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June 2, 2011

The Honorable Paul A. Peterson
Chair, Wagner Township Board of Supervisors
12968 State Highway 18
Finlayson, Minnesota 55735

Dear Chair Peterson:

The Office of the State Auditor ("OSA") received concerns about a possible conflict of interest in the Township of Wagner ("Town"). Specifically, concerns were raised about payments the Town made to a Town Supervisor for tree removal services. Based upon our review, it appears that proper procedures were not followed when the Town Supervisor performed work for the Town. This letter will provide the Town with guidance to help the Town comply with Minnesota law in the future.

Under Minnesota's general conflict of interest law, "a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom."¹ Because the general rule is so strict, the legislature created a number of exceptions. For example, a town board, "by unanimous vote, may contract for goods or services with an interested officer" if the contract is one "for which competitive bids are not required by law."²

To use this broad exception, however, a town and the interested supervisor must follow certain procedures. First, the town board must "authorize the contract in advance of its performance by adopting a resolution setting out the essential facts and determining that the contract price is as low as or lower than the price at which the commodity or services could be obtained elsewhere."³ Second, before claims are paid on the contract, the interested officer must file with the town clerk "an affidavit stating:

- (a) the name of the officer and the office held by the officer;
- (b) an itemization of the commodity or services furnished;

¹ See Minn. Stat. § 471.87 (2010). See also Minn. Stat. § 365.37 (2010) (town board conflicts of interest).

² See Minn. Stat. § 471.88, subs. 1 and 5 (2010). The tree removal services provided by the Town Supervisor did not require sealed bids. See Minn. Stat. § 471.345, subd. 5 (2010).

³ See Minn. Stat. § 471.89 (2010) (copy enclosed).

- (c) the contract price;
- (d) the reasonable value;
- (e) the interest of the officer in the contract; and
- (f) that to the best of the officer's knowledge and belief the contract price is as low as, or lower than, the price at which the commodity or services could be obtained from other sources."⁴

The Town Clerk provided the OSA with meeting minutes from the Town Board's April 13, 2011, meeting where the need for a resolution and affidavits for work performed by Town Board officials was discussed. The Town Clerk was directed to draft a resolution authorizing the performance of emergency work by any Town Supervisor as needed.⁵ The Town Clerk also provided the OSA with an April 13, 2011, Affidavit of Official Interest in Claim for work performed by a Town Supervisor from January 11, 2011, through March 11, 2011, and the supporting reimbursement request submitted by the Town Supervisor.⁶ Finally, the OSA was provided with Town Board meeting minutes for March 10, 2010, and April 14, 2010, and reimbursement requests submitted by the Town Supervisor for work he performed for the Town in 2010.⁷

While it appears the Town attempted in 2011 to comply with Minnesota law governing services provided by a Town Board official, the required procedures were not followed in 2010, and the required resolution authorizing the Supervisor's work in advance was not adopted in 2011.⁸

In addition, the emergency resolution discussed at the Town Board's April 13, 2011, meeting does not appear to comply with Minnesota law. In the case of an emergency, when the contract with the interested official cannot be authorized in advance, payment of the claim must be authorized by a resolution that includes the facts of the emergency.⁹ A general resolution approving all emergency work as needed does not include the specific facts of the emergency, as required by Minnesota law.

⁴ *Id.* Additional information about hiring a town supervisor to perform work for a town is available on the Minnesota Association of Townships' ("MAT") website: www.mntownships.org/. A copy of MAT's Document Number C6000 (Statutory Conflicts of Interest: Contracting with your own Town) is enclosed. The document includes a sample resolution and sample affidavits. MAT's website also has information about the differences between resolutions and motions, and sample contracts for small service contracts that the Town may find to be helpful.

⁵ The emergency services resolution would also allow all Town Supervisors to order emergency services up to \$500 without calling an emergency meeting. The Town Clerk informed the OSA that the resolution was passed at the Town Board's May meeting. The OSA did not receive a copy of the written resolution.

⁶ The reimbursement request included such work as installing a water filter, repairing damage after a break-in, and work on culverts.

⁷ The minutes mentioned that the Town Supervisor would perform certain tree removal services for the Town. The reimbursement requests included such work as fixing a culvert, taking down a fence, cutting trees and brush, replacing mailboxes, and fixing a light at the Town Hall.

⁸ Services such as cutting trees and brush to accommodate a road improvement project are outside the normal duties of a town board supervisor. See MAT Document Number C6000 (page 3-4).

⁹ See Minn. Stat. § 471.89, subd. 2 (2010).

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Finally, some of the reimbursement requests we reviewed sought reimbursement for expenses that were paid/incurred more than 60 days prior to the submission of the reimbursement request. When employee expenses are not submitted within 60 days after the expenses were paid or incurred, the reimbursement may be taxable and appropriate withholdings may be required.¹⁰

The OSA recommends that the Town follow Minnesota law when hiring a Town official to perform services for the Town, including the use of the required resolutions and affidavits. In addition, we recommend that expense reimbursement requests be submitted on a monthly basis.

If you have any questions or concerns regarding these recommendations, please feel free to contact me directly at 651-297-5853 or by email at Nancy.Bode@osa.state.mn.us. In compliance with Minnesota law, a copy of this letter is being provided to the Aitkin County Attorney and the Aitkin County Auditor.¹¹

Sincerely,

/s/ Nancy J. Bode

Nancy Bode
Assistant Legal Counsel

Enclosures

cc. The Honorable Alan Kuhlman, Town Supervisor
The Honorable Robert Palmer, Town Supervisor
Ms. Jennette Alleman, Town Clerk
The Honorable Jim Ratz, Aitkin County Attorney
The Honorable Kirk Peysar, Aitkin County Auditor

¹⁰ See, e.g., Internal Revenue Service (IRS) Publication 15 (Circular E), Employer's Tax Guide (page 12), available on the IRS website at <http://www.irs.gov/pub/irs-pdf/p15.pdf>.

¹¹ See Minn. Stat. § 6.51 (2010).