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April 4, 2014

The Honorable Clayton Petersen
Chair, Board of Managers
Shell Rock River Watershed District
22108 - 720th Avenue
Albert Lea, Minnesota 56007

Dear Chair Petersen,

The Office of the State Auditor (OSA) reviewed two concerns it received about the Shell Rock River Watershed District (District). Specifically, the OSA received concerns about the District's failure to follow the formal bidding procedure required by Minnesota law when purchasing dredging equipment; and 2) the payment of "advance bonuses" to five employees, even though such bonuses are not permitted by Minnesota law. The OSA discussed concerns with the District's attorney and reviewed relevant documents.

Based on its review, the OSA found that the District did not comply with Minnesota contracting law in the purchase of dredging equipment. Further, the OSA found that the District's payment of "advance bonuses" to five employees in January 2013 either lacked a public purpose or the District lacked authority to make them, as required by Minnesota law. This letter will provide the District with guidance to help the District comply with Minnesota law in the future.

Contracting Procedures

The OSA received concerns that the District did not follow the formal bidding procedure required by Minnesota Statutes, section 471.345, in its purchase of dredging equipment.



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On September 21, 2012, at an “emergency” meeting, the District Board of Managers passed Resolution 2012-16 authorizing District staff to “place a bid” not to exceed \$350,000 for a 2010 dredge, and \$550,000 for dredge equipment consisting of various fixings, attachments, pumps, and piping, for a total not to exceed \$900,000. The District staff was to place bids for these items at an auction being held by the Ritchie Bros., Auctioneers, in Owatonna, Minnesota, on September 24, 2012.

On September 24, 2012, the District purchased, at auction, a 2010 IMS 7012HP 51 ft. Versi Dredge for \$340,000.00 and dredging equipment for an additional \$386,212.50, for a total of \$726,212.50, plus tax and administrative fees.¹ A copy of an undated District check made out to Ritchie Bros. in the amount of \$776,139.61 shows that the transaction was completed.

Minnesota Statutes, section 471.345 (“the Uniform Municipal Contracting Law”), is applicable to all purchases of equipment by all Minnesota political subdivisions.² For purchases of equipment that exceed \$100,000, subdivision 3 requires formal bidding with published public notice and sealed bids.³ The statute requires that the District undertake an open public process whereby equipment sellers compete through sealed bids to sell the equipment to the District at the lowest price. The procedure used by the District where it sent employees to an auction to compete with other buyers to pay the highest price for the equipment is not authorized by this statute and is inconsistent with the required formal bidding procedural requirements.⁴

In addition, the Board’s resolution authorizing staff to purchase the dredging equipment was made during an “emergency” meeting, called because of “the timing of the auction.” For government entities that have been given an “emergency” exception to bidding, an “emergency” generally requires an actual or imminent threat to health or safety.⁵ The timing of an auction is not an emergency under the Uniform Municipal Contracting Law.

¹Ritchie Bros., Auctioneers invoice, No. 201224300430, dated September 24, 2012.

²After a watershed district files its establishment order with the Minnesota Secretary of State, “the watershed district is a political subdivision of the state with the power, authority, and duties prescribed in this chapter.” Minn. Stat. § 103D.225, subd. 6.

³Minn. Stat. § 471.345, subd. 3 (requiring public notice pursuant to the law applicable to the political subdivision). See Minn. Stat. § 103D.811, subd. 2 (requiring that notice for watershed districts “be published in at least one of the newspapers of the state where notices are usually published”).

⁴None of the exceptions found within the Uniform Municipal Contracting Law apply to this purchase. See Minn. Stat. § 471.345, subd. 15 (cooperative purchasing through the state’s cooperative purchasing program or through a national municipal association’s purchasing alliance or cooperative) and Minn. Stat. § 471.345, subd. 16 (“reverse auction,” which involves electronic purchasing in which “vendors compete to provide . . . equipment at the lowest price in an open interactive environment”).

⁵For a city, town, county, or metropolitan airports commission, “emergency” is defined as “unforeseen combination of circumstances that calls for immediate action to prevent a “disaster.” Minn. Stat. § 12.03, subd. 3. “Disaster” is defined as “a situation that creates an actual or imminent serious threat to the health and safety of persons, or a situation that has resulted or is likely to result in catastrophic loss to property or the environment. Minn. Stat. § 12.03, subd. 2. Cf. Minn. Stat. § 375.21 (exempting counties from bidding procedures for emergencies arising from the destruction or impassibility of roads, or damage to other county property where delay could cause public health, safety, or welfare to suffer).

Based upon its review, the OSA found that the District did not follow the formal bidding procedure required by Minnesota Statutes, section 471.345, when it purchased a dredge and related equipment for \$776,139.61 in September 2012. We recommend that the District follow Minnesota law and, when purchasing equipment that exceeds \$100,000, use the formal bid procedure or an appropriate alternative method as required by Minnesota Statutes, section 471.345.

Payment of "Advance Bonuses"

According to the Auditor's Report, the district "paid out a bonus to some employees that was not paid under a pre-existing agreement or pursuant to collective bargaining."⁶ The "advance bonuses" paid to five employees in January 2013 either lacked a public purpose or the District lacked authority to make them, as required by Minnesota law.

On December 12, 2012, the Board of Managers approved a 2-1/2% cost of living wage increase and "Advance Bonuses" in lieu of additional wage increases for five of its employees. The District acknowledged that the "Advance Bonuses" had, in fact, been paid pursuant to a Board of Managers' motion.⁷

Minnesota law does not authorize "advance bonuses" for public employees.⁸ The District, like other public entities, can pay claims, including wages or salaries of their employees, once services have been performed, but cannot "advance" or pay for work not yet performed.

"Advance Bonus" Findings and Recommendations

The OSA found that payments of advance bonuses to five employees in January 2013, whether in appreciation for prior services or as advances on future salary, are not authorized by law.

We recommend that, in the future, the District not pay bonuses to its employees, except pursuant to pre-existing agreement or pursuant to collective bargaining. We also recommend that the District consult with its legal counsel to determine whether the District should make an attempt to recoup these funds from the employees and, if so, how it should recoup them.

⁶2012 Independent Auditor's Report on Minnesota Legal Compliance.

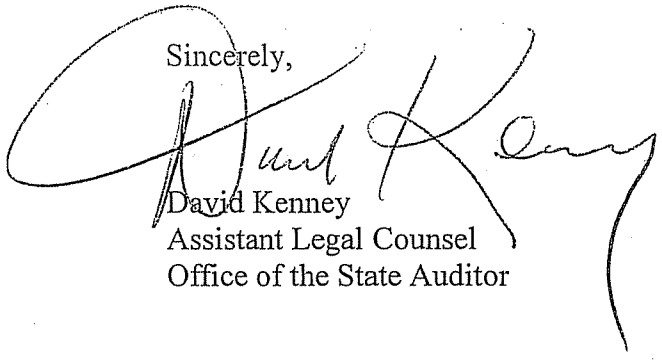
⁷Letter dated November 13, 2013, from Matthew Benda, the District's Atty. to the OSA.

⁸Public funds must be spent for public purposes. "Taxes . . . shall be levied and collected for *public purposes*." Minn. Const., Art. 10, § 1 (emphasis added). Minnesota Attorney General, in a series of opinions, consistently concluded that such bonuses violate the State Constitutional requirement that public funds be spent for public purposes. See Op. Att'y. Gen. 107-a-3, Jan. 22, 1980 (gift of public funds to private person in the form of a bonus serves private, not public, purpose); Op. Att'y. Gen. 125-a-47 (Jan. 13, 1948) (year-end bonus to employees of county sanitarium could not be paid); Op. Att'y. Gen. 469a-13 (Dec. 20, 1944) (year-end bonus to liquor store employee could not be paid).

Conclusion

If you have any questions about these matters, please feel free to contact me directly at 651-297-3671 or by email at David.Kenney@osa.state.mn.us.

Sincerely,



David Kenney
Assistant Legal Counsel
Office of the State Auditor

cc: Matthew L. Benda, Attorney for the District
The Honorable Craig S. Nelson, Freeborn County Attorney
The Honorable Pat Martinson, Freeborn County Auditor/Treasurer