



Oregon

Kate Brown, Governor

Government Ethics Commission

3218 Pringle Rd SE, Ste 220

Salem, OR 97302-1544

Telephone: 503-378-5105

Fax: 503-373-1456

E-mail: ogec.mail@oregon.gov

Web Site: www.oregon.gov/ogec

September 23, 2016

via email and USPS

John DiLorenzo, Jr.
1300 SW Fifth Avenue, Suite 2400
Portland, Oregon 97201

Dear Mr. DiLorenzo,

At its September 23, 2016 meeting, the Oregon Government Ethics Commission (Commission) adopted the following advisory opinion in response to the request set forth in your letter to the Commission dated July 22, 2016.

OREGON GOVERNMENT ETHICS COMMISSION ADVISORY OPINION NO. 16A-1003

SYNOPSIS OF FACTS AS PRESENTED TO THE COMMISSION:

The following factual information is derived from your letter and the attached documentation.

James M. Whitty was employed by the Oregon Department of Transportation (ODOT) from November 19, 2001 to March 24, 2016. During this time, Mr. Whitty managed ODOT's Office of Innovative Partnership and Alternative Funding. One of his responsibilities in this role was to execute price agreements with a variety of private contractors for possible use by states that are members of the Western Road Usage Charging Consortium (WRUCC).

These price agreements set forth general terms and conditions for services that might later be required by WRUCC member states. ODOT serves as the Administrator and contracting Agency for the WRUCC. All WRUCC procurements, regardless of which states choose to be involved in a project, must go through the ODOT Procurement Office, and any work order contracts later issued pursuant to the price agreements would be entered into by the private contractor and by ODOT as the WRUCC administrator.



D'Artagnan's Price Agreement with ODOT:

During his time at ODOT, Mr. Whitty developed a request for proposals (RFP), evaluated firms for qualification, and executed price agreements with eight firms. One of these was with a firm called D'Artagnan Consulting LLP. The price agreement included all the terms of an eventual contract other than the statement of work, schedule and costs, which were left to be negotiated upon selection of a qualified contractor for a work order contract assignment. Mr. Whitty signed the price agreement as the ODOT Expenditure Decision Authority on 4/2/15. ODOT awarded the price agreement to D'Artagnan on 4/11/15.

On 7/15/16, after Mr. Whitty left his employment with ODOT, the price agreement between ODOT and D'Artagnan was amended in order to reflect 2015 legislation related to public contracts generally. The amendments made changes to, among others, statements related to applicable law, certified small businesses, discriminatory wage rates and employee discussions concerning compensation. According to your letter, Mr. Whitty was not involved in the process or execution of the amendment.

According to Mr. Whitty's email, D'Artagnan won three procurements for work order contracts with WRUCC member states. Mr. Whitty was involved in the procurement process for at least one of the projects. He made the decision to commit ODOT funds to all three of these projects. Two of the three work order contracts, including the one for which Mr. Whitty was involved in the procurement process, are now closed. The third work order contract, to which Mr. Whitty committed ODOT funds after the work order contract had been awarded and the work begun, is still active.

Mr. Whitty's Employment with D'Artagnan:

Mr. Whitty is now employed by D'Artagnan. In addition to his salary, he holds a 2% equity ownership in the company, with the ability to raise that percentage to 4%. He currently works on international projects that are unrelated to the WRUCC and to any ODOT projects with which he was involved while working there.

According to your letter, all WRUCC procurements must go through the ODOT Procurement Office. All WRUCC work order contracts would incorporate the price agreement signed by Mr. Whitty. Your letter states that the ODOT Procurement Office has taken the position that all contracts related to the WRUCC are ODOT contracts, whether or not ODOT proposed them, funded them or worked on them.

To summarize your questions, you asked:

1. Whether Mr. Whitty could work on projects proposed by other states that are part of the WRUCC; and

2. Whether Mr. Whitty could work on projects proposed by the WRUCC after March 24, 2016 that are led by ODOT or other states.

BACKGROUND:

ORS 244.047(2) prohibits a person who ceases to hold a position as a public official from having "a direct beneficial financial interest in a public contract described in subsection (3) of this section for two years after the date the contract was authorized." According to ORS 244.047(3)(a), subsection (2) applies to a public contract that was authorized by a person acting in the capacity of a public official.

OAR 199-005-0035(6) states:

As used in ORS 244.047, a public contract is "authorized by" a public official if the public official performed a significant role in the selection process of a contractor or the execution of the contract. A significant role can include recommending approval or signing of the contract, including serving on a selection committee or team, or having the final authorizing authority for the contract.

Your letter offered three reasons why this statute should not disqualify D'Artagnan or Mr. Whitty from working on other state WRUCC projects, i.e., why this statute does not apply to WRUCC work order contracts created pursuant to the price agreement.

To summarize your arguments:

1. A price agreement is not a "public contract" as defined in ORS 279A.010(1)(z) because the price agreement does not constitute a sale or other disposal or a purchase of services, nor does it obligate ODOT, the WRUCC or the private contractor to anything. It is a list of conditions that would apply if a contract were later formed, leaving terms such as scope of work, deliverables, price and payment to be determined at that time;
2. Even if the price agreement were a public contract, the terms have been substantially amended by the amendment of 7/15/16;
3. Despite his 2-4% equity interest in the company, Mr. Whitty's compensation from D'Artagnan does not depend on the success of any particular project, and so he lacks a "direct beneficial financial interest in a public contract" as described in ORS 244.047.

ANALYSIS:

Public Contract –

ORS 244.047 provides that “public contract” has the meaning given in ORS 279A.010. That statute defines a public contract as:

...a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “Public contract” does not include grants. ORS 279A.010(1)(z).

Because the price agreement between ODOT and D’Artagnan does not prescribe the terms of any sale or other disposal, or a purchase, lease, rental or other acquisition of personal property, services, or the other items mentioned by the definition of public contract in ORS 279A.010(1)(z), this particular price agreement alone is not, for purposes of ORS 244.047, a public contract.

Instead, a public contract in this circumstance is formed when the WRUCC, through ODOT, and D’Artagnan agree on the terms of a work order contract. The relevant public contract is the work order contract, which incorporates by reference the price agreement that Mr. Whitty authorized. The work order contract is not a complete public contract without the incorporated priced agreement, because the price agreement provides many of the general terms of the contract. The work order contract contains the price agreement terms as well as the terms determined at the time of the negotiation of the work order contract, such as scope of work, deliverables, price and payment.

Authorization of a Public Contract –

A public contract is authorized by a public official for purposes of ORS 244.047 if the public official had a “significant role” in the selection of a contractor or the execution of the contract. This can include recommending approval or signing of the contract, including serving on a selection committee or team, or having the final authorizing authority for the contract. OAR 199-005-0035(6).

At the time that Mr. Whitty signed the price agreement in question, he was the ODOT Expenditure Decision Authority for the price agreement. His role in developing the RFP, evaluating the firms for qualification, and signing the price agreement constituted authorization of the price agreement, one of the two components that make up any potential public contract under these conditions.

Timeline –

The relevant date for the two year prohibition on a direct beneficial financial interest under ORS 244.047 in this case is the date on which the price agreement was executed, because that is the portion of the public contract that Mr. Whitty authorized. That agreement was executed on 4/11/15. Thus, under ORS 244.047, Mr. Whitty is prohibited from receiving a direct beneficial financial interest from the price agreement he authorized until two years after the date that the price agreement was executed. That two year time period will end on 4/10/17.

The 7/15/16 amendments to the price agreement did not substantially alter the price agreement and such amendments were, in fact, contemplated by the price agreement itself as negotiated by Mr. Whitty.

Any work order contracts that Mr. Whitty authorized or to which he determined to commit ODOT funds while serving as the ODOT Expenditure Decision Authority would constitute a separate public contract with its own timeline for purposes of ORS 244.047.

Question 1: May Mr. Whitty work on projects proposed by other states that are part of the WRUCC?

Answer 1: As noted above, Mr. Whitty may work on projects proposed by other states under the price agreement that he authorized once the two year prohibition required by ORS 244.047 has passed from the date that the price agreement was executed. If he authorized a work order contract while at ODOT, he may work on the project described by that work order contract once two years have passed since the work order contract was executed.

Question 2: May Mr. Whitty work on projects proposed by the WRUCC after March 24, 2016 that are led by ODOT or other states?

Answer 2: Under ORS 244.047, Mr. Whitty may work on projects proposed by WRUCC, whether led by ODOT or by other states, once two years have passed since the execution of the price agreement that he authorized. Again, if he authorized a work order contract while at ODOT, he may work on that project once two years have passed since the work order contract was executed.

CONCLUSION:

Mr. Whitty ceased to hold a position as a public official when he left ODOT for D'Artagnan. ORS 244.047 prohibits him from having a direct beneficial financial interest in a public contract that he authorized for two years after the date the contract was authorized. In this case, the portion of the contract that he authorized was the price agreement between ODOT and D'Artagnan, and the date of his authorization of the contract is the date on

which the price agreement was executed. In the case of any work order contracts which he also authorized, the date of authorization is the date on which the work order contract was executed.

This opinion does not address the issue of whether Mr. Whitty's 2 or 4% equity interest in D'Artagnan itself or any profit-sharing therein constitutes a direct beneficial financial interest in any public contracts between ODOT or the WRUCC and D'Artagnan. This question cannot be addressed because D'Artagnan currently has an open work order contract with the WRUCC under the price agreement that Mr. Whitty authorized. Mr. Whitty also made the decision to commit ODOT funds to that project. OAR 199-001-0030(2) states that the Oregon Government Ethics Commission will not issue an Advisory Opinion based upon actual events that have already occurred.

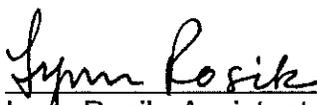
This opinion reflects only the application of ORS 244.047 to the specific facts presented to the Oregon Government Ethics Commission. The Commission expresses no opinion, and does not intend to address, any ODOT rules, policies or contract provisions that may govern ODOT's public contracts and contractors.

THIS OPINION IS ISSUED BY THE OREGON GOVERNMENT ETHICS COMMISSION PURSUANT TO ORS 244.280. A PERSON SHALL NOT BE LIABLE UNDER ORS CHAPTER 244 FOR ANY GOOD FAITH ACTION OR TRANSACTION CARRIED OUT IN ACCORDANCE WITH THIS OPINION. THIS OPINION IS LIMITED TO THE FACTS SET FORTH HEREIN.

Issued by Order of the Oregon Government Ethics Commission at Salem, Oregon on the 23th day of September 2016.



Charles Tauman, Chairperson



Lynn Rosik, Assistant Attorney General

ADDENDUM

RELEVANT STATUTES AND ADMINISTRATIVE RULES: The following Oregon Revised Statutes (ORS) and Oregon Administrative Rules (OAR) are applicable to the issues addressed in this opinion:

ORS 244.047 Financial interest in public contract. (1) As used in this section:

(a) "Public body" has the meaning given that term in ORS 174.109.

(b) "Public contract" has the meaning given that term in ORS 279A.010.

(2) Except as provided in subsection (4) of this section, a person who ceases to hold a position as a public official may not have a direct beneficial financial interest in a public contract described in subsection (3) of this section for two years after the date the contract was authorized.

(3) Subsection (2) of this section applies to a public contract that was authorized by:

(a) The person acting in the capacity of a public official; or

(b) A board, commission, council, bureau, committee or other governing body of a public body of which the person was a member when the contract was authorized.

(4) Subsection (2) of this section does not apply to a person who was a member of a board, commission, council, bureau, committee or other governing body of a public body when the contract was authorized, but who did not participate in the authorization of the contract.

ORS 279A.010(z) "Public contract" means a sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. "Public contract" does not include grants.

OAR 199-001-0030 Advisory Opinions... (2) The Oregon Government Ethics Commission will issue an Advisory Opinion based on real or hypothetical facts or circumstances but not upon actual events that have already occurred.

OAR 199-005-0035(6) As used in ORS 244.047, a public contract is "authorized by" a public official if the public official performed a significant role in the selection of a contractor or the execution of the contract. A significant role can include recommending approval or signing of the contract, including serving on a selection committee or team, or having the final authorizing authority for the contract.

