

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 98-F-19

Date Issued: June 10, 1998

Requested by: Carol Olson, Executive Director, North Dakota
Department of Human Services

- QUESTION PRESENTED -

Whether an organization receiving reimbursement for expenses incurred pursuant to a contract with a state agency entitled "Grant Agreement" is "supported in whole or in part by public funds" and is therefore a "public entity" subject to the open records and meetings laws.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that an organization receiving public funds under a contract with a state agency is not "supported in whole or in part by public funds," even if the contract is entitled "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives.

- ANALYSIS -

The open records and meetings laws apply to any "public entity." N.D.C.C. §§ 44-04-18, 44-04-19.¹ "Public entity" is defined, in part, as all "[o]rganizations or agencies supported in whole or in part by public funds, or expending public funds." N.D.C.C. § 44-04-17.1(12)(c). An organization is supported by public funds if

¹ The definition of "record" also includes records in the possession of an agent of a public entity. Whether a contractor is acting as an agent of a state entity is a question of fact. However, a clause in the contract attached to the opinion request indicates that the organization will act as an independent entity and retains "sole and absolute discretion in the judgment of the manner and means of carrying out the [organization's] activities and responsibilities under this agreement." Grant Agreement, para. VII. This clause, if followed by the parties in the performance of the agreement, indicates that the organization is not an agent of the state entity.

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the amount of public funds it receives exceeds "the fair market value of any goods or services given in exchange for the public funds, whether [received] through grants, membership dues, fees, or any other payment." N.D.C.C. § 44-04-17.1(9). Compare Adams County Record v. Greater North Dakota Ass'n, 529 N.W.2d 830, 836 (N.D. 1995) ("support" does not include a bargained-for exchange of value).

In the situation presented, the North Dakota Department of Human Services (Department) has entered into a contract with a private organization. Although the contract is entitled "Grant Agreement," the payment of funds is not unconditional. Instead, the organization has agreed to provide parent-to-parent technical assistance to parents, including a 24-hour communication hotline and a parents' referral network, in exchange for reimbursement of its allowable expenses, up to a maximum reimbursement of \$240,000 over the term of the contract. Thus, the "Grant Agreement" is, in fact, an enforceable contract.

Periodic program reports will be provided to the Department. Reimbursement of allowable expenses will be paid upon request through monthly billings sent to the Department. Thus, in addition to the language in the contract explaining the services provided under the contract, the periodic program reports and monthly billings (which would be subject to N.D.C.C. § 44-04-18) will reasonably identify the goods or services provided by the organization and the amount of public funds it receives in exchange for those goods and services. Compare 1996 N.D. Op. Att'y Gen. 99, 101 (no means to identify how public funds are spent).

When public funds are provided by a public entity to an organization as reimbursement for reasonably identified goods and services, the remaining question is whether the amounts paid by the public entity reflect the fair market value of those goods or services. As suggested in the request for this opinion, fair market value is a question of fact that must be determined on a case-by-case basis. However, certain facts can be considered in making that determination.

"Fair market value" is commonly understood as the amount that a willing buyer will pay a willing seller for certain goods or services, or the value of the goods or services as determined on the open market. Black's Law Dictionary 597 (6th ed. 1990). Thus, if a competitive bid or proposal process was used to award the contract and establish the reimbursement rates, the rates resulting from that process could be presumed to be "fair market value." Even if a competitive contracting process was not used, the quality and

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availability of other contractors (or lack thereof) for the same goods and services can also be considered.

Finally, "fair market value" does not exclude, by definition, a commercially reasonable amount of profit for the contractor. The fair market value of the goods or services purchased by a public entity will usually exceed the cost of those goods or services to the contractor. Any profit to the contractor is one factor the public entity must consider in its review of the overall price that it pays for the goods or services that are being provided.

In conclusion, it is my opinion that an organization receiving public funds under a contract with a state agency is not "supported in whole or in part by public funds," even if provided under a "Grant Agreement," as long as the goods or services provided in exchange for those funds are reasonably identified in the agreement and have a fair market value that is equivalent to the amount of public funds it receives.

The contract referred to in this opinion does not specify that the organization's records must be open to the public. As more and more traditional government functions are carried out through contracts with private entities rather than directly by governmental agencies, it becomes more important to maintain public access to non-confidential records regarding public business. Therefore, when entering into a contract for services, I recommend that agencies include a provision requiring the contractor to allow public access to records relating to the services provided by the contractor.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

Heidi Heitkamp
ATTORNEY GENERAL

Assisted by: James C. Fleming
Assistant Attorney General

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