



REBECCA OTTO  
STATE AUDITOR

# STATE OF MINNESOTA

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July 18, 2013

The Honorable Bob Lochner  
Mayor, City of Buckman  
P.O. Box 609  
Buckman, Minnesota 56317-0609

Dear Mayor Lochner:

The Office of the State Auditor (“OSA”) received concerns about the City of Buckman (“City”). In response to the concerns, the OSA contacted the City Clerk and reviewed copies of relevant City documents.

Based upon its review, the OSA found that the City did not follow proper conflict of interest procedures when it hired a City Council Member to provide snow removal services. The OSA also knows of no authority for the City to sell land to public officials. This letter provides the City with guidance for the future.

### **Conflict of Interest**

The City has contracted with a City Council Member to provide snow removal services.<sup>1</sup> The City informed the OSA that the City did not adopt the resolution and affidavit required by law prior to entering into a contract with a City Council Member. However, the City agreed to follow the proper procedures in the future.<sup>2</sup>

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.”<sup>3</sup> Abstaining from voting on the contract does not negate the conflict.<sup>4</sup>

Because the general rule is so strict, the legislature created a number of exceptions.<sup>5</sup> Under one exception, a city, “by unanimous vote, may contract for goods or services with an interested

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<sup>1</sup> According to the City, the City Council Member was paid \$1,450 for snow removal services conducted during the winter of 2012 and 2013.

<sup>2</sup> The City reported that the City Council plans to adopt a conflict of interest resolution for the snow removal services. In addition, the City Council Member has agreed to submit an affidavit regarding the snow removal services provided during the winter of 2012 and 2013.

<sup>3</sup> See Minn. Stat. § 471.87. See also Minn. Stat. § 412.311, subd. 1 (“[e]xcept as provided in sections 471.87 to 471.89, no member of a council shall be directly or indirectly interested in any contract made by the council”). A public officer who violates Minn. Stat. § 471.87 is guilty of a gross misdemeanor. See Minn. Stat. § 471.87.

<sup>4</sup> See, e.g., Ops. Att’y Gen. 90e-6 (June 15, 1988), and 90-E-5 (November 13, 1969).

<sup>5</sup> See, e.g., Minn. Stat. § 471.88.

officer” if the contract is one “for which competitive bids are not required by law.”<sup>6</sup> To use this broad exception, however, the city and the interested officer must follow certain procedures.<sup>7</sup>

More specifically, the city council 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 or lower than the price at which the commodity or services could be obtained elsewhere.”<sup>8</sup> In addition, before claims are paid on the contract, the interested officer must file with the 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; 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.”<sup>9</sup>

The Minnesota Attorney General’s Office has taken the position that whether an officer has a conflict of interest in a contract is a matter that involves questions of fact appropriately determined by the governing body.<sup>10</sup> Therefore, when contracting with a city officer or a business in which a city officer has an interest, the city council should determine from all the circumstances whether a conflict of interest exists.<sup>11</sup> If a conflict of interest is found to exist in a contract for goods or services, the city must follow the statutorily required resolution and affidavit procedures.

Finally, if a conflict of interest exists, the conflicted city officer may not supervise or oversee the work that creates the conflict. These safeguards assure the taxpayers that the city’s contracting process is open and in the city’s best interests.

The OSA recommends that, in the future, the City Council determine whether a conflict of interest exists and record the conflict of interest determination in the City Council meeting minutes. When a conflict of interest exists, we recommend that the required resolution be adopted and the required affidavit be obtained if the City is contracting for goods or services that are not subject to competitive bidding.<sup>12</sup> We also recommend that the City consider entering into

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<sup>6</sup> Minn. Stat. § 471.88, subd. 5.

<sup>7</sup> See Minn. Stat. § 471.89, subd. 1.

<sup>8</sup> Minn. Stat. § 471.89, subd. 2 (emphasis added).

<sup>9</sup> *Id.* at subd. 3 (emphasis added).

<sup>10</sup> See, e.g., Ops. Att’y Gen. 90a-1 (October 7, 1976), 90-E-5 (November 13, 1969), 90e-5 (May 25, 1966), and 90-E-5 (August 25, 1955).

<sup>11</sup> See, e.g., Ops. Att’y Gen. (July 30, 1940) and (July 14, 1939).

<sup>12</sup> Due to the dollar value, competitive bidding was not required for the snow removal services. Under Minnesota law, the contract could be awarded either upon quotation or in the open market. See Minn. Stat. § 471.345, subd. 5. Additional guidance on conflicts of interest is available in the League of Minnesota Cities’ (“LMC”) information memo on Official Conflict of Interest, available on the LMC’s website, [www.lmc.org](http://www.lmc.org). A model resolution and a model affidavit are provided on pages 37-40 of the memo.

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a written agreement with the Council Member regarding the services he is providing to the City.<sup>13</sup>

### **Land Sale**

In 2009, the City sold a parcel of land known as the Vanderpoel property to Buckman Builders for \$6,631.20.<sup>14</sup> According to the City, the Mayor and a City Council Member had ownership interests in Buckman Builders. The City worked with the City Attorney on the sale, and reported to the OSA that the LMC was also contacted about the matter.

Minnesota law generally prohibits the sale of City-owned property to a public official or employee.<sup>15</sup> The statute provides an exception for an employee when certain conditions are met.<sup>16</sup> However, there is no similar exception for public officials. In the future, the OSA recommends that the City comply with Minnesota law.<sup>17</sup>

### **Conclusion**

The OSA provided the City with guidance to help the City comply with Minnesota law in the future. We appreciate the assistance provided by the City Clerk during this review. The OSA will not be taking further action on these matters at this time. If you have any questions about any of the matters discussed in this letter, please feel free to contact me at (651) 297-7108 or by email at [Terrilyn.Diamond@osa.state.mn.us](mailto:Terrilyn.Diamond@osa.state.mn.us).

Sincerely,

*/s/ Terrilyn Diamond*

Terrilyn Diamond, Attorney  
Office of the State Auditor

cc: The Honorable Jeff Dingmann, City Council Member  
The Honorable Greg Gangl, City Council Member  
The Honorable Richard Herold, City Council Member  
Ms. Laura Otremba, City Clerk

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<sup>13</sup> A contract may be oral or in writing. A written contract identifies the significant terms of the agreement for both parties, including the services to be performed and conditions for payment. A written contract may also limit the City's exposure to the risk of damages. For guidance on written contracts see the LMC Insurance Trust's information memo on Service Contracts: Looking Out for Your City, available on the LMC's website. A model Snowplowing and Ice Control policy is also available on the LMC's website.

<sup>14</sup> The City informed the OSA that the purchase price paid cleanup costs and back taxes on the property. In 2008, the City Council approved the sale of the property. See City Council meeting minutes, April 10, 2008.

<sup>15</sup> See Minn. Stat. § 15.054.

<sup>16</sup> *Id.* (exception for public employees if the public property or materials are no longer needed by the political subdivision, and the sale is made after reasonable notice at a public auction or by sealed bids).

<sup>17</sup> Additional guidance on the sale of public property is available on the LMC's website. See LMC's information memo on Purchase and Sale of Real Property.