

March 15, 2000

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

Dear Mr. Tosh:

This letter is in response to your correspondence dated March 2, 2000 regarding a possible conflicts of interest issue for Port of Port Orford Commissioner Scott Macdonald and his private employment.

**OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION STAFF**  
**OPINION NO. 00S-005**

**STATED FACTS:** On July 8, 1999, the Port Commission of the Port of Port Orford awarded a contract to construct a new dock. The contract contains a number of jobs which were to be subcontracted. The general contractor will be bidding out some concrete work in the near future. The subcontract will not be subject to vote or approval by the commission.

A member of the Port Commission of the Port of Port Orford. He is the owner of a concrete contracting business. The commissioner wishes to submit a bid for the concrete work. The commissioner was not present at the meeting of the Port Commission when the commission voted to award the contract. The commissioner did not participate in bid opening, deliberations, or recommendation for the contract award. The commissioner was not listed as a subcontractor in the bid documents, and was not involved in any discussions with the general contractor regarding submitting a bid for work to be subcontracted. The commissioner wishes to know whether he can bid on the job.

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

ORS 244.020(1): Actual conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which would be to the private pecuniary benefit or detriment of the person or the person's relative or any business with which the person or a relative of the person is associated...

C. Randall Tosh

March 15, 2000

Page Two

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 244.020(7): Potential conflict of interest means any action or any decision or recommendation by a person acting in a capacity as a public official, the effect of which could be to the private pecuniary benefit or detriment of the person or the person's relative, or a business with which the person or the person's relative is associated...

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 244.040: 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 244.120: Methods of handling conflicts; generally; application to elected officials or members of boards. (1) Except as provided in subsection (2) of this section, when met with an actual or potential conflict of interest, a public official shall:

ORS 244.120(2): An elected public official, other than a member of the Legislative Assembly, or an appointed public official serving on a board or commission, shall:

(a) When met with a potential conflict of interest, announce publicly the nature of the potential conflict prior to taking any action thereon in the capacity of a public official; or

(b) When met with an actual conflict of interest, announce publicly the nature of the actual conflict and:

(A) Except as provided in subparagraph (B) of this paragraph, refrain from participating as a public official in any discussion or debate on the issue out of which the actual conflict arises or from voting on the issue.

(B) If any public official's vote is necessary to meet a requirement of a minimum number of votes to take official action, be eligible to vote, but not to participate as a public official in any discussion or debate on the issue out of which the actual conflict arises.

QUESTION: Would it be a violation of Oregon Government Standards and Practices laws for the Port commissioner to perform subcontract work for the general contractor?

OPINION: No. ORS 244.040(1)(a) prohibits a public official from using, or attempting to use, official position or office to obtain financial gain or avoidance of financial detriment for the official, the official's relative or a business with which the official or a relative of the official is associated, regardless of whether actual conflicts of interest or potential conflicts of interest are announced or disclosed pursuant to ORS 244.120.

There is no indication from the stated facts that the commissioner had any business association with the general contractor prior to the Port Commission's decision to award the contract. The commissioner's position on the Port Commission would not prohibit the commissioner from submitting a bid for concrete work.

However, the commissioner would be considered an agent of the general contractor if the commissioner is successful in being awarded a sub-contract. As an agent of the general contractor, the commissioner would be required to comply with Oregon Government Standards and Practices laws when matters that financially benefit the general contractor come before him in his capacity as a member of the port commission.

The Oregon Government Standards and Practices laws define actual conflict of interest ORS 244.020(1) and potential conflict of interest ORS 244.020(7). The difference between an actual conflict of interest and a potential conflict of interest is determined by the words would and could.

An actual conflict of interest occurs when the action is reasonably certain to result in a financial benefit or detriment. It will occur when an action taken by a public official would directly and specifically affect the financial interest of the official, the official's relative or a business with which the official or a relative of the official is associated.

C. Randall Tosh  
March 15, 2000  
Page Four

A potential conflict of interest exists when an official takes action that could possibly have a financial impact on the official, a relative of the official or a business with which the official or a relative of the official is associated. Such possible financial impact is not certain.

If a potential conflict of interest arises, an elected official or an appointed official of a board or commission may participate in the action, once a public disclosure has been made. In the case of an actual conflict of interest, the elected official must publicly declare the actual conflict and refrain from taking any official action on the issue. If the official's vote is necessary in order to meet a required minimum number of votes for the public body to take action, the official may vote but may not discuss, debate or otherwise participate in the matter.

**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/macdonald.so