, however, a district office employee emailed Vicki Ashley of ODOT and stated that “the sign-in/out sheets are a joke” and that the employee knew “for a fact that they have

been falsely completed in the past.” **(Exhibit 20)** In a February 5, 2009, interview, Possitivity CEO Chwan herself admitted the sign-in/out sheets were a problem.

Accordingly, a wrongful act or omission occurred in this instance.

Other Matter – Misinterpretation of ORC §125.609 regarding obtaining waivers from the Office of Procurement for the Community Rehabilitation Programs (OPCRP).

During the course of the investigation, the Office of the Ohio Inspector General found two instances where Possitivity, acting on behalf of ODOT, petitioned the Office of Procurement for Community Rehabilitation Programs (OPCRP) at the Ohio Department of Administrative Services (ODAS) requesting a waiver from the rule requiring the use of community rehabilitation programs to perform certain services at ODOT sites. **(Exhibit 21)** During the interview of an employee from one of the ODOT district offices, a deputy inspector general asked if employees at the district office had ever looked into using a private company instead of a CRP. The response was, “we have always been told that if OPI⁴ didn’t have it, our second option was Possitivity.” **(Exhibit 22)**

This seems to be in contradiction of ORC §125.609, which states a waiver may be granted if compliance is “not advantageous.” **(Exhibit 23)** ODOT performed an analysis, and the results showed private vendors were significantly cheaper than CRPs in some instances. Chwan even stated in her interview on February 5, 2009, that Possitivity did not ask for bids from, nor did it compare CRP prices with, the private sector.

In an interview conducted January 27, 2009, by the Office of Ohio Inspector General, Ron Rowland of ODAS stated that the Office for Procurement for Community Rehabilitation Programs did not have a policy to determine fair prices and when they did try to establish a fair price it was “. . . kind of arbitrary.” This arbitrary method was in contradiction to ORC §125.606 which states the OPCRPs “. . . shall attempt to establish for each item on the procurement list a

⁴ OPI – Ohio Penal Industries, a division of the Department of Rehabilitation and Correction.

fair market price that is representative of the range of prices that a government ordering office would expect to pay to purchase the item in the marketplace.” (Exhibit 24)

Accordingly, a wrongful act or omission occurred in this instance.

Conclusion

Throughout this investigation, the Office of the Ohio Inspector General expressed to senior ODOT managers concerns with the CRP contract and dissatisfaction with the performance of Possitivity under the contract. In the course of reviewing the documents and records, along with information obtained regarding ODOT’s historical relationship with Possitivity, senior ODOT management began to reevaluate the property management company contract. The potential conflicts of interest and the amount of ODOT time and resources spent double-checking Possitivity’s questionable work product led ODOT to the decision to abandon the property management company contract and bring oversight of the CRP contracts in-house, utilizing existing staff. The contract with Possitivity ended on September 30, 2009.

Recommendations

The Office of the Ohio Inspector General makes the following recommendations to ODOT and ODAS and asks that they respond within 60 days with a plan detailing how these recommendations will be implemented:

- 1) To avoid conflicts of interests, property management companies may not be approved agents of the Office of Procurement for Community Rehabilitation Programs.
- 2) To ensure accuracy of timekeeping, ODOT should implement an electronic timekeeping method for recording beginning and end work times for employees. ODOT should also improve their system of checks and balances related to this program.
- 3) The Office of Procurement for Community Rehabilitation Programs (OPCRP) should establish a consistent written policy for determining the fair market price for services provided by CRPs. This should include consulting the private sector for services provided where available. The OPCRP should also establish thresholds for when

community rehabilitation program services are “not advantageous” and when a waiver will be granted pursuant to ORC §125.609.

Referrals

This report is to be referred to the Office of Procurement for Community Rehabilitation Programs at the Ohio Department of Administrative Services and to the Ohio Department of Transportation for implementation of the above recommendations. The Office of the Ohio Inspector General does not plan to refer this report to other entities.

Findings

- There **IS NOT** reasonable cause to believe a wrongful act/omission occurred in this instance.
- There **IS** reasonable cause to believe a wrongful act/omission occurred.
- There **IS** reasonable cause to believe that there is an appearance of impropriety.

C A S E A S S E S S M E N T

AGENCY: Ohio Department of Transportation (ODOT)

CLASSIFICATION:

WRONGFUL ACT OR OMISSION:	2	RECOMMENDATIONS:	3
APPEARANCE OF IMPROPRIETY:	1	REFERRALS:	2



Randall J. Meyer, Inspector General

08-04-11

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