

May 17, 2001

Tracey Cordes
County Council
Coos County Courthouse
Coquille, Oregon 97423

Dear Ms. Cordes:

This is in response to your correspondence dated May 2, 2001 regarding the propriety of an information systems firm bidding on a county Request for Proposal (RFP), which is to be based, in part, on analysis performed by the firm.

OREGON GOVERNMENT STANDARDS AND PRACTICES COMMISSION
STAFF OPINION NO. 01S-006

STATED FACTS: Coos County has an AS-400 computer system that is critical to numerous vital county functions. County officials and staff wanted a full evaluation of the existing system and a prediction of future needs. The county staff lacked the expertise to accomplish this goal. There was no known resource in or near the county with the ability to provide this service so the county retained the services of an information systems firm from the Portland area from whom the county has previously received products and services.

The engineers of this firm performed an analysis and evaluation of the county computer system. In the report of their findings they included what will become the technical section of a county RFP. The technical section describes the current technical environment, future planned activities, strategic directions, known requirements and desired products and services. The firm also included a complete draft RFP they pieced together from previous projects of the firm. In doing the analysis and in preparing the report, the county staff does not believe the engineers had access to information that would not be generally available to the public.

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The county staff is conducting an internal review of their information system and the RFP draft is being circulated with all other information gathered. When the internal review is completed a RFP will be prepared and it is anticipated that it will contain changes and differ from the draft provided by the Portland firm. The RFP will be announced with the publication of legal notice, distribution of the RFP documents and solicitation of proposals. County staff anticipates that the firm that performed the evaluation and analysis will respond by submitting a proposal.

RELEVANT STATUTES: The following Oregon Revised Statutes (ORS) are applicable to the issues that are addressed in this opinion:

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.

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:

244.040(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.

QUESTION NO. 1: Would employees of the information systems firm be public officials subject to Oregon Government Standards and Practices laws?

OPINION: No. ORS 244.020(15) defines a public official as one serving a public body of the state as an officer, employee, agent or otherwise with or without compensation. In the past, the GSPC has offered the opinion that if a business provides a service that would otherwise be provided by the governing body the employees of that business would be public employees defined in ORS 244.020(15). However, if a business is compensated for a service to the governing body that would not otherwise be provided by the governing body, the

employees of the business would not be public officials subject to Government Standards and Practices laws.

Oregon Attorney General Opinion Number 8214, dated 4/9/90, addressed the application of the definition of public official to contractors for government bodies. The opinion states, that a private sector contractor does not become a public official merely by entering into a contract to provide services to the government. The nature of the services provided was an important factor in this opinion. Assigning the definition of public official was to be determined by whether the contractor merely performed services for the government or performed services on behalf of the government.

The private sector firm in the stated facts of this opinion would not appear to meet the definition of public official. The firm was compensated by the county to perform a service the county was unable to do with its resources. The firm evaluated the computer information management system, prepared a report of findings and wrote the technical portion of a planned RFP. In addition, the firm provided a sample RFP to the county with their other reports. The services do not appear to be those that would otherwise be provided by the governing body and they appear to be services provided for and not on behalf of the governing body. Accordingly, it appears that Government Standards and Practices laws would not apply to the employees of this firm.

QUESTION NO. 2: How does this situation differ from previous staff opinions where private sector contractors were found to be public officials and bound by the requirements of Government Standards and Practices laws?

OPINION: In the request for this opinion, two GSPC Staff opinions were cited as analogous, 96S-027 and 98S-013. While there are similarities, the nature and the scope of the private contractors services are important to consider, as the assignment of public official depends, in part, on whether the performance of services is for or on behalf of the governing entity.

In 96S-027, the contractor was previously a county employee and the chair of a county board. In those public positions, the employee identified reducing the use of tobacco as a county issue. Resigning as a county employee, the contractor assisted the county in applying for a grant to fund a new position, helped write the position specifications and vacancy announcement. The contractor's resume closely mirrored the county position requirements. The stated facts and the services provided, both in scope and nature, for the opinion offered in 96S-027, differ from those of this opinion. The contractor was a public official when the events began and remained involved as a private contractor, paid or unpaid. It appeared that these services would otherwise have been performed by the

county, but were instead performed on behalf of the county, which defined this contractor as a public official governed by Government Standards and Practices laws.

In 98S-013, a city retained the services of a private engineering company. This company developed a public works project, assisted in applying for a grant to fund the project, in large part, wrote the RFP and an employee of the company was designated as a contact person in the published notices.

While the stated facts in 98S-013 share points of comparison with those in this opinion request, there is a significant difference in the nature and scope of the services provided. The engineering firm, in 98S-013, was involved in the formulation of the public works project and continued on in acquiring funds, to preparing the RFP and then acting as a point of contact for prospective bidders. This level of involvement made it appear that the engineering company had gone beyond the point of providing a service for the city and it appeared the company was performing a service on behalf of the city. The services provided by the engineering company employees reached the threshold necessary for them to be considered public officials governed by the applicable Government Standards and Practices laws.

In the stated facts of this opinion, the nature and scope of the information systems company s involvement appear more limited than that in the other opinions cited. The company was compensated to do an analysis and evaluation of the county computer system. They submitted a report and included the technical portion for a planned RFP along with a draft of a complete RFP. This company was not involved at the beginning of the county review of its computer system, but provided an analysis and evaluation service and their involvement ended. Then the county continued with an internal review and the end result will be the issuance of a RFP. In the stated facts it is anticipated that the final RFP will be different than the draft that was provided.

The services of the information systems firm could best be described as performed for the county and not on behalf of the county. The services do not appear to be those that would have been provided by the county. It appears that the stated facts for this opinion differ from those of the previous opinions cited and discussed herein. Accordingly, these employees would not be public officials governed by Government Standards and Practices laws.

THIS RESPONSE ADDRESSES ONLY THE APPLICATION OF ORS 244 TO THE FACTS STATED HEREIN. ANY RELEVANT INFORMATION, WHICH WAS NOT INCLUDED BY THE REQUESTER OF THIS OPINION IN THE STATED FACTS, COULD COMPLETELY CHANGE THE OUTCOME OF THIS

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OPINION. OTHER LAWS OR REQUIREMENTS MAY ALSO APPLY. THIS IS NOT A FORMAL ADVISORY OPINION PURSUANT TO ORS CHAPTER 244.280. THIS OPINION DOES NOT EXEMPT A PUBLIC OFFICIAL FROM LIABILITY UNDER ORS CHAPTER 244 FOR ANY ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS ONLY MY PERSONAL ASSESSMENT AS THE EXECUTIVE DIRECTOR OF THE OREGON STANDARDS AND PRACTICES COMMISSION.

Do not hesitate to call or write if you have questions or would like additional clarification.

Sincerely,

L. Patrick Hearn
Executive Director

01S-006dc