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January 31, 2006

Mr. J. Stanley Shaw
Shaw, Licitra, Gulotta, Esernio & Schwartz, P.C.
1475 Franklin Avenue
Garden City, NY 11530

Dear Mr. Shaw:

Re: Diagnostic Health Services, Inc.
SF-20050012

This is in response to your letter addressed to Thad McTigue of this Office, dated July 28, 2005, and your letter addressed to David Loglisci of this Office, dated July 18, 2005, on behalf of your client, Diagnostic Health Services ("DHS"), relating to the procurement of "Consultive Examination Contract Medical Provider – Brooklyn" services by the Office of Temporary and Disability Assistance ("OTDA").

OTDA disqualified your client's proposal from consideration after determining that it was non-responsive. DHS asserted that OTDA should have waived DHS's deviations from the specifications, and that the winning proposer has been engaging in unfair trade practice.

For the reasons set forth below, OSC has concluded that OTDA properly rejected DHS's proposal as non-responsive, and has approved the contract award to Industrial Medical Associates ("IMA").

Request For Proposals (RFP) section I.K, Minimum Qualifications Required of Offerors, provides in relevant part, "[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." In short, offerors were required to be either a

Public Health Law Article 28 hospital or a professional corporation. In addition, the RFP further provided in section II.B entitled Eligibility that “[a]ll offerors must be in full compliance...*at the time the bid is submitted.*” (*emphasis added*)

DHS asserted that the agency could have waived the requirement that the offerors (proposers) be in compliance with the above specification at the time of the proposal submittal date. In previous procurements, proposers who had applied for status as an Article 28 hospital or as a professional corporation by the due date for proposals were eligible to submit a proposal. When questioned by OSC, OTDA stated the change was necessitated by unreasonable delays contractors have been taking in securing the requisite status.

The procurement record demonstrates that as of June 29, 2005, the due date for receipt of proposals, DHS had not attained Article 28 status, a process that began in April 2002 with DHS’s filing of an application with the Department of Health for a Certificate of Need. Furthermore, DHS did not file with the Department of State for a Certificate of Incorporation as a Domestic Professional Corporation until July 5, 2005. Consequently, DHS did not meet the mandatory requirement for submitting a proposal.

While an agency may determine to waive non-material deviations from specifications, there is no requirement that the agency must waive such deviations. In any event, we are satisfied that this mandatory requirement was material and, therefore, not waivable.

Furthermore, while not raised by you or your client, we have considered whether this requirement by OTDA was a reasonable bid specification. OTDA has indicated to us that this requirement was inserted into the bid specifications in order to ensure that the contractor was in compliance with the restrictions in the Education Law against the unauthorized practice of medicine. Specifically, OTDA has indicated, and the State Education Department (“SED”) has confirmed, that SED requires that medical services such as those required under this contract can only be performed by physicians who own, or are employed by, an Article 28 Corporation, a professional corporation composed of physicians, or other permissible business organization for the practice of medicine in this state (such as a partnership of physicians). In light of this, we are satisfied that OTDA reasonably and properly inserted this requirement into the RFP.¹

Finally, while DHS alleges that IMA is engaging in unfair trade practices, which could render IMA non-responsible for this engagement, it is 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 the allegations set forth in your memorandum concerning the activities of IMA do not provide sufficient documentation to support a finding of non-responsibility. In the event that DHS decides to pursue a formal complaint through the Office of

¹ Physicians may operate as business organizations or other corporations, such as partnerships or sole proprietorships. However, such business organizations are still required to comply with the requirements of the Education Law and the Education Department. While the language of the specification is not entirely clear as to whether a group of physicians operating as a non-corporate entity (such as a partnership) would be eligible to bid, we are advised by OTDA that if a bid had been submitted by such an entity it would have verified with SED that this was a permissible organization and, if SED affirmed that it was, OTDA would accept the bid. In any event, it does not appear that any potential proposer, operating in compliance with the medical licensing laws, but not as an Article 28 corporation or a professional corporation, failed to bid based upon the requirement of the specification.

the Attorney General, OSC stands ready to fully cooperate through Robert Brackman, OSC Deputy Comptroller for Investigations.

Therefore, for the reasons stated above, OSC is satisfied that OTDA correctly rejected DHS's proposal.

Please be advised that the contract awarded to IMA for Consultative Examination Contract Medical Provider – Brooklyn was approved by this Office on January 6, 2006. Should you have any questions regarding this letter, please feel free to contact me at (518) 402-4103.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joan M. Sullivan".

Joan M. Sullivan
Assistant Comptroller

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