

May 18, 1998

C. Randall Tosh  
Attorney at Law  
936 Central  
Coos Bay, OR 97420-0309

Dear Mr. Tosh:

This letter is in response to your correspondence dated April 17, 1998 and May 8, 1998, concerning whether or not the engineering firm that developed a public works project for a city which you represent would have a conflict of interest which would affect its ability to submit a proposal to enter into a contract with the city to perform engineering services on the project.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF**  
**OPINION 98S-013**

**STATED FACTS:** A city retained an engineering firm to develop a public works project. The engineering firm also assisted the city in applying for grant funds which were to cover a significant portion of project costs.

The city decided to use a request for proposals (RFP) as a means of selecting an engineering firm to perform the engineering services on the project. The city did not have a public works director on staff. It appears that employees of the engineering firm assisted the city in drafting the RFP. The RFP identified the engineering firm as the firm which completed the master plan for the project. In addition, an engineer with the firm and the city manager were identified in the RFP itself as the people to whom questions about the project should be directed.

Three engineering firms submitted responses to the RFP, including the firm which had developed the project, written the grants, and drafted the RFP. The responses were evaluated by a member of the city council and a member of the community. The firm whose employees developed the project was awarded the bid. This firm was not the lowest bidder; however, the lowest bidder submitted a proposal which was considered non-responsive by the evaluating team.

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The engineering firm is still involved in the project. At this time, the city is ready to begin the construction oversight and contract administration, which is considered the second phase of a public works project. At the present time, there is neither a contract with the engineering firm to provide services for this phase, nor a contract amendment to like effect. The firm is under the impression that it will be performing the work for the second phase.

RELEVANT STATUTES: The following Oregon Revised Statutes are applicable to the issues addressed herein:

ORS 244.020(15): Public official means any person who, when an alleged violation of this chapter occurs, is serving the State of Oregon or any of its political subdivisions or any other public body of the state as an officer, employee, agent or otherwise, and irrespective of whether the person is compensated for such services.

ORS 244.020(2): Business means any corporation, partnership, proprietorship, firm, enterprise, franchise, association, organization, self-employed individual and any other legal entity operated for economic gain but excluding any income-producing not-for-profit corporation that is tax exempt under section 501(c) of the Internal Revenue Code with which a public official is associated in a nonremunerative capacity.

ORS 244.020(3): Business with which the person is associated means any business of which the person or the person's relative is a director, officer, owner or employee, or agent or any corporation in which the person or the person's relative owns or has owned stock worth \$1,000 or more at any point in the preceding calendar year.

ORS 244.040: Code of ethics; prohibited actions; honoraria. The following actions are prohibited regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

(1)(a) No public official shall use or attempt to use official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office, other than official salary, honoraria, except as prohibited in paragraphs (b) and (c) of this subsection, reimbursement of expenses or an unsolicited award for professional achievement for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated.

ORS 244.040(4): No public official shall attempt to further or further the personal gain of the public official through the use of confidential information gained in the course of or by reason of the official position or activities of the public official in any way.

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QUESTION #1: Would employees of the engineering firm be public officials subject to Oregon Government Standards and Practices laws?

OPINION: ORS 244.020(15) defines a public official ...as an officer, employee, agent or otherwise... If the city hired the engineering firm to develop the public works project and assist in the drafting of the RFP, the firm's employees would be considered agents of the city, public officials, pursuant to ORS 244.020(15). The employees involved would then be required to comply with Oregon Government Standards and Practices laws.

ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, their official position or office to obtain financial gain or avoidance of financial detriment that would not otherwise be available but for the public official's holding of the official position or office...for the public official or the public official's relative, or for any business with which the public official or a relative of the public official is associated. (Emphasis added)

QUESTION #2: As public officials, would employees of the engineering firm which developed the project and assisted the city in obtaining the grants and drafting the request for proposal, violate Oregon Government Standards and Practices laws, especially ORS 244.040(1)(a) and ORS 244.040(4), if the firm submitted a bid proposal to the city for the firm to enter into personal services contracts to perform engineering work on the project?

OPINION: In GSPC Staff Opinion No. 96S-027, a mental health therapist who engaged in tobacco-use education and cessation for private and public agencies used his experience to assist a county obtain grant funding for a coordinator to oversee county efforts to reduce teenage smoking. The therapist planned to apply for the coordinator position from the outset. The opinion concluded that the therapist's participation in the process of helping to create the coordinator's position would have put him in the position of violating ORS 244.040(1)(a) if he had attained the position.

In this instance, the facts state that, after the engineering firm developed the public works project for the city, the firm also assisted the city in applying for grant funds to pay for the project and its employees apparently assisted the city in drafting the RFP that was to be used in selecting the project engineer. If the engineering firm assisted the city in drafting the RFP with the intent to submit its proposal to be selected the project engineer, the employees' participation could put them in the position of violating Oregon Government Standards and Practices laws.

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QUESTION #3: Would the engineering firm be prohibited by Oregon Government Standards and Practices laws from responding to the RFP?

OPINION: The engineering firm can respond to the RFP if the information relied upon in the response is available to the public. ORS 244.040(4) prohibits public officials from using confidential information gained in the course of or by reason of their official position for personal financial gain. If all of the information that the engineering firm relies upon in submitting its proposal has been made available to all other potential bidders, the information would not be considered confidential. However, if the information used to respond to the RFP was not generally available to the public, the prohibition of ORS 244.040(4) would apply.

QUESTION #4: Does the fact that personal services contracts are treated somewhat differently from other public contracts under ORS 279.005 thru ORS 297.990 determine whether the engineering firm's activities are a violation of Oregon Government Standards and Practices laws, since ORS 279.051 allows the exemption of personal contracts from competitive bidding requirements?

OPINION: The fact that personal services contracts may be exempt from competitive bidding requirements pursuant to ORS 279.051 does not relieve the engineering firm personnel from compliance with the requirements of ORS Chapter 244 as stated in the opinion to Question #2.

**THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS CHAPTER 244 TO THE FACTS STATED HEREIN. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. IT IS MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION.**

Sincerely,

L. Patrick Hearn  
Executive Director

LPH:aip/tosh.so