



Barry L. Kluger  
Inspector General

**Office of the Inspector General**  
Metropolitan Transportation Authority  
Two Penn Plaza, 5<sup>th</sup> Floor  
New York, New York 10121  
212-878-0000

March 28, 2016

Mr. Patrick A. Nowakowski  
President  
MTA Long Island Rail Road  
Jamaica Station  
Jamaica, NY 11435-4380

**Re: Failure to Disclose Conflict of  
Interest  
MTA/OIG #2016-05**

Dear Mr. Nowakowski:

The Metropolitan Transportation Authority (MTA) Office of the Inspector General (OIG) has completed an investigation into allegations that Richard Oakley, Chief Program Officer, Long Island Rail Road (LIRR), improperly provided preferential treatment to an LIRR contractor that employs Oakley's son. Although we did not substantiate the allegations, we did find that Oakley failed to properly notify the appropriate LIRR Contracting Officer of his son's employment with a contractor as required. We also found that during the pendency of our investigation, LIRR lacked a formal policy about how recusals should be reviewed and documented. We recommend that LIRR consider disciplining Oakley, as it deems appropriate, and that he be retrained about his ethical obligations to disclose potential conflicts of interest. Finally, we recommend that LIRR comply with the newly revised MTA All-Agency Code of Ethics (Code of Ethics) Section 4.01, which addresses how recusal shall be managed by MTA Agencies.<sup>1</sup>

### **BACKGROUND**

Long Island Rail Road Corporate Policy & Procedure, PL-015, section V (C)(4)(a) requires that each member of an evaluation committee sign the latest standard Confidentiality Statement that, among other things, "certifies that the Member does not have, and will disclose, a conflict of interest." Among the circumstances that may create a conflict of interest identified in the Confidentiality Statement is "present employment by a member of my immediate family with the prime consultant, contractor or vendor or with a proposed sub-consultant, subcontractor or supplier." Additionally, participants affirmatively agree to "promptly report, in writing, the fact of my interest or connection, and the nature of it to the Contracting Officer."

---

<sup>1</sup> On December 16, 2015, a revised MTA All-Agency Code of Ethics was issued that added to Section 4.01 very specific guidelines on how agencies must handle employee recusals.

## INVESTIGATION

### Oakley's Prior Recusals

OIG investigators obtained information about proposals submitted by LIRR contractor Posillico Civil, Inc. (Posillico) and Oakley's participation in the selection process. Cynthia Carter, Deputy Chief Procurement Officer, advised that Oakley is generally a member of the Steering Committee, but does not cast a vote on the Technical Evaluation Committee (TEC). However, the TEC is generally composed of Oakley's direct reports. OIG investigators asked if Carter knew Oakley's son was employed by Posillico and she confirmed that she did. In December 2014, Carter sent Oakley an e-mail asking him if he would be recusing himself from the steering committee for a contract for which Posillico submitted a proposal. He responded, "Yes, Good memory." As of February 2015, there were four projects for which Posillico submitted bids, either as a joint-venture or independently.<sup>2</sup> Procurement provided OIG with copies of the Standard Confidentiality forms Oakley signed as a participant in the evaluation of the firms. Oakley signed the Certification of Participation in Selection, Negotiation or Award of Contract. He did not report to the Contracting Officer, in writing, that his son was employed by Posillico, as the form clearly required. Posillico was the winner on one of those contracts and joint venture Skanska-Posillico was a winner on a second contract.

OIG investigators also spoke with Stephen Papandon, Senior Deputy General Counsel and Ethics Officer, LIRR to discuss whether Oakley had disclosed that his son worked at Posillico. Papandon stated that Oakley "has told everyone that his son is employed by Posillico." Papandon claimed that Oakley recuses himself from all matters related to Posillico, but explained that it is not done in writing but rather is done informally. Papandon stated he had only been the Ethics Officer for a year and during that time Oakley had not sought ethical guidance from him on how to manage his role as Chief Program Officer and his son's employment with Posillico. Papandon was unable to provide OIG with any prior written opinions provided to Oakley on this issue.

Papandon further stated there is no formal written recusal policy or procedure other than what is required by the MTA All-Agency Code of Ethics. Papandon added that sometimes employees contact him, but not all of them do. He explained that a conflict of interest does not always result in an employee's recusal because LIRR must consider whether someone other than the potentially conflicted employee can perform the same function. When asked if Oakley's functions could be performed by someone else, Papandon said that a subordinate could fill in for him. Papandon stated he is not the repository for all of LIRR's recusals and that some recusals are "very informal."

---

<sup>2</sup> Those contracts are: #6167 Ellison Avenue Bridge (Posillico); #6067 3 Montauk Bridges (Posillico); #6151 Colonial Road (Posillico); and #6119 Mainline 2<sup>nd</sup> Track (Skanska-Posillico).

### **Interview of Oakley**

Oakley stated that his son, a mechanical engineer, is and has been employed by Posillico for six or seven years. Oakley described his son's title as Project Engineer. Oakley was not forthcoming when we began asking him specific questions about his son's employment at Posillico. He stated his son does not work on any LIRR projects and when asked what projects his son works on for Posillico, Oakley stated "he works in the field." When asked about specific projects, Oakley added that his son works at the Atlantic Yards. He explained that Posillico's contract at the Atlantic Yards is with Forest Rattner, not LIRR or MTA. Oakley stated LIRR is not overseeing the Atlantic Yards project, but admitted that LIRR in-house construction employees must coordinate with Forest Rattner. Oakley stated Forest Rattner has to coordinate its work with LIRR's consultant on-the site, who is about five levels of supervision removed from Oakley. Oakley added he reported his son's employment with Posillico and assignment to the Atlantic Yards to Richard Gans, Vice President & General Counsel, LIRR, who advised him that he had no obligation to file a written disclosure about his son's employment.

OIG staff showed Oakley confidentiality forms he signed relating to the four contracts for which Posillico submitted proposals. We specifically showed Oakley the language that states he is obligated to report to the Contracting Officer, in writing, any potential conflict of interest, including employment by an immediate family member with a contractor submitting a proposal. When asked if he ever provided such written notice, Oakley stated his belief that it only applied when a family member was working on LIRR contracts. When asked to show us where such language appeared in the confidentiality form, Oakley admitted that it was his interpretation and admitted that he did not seek guidance or an interpretation of the language from either the Chief of Procurement or the Ethics Officer.

### **Subsequent Contract**

During the course of our investigation we received an additional anonymous allegation that Oakley failed to comply with his obligation to disclose his potential conflict of interest in connection with proposals for the Wreck Lead Bridge contract # 618 including Posillico's. Andrea Savva, Contract Administrator, Procurement & Logistics, LIRR, told us that Oakley emailed her a request for copies of the proposals. Savva sent him a copy of the confidentiality statement and told him that he needed to sign and return it before she could send him the proposals. Oakley returned a signed confidentiality statement, but Savva did not send him the proposals because he did not send a written disclosure about his son's employment at Posillico.

Claudia Montuori, Manager, Restoration and Mitigation Procurement, LIRR, spoke to Dennis Mahon, Chief Procurement Officer, LIRR, and told him that she did not believe Oakley had complied with the confidentiality form because he did not provide a written disclosure that his son is employed by Posillico. Mahon told us he called Oakley and told him Posillico was a proposer and Oakley seemed surprised. Mahon told Oakley he would have to recuse himself

Mr. Patrick Nowakowski  
Re: MTA/OIG #2016-05  
March 28, 2016  
Page 4

because of his personal relationship with a Posillico employee. On September 10, 2015, Oakley sent an e-mail to Montuori, Mahon, and Robert Fazio, Assistant Chief Program Officer, which stated:

“Please be advised that although I previously signed the confidentiality form for Wreck Lead Construction, I will be recusing myself from any related procurement activities or decision-making responsibilities due to personal reasons.”

When questioned about this incident, Oakley stated he did not know Posillico had submitted a proposal for the contract and recused himself when he found out. According to Mahon, Oakley’s subordinates now will report all information relative to this contract to Bruce Pohlot, Senior Vice President, LIRR.

OIG investigators spoke to Gans about how LIRR has been managing the ethical issues presented by Oakley’s position as Chief Programs Officer and his son’s employment at Posillico. Gans said that LIRR has recently created a notice that procurement will send to Oakley advising him when Posillico has submitted a proposal/bid. The notice requires that Oakley sign an acknowledgment and “designate a subordinate to act in [his] behalf with respect to this matter, and inform [his] staff of such designation as necessary.”

#### *MTA Code of Ethics*

The MTA Code of Ethics § 4.05 (a) prohibits employees from participating in “the selection, award, or administration of a contract if the Employee knows that he or any of his Family Members, or an organization that employs [his family member] has a financial or other interest, in any of the companies, their parent company, its affiliates or subsidiaries (“the company”) that propose or bid on or are awarded such contract.” This provision may be waived “if the Head of the relevant Agency’s Department, as well as General Counsel, and the Agency’s Ethics Officer state in writing that it is in the best interests of the Agency to waive the provision for a specific procurement or contract. Copies of any approved Waiver Request must also be filed with MTA Corporate Compliance.” According to Papandon, Oakley’s son’s employment at Posillico was widely known throughout LIRR. Nevertheless, Oakley did not seek a waiver from Section 4.05’s proscription, nor did LIRR’s Ethics Officer or General Counsel evaluate whether a waiver would be appropriate and file it with MTA Corporate Compliance. We have confirmed that LIRR has not filed a waiver for Oakley with MTA Compliance.

In December 2016, Section 4.01 of the Code of Ethics was revised and now requires that all employees notify their Agency Ethics Committee regarding any possible conflict of interest. It cites an MTA employee’s participation in an MTA Agency transaction in which that employee’s family member has a direct or indirect interest. The expanded policy details exactly what a written recusal must include, and requires, among other things, that delegation of authority must be to a non-subordinate employee. Although LIRR’s form, dated October 22, 2015, is an

improvement over its prior informal recusal, it does not comply with the requirements of the MTA All-Agency Code of Ethics section 401, which specifically states:

If an Employee believes he or she has an actual or apparent Conflict of Interest involving the MTA on a particular matter, the Employee shall not participate in the matter pending a determination by their Agency Ethics Officer. Recusals are at the Agency's discretion and shall be approved only if practical and in the best interests of the applicable MTA Agency.

The recusal requires that the Employee not participate directly or indirectly in any discussion or decision that in any way relates to the matter that gives rise to the Conflict of Interest. In addition the recusal must be in writing and contain:

- (a) The nature of the actual or apparent Conflict of Interest;
- (b) A delegation of authority to a non-subordinate employee;
- (c) Any requirements and conditions of the recusal;
- (d) The period of time the recusal will remain in effect;
- (e) The approval of the Agency Ethics Officer; and
- (f) The concurrence of the Chief Compliance Officer

A copy of the recusal must be sent to all employees who are likely to work on the matter giving rise to the recusal

### FINDINGS

1. Oakley failed to seek an appropriate waiver to MTA All Agency Code of Ethics § 4.05 (a) from the Agency's General Counsel and the Agency's Ethics Officer.
2. On at least four occasions, Oakley failed to comply with the disclosure requirements of LIRR's confidentiality statement. Long Island Rail Road Corporate Policy & Procedure, PL-015, section V (C)(4)(a).
3. Oakley failed to recuse himself in writing on four of the contracts in which Posillico was involved between 2013 and 2014.
4. Oakley repeatedly expressed a cavalier attitude regarding his conflict of interests and failed to grasp the significance of the conflict created by his son's employment with a contractor that regularly submits proposals for LIRR work.
5. LIRR Procurement staff appropriately recognized the significance of Oakley's conflict and solicited Oakley's recusal when Posillico submitted proposals for contracts.

Mr. Patrick Nowakowski  
Re: MTA/OIG #2016-05  
March 28, 2016  
Page 6

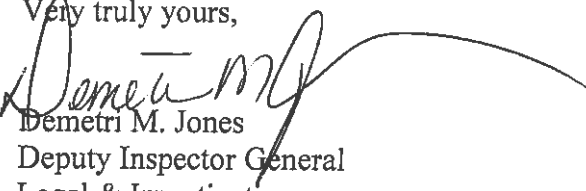
6. LIRR failed to recognize the need to evaluate whether a waiver of MTA All-Agency Code of Ethics § 4.05(a) was appropriate for contracts for which Posillico submitted a proposal given Oakley's son's employment with Posillico.
7. In October 2015, LIRR created a memorandum to be sent to Oakley by Procurement when Posillico was a bidder/proposer on a contract, requiring Oakley to designate a subordinate to act on his behalf.
8. During the pendency of this investigation LIRR did not have written procedures for employee recusals, nor did it require that the Ethics Officer be apprised of all recusals.
9. During the pendency of this investigation LIRR did not require that recusals be in writing.

#### RECOMMENDATIONS

1. LIRR should consider disciplining Oakley as it deems appropriate and Oakley should receive additional ethics training focused on his obligation to recognize a potential conflict of interest and steps he must take to recuse himself in such matters, if warranted.
2. LIRR should immediately comply with the newly revised Code of Ethics, enact a formal recusal policy, and communicate its recusal procedures to all of its employees. In particular, personnel should be instructed that in the event of an employee's recusal, any designated replacement employee shall not be a subordinate of the recused employee.

As always, we appreciate your continued courtesy and cooperation. Should you have any questions, or need additional information, please contact me at (212) 878-0279 or Senior Associate Counsel Maura Daly at (212) 878-0013.

Very truly yours,

  
Demetri M. Jones  
Deputy Inspector General  
Legal & Investigations