

State of New Jersey
Office of the Inspector General
Mary Jane Cooper, Inspector General



Supplemental Report:
Department of Corrections
Inmate Health Services

December 9, 2008



State of New Jersey

OFFICE OF THE INSPECTOR GENERAL

PO Box 208

TRENTON NJ 08625-0208

JON S. CORZINE
Governor

MARY JANE COOPER
Inspector General

December 9, 2008

The Honorable Jon S. Corzine
Governor
State of New Jersey
PO Box 001
Trenton, NJ 08625-0001

**Re: New Jersey Department of Corrections
Inmate Health Services (Supplemental Report)**

Dear Governor Corzine:

Enclosed please find the Office of the Inspector General's (OIG) report concerning the Department of Corrections' (DOC) failure to enforce the liquidated damages provisions of the contract with Correctional Medical Services, Inc. (CMS) to provide inmate health services. Under a contract that ended on October 1, 2008, and valued at approximately \$85 million per year, CMS provided health services to the approximately 26,000 inmates housed in the State's fourteen correctional facilities. The report recognizes as much as \$4.5 million in unassessed liquidated damages and \$700,000 in overcharges by CMS and recommends efforts to recover these funds.

This review is a continuation of an investigation initiated at the request of the Department of the Treasury (Treasury). OIG's initial report was issued on October 15, 2007, and addressed DOC's failure to monitor the provision of inmate dental services. This supplemental report details DOC's failure to assess liquidated damages for CMS's poor performance and other issues that came to our attention during the course of our further investigation.

As required by statute, a copy of this supplemental report has been sent to Senate President Richard J. Codey, Assembly Speaker Joseph J. Roberts and the Department of Corrections.

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We have included for your consideration a recommendation for the promulgation of a statute making it a crime to knowingly and willfully make materially false, fictitious or fraudulent statements or representations in any matter with the jurisdiction of the executive, legislative or judicial branch of the government of New Jersey.

I am available to discuss this report with you at anytime.

Very truly yours,



Mary Jane Cooper
Inspector General of New Jersey

Encl.

- c: Senate President Richard J. Codey, New Jersey State Senate
Speaker Joseph J. Roberts, Jr., New Jersey State Assembly
Commissioner George W. Hayman, New Jersey Department of Corrections
Edward McBride, Chief Counsel, Office of the Governor
Debra Bell, Assistant State Treasurer, Department of the Treasury
Kathleen Wiechnik, Executive Director, State Ethics Commission
Ricardo Solano, Jr., First Assistant Attorney General
Boris Moczula, Acting Director, Division of Criminal Justice
Susan Roop, Assistant Attorney General
Alice Small, Deputy Executive Director, Division of Purchase and Property
Robert Smartt, Ethics Liaison Officer, Department of the Treasury

Supplemental Report: Department of Corrections

Inmate Health Services

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I. INTRODUCTION

A. Scope of Investigation

On October 15, 2007, the Office of the Inspector General (OIG) issued a report of findings regarding the delivery of dental care to the approximately 26,000 inmates in the State's fourteen correctional facilities. The evidence uncovered by OIG's initial investigation concluded that for most of the first two-year term of the contract, the Department of Corrections (DOC) did not adequately monitor the performance of its dental services vendor, Correctional Medical Services, Inc. (CMS). OIG also found that for those months for which DOC had performance data, CMS frequently failed to deliver services in accordance with contractual requirements.

This report supplements OIG's October 15, 2007 report. As noted in OIG's initial report, while investigating the issues that were the subject of the initial report, OIG made several observations that required further investigation and analysis. In pursuing those open issues, OIG obtained evidence that contradicted the explanation of the DOC Assistant Commissioner responsible for DOC's failure to assess liquidated damages for CMS's failures to satisfy contractual performance requirements during the term of the contract. Therefore, OIG continued its investigation into the failure to assess liquidated damages.

This report describes the results of the continued investigation including evidence of an improper agreement between a DOC Assistant Commissioner and a CMS Vice President that DOC would not assess liquidated damages against CMS despite CMS's substandard performance. In addition, this report addresses the relationship between CMS and its dental

subcontractor, AllCare Dental Group LLC. Finally, this report identifies a number of additional overpayments to CMS that the Department of Treasury (Treasury) may determine should be recovered.

B. Investigative Process

In conducting the supplemental investigation, OIG interviewed 18 people, some of them more than once and some who had not been interviewed during OIG's initial investigation. Those interviewed include the current and former DOC Commissioners; the DOC Assistant Commissioner responsible for implementation and oversight of the inmate health services program; and the CMS Regional Vice President responsible for administrative and operational oversight over the inmate health services contract, who was interviewed in the presence of his attorney.

OIG gathered over 1,000 pages of documents (in addition to the over 12,000 pages of documents previously collected) that were logged into a database. The majority of additional documents were produced in response to subpoenae issued by OIG and included numerous CMS internal email.

During its initial investigation, OIG issued two letter requests to CMS (March 30, 2007 and August 20, 2007), requesting all documents relevant to the liquidated damages provisions of the contract. The second letter request was issued after CMS told OIG that a letter request was all that was required and a subpoena was not necessary to obtain all requested documents. Nonetheless, on August 15, 2008, knowing that the contract with CMS was about to end and that

all relevant documents were about to be taken from the State (because CMS was closing its New Jersey offices and moving its records to St. Louis, MO), OIG issued a subpoena again requesting all documents relevant to the liquidated damages provisions of the contract. At the time, CMS took issue with OIG's subpoena, again telling OIG that a subpoena was unnecessary because CMS had fully cooperated with the two earlier letter requests. Nonetheless, in response to OIG's subpoena, CMS produced clearly relevant documents that should have been but were not previously provided to OIG pursuant to the two earlier letter requests.

OIG provided a draft of this report to the DOC Commissioner for review and comment. The Commissioner's comments have been included in this report as appropriate and relevant. OIG also met with all the individuals identified herein (either by name or by title) and afforded them an opportunity to address conflicting evidence found by OIG; where appropriate and relevant, this report includes their responses.

Because OIG had obtained evidence that contradicted the responsible DOC Assistant Commissioner's explanation for DOC's failure to assess liquidated damages, OIG also provided him with relevant portions of a draft of this report. The responsible DOC Assistant Commissioner did not respond in writing. Therefore, in order to be certain that OIG understood the Assistant Commissioner's version of events, OIG issued a subpoena for his testimony. His relevant comments are also included in this report.

C. Format of Report

This report¹ is divided into five sections: Section I is this Introduction; Section II is an analysis of evidence and conclusions regarding the improper agreement to suspend the assessment of liquidated damages; Section III contains a detailed analysis of the evidence regarding CMS's circumvention of New Jersey dental practice regulations; Section IV contains a discussion of amounts that CMS has overcharged DOC in addition to those addressed in OIG's initial report; and Section V contains recommendations for corrective action.

D. Contract Chronology

The initial two-year term of the CMS contract commenced on April 1, 2005 and ended on March 31, 2007. On March 27, 2007, the CMS contract was extended for an additional one-year term. OIG's initial report was issued on October 15, 2007. On March 31, 2008, the State announced that it would not extend the CMS contract and instead awarded a contract for inmate health services to the University of Medicine and Dentistry of New Jersey (UMDNJ). The State invoked a clause in the CMS contract requiring CMS to continue to provide inmate health services for a period of 180 days, during which time the inmate health services program would transition to UMDNJ. CMS provided inmate health services to DOC until October 1, 2008.

E. Efforts to Recover Liquidated Damages and Other Funds

In OIG's first report, OIG wrote that it had determined that for 17 months (November 1, 2005 through March 1, 2007) of the first two years of the contract, the total liquidated damages accrued for both medical and dental services appeared to be between \$2.5 million and \$3.5

¹ This supplemental report is freestanding and OIG has provided sufficient information for the reader to understand the matters discussed herein without referring to OIG's earlier related report.

million. As a result of OIG's recommendation and as a follow-up to Treasury's Contract Compliance & Audit Unit's (CCAU) November 5, 2007 audit² of the inmate dental services program, CCAU reviewed the performance data available and agreed with OIG that DOC could have assessed liquidated damages against CMS for deficiencies in the delivery of inmate health services (both medical and dental services). The Attorney General's Office, Treasury's Division of Purchase and Property and DOC's administration, are currently working to assess and recover the liquidated damages.

It is anticipated that the accrued liquidated damages total resulting from their efforts may be different than OIG's total for a number of reasons. For instance, CCAU's calculation includes performance data for additional months after OIG's calculation was made (that is, CCAU's data is for October 30, 2005 through March 30, 2008). Additionally, as described in OIG's first report, liquidated damages can be calculated using a variety of methods and CCAU may decide to use a different methodology that may produce a different but equally correct result. Further, during the continuing investigation, OIG learned that both DOC and CMS had reports for July through October 2005 indicating that CMS was liable for liquidated damages. The documents also indicated that CMS had set aside \$157,767.50 in a reserve account earmarked for liquidated damages. Neither OIG nor CCAU had included this amount in their calculations, but OIG made CCAU aware of the new information.

This report also explains OIG's finding that CMS overcharged DOC \$706,659 during the term of the contract and the status of efforts to recover those funds.

² CCAU's audit report of the July and November 2005 performance data was released after OIG issued its initial report in this matter.

II. ASSISTANT COMMISSIONER'S UNAUTHORIZED ACTIONS

A. Introduction

At the time of OIG's initial report, OIG accepted representations by DOC Assistant Commissioner for Administration Peter Roselli³ (the DOC employee responsible for the administration of the CMS contract) that former DOC Commissioner Devon Brown had authorized the suspension of liquidated damages against CMS early in the contract and, for that reason, liquidated damages were never assessed against CMS. Since that report, OIG found evidence that Commissioner Brown did not authorize the suspension of the assessment of liquidated damages against CMS. The evidence indicates that, instead, Assistant Commissioner Roselli entered into an *ultra vires* agreement with the CMS Vice President responsible for the DOC contract to suspend the liquidated damages provision of the contract. The Assistant Commissioner then engaged in conduct resulting in the suspension of the assessment of liquidated damages against CMS for the duration of the contract.

The evidence indicates that Assistant Commissioner Roselli thereafter provided false information to Commissioner Brown's successor, (then Acting)⁴ Commissioner George Hayman, indicating to Hayman that former Commissioner Brown had authorized the suspension of the assessment of liquidated damages against CMS; that the suspension of liquidated damages was

³ At most times during the events discussed in this report, Peter Roselli was DOC Assistant Commissioner of Administration, having been appointed to that position on July 7, 2003. On September 1, 2007, Roselli's title was changed to "Deputy Commissioner", a functional job title; while his actual title became "Confidential Assistant to the Commissioner." OIG has been advised that effective September 30, 2008, Roselli was no longer employed by the State. For ease of reference, throughout this report, he is referred to as Assistant Commissioner.

⁴ Hayman has since been appointed Commissioner.

based on Brown's policy; and that the policy was successful in reaching the contract goals. Commissioner Hayman explained to OIG that he followed the practice of suspension of liquidated damages against CMS based on the representations of Assistant Commissioner Roselli, not understanding that the representations were false.

The Assistant Commissioner's conduct resulted in a substantial loss of liquidated damage payments to the State and a significant financial benefit to CMS. There is convincing evidence of an improper unauthorized agreement between Assistant Commissioner Roselli and the CMS Vice President. OIG did not uncover evidence to support a conclusion that Assistant Commissioner Roselli received a personal benefit from CMS or its representatives in return for his participation in the improper *ultra vires* arrangement benefitting CMS.

B. Background

As discussed in OIG's initial report, the CMS contract provided for the assessment of liquidated damages in the event that CMS failed to meet specified time requirements for the delivery of twenty-five particular services. The evidence gathered prior to OIG's initial report indicates that CMS was clearly aware that the contract provided for the assessment of liquidated damages. For instance:

- CMS's proposal in response to the 2004 RFP included precise changes to the methods for computing liquidated damages proposed by DOC, including revising the method for computing liquidated damages to individual facilities instead of a system-wide application, thereby lessening the amounts assessed (CMS's proposal became the contract requirement); and

- CMS provided documents to OIG showing that from April 1, 2005 (the start date of the contract) through December 31, 2006 CMS had reserved \$157,767.50 and budgeted almost \$675,000 specifically to pay liquidated damages.⁵

As stated in OIG's initial report, shortly after the expiration of the "grace period" of the contract (the first 90 days), during which DOC was prohibited by contract terms from assessing liquidated damages, and throughout the term of the contract, it was evident that CMS's performance was inconsistent and often fell far short of the specified contract standards for which liquidated damages could be assessed. Nonetheless, liquidated damages were never assessed by DOC.

The CMS contract provided a protocol for the determination of the amount of liquidated damages to be deducted from the monthly payment to CMS. When OIG asked DOC staff to explain the process for assessing liquidated damages, DOC staff told OIG that in order for liquidated damages to be assessed, it would have been necessary for Assistant Commissioner Roselli to have given instructions to implement the contract specified protocol to assess them; and Roselli had never given instructions for the implementation of the protocol.

⁵ OIG initially reported that documents provided by CMS indicated that \$675,000 was set aside as a reserve. In a recent interview, the CMS Vice President claimed that although he knew little about accounting for liquidated damages, the CMS documents actually indicated that \$675,000 was only an amount budgeted by CMS for anticipated liquidated damages assessments for the two-year contract term. He further claimed that for the period May 1, 2005 through September 30, 2005, CMS had actually reserved only \$157,767.50 for liquidated damages and that to the best of his knowledge, that amount was the total amount actually reserved by CMS for liquidated damages during the term of the contract.

That CMS ceased setting aside additional reserves despite performance so poor as to merit the assessment of liquidated damages tends to indicate that the CMS Vice President had successfully convinced the DOC Assistant Commissioner to abide by their unauthorized agreement suspending liquidated damages throughout the term of the contract. Indeed, during an interview, the CMS Vice President told OIG that the \$157,767 reserve was reversed, indicating that, because the improper agreement was solidified (perhaps in part by the departure of Commissioner Brown from the New Jersey DOC, as explained *infra*), CMS was no longer worried that liquidated damages would be assessed.

1. Assistant Commissioner's Explanation

During OIG's initial investigation of DOC's management of the CMS contract, OIG had asked Assistant Commissioner Roselli why liquidated damages were never assessed. He gave OIG two reasons: (1) CMS was improving its performance; and (2) neither of the two Commissioners who served during the term of the contract wanted to assess liquidated damages under those circumstances because they considered them counter-productive.

More particularly, Assistant Commissioner Roselli told OIG that, despite the terms of the contract providing for liquidated damages for CMS's failures to meet performance standards specified in the contract, DOC had decided early in the contract period to apply a more general and subjective standard. DOC had decided that even when CMS failed to meet the standards specified in the contract and liquidated damages were warranted, DOC would not assess liquidated damages against CMS unless CMS had failed to demonstrate improvement in its performance. Assistant Commissioner Roselli told OIG that the basis for the decision was that liquidated damages were deemed punitive and counter-productive and that DOC wanted to work cooperatively with the vendor to achieve the beneficial results of the contract. The Assistant Commissioner said that since CMS had consistently demonstrated improvement, DOC had not found it necessary to use the leverage of liquidated damages to achieve the contract goals. He stated that the contract merely said that liquidated damages "may" be assessed and thus were discretionary. The fact that in the contract the standards were titled "Objective Performance

Indicators” (OPIs) meant to him that, in any event, the standards were to be used as quality improvement tools rather than penalties.⁶

The Assistant Commissioner had told OIG that the decision not to abide by the contract provision for liquidated damages for the reasons stated above was made with the full knowledge and approval of former DOC Commissioner Devon Brown, who had left DOC on January 10, 2006 for a position in Washington, D.C.⁷ Assistant Commissioner Roselli further told OIG that Commissioner Brown’s decision was then adopted by Brown’s successor, current DOC Commissioner George Hayman.

The evidence gathered by OIG prior to OIG’s initial report did not support Assistant Commissioner Roselli’s stated underlying basis (that is, that CMS’s performance was consistently improving) for the initial decision to refrain from assessing liquidated damages. As noted in OIG’s initial report, the evidence DOC provided to OIG indicates that during the first seven months of the CMS contract DOC did not appear to take steps to precisely compare or record CMS’s performance in the areas specified in the contract for liquidated damages; and therefore, DOC did not appear to make observations of CMS’s improvement or failure during those months.⁸ Moreover, even several months later (when the automated system was

⁶ As discussed *infra*, OIG would learn during its continuing investigation that the rationale used by Roselli was actually provided to him by the CMS Vice President in the event that Roselli was ever questioned about the failure to assess liquidated damages. The rationale was also used repeatedly by the CMS Vice President during monthly meetings attended by senior DOC staff including Roselli.

⁷ The contract was implemented during Commissioner Brown’s tenure, and the first nine months of the contract occurred while he served as Commissioner. Brown resigned as DOC Commissioner effective January 10, 2006, to accept the position of Director of the Washington, D.C. Department of Corrections.

⁸ As it turned out, during OIG’s continuing investigation, OIG learned that DOC and CMS had reliable data about CMS’s performance during those early months but neither entity had made the data available to OIG or reported to

recognized by CMS and DOC as generally accurate), it was readily apparent that CMS was not improving in many areas for which liquidated damages were available, but DOC still did not assess liquidated damages against CMS. Further, OIG's review of the information provided to OIG by DOC and available to DOC and CMS at the time revealed that responsible DOC staff -- including the Assistant Commissioner -- knew that CMS's performance in the contract areas specified as subject to liquidated damages for failure to meet performance indicators was inconsistent at best, but did not indicate steady improvement. Thus, at the time of OIG's initial report there were apparent weaknesses in the support for Assistant Commissioner Roselli's stated basis for the decision to suspend the assessment of liquidated damages against CMS.

Nonetheless, at the time, OIG accepted Assistant Commissioner Roselli's representations that he was acting with the authorization, full knowledge, and approval of former Commissioner Brown when making the initial determination to suspend the assessment of liquidated damages against CMS for policy reasons. Several factors lent credence to the Assistant Commissioner's representations about the Commissioner's alleged authorization at that time, including:

- A letter to Assistant Commissioner Roselli dated August 29, 2005 from the CMS Vice President responsible for the contract, written "to clarify contract issues that CMS believes to have been resolved in previous CMS/DOC Contract Management Meetings." It stated: "Liquidated Damages will only be assessed for continued failure to progress in

OIG the results until recently. (CMS's email dated summer 2005 (provided to OIG in September 2008) revealed that in the summer of 2005, CMS managers were concerned about the amount of liquidated damages that could be assessed because of CMS's poor performance. The email indicated that CMS managers had precise information about CMS performance and the related liquidated damages. This information would have come from DOC records.) Now that OIG is aware of the data, it confirms OIG's understanding that CMS's early performance in areas designated as Objective Performance Indicators was often poor.

program improvement efforts.” Assistant Commissioner Roselli told OIG that the August 29, 2005 letter accurately reflected the agreement with CMS.

- Commissioner Hayman, who had worked under former Commissioner Brown, told OIG that it was his understanding that the decision to assess liquidated damages only if CMS had failed to demonstrate continuous improvement had been made during Commissioner Brown’s administration.

Commissioner Hayman told OIG that he continued to implement the policy that he understood was begun by Commissioner Brown because it was effective.

2. Newly Gathered Evidence Undermines Explanation

a) Authorization of Former Commissioner

Following the issuance of OIG’s initial report, however, OIG began to accumulate evidence indicating that Commissioner Brown had not authorized the Assistant Commissioner to suspend the assessment of liquidated damages against CMS. The evidence includes:

- Statements from individuals involved in the preparation of the 2005 contract with CMS. They told OIG that former Commissioner Brown had insisted that liquidated damages provisions be included in the contract; that the twenty-five liquidated damages provisions in the contract had been the result of a rigorous development process; and that it was thus unlikely that Commissioner Brown would have then waived those liquidated damages provisions.
- A letter to OIG dated September 28, 2007, signed by Commissioner Hayman, in which he spoke of former Commissioner Brown’s “adamant requirement to include objective

performance indicators in the 2004 RFP.” (The reason for including objective performance indicators in the contract was to form a basis for liquidated damages, and the observation was significant because it indicated the strength of Commissioner Brown’s insistence on liquidated damages.)

In view of evidence casting doubt on Assistant Commissioner Roselli’s statements about Commissioner Brown’s approval and authorization of the suspension of assessment of liquidated damages against CMS, OIG interviewed former Commissioner Brown from his Washington, D.C. office. He flatly denied authorizing Assistant Commissioner Roselli -- or anyone at DOC -- to suspend the assessment of liquidated damages against CMS. Former Commissioner Brown said that he had insisted on the inclusion of liquidated damages in the contract. He described efforts that he undertook for the specific purpose of developing the liquidated damages provisions of the contract. During the OIG interview, former Commissioner Brown stated, “Not to impose something that I crafted defies logic. I was vehement. I was the impetus behind liquidated damages.”

Former Commissioner Brown told OIG he was aware that liquidated damages could not have been assessed during the 90-day grace period that began at the beginning of the contract on April 1, 2005 and ended on June 30, 2005. However, Commissioner Brown’s tenure at DOC, which ended with his resignation effective January 10, 2006, included a period of six months during which liquidated damages could have been assessed under the terms of the contract. OIG’s calculations revealed that liquidated damages were warranted by CMS’s poor performance during that period, and could have been calculated and assessed by DOC but were

not. Brown told OIG that he was unaware that during the six months of his tenure after the transition period ended, CMS had failed to satisfy contract performance requirements; that there had been substandard performance sufficient to trigger significant liquidated damages; and that, despite this, liquidated damages had not been assessed. Brown further told OIG that if he had known that CMS's substandard performance was occurring, he would have insisted on assessing liquidated damages.

OIG provided former Commissioner Brown the CMS letter dated August 29, 2005 (which was received by Assistant Commissioner Roselli during Brown's tenure as DOC Commissioner). Brown's statements to OIG indicated that rather than being evidence of a modification of the agreement between the DOC and CMS, it was evidence of an unauthorized agreement between the Assistant Commissioner responsible for administering the contract and the CMS Vice President.

Former Commissioner Brown was certain that he had not seen the letter during his tenure as Commissioner of DOC or even until it was provided to him by OIG. He said that he was not aware of the purported agreement to suspend the assessment of liquidated damages that the letter alleged to record, nor had such an agreement been brought to his attention while he was Commissioner. Former Commissioner Brown told OIG that because the other matters addressed in the August 29, 2005 letter were outside his usual scope of review, he normally would not be involved in them, but he would expect that an agreement to change liquidated damages provisions would be brought to his attention because his interest in the area was well known.

Other evidence corroborated former Commissioner Brown's assertion that he had neither seen the letter while he served as Commissioner nor agreed to the contract changes it purported to record:

- On its face, the letter indicated that the CMS Vice President had not copied it to anyone at DOC.
- During an interview, the CMS Vice President told OIG that he had not provided a copy of the letter to anyone at DOC other than Assistant Commissioner Roselli.
- Assistant Commissioner Roselli, to whom the letter was addressed, also told OIG that he had neither shown nor discussed the letter with anyone at DOC nor responded to it in writing.
- OIG had received a copy of the August 29, 2005 letter from CMS during a March 2007 interview. OIG had made a document request of DOC, but DOC did not provide the letter to OIG, tending to indicate that DOC staff was unaware of it.

b) Authorization of the Current Commissioner

After discovering evidence that indicated that former Commissioner Brown had not authorized suspension of the assessment of liquidated damages against CMS, OIG met with Commissioner Hayman to determine how he came to his understanding that it was former Commissioner Brown who had authorized the suspension of liquidated damages and initiated the policy. Commissioner Hayman told OIG that when he was appointed Acting Commissioner (on January 10, 2006, upon the resignation of former Commissioner Brown), Assistant Commissioner Roselli explained to him that the liquidated damages clause in the CMS contract was suspended pursuant to DOC policy that had been implemented by former Commissioner

Brown. Assistant Commissioner Roselli told Commissioner Hayman that the policy was working well and he advised Commissioner Hayman to continue former Commissioner Brown's policy. Commissioner Hayman accepted the word of Assistant Commissioner Roselli as truthful and correct information and based on what Roselli told him, authorized the continued implementation of the policy.

Hayman told OIG that he was not against the use of liquidated damages as a management tool. He also told OIG that he met often with Roselli and discussed the CMS contract. Roselli never told him that CMS's performance was so poor to warrant the assessment of liquidated damages. If Hayman had been made aware that CMS's performance was so poor, the so-called department policy would not have prevented him from considering the assessment of liquidated damages.

C. Agreement to Suspend Liquidated Damages

Since the newly gathered evidence indicated that Commissioner Brown had not authorized the suspension of liquidated damages and that Commissioner Hayman had been provided false information about the circumstances under which the suspension had been implemented and that caused him to continue the policy, OIG continued its investigation to determine how the liquidated damages provision of the contract came to be suspended. As described below, the evidence indicates that Assistant Commissioner Roselli had entered into and implemented an unauthorized improper agreement with the CMS Vice President to suspend the assessment of liquidated damages regardless of CMS's performance, and it appears that

Roselli thereafter took steps to keep that agreement secret from his supervisors and responsible State employees who might have interfered with its implementation.

In a second OIG interview conducted on September 15, 2008, the CMS Vice President explained to OIG that CMS had successfully avoided the payment of liquidated damages in previous projects including one for which he had been responsible. When he took responsibility for the contract at DOC, he took steps to ensure that CMS did not pay liquidated damages throughout the contract term regardless of whether or not damages were merited by CMS's poor performance. The CMS Vice President told OIG that he accomplished his goal with the cooperation of Assistant Commissioner Roselli. The CMS Vice President told OIG, and the evidence indicates, that he met no resistance from and seemed to have a willing collaborator in his efforts to avoid liquidated damages in the person of Assistant Commissioner Roselli. The evidence further indicates that, in taking part in this effort, Assistant Commissioner Roselli was acting beyond the scope of his authority, in contradiction of Commissioner Brown's directions and in contravention of contract provisions; all the while, the Assistant Commissioner was dissuading efforts of responsible State employees who may have enforced the liquidated damages terms of the contract.

The evidence, including the CMS Vice President's sworn testimony to OIG, the August 29, 2005 letter and other documents provided by CMS further indicates that the CMS Vice President and Assistant Commissioner Roselli had been working to avoid implementing the liquidated damages provision of the contract perhaps as early as January 2005, the intended start date of the contract -- some three months before the actual start date. The CMS Vice President

told OIG that the actual agreement was made closer in time to the actual start date of the contract. He told OIG that he had provided no personal benefit to DOC Assistant Commissioner Roselli in return for his part in this effort; that he was unaware of whether anyone else from CMS had provided a personal benefit to the Assistant Commissioner in return for his actions benefitting CMS; and that he did not provide any extra benefits to the State or any of its entities in return for suspending the contract term and agreeing that no liquidated damages would be assessed.⁹

1. Monthly Meetings

Although the CMS Vice President denied that he was aware of Commissioner Brown's strong support for liquidated damages as a management tool in the CMS contract,¹⁰ Assistant Commissioner Roselli was well aware that Commissioner Brown strongly supported liquidated damages as a management tool. The CMS Vice President told OIG that he provided Assistant Commissioner Roselli some rationale to use to explain why no liquidated damages had been assessed although warranted by CMS's poor performance, in the event that the Commissioner questioned Roselli about the failure to assess them.

⁹ The CMS Vice President acknowledged that significant financial loss to CMS due to substantial assessment of liquidated damages associated with the contract for which he was responsible had the potential to have an impact on his career with CMS. He denied to OIG that he ever thought about this possibility or that the possibility motivated his conduct while working with DOC. The credibility of his denials is undermined somewhat by his reactions to the internal communications from his supervisors upon first viewing the early calculations of liquidated damages and their demands to know what he was going to do about them, as described *infra*.

¹⁰ The CMS Vice President told OIG that he believed that the newly added liquidated damages provision in the contract was the result of advice provided by a consultant hired by the State. Ironically, this was the same consultant whose advice Roselli proffered to OIG as justification for not assessing liquidated damages.

In addition, unless responsible staff were convinced that there were appropriate reasons for not assessing liquidated damages and that DOC management supported those reasons, they also might question the failure to assess liquidated damages after the grace period ended, and could raise questions to upper management -- that is, the Commissioner or Treasury staff -- about the failure to assess liquidated damages despite CMS's poor performance. The CMS Vice President explained to OIG that at monthly meetings early in the contract period attended by responsible DOC staff, he used the same rationale for not assessing liquidated damages, and Roselli agreed and/or offered support for the reasons.

Evidence of efforts of the CMS Vice President and Assistant Commissioner Roselli in this regard was found in the agenda and minutes of these monthly meetings held at DOC offices in 2005 that were attended by responsible DOC and CMS staff.¹¹ These meetings were presided over, at least in name, by Assistant Commissioner Roselli, but the agenda/minutes indicate that he allowed the CMS Vice President to control important aspects of the meetings. The CMS Vice President prepared the agenda and minutes for the meetings, selected the topics to be discussed, recorded brief descriptions of matters discussed and recorded assignments and the status of assignments. Assistant Commissioner Roselli allowed the CMS Vice President to use these meetings and agenda/minutes to lay the groundwork for convincing responsible DOC personnel (who reported to Assistant Commissioner Roselli and who were involved in administering the contract), that, despite the language in the contract and Commissioner Brown's intentions, it was appropriate to refrain from assessing liquidated damages no matter how poorly CMS performed.

¹¹ In response to an OIG subpoena, CMS produced the agenda/minutes for every contract management meeting between DOC and CMS from April 26, 2005 (shortly after the April 1, 2005 start of the contract) through November 22, 2005.

To this end, at least as early as the April 1, 2005 commencement of the contract and during the grace period before liquidated damages were permitted to be assessed under the contract, when conferring with DOC staff the CMS Vice President continuously called liquidated damages, “punitive” (when legally clearly not)¹² and “counterproductive” to the improvement of the inmate health services program. In so doing, the CMS Vice President also began to enunciate one of the “rationale” on which the Assistant Commissioner could rely in justifying the failure to assess liquidated damages should he be asked in the future.¹³

More particularly, both the agenda/minutes provided by CMS and the CMS Vice President’s statements to OIG revealed that in one of the first contract management meetings between DOC and CMS managers, held on April 26, 2005, the CMS Vice President included “Performance Indicators” as a topic for discussion under “New Business,” using that phrase instead of “liquidated damages” to divert attention from the monetary component associated with poor and incomplete performance. The combined agenda/minutes for the April 26, 2005 meeting he prepared demonstrate his tactic, reporting the discussion of the first monthly meeting as follows: “Expectation is that [performance indicators] are quality improvement tools and that this is not a hammer. Mr. Roselli agreed.”

In an OIG interview, the CMS Vice President explained that in a CMS/DOC management meeting, he had also expressed a view that liquidated damages could be used as leverage to make

¹² As discussed in OIG’s initial report, in the inmate health services contract, liquidated damages are a predetermined amount, agreed to by DOC and CMS prior to the commencement of the contract, and designed to make DOC whole on those occasions where DOC has suffered a loss because CMS did not perform as it had promised under the contract.

¹³ Indeed, the Assistant Commissioner used some of these unsupported explanations when initially interviewed by OIG.

a vendor perform its obligations under the contract if the vendor was uncooperative. So long as CMS was working towards accomplishment of a goal (i.e., an objective performance indicator), there was no reason for DOC to assess liquidated damages. The CMS Vice President explained that he and DOC Assistant Commissioner Roselli had agreed that so long as CMS was working “collaboratively” and “cooperatively” to remove the “barriers” to accomplish that goal, then liquidated damages would not be appropriate.

With time, the CMS Vice President’s verbiage became more subtle. Appearing under the heading of “Old Business” in agenda/minutes that he prepared for subsequent meetings is the sentence: “It was agreed that the Performance Indicators were a quality improvement tool and not a punitive tool” -- deleting the reference to “hammer”. The CMS Vice President kept the phrase on the agenda even when there was no discussion of the subject thereby subtly reinforcing the philosophy at each meeting. He explained to OIG that he wanted to keep the topic “alive and current”.

The CMS Vice President told OIG that Assistant Commissioner Roselli did not demonstrate resistance to the CMS Vice President’s incorrect characterizations whenever he brought up the topic of Objective Performance Indicators. This included at the monthly meetings attended by DOC staff. One senior DOC official who attended the monthly meetings told OIG that he and one or two other DOC staff members consistently protested the CMS Vice President’s characterization of objective performance indicators. Roselli sat silent and did not support them. In fact, when after the first monthly meeting, Assistant Commissioner Roselli realized that the employee had intended to create and circulate minutes of the meetings, Roselli

directed him not to take minutes. Therefore, there was no record of the employees' protests to the CMS Vice President's statements.

According to the CMS Vice President, Assistant Commissioner Roselli either affirmatively agreed with the CMS Vice President's discussion on the benefits of suspending liquidated damages or sat silent, appearing to agree. Indeed, DOC staff told OIG that they understood that the policy articulated by the CMS Vice President at these meetings was the DOC policy. This included staff who would have been responsible for assessing and collecting liquidated damages had Assistant Commissioner Roselli given direction to implement the protocol for so doing.

Thus, the Assistant Commissioner did not take the opportunity while standing before his staff to remind the CMS Vice President that, by definition, neither objective performance indicators nor liquidated damages are "punitive." Nor did the Assistant Commissioner report that Commissioner Brown believed that, based on CMS's past performance, liquidated damages were a necessary and important tool to assure CMS's future performance under this new contract. Nor did he opine that objective performance indicators and liquidated damages are a part of the contract that Commissioner Brown had carefully drafted to ensure that liquidated damages would be assessed when warranted by CMS's lack of performance.

2. Automated Reports

Another tactic that the CMS Vice President attempted to use to forestall the assessment of liquidated damages was to delay the use of automated reports measuring the Objective

Performance Indicators. Here too, Assistant Commissioner Roselli supported the CMS Vice President.¹⁴ As stated in OIG's initial report, although Assistant Commissioner Roselli had been aware since August 2004 that DOC's EMR system would require modification in order to be useful in calculating liquidated damages, the process was slowed by several intervening assignments. Nonetheless, documents indicate that in an email dated July 28, 2005 and copied to both of their supervisors, the DOC Statewide Medical Director and the CMS Director of Quality Improvement agreed that the objective performance indicator reports were acceptable for at least some of the indicators as early as June 1, 2005.¹⁵

The grace period (during which liquidated damages could not be assessed) expired as of July 1, 2005. The objective performance indicator reports existing at the time were sufficient to show that CMS's performance was falling short in a number of areas, thereby triggering liquidated damages; this information was shared with CMS managers. The CMS Vice President said that the performance shortfall figures (but never the dollar amount of liquidated damages they represented) were discussed at every monthly contract management meeting and at weekly contract performance meetings. Starting in early August 2005, the CMS Vice President began forwarding objective performance indicator reports to CMS corporate headquarters. These

¹⁴ During OIG's investigation, both the CMS Vice President and Assistant Commissioner Roselli attempted to explain the failure to assess any liquidated damages by exaggerating the unavailability and unreliability of the data. However, documents recently provided demonstrate that not only was the data available and able to be manually validated (as OIG reported originally), but the automated reports were reliable. Moreover, both the DOC Assistant Commissioner and the CMS Vice President were aware that the reports were reliable when they were trying to convince OIG otherwise.

¹⁵ This document was clearly responsive to OIG's letter requests of CMS but CMS did not provide it to OIG until September 2008 in response to OIG's subpoena.

reports contained data from which CMS was able to determine likely monthly liquidated damages for a few of the indicators.¹⁶

D. Agreement Documented

In August 2005, Treasury's CCAU commenced its audit of inmate dental services. The evidence, including the statements of the CMS Vice President, indicates that, concurrently, Treasury began putting pressure on DOC to assess liquidated damages. DOC representatives were told "point blank" by CCAU representatives that DOC was required to assess and collect liquidated damages. A senior CMS manager was told by a senior DOC official that Treasury was about to apply pressure on DOC to assess liquidated damages against CMS.

CMS's recently provided email (as a result of a subpoena)¹⁷ reveal that, in August 2005, CMS supervisors at corporate headquarters were concerned about the amount of liquidated damages reflected in reports they were receiving for just the first months for only a few Objective Performance Indicators and "how quickly these types of things can add up." Other documents CMS provided to OIG (as a result of the subpoena) indicate that the suspected amount of liquidated damages at that time was \$157,767.50. The documents further indicate that CMS corporate officials demanded to know what the CMS Vice President was going to do to correct performance and address the growing liquidated damages liability. The documents

¹⁶ These reports were not made available to OIG. According to DOC Office of Information of Technology staff, when the electronic reports were first introduced, the dollar amount for liquidated damages appeared on the reports; several months later, at Roselli's instruction, the dollar amount was removed.

¹⁷ Although clearly within the scope of documents OIG requested in its earlier letter requests of CMS, these were among the documents only recently provided by CMS to OIG in response to a subpoena.

provided to OIG by CMS indicate that part of the CMS Vice President's response to corporate headquarters was to explain that he would attempt to improve services; that the actual amount of liquidated damages was lower;¹⁸ and that he would take steps to ensure that the DOC Assistant Commissioner would uphold his part of their agreement not to assess liquidated damages.

The CMS Vice President told OIG that he met with Assistant Commissioner Roselli in Roselli's office on or before August 29, 2005 to "reinforce" his agreement with Roselli.¹⁹ At the meeting, the CMS Vice President told Roselli that he had learned that Treasury was about to put pressure on DOC staff to assess liquidated damages against CMS. The CMS Vice President told Roselli that he heard that Treasury was aware that the automated performance tracking system was working for some of the performance indicators, that it revealed that CMS's performance was falling sufficiently short of standards laid out in the contract to warrant liquidated damages, and that additional reports would soon be released potentially showing that liquidated damages were warranted for substandard performance in other areas. He said that he told Roselli that he wanted an "affirmation" if DOC was going to change direction and begin assessing liquidated damages.

The CMS Vice President told OIG that, at this meeting, he learned that Assistant Commissioner Roselli was already aware of Treasury's position that DOC should begin assessing liquidated damages based on the automated reports. According to the CMS Vice

¹⁸ Although the CMS Vice President attempted to convince OIG that the liquidated damages amounts produced by the automated OPI reports were unreliable at times, his treatment of them at that time (that is, correcting and forwarding the reports to this supervisors in St. Louis as the basis for setting aside a reserve) indicates that he realized that they could readily be corrected, thus making them reliable.

¹⁹ Although both the CMS Vice President and Assistant Commissioner Roselli told us that they rarely met privately, a senior DOC official said that he often saw them conferring privately.

President, who claimed that he could not remember the exact conversation with Assistant Commissioner Roselli, he went away from the meeting understanding that Roselli continued to agree that liquidated damages would not be assessed unless CMS demonstrated continued failure to improve. Corroborating the CMS Vice President's understanding is that Roselli did not shortly thereafter -- or at any time during the contract period -- give orders directing his staff to implement the protocol for the assessment of liquidated damages against CMS.

The CMS Vice President told OIG that he documented the agreement in a letter to Assistant Commissioner Roselli dated August 29, 2005 -- the same day of or shortly after the meeting.²⁰ In relevant part the letter read:

Objective Performance Indicators

- a. CMS and DOC agreed that the Objective Performance Indicators were a quality improvement tool.
- b. Liquidated Damages will only be assessed for continued failure to progress in program improvement efforts.²¹

Although the letter did not indicate that it had been shared with anyone other than the DOC Assistant Commissioner, the CMS Vice President told OIG that he had provided the August 29, 2005 "letter" to CMS corporate supervisors, in draft and final copy before he provided it to the Assistant Commissioner. The CMS Vice President told OIG that he never provided a copy of the letter to anyone at the State (other than Roselli) until he provided it to

²⁰ The CMS Vice President said that there were other contract changes that had also been under discussion since January 2005 that he also discussed at the meeting. These matters were also documented in the August 29, 2005 letter. All of the changes were beneficial to CMS or at least neutral.

²¹ During an OIG interview the CMS Vice President acknowledged that this agreement essentially eliminated the possibility of liquidated damages. CMS could slowly improve, never reaching contract standards and never warranting the assessment of liquidated damages.

OIG and that he neither requested nor received a written or verbal response to the letter from Assistant Commissioner Roselli.

The evidence is not entirely clear why the CMS Vice President provided a copy of the letter to Roselli. The letter might appear to have served the CMS Vice President's personal purposes in that it demonstrated to his supervisors that he took action to prevent assessment of liquidated damages and that he appeared to have documented an agreement with the Assistant Commissioner. However, that benefit was somewhat nullified when his supervisors asked the CMS Vice President if Roselli had responded in writing verifying that in fact this was their agreement, and he had to tell them that Roselli never responded in writing.

The CMS Vice President told OIG that he documented the agreement he had with Assistant Commissioner Roselli in the August 29, 2005 letter because up to that point CMS had nothing documenting the contract change. This explanation might be credible if he, his CMS supervisors, and the DOC Assistant Commissioner had handled the August 29, 2005 letter differently; for example, they did not treat the letter as even an informal contract amendment.

In fact, the CMS Vice President acknowledged during an OIG interview that this letter was not sufficient to constitute a change in contract terms, nor a formal amendment to the agreement binding DOC. The CMS Vice President told OIG that as far as he knew, the only State representative aware of the agreement was DOC Assistant Commissioner Roselli, and the only State representative to whom he provided a copy of the August 29, 2005 letter (until OIG's investigation) was likewise DOC Assistant Commissioner Roselli. Moreover, CMS never

followed up or contacted Roselli asking for confirmation of the agreement or even whether he even received the letter.

Further, although many DOC employees administered the CMS contract and should have been made aware of any changes, none of them were. On its face, the letter did not indicate that it had been copied to anyone in Treasury or anyone else at DOC or elsewhere. Therefore, neither CMS nor the CMS Vice President could use the letter to argue that it constituted an informal contract amendment.

Indeed, the CMS Vice President's failure to provide copies of this agreement to other high level DOC officials and staff, to the Commissioner's office, or to Treasury indicates that the CMS Vice President was well aware that the letter did not represent an above-board agreement -- even an informal one -- that CMS could enforce on any legitimate or official level. It is also reasonable to conclude that the letter was written and intended for immediate distribution to only one State representative: the Assistant Commissioner, and that the letter documents an improper unauthorized agreement between the CMS Vice President and Roselli to suspend liquidated damages against CMS. Taking the CMS Vice President at his word that he met with the Assistant Commissioner to "reinforce" their illicit agreement to suspend the assessment of liquidated damages against CMS, it is reasonable to conclude that the document first memorializing the agreement -- the August 29, 2005 letter -- may have had the same purpose.

OIG asked Assistant Commissioner Roselli about the August 29, 2005 letter. In an earlier interview held in 2007 before OIG's initial report was issued, the Assistant Commissioner

told OIG that he had in fact received the letter from the CMS Vice President and that it accurately documented his verbal agreement with the CMS Vice President.

However, in a recent interview on August 21, 2008, the Assistant Commissioner claimed that he neither recalled a meeting with the CMS Vice President about the contents of the letter nor receiving the letter. Moreover, he denied that he had reached the agreement with the CMS Vice President that the letter purported to record. He asserted that although he would *never* have entered into such an agreement with the vendor, CMS would not have even requested such an agreement in August 2005, because the reports upon which liquidated damages would have been based at the time were not reliable and therefore DOC was not in a position to assess liquidated damages against CMS.

The more recent denial by the Assistant Commissioner is not credible in the face of his earlier acknowledgement of the agreement and receipt of the letter documenting it.²² The Assistant Commissioner's assertion that the automated Objective Performance Indicator reports were unreliable -- and therefore CMS would not fear assessment of liquidated damages and would not have requested relief at that time -- is also not credible. It is contradicted by documentary evidence. The letter itself and related contemporaneous CMS email are evidence that the automated programs were close to providing liquidated damages reports (if not already doing so) and that CMS was concerned about the looming threat of assessment of liquidated damages. Further, there is ample documentary evidence that the automated system was producing reliable reports and that Treasury was demanding that DOC begin assessing liquidated

²² Other factors tending to corroborate that Roselli reached the agreement documented in the letter were that Roselli never implemented the protocol for assessing liquidated damages against CMS and contemporaneous internal CMS email provided to OIG discussing the communication.

damages. The evidence indicates that both before and within a short period of time after the August 29, 2005 letter, the automated system was regularly producing reliable reports for many Objective Performance Indicators. The reports were validated and accepted as reliable at weekly meetings by CMS and DOC staff.

Although the August 29, 2005 letter contained several changes to the contract, Assistant Commissioner Roselli had neither circulated nor responded to the letter. On the other hand, once both Commissioner Hayman and former Commissioner Brown were afforded an opportunity to read the letter during OIG's investigation, they each told OIG that, because the letter sought to memorialize what they each considered to be a number of significant changes to the contract, DOC practices would dictate a written response to such a letter either confirming or denying the changes and circulation to each of the DOC parties and groups affected by the changes. Instead, it appears that Assistant Commissioner Roselli, having been faced with the CMS Vice President's decision -- after eight months of working in secret -- to document the *sub rosa* agreement, put the letter away where only he would find it.²³ Assistant Commissioner Roselli's failure to circulate the letter to DOC staff or to respond, tends to indicate that the Assistant Commissioner did not want anyone else at DOC or Treasury to be aware of his unauthorized agreement with the CMS Vice President.

Whether so intended by the CMS Vice President, the existence of the August 29, 2005 letter (documenting the Assistant Commissioner's *ultra vires* improper agreement to provide an

²³ The evidence indicates that Assistant Commissioner Roselli only revealed the letter in response to OIG's recent subpoena long after he knew that OIG already had it having been shown the letter by OIG during OIG's earlier investigation.

unwarranted benefit to CMS at the State's expense and contrary to the Commissioner's intentions) could have been construed by the Assistant Commissioner as a threat to expose his conduct if he did not continue to go along with CMS. Indeed, if, in the face of pressure from Treasury or other State authorities to assess liquidated damages, or if Commissioner Brown began to ask questions about whether the liquidated damages provisions were working, or if the Assistant Commissioner should be tempted to begin assessing liquidated damages against CMS, the letter could have surfaced, potentially doing great harm to the Assistant Commissioner's thirty-plus year career.²⁴ As described below, when Commissioner Brown left DOC, taking with him DOC's institutional interest in implementing the liquidated damages provision of the contract, the threat of exposure would be significantly weakened. Although the letter could still expose the agreement that the Assistant Commissioner had entered into with the CMS Vice President, it was unlikely that anyone would look for and find it.

Whatever Assistant Commissioner Roselli's motivation, he lived up to his part of the agreement throughout the term of the contract. Despite CMS's obviously poor and inconsistent performance (by OIG's calculation using DOC's data, it warranted several millions of dollars of liquidated damages), Assistant Commissioner Roselli never directed his staff to implement the protocol for assessing liquidated damages. In fact, he steered them in the opposite direction: for those indicators that required manual audits, he directed that the audit reports not require liquidated damages, but be termed quality improvement tools; he directed his senior staff to cease referring to liquidated damages in connection with the Objective Performance Indicators; and he essentially removed any consideration of liquidated damages from the relationship with

²⁴ CMS could have used it as a threat against Roselli or, as they did in their initial interview with OIG, as an explanation for the lack of any liquidated damages, perhaps unintentionally exposing Roselli. In either event, the effect on Roselli could be the same: his participation in the agreement could be exposed.

CMS. Moreover, when questioned by OIG about DOC's failure to assess liquidated damages in the face of CMS's obvious performance weaknesses, Assistant Commissioner Roselli provided specious defenses for DOC's failures under his leadership.

E. CMS October 6, 2005 Letter

In the weeks following August 29, 2005, improvements to DOC's automated programs that were designed to measure contract performance were moving forward, producing more reliable reports and calculating liquidated damages in more areas. Treasury's auditors were demanding the assessment of liquidated damages, and it was evident that it would be difficult to forestall the assessment of liquidated damages throughout the term of the contract. The evidence indicates that the CMS Vice President and the Assistant Commissioner engaged in another tactic to push the assessment of liquidated damages into the future.

Hardly a month after the August 29, 2005 letter, with Treasury still auditing the delivery of inmate dental services and the automated system designed to track contract performance now regularly generating reliable Objective Performance Indicator reports, the CMS Vice President wrote a second letter to Assistant Commissioner Roselli concerning the assessment of liquidated damages. The CMS Vice President told OIG this letter, dated October 6, 2005,²⁵ was intended to provide Assistant Commissioner Roselli with a basis for not assessing liquidated damages in spite of the functioning system producing reliable Objective Performance Indicator reports and liquidated damages assessments. It also provided a rationale for the Assistant Commissioner to use to justify his failure to assess any liquidated damages from CMS during the first nine months

²⁵ This letter was produced in the second half of 2008 by both CMS and DOC in response to OIG subpoenas -- not in response to OIG's earlier letter requests.

of the contract in the face of CMS's poor performance should the Assistant Commissioner be questioned by Commissioner Brown.

In the guise of a request for continued relief from assessment of liquidated damages, the CMS Vice President's letter provides additional rationale for the suspension of the assessment of liquidated damages, until at least January 1, 2006, but "ideally" until April 1, 2006.²⁶ The rationale was that since the automated system was only beginning to produce reliable reports and in only five areas, it would be unfair to start using the reports to assess damages against CMS without giving CMS an opportunity to work under the fully functioning measuring system, *i.e.*, the measurement of all 25 performance indicators. CMS was requesting the opportunity to function under the fully operating system for a full calendar quarter. Since the system would likely not be fully operational until January 2006, CMS understood that the process could potentially start assessing liquidated damages as of January 1, 2006, but the "ideal" start date for using the system to assess liquidated damages would be April 1, 2006.²⁷

²⁶ When OIG questioned the CMS Vice President about the significance of this date, the CMS Vice President admitted that there was no particular reason to forestall the change until that date other than that it was the first anniversary of the contract.

²⁷ The language in the missive is plain, and other documents support OIG's understanding of its meaning. Internal CMS email provided by CMS, written contemporaneously to the letter, indicate that the letter was intended to forestall the assessment of liquidated damages until at least January and hopefully until April 2006. When Assistant Commissioner Roselli was asked the intended purpose of the letter, he told OIG that he thought that the CMS Vice President wrote it because he believed that DOC was about to begin assessing liquidated damages in the fall of 2005, and the CMS Vice President hoped to delay the assessment of liquidated damages. Roselli's response is consistent with OIG's interpretation of the request in the letter -- that is, to hold off assessing liquidated damages for several months.

In sworn testimony, the CMS Vice President provided another -- but incredible -- explanation for the letter. (He claimed that he was asking for a new "baseline" from which to measure CMS's performance.) The CMS Vice President's explanation was not supported by the plain meaning of the language, its context, and other CMS documents provided to OIG. The CMS Vice President's incredible explanation is likely linked with events that followed the letter, as explained, *infra*, resulting in DOC's new administration and Assistant Commissioner Roselli's ability to convince the new Commissioner that liquidated damages were not conducive to achieving the contract goals. Having written the letter prior to those events (and provided it to OIG recently in response to a subpoena), the CMS Vice President was required to provide OIG with an explanation, however weak and lacking credibility, that

Once again, if this were a formal CMS request produced in normal course of business, it would have been shared with any number of Treasury and DOC staff so that it could receive proper discussion and a well considered decision. For instance, since this would have resulted in a significant savings to CMS, it is likely that CMS staff would have made their case to the appropriate DOC and Treasury staff and each State department would have files documenting the process and decision. Perhaps it would have been accompanied by charts and a cost benefit analysis (both financial and services cost). None of this was done. Although, according to the CMS Vice President, he provided copies to his CMS management, the only DOC or other State representative to receive a copy of it was DOC Assistant Commissioner Roselli.

An appropriate responsive argument on behalf of DOC would be that the DOC Electronic Medical Record had been measuring CMS's performance as several Objective Performance Indicators were brought online, there was a weekly meeting to validate these system results, and there was no reason not to begin to immediately assess liquidated damages for failures related to these functioning online Objective Performance Indicators. However, there was no such response and no written response at all from Assistant Commissioner Roselli to the CMS October 6, 2005 letter.²⁸

A senior DOC official who did not see the CMS letter told OIG that he recalled that at a monthly meeting, the CMS Vice President took the position that all 25 of the Objective

was consistent with the failure to assess liquidated damages through the entire contract term rather than only before April 1, 2006.

²⁸ A difference between this letter and the August 29, 2005 letter (provided in response to OIG's subpoena) was that the October 6, 2005 letter had been date and time stamped in an automatic DOC stamping device. This could indicate that Assistant Commissioner Roselli intended to rely on the argument in the letter.

Performance Indicator reports would have to be functioning before liquidated damages could be assessed. The DOC official recalled that he responded to the CMS Vice President that there was no logical reason to forestall liquidated damages on individual Indicators. He also informed the CMS Vice President that in any event, even if DOC waited until all reports were functioning, DOC could nonetheless retroactively assess liquidated damages for all Objective Performance Indicators at that time. The DOC official recalled that this triggered great concern for the CMS Vice President and that after the meeting, he saw the CMS Vice President and DOC Assistant Commissioner Roselli talking privately.

As it turned out, the Assistant Commissioner did not need the rationale set out in the October 6, 2005 letter to explain to Commissioner Brown why no liquidated damages had been assessed against CMS as of January 2006 (or later). Commissioner Brown announced his resignation effective January 10, 2006, for a position in Washington, D.C. Shortly thereafter, Governor Corzine appointed George Hayman, who had been Assistant Commissioner of Operations, to serve as Acting Commissioner of DOC.

Commissioner Hayman and Assistant Commissioner Roselli both told OIG that Assistant Commissioner Roselli informed Acting Commissioner Hayman that it had been DOC policy under former Commissioner Brown not to assess liquidated damages. The Assistant Commissioner, using the rationale provided by the CMS Vice President (i.e., that DOC was working cooperatively with the vendor to achieve the goals of the contract; and that liquidated damages would be counter-productive and should be assessed only when CMS had failed to

demonstrate improvement in its performance²⁹) convinced Acting Commissioner Hayman that it was in the best interest of the successful implementation of the contract to continue “Commissioner Brown’s policy”. Commissioner Hayman told OIG that he accepted the word of Assistant Commissioner Roselli. He believed that he was following the policy of former Commissioner Brown when he agreed with Roselli’s recommendation to continue the suspension of the assessment of liquidation damages against CMS that had been in place. He accepted the Assistant Commissioner’s representations about CMS’s performance under the contract. He told OIG that the Assistant Commissioner had never presented him with data demonstrating that CMS was performing poorly.³⁰

A senior DOC official recalled that at some point, Assistant Commissioner Roselli told his staff to stop referring to liquidated damages when discussing Objective Performance Indicators. The employees who had protested the CMS Vice President’s harangue became frustrated by the lack of support from the Assistant Commissioner and by the realization that no liquidated damages were going to be assessed against CMS despite CMS’s poor performance. They stopped protesting the CMS Vice President’s characterizations and they also stopped pressing for liquidated damages in the face of CMS performance shortfalls. Instead, they focused only on improving CMS’s performance.

²⁹ As Assistant Commissioner, Hayman had attended several of the monthly meetings during which the CMS Vice President used this rationale. Having heard these matters discussed openly in this way would have at least put Hayman in the frame of mind to accept Roselli’s description of the alleged policy implemented by Brown after Hayman was appointed Acting Commissioner in January 2006.

³⁰ Commissioner Hayman told OIG that when OIG initially reported in October 2007 that its review demonstrated that CMS’s performance warranted \$2.5 to 3.5 million in liquidated damages, Assistant Commissioner Roselli downplayed OIG’s findings, saying that the data OIG used was unreliable and OIG’s calculations were flawed.

F. Assistant Commissioner Confronted with Evidence

OIG again interviewed Assistant Commissioner Roselli on August 21, 2008 to give him an opportunity to address the evidence that contradicted his earlier statements to OIG. Assistant Commissioner Roselli was told that former Commissioner Brown denied to OIG that he had been aware of or had authorized the suspension of liquidated damages against CMS. Contrary to his statements in earlier interviews, Assistant Commissioner Roselli admitted to OIG that he, Roselli, had made the decision to not to assess liquidated damages against CMS and that he did not inform Commissioner Brown of his actions nor seek his authorization or approval.

Assistant Commissioner Roselli attempted to excuse the failure to assess liquidated damages during Commissioner Brown's tenure by arguing that there was insufficient and unreliable data on which to assess liquidated damages before Brown resigned. However when confronted with evidence to the contrary, he acknowledged to OIG that liquidated damages could have been assessed on a number of Objective Performance Indicators and were warranted by CMS's poor performance.

During the tenure of Commissioner Brown, who had so strenuously and publicly worked to include -- essentially for the first time -- liquidated damages in a new contract with an entrenched vendor who had provided inmate health services to DOC for the previous nine years, Assistant Commissioner Roselli managed to see to it that liquidated damages, although warranted by CMS's poor performance, were not assessed. Assistant Commissioner Roselli also acknowledged that he, Roselli, had misled then Acting Commissioner Hayman by telling him

that it had been Commissioner Brown's decision and policy to suspend liquidated damages against CMS, thereby convincing Hayman to implement the policy.

Assistant Commissioner Roselli denied that he had made the decision to suspend the assessment of liquidated damages against CMS for any personal benefit or even in return for any additional benefit for DOC. Instead, in explaining his conduct to OIG, he relied upon the rationale provided by CMS. He stated that his actions were motivated by a desire to see the vendor and the contract succeed. He also told OIG that the assessment of liquidated damages was discretionary under the terms of the contract.³¹ Therefore, he said, liquidated damages were not mandated.³² None of his explanations addressed his lack of authority to take the actions he did nor addressed the loss of services and funds owed to the State caused by his actions.

The Assistant Commissioner's silence or affirmative agreement in the presence of his staff with the CMS Vice President's assertions that Objective Performance Indicators and attendant liquidated damages were punitive and counter-productive had the result of thwarting the efforts of DOC staff who would have enforced the contract terms and convincing others of his staff that what the CMS Vice President was asserting (a position that commercially benefited CMS but had no contractual or policy basis and was financially detrimental to DOC and the State), was actually DOC's, Treasury's and the State's position. Had Assistant Commissioner Roselli been a diligent and dutiful State employee minimally carrying out his supervisor's

³¹ The Assistant Commissioner often referenced a consultant utilized by DOC in preparation of the RFP as support for suspension of liquidated damages. However, his statements in this regard were unconvincing. The consultant actually supported the imposition of liquidated damages.

³² Assistant Commissioner Roselli never told OIG that he had taken the actions he did because he disagreed with Commissioner Brown on the benefit of assessing liquidated damages. However, whether or not he had agreed with the rationale offered by CMS, he could have presented it for the Commissioner's consideration. He did not.

wishes, he could have simply told the CMS Vice President that the Commissioner insisted on the assessment of liquidated damages and that he, Roselli, did not have the authority to change the contract.

When the automated system began creating several reports accurately demonstrating CMS's poor performance in areas for which liquidated damages could be assessed, Assistant Commissioner Roselli could have explained to CMS that suspending the assessment of liquidated damages was a significant deviation from the terms of the contract, requiring a formal contract amendment that involved the approval of the Treasury Department.³³ Instead, the evidence indicates that Assistant Commissioner Roselli entered an *ultra vires* agreement to suspend the assessment of liquidated damages, having no authority to waive the State's contract rights -- to the contrary, it was his obligation to protect and enforce the State's contract rights.

Assistant Commissioner Roselli offered OIG no explanation for not informing Commissioner Brown of his decision not to assess liquidated damages actions against CMS and never assessing liquidated damages against them, although he admitted that at the time he understood his actions were contrary to Commissioner Brown's intentions. He offered no explanation for misleading Commissioner Hayman about DOC's policy. He also offered no explanation for his false statements to OIG during OIG's investigation into DOC's management of the CMS contract.

³³ In separate interviews with OIG, both the CMS Vice President and the Assistant Commissioner stated that suspending the assessment of liquidated damages would have required a formal contract amendment.

G. Conclusions

The evidence gathered during OIG's investigation indicates that:

- Assistant Commissioner Roselli entered into an agreement with the CMS Vice President to refrain from the assessment of liquidated damages against CMS for the duration of the contract regardless of CMS's failure to meet contract specifications. OIG did not uncover evidence of a personal benefit to Assistant Commissioner Roselli in return for his participation in the improper arrangement benefitting CMS.
- Assistant Commissioner Roselli acted beyond his authority and without the approval or authorization of former Commissioner Brown, or anyone in the State who had the authority to alter the terms of the inmate health services contract to suspend the provision providing for the assessment of liquidated damages, when he entered into an agreement with the CMS Vice President to refrain from assessing liquidated damages against CMS regardless of CMS's failure to perform its responsibilities under the contract.
- Assistant Commissioner Roselli did not inform Commissioner Brown that CMS's performance warranted the assessment of liquidated damages, but that none were assessed.
- Assistant Commissioner Roselli falsely told then Acting Commissioner Hayman that former Commissioner Brown had implemented a policy suspending the assessment of liquidated damages.

- During OIG's investigation into his and DOC's management of the CMS contract, Assistant Commissioner Roselli made false statements to OIG, intending to mislead OIG.
- The evidence indicates that CMS did not respond fully to OIG's letter requesting the production of enumerated documents despite representations by CMS that a subpoena was not necessary.

III. CMS CIRCUMVENTION OF NJ DENTAL PRACTICE REGULATIONS

In OIG's initial report, we referenced the fact that CMS had subcontracted to a newly formed company, AllCare Dental Group, LLC (AllCare), to provide inmate dental services. Sometime around February 2005, CMS learned that it was not qualified under New Jersey law to provide dental services. CMS then contracted with AllCare, allegedly an authorized dental services provider, owned by a physician (himself a CMS employee) and his dentist wife. Subsequent to OIG's initial report, we interviewed the owners of AllCare and learned that in fact, they were admittedly only a "staffing agency," that had no staff at the commencement of the contract and no experience providing dental services to inmates. As described below, the evidence indicates that CMS was the driving force behind the creation of AllCare and used AllCare to circumvent the regulatory requirements prohibiting CMS from providing dental services directly to DOC, enabling CMS to retain a greater profit.

Regulations promulgated by the New Jersey State Board of Dentistry render unlawful the employment of dentists by corporations that are not formed and owned by dentists.³⁴ In practical terms, that means that CMS, as a regular business corporation not owned by dentists, cannot hire dentists as employees or engage their services as independent contractors.

When DOC learned that CMS was disqualified from hiring dentists, CMS hurriedly entered into negotiations with the CMS Statewide Medical Director, a New Jersey licensed physician, and his wife, a New Jersey licensed dentist. On March 2, 2005, less than one month

³⁴ Ownership of the professional corporation or limited liability company must be by dentists or by closely allied health care professionals (e.g., physicians, nurses, optometrists and physical therapists).

before the April 1, 2005 start of the inmate health services contract, the CMS Statewide Medical Director and his wife formed a limited liability company (AllCare Dental Services, LLC), with the CMS Statewide Medical Director owning 49% and his dentist wife owning 51% and serving as principal owner and dental director. On March 30, 2005, the newly formed AllCare Dental Services, LLC entered into a two-year subcontract with CMS, valued at in excess of \$4.2 million. This subcontract was later extended for a total term of 40½ months and a total value in excess of \$7 million.

At the time AllCare executed the subcontract with CMS, AllCare employed no dentists other than the principal owner, despite the fact that the subcontract called for AllCare to furnish the services of the equivalent of 14.56 full time dentists. As discussed in OIG's initial report, although AllCare was able to recruit dentists, AllCare was nonetheless sorely understaffed for the first four months of the contract. At the commencement of the contract, there were only two dentists -- the principal owner of AllCare and the CMS Statewide Dental Director (who was pulled from his administrative duties to provide clinical services) -- servicing the dental needs of almost 26,000 inmates. In fact, both of these dentists were treating inmates on a part-time basis: the principal owner of AllCare continued to maintain her outside dental practice and the CMS Statewide Dental Director continued to perform at least some of his administrative duties (although his clinical duties necessitated by AllCare's understaffing prevented him from devoting his full time to the administrative responsibilities of his primary position as CMS Statewide Dental Director).

Furthermore, at the time CMS and AllCare entered into their subcontract, the principal owner and dental director of AllCare had no experience providing dental services to inmates. Her experience was limited to operating a solo dental practice and serving as a staff dentist at a public health center.

Therefore, despite the fact that the contract requires CMS to engage the services of subcontractors “with documented experience demonstrat[ing] that each subcontractor has successfully performed work on contracts of a similar size and scope to the work that the subcontractor is designated to perform,” CMS instead contracted with a company newly formed for the purpose, having no administrative infrastructure, and having only one part-time dentist with no correctional experience. Clearly, AllCare did not satisfy the contractual requirements that the inmate dental services provider have relevant, demonstrable experience.

In fact, in interviews with OIG, the owners of AllCare described their company not as a provider of inmate dental services, but simply as a “dental staffing” or dentists “placement agency.” They understood their contract with CMS as requiring them only to recruit and retain dentists who would be managed by CMS. The principal owner of AllCare described her company as an “employment agency” and “staffing provider,” but “not a turnkey dental services provider.”

The evidence demonstrates that AllCare was not a provider of dental services, but simply provided dentists to CMS. AllCare performed no additional services other than furnishing dentists. The dentists reported to the CMS Statewide Dental Director. The principal owner of

AllCare reported that her contact with the CMS Statewide Dental Director was sporadic, occurring only when issues arose. CMS provided AllCare with substantial administrative support, including timekeeping and recruiting. The CMS continuing education director coordinated the quarterly meetings of dentists, which were held at CMS headquarters.

The evidence supports the conclusion that CMS used AllCare as a conduit -- offering the services of dentists through an eligible entity -- in order to circumvent State requirements prohibiting CMS from directly employing dentists. While AllCare itself is a permissible business format, the evidence supports the conclusion that it was acting as a dentist placement agency, placing dentists with CMS, an entity that is not permitted to hire dentists. The evidence also supports the conclusion that AllCare was specifically formed so that CMS could circumvent state dental regulations prohibiting business corporations (such as CMS) from employing dentists and providing dental services.

The evidence further indicates that CMS used AllCare to provide the dental services to DOC rather than a qualified dental services provider, because it enabled CMS to retain a greater profit. As discussed at length in OIG's initial report, in its bid submission to DOC, CMS had proposed to either provide dental services using dentists employed by CMS or, for an additional cost to DOC, continue to subcontract dental services to Correctional Dental Associates (CDA), an independent entity which had provided inmate dental services to DOC since 1996. In making the contract award, DOC opted to have CMS provide the services directly. When DOC learned that CMS was prohibited from employing dentists, CMS was required to come up with an alternative method of employing dentists. Instead of using a qualified provider, CMS

orchestrated the creation of AllCare. This allowed CMS to adhere to its original plans of directly providing dental services with only the most minor of modifications, because the cost of employing AllCare was (as discussed above) completely passed on to DOC.

Alternatively, if CMS had subcontracted with a qualified dental services provider, such as CDA, CMS would have incurred substantially greater costs (for example, as much as \$2.8 million for the first two contract years if it had contracted with CDA). Under such circumstances, CMS would not have been able to pass the increased costs on to DOC; CMS would have been responsible for the extra costs associated with subcontracting with CDA or some other qualified dental services provider, thus incurring additional expenses and reducing CMS's profits. However, by subcontracting with AllCare, CMS ensured that it received whatever profits it had anticipated receiving under its bid proposal.

IV. ADDITIONAL CMS OVERCHARGES

OIG's continuing review determined that at various times during the initial two-year term of the contract, the one-year extension and the six-month transition, CMS improperly charged DOC for: (1) oral surgeons; (2) meal breaks taken by dentists; (3) unauthorized charges that appear to be management fees that were duplicative of other management fee charges; and, (4) charges to manage substitute dentists who were not provided. DOC was not aware of these improper charges, and it did not take appropriate steps to ensure that all charges were authorized. These improper charges could have been identified timely by DOC during the administration of the contract if DOC personnel had requested and reviewed supporting documentation for the monthly CMS invoices. However, DOC personnel explained to OIG that prior to the issuance of OIG's October 15, 2007 report, DOC did not obtain documentation that would prove the accuracy of the dentists' charges appearing on the CMS invoice.³⁵ According to DOC personnel, subsequent to the issuance of OIG's initial report, DOC began to request detailed breakouts of the total cost of dentist services.

A. Overcharges for Oral Surgeons

In OIG's initial report, OIG noted its finding that CMS was improperly charging for the cost of oral surgeons, as those charges were included in the per diem amount charged by CMS to DOC. OIG recommended that DOC withhold the amount of \$132,345 from a future CMS payment to account for improperly charged oral surgeon fees for the time period of April 1, 2005

³⁵ Although the same might be true for the expenses of the medical program, OIG's review was limited to the dental program, and OIG did not address DOC's practices relating to the medical program charges appearing on CMS's invoice.

through March 31, 2007. On February 14, 2008, CMS credited DOC the amount of \$143,107.50 for improperly charged oral surgeon fees for the time period of April 1, 2005 through September 30, 2007.³⁶ In correspondence to OIG, responding to a draft of this supplemental report, DOC reported that upon further review, DOC staff determined that CMS owed DOC the amount of \$158,370 for the same time period.³⁷

B. Improperly Charged Meal Breaks

The contract for inmate health services provided that the State would not pay CMS for meal breaks taken by health services personnel, including dentists. In December 2006, DOC Bureau of Auditing tested the payroll records of 265 CMS medical employees for the month of December 2005 and found that CMS was properly deducting meal breaks prior to charging DOC.³⁸ However, DOC's audit did not review dentists' hours.

OIG obtained from CMS the invoices prepared by AllCare Dental Group, LLC (AllCare), the dental subcontractor, for dentists' hours for the period April 1, 2005 through March 31, 2007. OIG reviewed these invoices and found that CMS was not deducting the dentists' meal breaks prior to charging DOC, as required under the contract. Based on the invoices, OIG estimated that CMS had overcharged the State the amount of approximately \$258,569 for the period April

³⁶ In a cover letter accompanying the credit, CMS wrote, "it is not at all clear under the contract that CMS should not have billed amounts paid for oral surgery services. Nevertheless, in the spirit of cooperation, CMS is willing to resolve this potential issue of contract interpretation in the state's favor."

³⁷ OIG shared work papers with DOC supporting the amount of the overcharge for the period of April 1, 2005 through March 31, 2007, referenced in OIG's initial report.

³⁸ DOC follows a procedure requiring that a meal break of thirty (30) minutes be deducted from every shift of six (6) or more hours.

1, 2005 through March 31, 2007.³⁹ In a series of interviews with CMS, DOC and AllCare personnel, OIG confirmed that CMS had not deducted meal breaks for dentists and advised CMS, DOC and AllCare representatives that OIG would inform Treasury that CMS had been overcharging DOC for the cost of dentists' meal breaks.

On February 14, 2008, CMS credited DOC with \$274,123 for improperly charged meal breaks for dentists for the time period of April 1, 2005 through December 31, 2007.⁴⁰ The individual at DOC responsible for processing CMS invoices told OIG that DOC did not review CMS's calculation of the amount of the overpayment for the period of April 1, 2005 through December 31, 2007 and accepted CMS's credit without supporting documentation. At the request of OIG, DOC sought from CMS documents supporting CMS's calculation. CMS provided DOC with documents purporting to support CMS's calculation only for the period April 1, 2005 through December 31, 2005, not through December 31, 2007, the ending date of the time period used by CMS in determining the amount credited to DOC. In correspondence to OIG, DOC reported that DOC's review of the documentation to confirm the accuracy of CMS's credit is continuing.

C. Unauthorized Charges

The contract for inmate health services provided that CMS was paid a fixed amount each month for overhead costs, a management fee, and profit. These charges clearly appear in the

³⁹ OIG's calculation was an estimate because the invoices did not reflect the dentists' daily hours; as such, OIG was unable to apply DOC's procedure of deducting thirty (30) minutes for every shift of six (6) or more hours.

⁴⁰ In a cover letter accompanying the payment, CMS wrote that DOC should, "be assured that we [CMS] have taken all appropriate steps so that effective January 1, 2008, all time submitted to the state on behalf of all dentists will exclude any time spent in meal breaks."

monthly invoices submitted by CMS to DOC. During the initial two-year term of the contract, and the one-year extension and six-month transition, CMS charged DOC (as permitted under the contract) \$651,998 for overhead, management, and profit allocable to the equivalent of almost 15 full time dentists.⁴¹

During the same time period, CMS paid AllCare \$6,000 each month -- for a total of \$243,000⁴² over almost three and one-half years -- for overhead, management, and profit. Although not authorized by its contract with DOC to do so, CMS passed this charge on to DOC by combining it with other charges that appeared in CMS invoices submitted to DOC. Unlike AllCare's invoices to CMS, which detailed the charges per dentist and also included a separately delineated \$6,000 charge each month for overhead, management, and profit, when CMS billed DOC for the AllCare charges, CMS's invoice to DOC combined the dentists' charges and the \$6,000 fee, making it appear as if the \$6,000 was for dentists' salaries. Under such circumstances, DOC was not aware that it was paying the additional AllCare \$6,000 "overhead, management fee and profit" charge each month.

CMS should have paid the costs associated with this outsourcing arrangement out of its own management fee (that is, out of the \$651,998). Therefore, the \$243,000 that was added to the dentists' fees charged by CMS to DOC was an unauthorized charge and should be repaid by CMS to DOC.

⁴¹ CMS charged DOC \$194,895 in the first contract year; \$201,189 in the second contract year; \$186,119 during the one-year extension; and \$69,795 during four and one-half months of the six-month transition, for a total of \$651,998.

⁴² The DOC Statewide Dental Director informed OIG that AllCare ceased providing dentists services on August 14, 2008 and UMDNJ commenced providing dentists services on August 15, 2008; therefore, AllCare received a monthly management fee from April 1, 2005 through August 14, 2008, for a period of 40½ months.

D. Management Fee for Relief Staff Not Provided

The contract required that CMS provide dentists to correctional facilities according to a rigid day and time schedule. Under the contract, dentists were considered to be essential personnel; that is, in the event of an absence, whether scheduled or emergency, CMS was required to replace the absent dentist with a substitute (called, “relief”) dentist.⁴³ In this regard, the contract provided: “Replacement hours must be provided on the same shift on the same day as the hours originally scheduled to be provided and the Contractor [CMS] shall ensure that all essential functions are performed during the shift as would routinely be provided by regular staff.”

Even though CMS was required to provide relief dentists for those dentists who were absent, CMS, DOC, and AllCare representatives told OIG that CMS had never arranged with AllCare to hire dedicated relief dentists; CMS never instituted a formal relief program for absent dentists; and that over the course of the contract, CMS was unable to provide coverage for many of the shifts left vacant by absent dentists.

In preparing its bid, CMS aggregated all the charges for all of the relief staff as a single line item in the budget. This line item, called “Paid Time Off,” comprised the equivalent of 37.38 full time staff for each year in the original two-year term of the contract, and the equivalent of 46 full-time staff during the third year of the contract and the six-month transition

⁴³ In the proposed budget submitted by CMS as part of its bid for the contract with DOC, twelve positions are identified as “Must Relieve.” In addition to dentists and dental assistants, the “Must Relieve” staff includes physicians, nurse practitioners, the directors and supervisors of nursing services, and nurses and practical nurses on the day, evening and night shifts.

period.⁴⁴ The total annual cost for “Paid Time Off” personnel was budgeted as not to exceed \$2,387,079 in the first contract year; \$2,482,562 in the second contract year; \$3,010,707 in the third contract year; and \$1,505,353 during the six-month transition period, for a total of \$9,385,701; these amounts were accepted by DOC.⁴⁵

Despite the fact that CMS did not provide relief dentists, CMS was paid a management fee by DOC to manage the nonexistent relief dental staff. As explained above, the contract for inmate health services provided that CMS was to be paid a fixed amount each month for overhead costs and a management fee. The \$9,385,701 amount budgeted for total relief staff was included in the base amount used to calculate CMS’s management fee to be paid by DOC. Because the management fee is a fixed amount each month, DOC was paying CMS even though the relief staff was not provided.

In the absence of a formal relief staffing program for dentists, CMS shifted its Statewide Dental Director away from his administrative duties and had him furnish clinical services at a number of those correctional facilities where the dentists were absent.⁴⁶ OIG obtained and analyzed time records provided by AllCare and determined that the CMS Statewide Dental

⁴⁴ We note that the budget form designed by DOC includes a column specifically requesting the bidder to report relief staff (called, “Relief Factor Staffing”) for each of the twelve job categories identified by DOC as “Must Relieve.” In its bid, CMS marked each of those twelve positions with a zero and created a category called “Paid Time Off,” in which CMS indicated the equivalent of 37.38 full time staff for each of the contract years in the original two-year term of the contract and 46.00 full time staff during the one-year extension and six-month transition period. The lack of specificity on the part of CMS makes it impossible to apportion the “Paid Time Off” budget among the twelve “Must Relieve” categories.

⁴⁵ These amounts are for base salary only, and do not include costs such as payroll taxes, workers’ compensation premiums, health insurance, etc.

⁴⁶ CMS shifted the CMS Statewide Dental Director from his administrative duties despite the fact that the position of CMS Statewide Dental Director is considered full-time. Although it is a full-time position, the CMS Statewide Dental Director’s salary was reduced for those hours during which he was providing clinical services; during those hours he was paid by AllCare. This adjustment prevented double billing of his base salary.

Director furnished 788 clinical hours in the first contract year, 761 clinical hours in the second contract year, and 230 clinical hours over the third contract year and six-month transition period, for a total of 1,779 clinical hours over the entire term of the contract.

In this situation, one individual performed two jobs -- serving as CMS Statewide Dental Director and serving as the dental relief staff. However, CMS charged two management fees, one to manage⁴⁷ the full-time CMS Statewide Dental Director (who was not working full time) and a second to manage the relief dental staff (which did not exist). Given the absence of a relief dental staff, CMS charged DOC twice to manage one person. Moreover, because the management fee is a fixed amount, CMS charged and received payment from DOC for two management fees; the second management fee is a duplicate charge.

In its bid proposal, CMS expressed both the overhead costs and the management fee as a percentage of the budgeted value of the contract. OIG used the reported percentages to determine those amounts attributable by CMS to the clinical services provided by the CMS Statewide Dental Director. Based on the time devoted by the CMS Statewide Dental Director to providing clinical services, the amount of the duplicate management fee is \$13,840 in the first contract year, \$13,607 in the second contract year, and \$3,719 in the third contract year and during the six-month transition, for a total of \$31,166 over the entire term of the contract.

⁴⁷ This fee is classified by CMS as the overhead cost associated with having a full-time Statewide Dental Director.

V. RECOMMENDATIONS

As a result of OIG's further review, OIG makes the following additional recommendations:

- Department of Treasury consider withholding \$243,000 from future payments to CMS to make up for unauthorized charges for management fees.
- Department of Treasury consider withholding \$31,166 from future payments to CMS to make up for managements fees improperly charged for relief staff not provided.
- The Office of the Attorney General, the Department of Treasury, and the DOC continue their efforts to determine, assess, and collect an appropriate amount of liquidated damages from CMS.
- The Office of the Attorney General and the State Ethics Commission consider the evidence regarding the conduct of the former Assistant Commissioner of DOC and the CMS Vice President to determine if further action is warranted.
- The Office of the Attorney General review the contracts of various corrections agencies in New Jersey to ensure that CMS is not engaged in the unauthorized practice of dentistry.

- New Jersey consider legislation similar to federal statutes, 18 U.S.C.A. § 1001 et seq., making it a crime to knowingly and willfully make materially false, fictitious or fraudulent statements or representations in any matter within the jurisdiction of the executive, legislative or judicial branch of the government of New Jersey.