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State Auditor

Suite 500  
525 Park Street  
Saint Paul, MN 55103

April 2, 2021

The Honorable Chris Lund, Mayor  
City of Hamburg  
P.O. Box 248  
Hamburg, Minnesota 55339

**TRANSMITTED VIA ELECTRONIC MAIL**

Dear Mayor Lund:

The Office of the State Auditor (OSA) received concerns about the City of Hamburg (City). The concerns related to a City contract used to provide cellular phone service to certain City elected officials and employees primarily for their personal use. The OSA reviewed certain City financial documents for the period March 15, 2019, through December 31, 2020, and found that:

- The City used a public contract to provide cellular phone service to certain City elected officials and employees primarily for their personal use.
- The City disbursed public funds to pay for cellular phone service for certain City elected officials and employees primarily for their personal use; later obtaining reimbursement of most but not all of these personal costs.
- The City used a debit card for certain City purchases, a practice inconsistent with Minnesota law.

This letter contains the OSA's findings and recommendations to help the City comply with Minnesota law.

### **Provision of Primarily Personal Cellular Phone service using a Public Contract**

#### **Minnesota Law**

Under Minnesota law, municipal expenditures must have a public purpose to be valid, and local government actions must be based upon statutory or charter authority.<sup>1</sup> Authority may be specifically stated in a statute (or home rule charter, if any) or implied as necessary to do something that is expressly authorized.<sup>2</sup> Public purpose has been defined by the Minnesota Supreme Court as "such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government."<sup>3</sup>

The Minnesota Attorney General's Office has addressed the specific question whether a local government can use a public contract to benefit employees who wish to purchase equipment or services from a telephone provider for their personal use.<sup>4</sup> As in the present situation, the contract

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<sup>1</sup> See, e.g., Minn. Const. art. 10, § 1; Op. Att'y Gen. (Dec. 4, 1934); 63a-2 (May 6, 1965); 59a-22 (Nov.23, 1966).

<sup>2</sup> See, e.g., *Mangold Midwest Co. v. Village of Richfield*, 143 N.W.2d 813, 820 (1966).

<sup>3</sup> See *Visina v. Freeman*, 89 N.W.2d 635 (1958).

<sup>4</sup> November 2, 1998, Office of the Attorney General letter to S. Knutson and M. Kenney, a copy of which is attached.

considered by the Attorney General's Office was made available to the local government members of the State of Minnesota Cooperative Purchasing Venture, (often referred to as the "state contract").

The Attorney General's Office noted that the procurement practice of purchasing service and equipment for the personal use of local government employees under the state contract would "impermissibly utilize government resources."<sup>5</sup>

The Attorney General's Office also stated:

We are aware of no statute that would specifically authorize a local governmental unit to procure goods and services on behalf of its employees personally. Thus, this Office is of the view that the [local government] is not authorized to undertake this type of procurement.<sup>6</sup>

### **City Agreement with Verizon Wireless**

An Authorized User Agreement (Agreement) for Verizon Wireless services was signed on behalf of the City by the City Clerk/Treasurer on March 15, 2019. This Agreement was made available to members of the State of Minnesota's Cooperative Purchasing Venture (CPV).<sup>7</sup> In this regard, the Agreement states, in part, that "the State of Minnesota has entered into a Participating Addendum ("PA") designating City of Hamburg, a government entity . . . as an authorized user . . ." The Agreement states the "Authorized User will ensure that this User Agreement will be used only in support of government, not for profit or private education business" and specifically provides that "Entities may not resell Wireless Services or Equipment purchased under this Contract to any third party, including its agents, contractors or contract employees."

### **City Elected Official and Employee Access to and use of City-Purchased Cell Phone Services**

The City Council Agenda for the April 9, 2019, City Council Meeting documents "Cell Phone for city Employees (Plans) – Cell Phone Plans are now available to City Staff and Council Members under the Government contract with Verizon Wireless."

The City Clerk/Treasurer informed the OSA that the City paid for several personal cellular phone lines. The City Clerk/Treasurer also described the City's practice of paying the Verizon bill in full each month and then billing each individual for their personal line. The City used a spreadsheet to reconcile these amounts. This spreadsheet shows that the majority of the payments the City made to Verizon Wireless each month paid for personal cell phone use of the City's elected officials and City Clerk/Treasurer. This spreadsheet also documented "Balance Forward" amounts for some of these personal accounts.

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<sup>5</sup> See November 2, 1998, letter from Assistant Attorney General Shelley Roe to Knutson, Flynn, Deans & Olsen.

<sup>6</sup> See November 2, 1998, letter from Assistant Attorney General Shelley Roe to Knutson, Flynn, Deans & Olsen.

<sup>7</sup> The CPV was established by Minn. Stat. § 16C.03, subd.10, allows eligible entities to purchase goods, certain services and utilities from contracts established by the Office of State Procurement (OSP) for Minnesota state agencies. OSP contracts with vendors to provide goods, services and utilities to state agencies. This program creates a legal relationship so that eligible governmental entities can use these contracts just like state agencies. Minnesota Statutes § 471.59, subd. 1, known as the Joint Powers Act, defines the governmental entities that may join the CPV program. See [www.mmd.admin.state.mn.us/coop.htm](http://www.mmd.admin.state.mn.us/coop.htm).

The City's use of a public contract and its expenditure of public funds to provide for a service primarily for certain elected official and employee private use appears inconsistent with Minnesota law regarding public purpose. It also appears inconsistent with the limitations in the Authorized User Agreement. The reimbursement by the elected officials and employees of most of these City expenditures does not remedy the impropriety of the unauthorized contract use and expenditure of public funds in the first place.

### **Recommendation**

The OSA recommends that the City discontinue the practice of using public funds to pay for the personal cell phones of the City's elected officials and City Clerk/Treasurer.

### **City Debit Card**

During review of City records, the OSA noted the existence and use of a City debit card. This debit card provided the card holder(s) with direct access to the City's bank account.

### **Minnesota Law**

While cities have express statutory authority to use credit cards for city purchases, a city's authority to use debit cards is less clear.<sup>8</sup> Debit cards allow city funds to be immediately withdrawn from a city's financial account, eliminating the opportunity to review the purchase before funds are removed. In addition, debit cards provide cities with less protection than credit cards.<sup>9</sup> Debit cards also circumvent the claims approval safeguards found in Minnesota law.<sup>10</sup>

### **Recommendations**

The OSA recommends that the City refrain from using debit cards in the future.

In addition, the City should use credit cards only in accordance with a comprehensive credit card policy. In order to provide guidance on what to include in such a policy, the OSA has enclosed a copy of the OSA's Statement of Position, "Credit Card Use and Policies."<sup>11</sup>

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<sup>8</sup> See Minn. Stat. § 471.382. In contrast to the specific naming of credit card use as an acceptable means to pay city claims, the statutes do not similarly specifically name "debit card" use. Moreover, the statutes do specifically name "debit card" use as an acceptable way to receive payment. See Minn. Stat. §§ 471.382 (authority to pay claims with credit card) and 471.381, subd. 1 (authority to pay claims by "all forms of electronic or wire funds transfer"), *but see* Minn. Stat. § 471.381, subd. 2 (authorizes cities to accept payment by use of a credit card, debit card, and "all forms of electronic or wire funds transfer").

<sup>9</sup> See, e.g., Credit, Debit, or ACH: Consequences & Liabilities, A Comparison of the Differences in Consumer Liabilities by Ann. H. Spiotto, Federal Reserve Bank of Chicago (September 2001).

<sup>10</sup> See, e.g., Minn. Stat. § 412.271, subd. 2 (claims must generally be itemized and in writing).

<sup>11</sup> The Statement of Position is also available on the OSA's website at:

[http://www.auditor.state.mn.us/other/Statements/creditcardusepolicies\\_0703\\_statement.pdf](http://www.auditor.state.mn.us/other/Statements/creditcardusepolicies_0703_statement.pdf). The City may also want to review the League of Minnesota Cities' publication, *Procedures for Paying City Claims* (January 2019), available on the League of Minnesota Cities' website, [www.lmc.org](http://www.lmc.org) (Section VII covers credit cards).

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Should you have questions about this letter or would like additional guidance, you can contact me at (651) 296-4717 or mark.kerr@osa.state.mn.us. If you are unable to reach me, feel free to contact Nichole Bjornrud, CPA, CFE, at (651) 282-2750. As required by Minn. Stat. § 6.50, we will file a copy of this letter with the Carver County Attorney.<sup>12</sup>

Sincerely,

*/s/ Mark F. Kerr*

Mark F. Kerr, JD, CFE  
Special Investigations Director  
Office of the State Auditor  
(651) 296-4717

Encl.

cc: The Honorable Scott Feltmann, City Council Member  
The Honorable Eric Poppler, City Council Member  
The Honorable Tim Tracy, City Council Member  
The Honorable Jessica Weber, City Council Member  
Mr. Jeremy Gruenhagen, City Clerk/Treasurer  
Mr. J. Michael Melchert, City Attorney

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<sup>12</sup> See Minn. Stat. § 6.50 (“[I]n case of any violation of law, such report shall be filed with the city attorney thereof and with the county attorney of the county in which the administrative offices of such city are located, and these officials of the law shall institute such proceedings as the law and the public interest require.”).