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June 25, 2013

The Honorable Samuel Clark
Mayor, City of Cromwell
P.O. Box 74
Cromwell, Minnesota 55726-0074

Dear Mayor Clark:

The Office of the State Auditor ("OSA") received concerns about the City of Cromwell ("City"). In response to the concerns, the OSA contacted the City Clerk/Treasurer and reviewed copies of relevant City Council meeting minutes.

Based upon its review, the OSA found that the City did not follow proper procedures when hiring the Mayor's spouse as the City's Clerk/Treasurer or when purchasing an item from a business owned by a City Council Member. This letter contains the OSA's recommendations to bring the City into compliance with Minnesota law.

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 Abstaining from voting on the contract does not negate the conflict.²

Because the general rule is so strict, the legislature created a number of exceptions.³ Under one exception, a city, "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."⁴ To use this broad exception, however, the city and the interested officer must follow certain procedures.⁵

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."⁶

¹ 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.

² See, e.g., Ops. Att'y Gen. 90e-6 (June 15, 1988), and 90-E-5 (November 13, 1969).

³ See, e.g., Minn. Stat. § 471.88.

⁴ Minn. Stat. § 471.88, subd. 5.

⁵ See Minn. Stat. § 471.89, subd. 1.

⁶ Minn. Stat. § 471.89, subd. 2 (emphasis added).

In addition, before claims are paid on the contract, the interested officer must file with the clerk/treasurer “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.”⁷ A sample of the required resolution and affidavit are available on the League of Minnesota Cities’ website, www.lmc.org.⁸

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.⁹ Therefore, when contracting with the spouse of 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.¹⁰ 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.

In August 2012, the City hired the Mayor’s spouse as the City’s Clerk/Treasurer. On at least two occasions, the Mayor abstained from voting on matters related to his spouse.¹¹ In 2012, the City purchased a 3-door cooler costing \$1,975 for the municipal liquor store from a business owned by a City Council Member.¹² The City Council Member abstained from voting on the motion to approve the purchase.¹³ The Clerk/Treasurer informed the OSA that the City did not adopt the resolution or obtain the affidavit required by Minnesota law when the Mayor’s spouse was hired or when the cooler was purchased.

Because the Mayor has abstained on matters related to his spouse and the City Council Member abstained on the cooler purchase decision, it appears the City Council has determined there are conflicts of interest. We recommend that the City Council’s conflict of interest determinations

⁷ *Id.* at subd. 3 (emphasis added).

⁸ Additional guidance on conflicts of interest is available in the League of Minnesota Cities’ information memo on Official Conflict of Interest. A model resolution and a model affidavit are provided on pages 37-40 of the memo.

⁹ *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).

¹⁰ *See, e.g.*, Ops. Att’y Gen. (July 30, 1940) and (July 14, 1939).

¹¹ City Council meeting minutes, July 30, 2012 (Mayor abstained from vote to hire spouse as new Clerk/Treasurer) and October 24, 2012 (Mayor abstained from vote to move spouse from probationary wage to starting wage).

¹² City Council meeting minutes, September 26, 2012.

¹³ *Id.* The City informed the OSA that the City was attempting to sell the cooler. *See also* City Council meeting minutes, November 28, 2012.

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be recorded in the City Council meeting minutes.¹⁴ When the City Council determines that a conflict of interest exists, we recommend that the required resolutions be adopted and the required affidavits be obtained if the City is contracting for goods or services that are not subject to competitive bidding.¹⁵

If you have any questions about 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. As required by Minnesota law, a copy of this letter is being filed with the City Attorney and the Carlton County Attorney.¹⁶

Sincerely,

/s/ Terrilyn Diamond

Terrilyn Diamond, Attorney
Office of the State Auditor

cc: The Honorable Tom Borglund, City Council Member
The Honorable Raymond Lally, City Council Member
The Honorable Lisa Lund, City Council Member
The Honorable Warren Peters, City Council Member
Ms. Jenny Clark, City Clerk/Treasurer
Mr. Frank Yetka, City Attorney
The Honorable Thomas Pertler, Carlton County Attorney

¹⁴ According to the minutes, potential conflicts of interest were discussed at the July 30, 2012, City Council meeting when the Mayor's spouse was hired. However, the substance of the discussion and any determination made by the City Council regarding the existence of a conflict were not recorded in the minutes.

¹⁵ Due to the dollar value, competitive bidding was not required for the cooler purchase. Under Minnesota law, the contract could be awarded either upon quotation or in the open market. See Minn. Stat. § 471.345, subd. 5. Similarly, employment contracts are generally not subject to the competitive bidding laws.

¹⁶ See Minn. Stat. § 6.50.