



Secretary of State Report

Oregon Department of Transportation: Office of Project Delivery Investigation

Summary

PURPOSE

The purpose of our investigation was to follow up on allegations regarding violation of the Oregon Department of Transportation's Conflict of Interest Policy and questionable management decisions relating to contracting practices within the Oregon Department of Transportation's Office of Project Delivery.

BACKGROUND

The Oregon Department of Transportation (ODOT) is responsible for overseeing the Oregon Transportation Investment Act (OTIA) III State Bridge Delivery Program, with the objective of managing \$1.3 billion to improve the deteriorating condition of the state's transportation infrastructure. ODOT assigned the management responsibilities of OTIA III to its Office of Project Delivery (OPD). OPD has the authority to initiate, develop, approve, and implement solicitations and contracts necessary to support OTIA III program delivery priorities.

RESULTS IN BRIEF

Our investigation at OPD substantiated allegations regarding violation of ODOT's Conflict of Interest Policy and allegations surrounding questionable management decisions relating to a request for proposal. As a result, ODOT is less able to ensure compliance with fair contracting practices.

Specifically, we found that an ODOT manager violated ODOT's Conflict of Interest Policy, PER 01-02-02, by not avoiding actions that created the appearance of using one's position for personal gain or private benefit.

We found that this manager was employed by the same industry firm prior to and subsequent to employment at ODOT and may have given preferential treatment to the industry firm while employed at ODOT. We found that ODOT does not have a "cooling off period" policy for employees leaving ODOT employment for work with industry firms seeking work through ODOT. We also found that OPD management did not justify its discretion for allowing a request for proposal despite ODOT procurement managers and legal advice stating that the request included numerous flaws.

RECOMMENDATIONS

We recommend ODOT Management:

- Enforce its conflict of interest policy.
- Establish and enforce a 'cooling off period'.
- Reevaluate contracts previously awarded to the industry firm to ensure compliance with fair contracting practices.
- Continue to make changes that clearly maintain the integrity of the procurement process and monitor discretionary actions taken by OPD management.

AGENCY'S RESPONSE

The Oregon Department of Transportation generally agrees with the recommendations.

Background

During the 2003 legislative session, the State of Oregon made a commitment to improve the deteriorating condition of the state's transportation infrastructure by signing House Bill 2041, and providing \$1.3 billion for the repair and replacement of state highway bridges. During the next 10 years, the Oregon Transportation Investment Act (OTIA) III State Bridge Delivery Program will attempt to meet several objectives including to repair and replace the state's bridges, stimulate Oregon's economy, employ efficient and cost-effective delivery practices, maintain freight mobility and keep traffic moving, build projects sensitive to its communities and landscape, and capitalize on funding opportunities.

The Oregon Department of Transportation (ODOT) assigned the management responsibilities of OTIA III to its Office of Project Delivery (OPD). OPD has the authority to initiate, develop, approve, and implement solicitations and contracts necessary to support OTIA III program delivery priorities, including all contracting and procurement tasks.

During the 2003-2005 biennium, OPD issued OTIA III related contracts totaling approximately \$157 million.

Investigation Results

Our investigation at the OPD substantiated allegations regarding violation of ODOT's Conflict of Interest Policy and allegations surrounding questionable management decisions relating to a discipline specific request for proposal. As a result, ODOT is less able to ensure compliance with fair contracting practices.

Conflict of Interest

We found that an OPD unit manager (employee) violated ODOT's Conflict of Interest Policy, PER 01-02-02, by not avoiding actions that created the appearance of using one's position for personal gain or private benefit. We could not conclude that an actual violation of Oregon Revised Statute 244.040 Code of Ethics occurred, as we could not prove that the employee used the position to obtain financial gain. However, the following actions indicate the appearance of a conflict of interest, which includes the promise of outside employment that would interfere with or inappropriately influence one's decisions or actions.

The employee was employed by ODOT from February 2002 to May 2005. Prior and subsequent to working at ODOT, the employee worked for the same industry firm (firm). As a result of this employee's violating the Conflict of Interest Policy, the firm may have received preferential treatment or received a benefit that other industry firms did not receive. Our determination was based on the following:

- The employee was listed as a reference on the firm's qualifications while at the same time participating as an ODOT employee scorer on the evaluation team for which the firm was an applicant.
- In one instance, a scoring summary showed that the employee ranked the firm significantly higher than other competing firms and higher than other scorers ranked the firm. The employee ranked the firm first, while one other member of the six-person evaluation team ranked the firm fourth and four members ranked the firm fifth out of six firms.
- In an email to the employee dated February 25, 2005, the

firm's executive management requested that the employee "pave a smooth path in the approval process" for a \$5.3 million contract amendment between the firm and ODOT. Although this may be a common communication practice, it contributes to the appearance of conflict of interest due to the employee's prior and current employment with the firm.

- One week after approving the \$5.3 million contract amendment on May 4, 2005, the employee formally notified ODOT management that the employee had entered into preliminary negotiations with the firm for employment opportunities.
 - According to several ODOT employees, the employee, while drafting a request for proposal to select a private-sector firm to manage the OTIA III State Bridge Delivery Program, performed ODOT responsibilities 1-2 days a week from the offices of the firm.
 - In some instances, when the employee was the manager of the OPD Unit's contracts, a disproportionate share of the environmental contract work went to the firm compared to other approved industry firms. Based on department documentation for environmental work order contracts issued during the 2003 – 2005 biennium, the firm was awarded 62 percent of the total amount awarded. There were six approved firms and the next highest amount represented only 19 percent of the total awarded.
- According to the work order assignment and requirements, work is to be issued on a rotating basis among contractors based on qualifications, geographical proximity, availability, resources, and

equitable assignment of previous work orders.

In May 2005, the employee accepted a position with the firm. At this time, the OPD manager assumed responsibilities for managing contracts with the firm.

Additionally, we found that ODOT does not have a 'cooling off period' policy for employees leaving ODOT employment for work with industry firms seeking work through ODOT. A cooling-off period is a formal waiting period limiting the contacts employees can have with their agencies after leaving government. This period prohibits employees from communicating with their former agencies on behalf of another company or organization. A cooling off period for former employees helps to avoid actual or perceived situations such as the former employee influencing the award of a contract, using his or her position to gain employment with an industry firm, or a contractor realizing a material competitive advantage in a procurement. Although there are no specific statutes or policies regarding the time frame of the cooling off period for the industry, federal guidelines and other states have implemented a one-year cooling off period.

We recommend ODOT management:

- Enforce its conflict of interest policy.

Agency's Response:

Implementation ongoing. We will enforce the policy through language contained in agreements signed by the agency and private firms. We will work with staff at the Department of Justice to ensure proper language is contained in applicable contracts. Moreover, as discussed below, we have updated and distributed ODOT's conflict of interest policy (Code of Conduct) to focus better on the overarching issues cited in your report.

- Establish and enforce a 'cooling off period' appropriate for the industry.

Agency's Response:

Implemented. We updated our conflict of interest policy (Code of Conduct) and distributed it to all agency employees on July 6, 2006. The policy clearly defines how to handle situations that involve employees coming to ODOT from private firms and/or leaving ODOT to work for private firms. The conflict of interest policy includes a "cooling off" period of one year, for employees in both situations.

With regard to the possible appearance of conflict of interest raised in the investigation, the department did put in place, with agreement from the industry firm, provisions to isolate the former ODOT employee from negotiations on any work with ODOT for a period of one year from the employee's date of hire with the private firm.

- Reevaluate contracts previously awarded to the firm to ensure compliance with fair contracting practices.

Agency's Response:

Implemented. The report states that the firm received 62 percent of the total environmental work order contracts awarded during a two-year period. In response to the recommendation, we took a more comprehensive look and evaluated the total volume of contracts awarded to the firm during the former employee's tenure with ODOT and found that the firm received only 2.5 percent of all contracts. Moreover, we assessed the specific time period when the former employee was a manager at the Office of Project Delivery (OPD) and found that the firm was awarded only 1.5 percent of the available work.

With regard to the discretion applied by OPD management, we have taken specific actions that

resolve any concerns about RFP 22175. As you noted, responsibility for procurement has been moved from OPD to ODOT's central procurement office, ensuring that the responsibility for rigidly following the procurement rules is not blurred by the responsibility to deliver ODOT's programs. Not noted in your report, however, is that subsequent to rescoring of the proposals, awards under RFP 22175 were made without further protest. In other words, we corrected any flaws in that particular solicitation to the satisfaction of the ODOT Office of Procurement, the Department of Justice, and to the proposers.

Questionable Management Decisions

We found that OPD management did not justify its discretion for letting a request for proposal despite ODOT procurement managers and legal advice stating that the request included numerous flaws.

In the establishment of the OPD Unit, ODOT executive management allowed OPD management 'discretion' in managing the unit. According to ODOT executive management, the discretion awarded to OPD management was no broader than what Department of Justice stated was appropriate under the law. Any discretion proposed by OPD management was required to be reviewed by Department of Justice for compliance with applicable laws permitting discretion in evaluating Personal Services contracts. Justification for any discretion is to be documented in the contracting files.

While such a large program as OTIA III may require establishing new practices and procedures, OPD management exercised its discretion in a manner not intended by executive management.

In May 2005, OPD management let RFP 22175, containing 18 discipline specific projects expected to cost as much as \$250 million, making the RFP one of ODOT's biggest contracts let to date.

OPD management let the RFP while ignoring advice from ODOT procurement specialists who cited numerous flaws in the solicitation. The flaws included concerns regarding conflict of interest disclosure, grading of cost disclosure, lack of thorough planning, lack of documentation of interaction with the industry, lack of open competition, and the methodology for contractor selection.

Additionally, in October 2005 Department of Justice attorneys stated their best advice was to terminate the RFP and re-issue it to clearly maintain the integrity of the procurement process, ensure ODOT obtains the strongest possible team of consultants for the upcoming projects, and treat the entire contracting community fairly.

However, OPD management disregarded the advice and continued forward with the RFP. We found no evidence in the files documenting justification of management's decision to continue on with the RFP.

We also found that, while numerous ODOT staff voiced concerns over OPD management practices from October 2005 until the rescission of the Notices of Intent to Award in January 2006, executive management did not take timely action to maintain the integrity of the procurement process. Additionally, firms in the industry raised concerns regarding the RFP language that resulted in protests from 13 of 80 (16.25 percent) industry firms who submitted proposals.

In December 2005, we met with the new ODOT Director to provide the results of our investigation. During this same time, an internal scoring review team, separate from the OPD management, reviewed proposal scores for RFP 22175 and found scoring "inconsistencies" and scoring that "did not make sense".

In response to concerns raised by our investigation and ODOT staff, in January 2006 executive management transferred some of the procurement activities from OPD management to ODOT's central Procurement Office, which rescinded all Notices of Intent to Award for the Discipline Specific RFP 22175 and rescored all proposals.

Additionally, in February 2006 the ODOT Director removed the current OPD manager and appointed an interim manager to manage the OTIA III program and to focus on strengthening internal and external relationships necessary to deliver the program.

We recommend that ODOT executive management continue to make changes that clearly maintain the integrity of the contracting procurement process and monitor the discretionary actions taken by OPD management.

Agency's Response:

Implemented. As noted in the report, personnel changes re-established confidence in ODOT's ability to deliver the OTIA III State Bridge Program. We continue to monitor actions related to the OTIA III program and continue to seek the views of ODOT stakeholders on how we are doing managing the program.

ODOT has a revised, clear conflict of interest policy (Code of Conduct) that we will enforce with contractual language and acknowledge the agency's structural changes that clarify and maintain the integrity of

procurement activities. We appreciate the recommendations contained in this report because they help us improve our programs and accountability.

Objectives, Scope and Methodology

The purpose of our investigation was to follow up on allegations regarding violation of the Oregon Department of Transportation's Conflicts of Interest Policy and questionable management decisions relating to contracting practices within the Oregon Department of Transportation's Office of Project Delivery.

During our investigation, we interviewed numerous ODOT staff from the Office of Project Delivery, the Alternative Delivery Unit, the ODOT Procurement Office, and various other internal and external individuals as determined appropriate, including industry firms.

We also reviewed the Procurement Process Analysis Final Report submitted by Calyptus Consulting Group, Inc.; pertinent laws and department policies and procedures; email records of various staff and management; documentation of contracts, statements of proposals, scoring evaluations, and communications between the Office of Project Delivery and industry firms.

We conducted our investigation from August 2005 to January 2006.



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The courtesies and cooperation extended by the officials and staff of the Oregon Department of Transportation were commendable and much appreciated.

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