



DEPARTMENT OF JUSTICE
GENERAL COUNSEL DIVISION

MEMORANDUM

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Under Oregon law, officers of local public bodies may rely only on the advice of their duly appointed legal counsel. To enjoy the benefits associated with reliance on the advice of legal counsel, local public bodies and their officers must rely on the advice of an attorney who has been duly appointed to advise them. See *Belgarde v. Linn*, 205 Or App 433, 439-42, 134 P2d 1082 rev den 341 Or 197 (2006); *Bear Creek v. Hopkins*, 53 Or App 212, 216-18, 631 P2d 808, rev den 292 Or 108 (1981) (both cases recognizing good-faith reliance on the advice of authorized counsel as a defense against a local public body officer's personal civil liability).

DATE: July 18, 2023

TO: Darwin Pierce, OPBC, CPPB
Oregon Forward Program Coordinator
Department of Administrative Services

FROM: Karen J. Johnson, Sr Assistant Attorney General
Suzanne Cook, Assistant Attorney General
Business Transactions Section

SUBJECT: Oregon Forward Program – Percentage of Work Hours Performed by Individuals with Disabilities

Questions Presented and Short Answer

Question: Whether the requirement that a nonprofit organization employ individuals with disabilities for not less than 60 percent of the work hours of direct labor required for the manufacture or provision of the products or services during a fiscal year applies to the organization as a whole or just for the parts of the organization providing products or services in Oregon.

Answer: The requirement that a nonprofit organization employ individuals with disabilities for not less than 60 percent of the work hours of direct labor required for the manufacture or provision of the products or services during a fiscal year in order to qualify as a “qualified nonprofit agency for individuals with disabilities” applies to the organization as a whole.

Discussion

The Oregon Legislature created the Oregon Forward Program (formerly known as the Qualified Rehabilitation Facilities or QRF Program) in 1977

“to encourage and assist individuals with disabilities to achieve maximum personal independence within their communities through productive gainful employment by assuring an expanded and constant market for products and services produced by qualified nonprofit agencies for individuals with disabilities, thereby enhancing their dignity and capacity for self-support.”¹

ORS 279.850(1)² commands public agencies to acquire products and services from Oregon Forward Contractors (OFC) when those products or services have been placed on the Oregon Forward Program Procurement List the Department of Administrative Services (DAS) must maintain under ORS 279.845(2).³ The Oregon Court of Appeals recognizes the OregonForward Program as a set-aside program under which public agencies may directly award OFC contracts without conducting the competitive selection process that otherwise would be required by the Public Contracting Code.⁴

To become an OFC, an organization must be a Community Rehabilitation Program⁵ organization meeting the following requirements:

¹ ORS 279.840

² ORS 279.850(1) states:

“Except as provided in paragraph (b) of this subsection and subject to paragraph (c) of this subsection, any public agency that intends to procure a product or service on the procurement list that the Oregon Department of Administrative Services established under ORS 279.845 shall, in accordance with the department’s rules, procure the product or service at the price the department establishes from a qualified nonprofit agency for individuals with disabilities, provided that the product or service is of the appropriate specifications and is available within the period the public agency requires.”

³ ORS 279.845(2) provides:

“The department shall establish and publish a list of sources or potential sources of products produced by any qualified nonprofit agency for individuals with disabilities and the services provided by any such agency, which the department determines are suitable for procurement by public agencies pursuant to ORS 279.835 to 279.855, 279A.025 (4) and 279C.335. This procurement list and revisions thereof shall be distributed to all public purchasing officers.”

⁴ See *Independent Contractors Research Institute v. DAS*, 207 Or App 78, 81, 139 P3d 995, rev den 341 Or 579 (2006) (“The key provision of the [Oregon Forward Act] requires public agencies to purchase products and services from nonprofit providers, outside of the competitive bidding process that normally governs public contracting, if the provider is a nonprofit agency employing [individuals with disabilities].”).

⁵ Per OAR 125-055-0005(2), as CRP is:” a nonprofit organization for Individuals with Disabilities providing or facilitating one or more of the following services to Individuals with Disabilities, enabling them to maximize their opportunities for employment:

(a) That is organized under the laws of the United States or of this state to provide training or employment in this state for Individuals with Disabilities, and the net income of which does not inure in whole or in part to the benefit of any shareholder or other individual;

(b) That complies with any applicable occupational health and safety standard required by the laws of the United States or of this state; and

(c) That employs Individuals with Disabilities in the manufacture of products or in the provision of services for external customers, whether or not the products or services are procured under ORS 279.835 to 279.855, for not less than:

.....

(B) 60 percent of the work hours of the OFC's direct labor or the direct labor ratio required by the federal program established by the Javits-Wagner O'Day Act or any successor federal program, whichever is lower, during a fiscal year that begins on or after July 1, 2021. If the federal ratio established under 41 USC §8501 is amended to state a direct labor percentage that is lower than the percentage prescribed by ORS 279.835(6)(c)(C), the Department will initiate rulemaking to consider the application of ORS 279.835(6)(c)(C) to the Oregon Forward Program.⁶

The organization must submit an application to DAS along with the following:

- (a) IRS 501(c)(3) letter;
- (b) Articles of Incorporation;
- (c) Bylaws;

- (d) Mission Statement;
- (e) A description of how the applicant is operating as a CRP; and
- (f) A written plan for the applicant's compliance with the direct labor requirement of ORS 279.835(5)[sic].⁷

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- (a) Medical, psychiatric, psychological, social, and vocational services;
 - (b) Physical, occupational and recreational therapy;
 - (c) Speech, language, and hearing therapy;
 - (d) Assessment for determining eligibility and vocational rehabilitation needs;
 - (e) Job development, placement, and retention services;
 - (f) Psychosocial rehabilitation services;
 - (g) Supported employment services;
 - (h) Services to family members, if necessary, to enable the applicant or eligible individual to achieve an employment outcome; and
 - (i) Personal assistance services.

⁶ OAR 125-055-0005(7); ORS 279.835(6)

⁷ OAR 125-055-0015(1)

In addition, if an OFC's gross revenues generated under the Oregon Forward Program exceeds \$100,000 annually, the organization must submit an annual independent audit setting forth the information about the organization:

- (a) A list of all products and services provided during the OFC's fiscal year;
- (b) A list of all individuals with disabilities employed by the OFC providing direct labor, unique employee identification number, job description and disability status;
- (c) A list of all individuals performing paid or unpaid direct labor, unique employee identification number and job description;
- (d) A compilation of the total hours of direct labor performed by the during the fiscal year;
- (e) Payroll reports for all individuals employed by the OFC during the fiscal year, including employee name, work hours paid, vacation hours, sick leave hours and training hours. Hours worked must be segregated from hours paid but not worked;
- (f) Time and billing records showing direct hours worked by each employee in the manufacture of goods or provision of services;
- (g) The OFC must have documentation of disability on file for each employee who is claimed to be an individual with a disability. The acceptable forms of disability documentation are defined in OAR125-055-0017(1)(b); and
- (h) A Competitive Employment statement must be on file for each employee who is claimed to be an individual with a disability, except as described in OAR 125-055-0017(1).⁸

Nowhere do the statutes or the rules indicate that DAS is to look at anything less than the entire organization as defined in its Articles of Incorporation and Bylaws or to just one contract or to just one product or service line.

In *BWK, Inc. v the Department of Administrative Services and Garten Services, Inc.*, the Appellate Court considered an argument that the percentage requirement only applied to one set of services.⁹ BWK filed suit against DAS claiming, in part, that DAS had erred in determining that Garten had met the statutory requirement of employing Individuals with Disabilities in the provision of services for not less than 75 percent of the work hours for direct labor as required by ORS 279.835(5)(c) [the current statutory requirement is 60 hours under ORS 279.835(6)(c)]. BWK is an entity that provides mail presorting and other mail related services in competition with Garten. BWK argued that the work hour percentages applied only to the work hours on the mail presorting services alone and not to the all the services provided by Garten employees across all its lines of services. Citing, *Independent Contractors Research Institute*, 207 Or. App. at 91, 139 P.3d 995, the Appellate Court stated that

“the 75 percent requirement ... applies generally to the QRF and not specifically to each particular product or service contract: The text of ORS 279.835(5)(c) does not imply that only products or services deriving from a 75 percent disabled

⁸ OAR 125-055-0035(3)

⁹ See *BWK, Inc vs. DAS*, 281 P.3d 156, 214 Or. App (2009).

workforce can qualify for inclusion on the procurement list. The statutory criteria addresses providers, not products or services. An entity either qualifies as a QRF or it does not; the statutes do not provide for partial qualification, that is, qualification with respect to some products and services and not others”.

A similar argument can be made here. Pursuant to the statutes and rules, DAS does not base its determination that an organization is a qualified CRP upon only the employees providing services in the State of Oregon. DAS looks to the entire organization. To quote the Appellate Court, ‘an entity either qualifies as an OFC or not’. The statutes and the rules look to the operation of an entire organization to keep in mind the purpose of the law: encouraging and assisting Individuals with Disabilities to achieve maximum personal independence in their communities through productive, gainful employment by assuring an expanded and constant market for Oregon Forward products and services.

Assuming it was not intending to violate the spirit of the law, an organization could elect to create a separate legal entity to provide products and services in Oregon only and apply for OFC status as a separate legal entity. The 60 percent work hour requirement then would apply to those services provided by employees of the separate legal entity.

Conclusion

The 60 percent of direct hour work hours requirement to qualify as an OFC applies to the entire legal entity or organization applying for OFC status.