



February 19, 2008

Government Ethics Alert

The Effect of Senate Bill 10 on Public Contracts

Senate Bill 10 (OR Laws Ch. 877 (2007)) made some big changes to the state's government ethics laws. One change that worries many public officials is located in Section 23a of the bill, and now ORS 244.047 – the public contracts provision.

The government ethics statutes define the term “public official” to include not only elected and appointed officials, but also employees, agents and volunteers who serve a public body.

ORS 244.047 provides generally that a “person may not, for two years after the person ceases to hold a position as a public official, have a direct beneficial financial interest in a public contract” that was “authorized by” that person, acting in his or her capacity as a public official, or by a board, commission, bureau, council, committee or other governing body of a public body of which the person was a member when the contract was authorized. The prohibition regarding a direct beneficial financial interest in a public contract does not apply to a person who was a member of the board, commission, bureau, council, committee or other governing body that authorized the contract so long as the person did not participate in the authorization of the contract.

“Public contract” is defined broadly to include:

[a] sale or other disposal, or a purchase, lease, rental or other acquisition, by a contracting agency of personal property, services, including personal services, public improvements, public works, minor alterations, or ordinary repair or maintenance necessary to preserve a public improvement. “Public contract” does not include grants.

ORS 244.047(1)(b); ORS 279A.010.

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But what does it mean to “authorize” a contract?

The administrative rules implementing SB 10, proposed but not yet adopted by the Oregon Government Ethics Commission, provide that:

[a] public contract is “authorized by” a public official if the public official performed a significant role in the development, creation or implementation of the contract. A significant role can include creating or recommending the specifications of the request for proposal (or similar contract specifications), developing benchmarks, performance measures, timelines, responsibility for contract management or recommending approval or signing the contract.

Other Definitions

The proposed rules do not define what constitutes a “direct beneficial financial interest” in a public contract. Does accepting a position with a private company, when the company is performing a contract authorized by the public official create a direct beneficial financial interest in the contract for the public official? The proposed rules also do not specify what a public official who is a member of the board, commission, bureau, council, committee or other governing body that authorizes a contract might do to avoid “participating” in the authorization of the contract.

Two Year Prohibition

ORS 244.047 provides that a person may not have a direct beneficial financial interest in a public contract he or she authorized “for two years after the person ceases to hold a position as a public official.” It is not clear from the language of the statute whether the two years begin to run after the public official leaves the position in which he or she authorized the public contract, or whether the two years begin to run only after the public official leaves the public sector altogether. For example, a public official authorizes a public contract for the Port of Portland. The public official then takes a job with the State of Oregon. Does the two year period begin to run when the public official leaves the Port of Portland? Or does the two year period only begin to run after the public official leaves public employment altogether?

Conclusion

In light of the lack of clarity surrounding these provisions, public officials who authorize contracts may want to create some sort of tracking system to identify which contracts they have authorized, in order to avoid violating ORS 244.047.

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