

**State of Minnesota
Campaign Finance & Public Disclosure Board
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REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA
under Minn. Stat. § 10A.02, subd. 12(b)**

ADVISORY OPINION 452

SUMMARY

Committees may jointly purchase services and products from a commercial vendor without the use of a third-party intermediary.

Facts

As a representative of a committee registered with the Board, you ask the Campaign Finance and Public Disclosure Board for an advisory opinion to clarify the guidance found in Advisory Opinion 436.¹ In particular, the answer provided to question 2 of Advisory Opinion 436 gives direction on how political committees may jointly purchase services from a commercial vendor without making an inadvertent in-kind contribution, or a prohibited contribution, between the committees that are making the purchase. The facts from Advisory Opinion 436 that are relevant to question 2, and needed to understand the basis of this opinion, are as follows.

1. The vendor is a commercial corporation that operates a research and opinion polling service that provides its customers with information which helps their election related activities in Minnesota.
2. The vendor's customers include candidate committees, political party units, political committees and funds, and independent expenditure committees and funds registered with the Board.
3. The vendor has in place policies and procedures that prohibit its customers from discussing their election related plans, including how the customer will use polling and research information, with employees of the vendor.
4. The vendor sells discrete research and polling projects in response to specific requests received from customers. The vendor charges either an hourly rate or a flat fee for these services. Both the hourly rate and the flat fee will reflect a rate the vendor reasonably believes will exceed the cost to produce the work requested.
5. If two or more customers jointly ask the vendor to work on a discrete research or polling project, the vendor will charge the same hourly rate or flat fee as it would if only one customer were purchasing the product. The cost of the project will be divided between the customers so that each customer pays an equal and proportionate share of the total project cost.

In addition, for the purposes of this opinion, the Board provides this definition.

¹ Advisory Opinion 436 (Nov. 5, 2013) https://cfb.mn.gov/pdf/advisory_opinions/AO436.pdf

6. "Bona fide use" means that each committee has an authentic, genuine, and real need for the services provided by the vendor that is autonomous of the needs of other committee(s) that jointly purchase the services.

Background

Advisory opinions issued by the Board provide safe harbor to a requestor who follows the advice given in the opinion. Political committees often refer to advisory opinions that were not issued to them for guidance on their behavior and for an understanding of how the Board interprets a given statutory requirement. In this opinion, the requestor asks for clarification on Advisory Opinion 436, which it has used for guidance when making joint purchases of services with other registered political committees.

Advisory Opinion 436 was issued to a commercial vendor that provides issue and candidate related research and polling services for use in political campaigns. The vendor was willing to sell its products to two or more committees that jointly purchased the products at the same rate or flat fee that would be charged to a single committee purchasing their products. Question 2 and the opinion provided in Advisory Opinion 436 are as follows:

Question 2: If two or more registered committees or funds evenly share the cost of purchasing a specific set of research or polling services, will the registered committees or funds have made in-kind contributions to each other equal in value to the amount each committee or fund saved by not purchasing the services alone?

Opinion: No, as long as all parties that are a part of the joint purchase have a bone fide use for the services purchased and the share each party pays is equivalent to the proportionate benefit each party expects to receive from the service. Registered committees and funds, like any other consumer, try to derive the best value possible for their money. As long as all of the parties in a joint purchase of services have a legitimate use for the services, and the joint purchase is a way to buy needed services at a reduced cost, then the joint purchase is not an in-kind contribution.

If, however, a participant in a joint purchase has no need for the services acquired, then the purpose of the joint purchase changes. A party to a joint purchase of services that has no bona fide use for the services is partially subsidizing the services used by the other participants in the purchase. In this scenario the cost paid by the party that had no use for the service is an in-kind contribution to any registered committee that received the service through the joint purchase. An in-kind contribution is not necessarily prohibited, but as pointed out by Advisory Opinion 410, an in-kind contribution between an IEPC and any other type of registered committee, is a violation of Chapter 10A.

An in-kind contribution may also occur if the cost paid by a party to a joint purchase is significantly disproportionate to the parties' use of the service. In such a case, the parties must allocate the cost of the service in proportion to the benefit they received from it....

To this point in Advisory Opinion 436 the guidance is clear, a joint purchase by committees of research and polling services does not create an in-kind contribution between the committees as long as 1) each committee has a bona fide use for the services, and 2) each committee pays an equal or proportionate share of the cost of the services.

However, the vendor in Advisory Opinion 436 stated that it had policies prohibiting its employees from discussing with customers their use of purchased services and the customers' election related plans. The Board noted in the opinion that these policies would prevent the vendor from ensuring that each committee involved in a joint purchase had a bona fide use for the services, and also would prevent the vendor from knowing if each committee was paying an equal or equitable share of the cost of the services. In the opinion, the Board provided that it "... may investigate to determine if all parties to the purchase had a bona fide need for the information acquired and that the amount paid in a joint purchase was appropriate."

The requestor believes that committees have tried to comply with the guidance of Advisory Opinion 436 in part by using a third-party vendor to act as a conduit between the vendor providing the services and the committees that are purchasing the services. Presumably the third-party vendor determines that each committee that participates in the joint purchase has a bona fide use for the product, and that each committee is paying an equal or equitable share of the cost.

With this background in mind, the requestor asks the following questions.

Issue One

Is a third-party vendor required to properly execute a joint purchase of bona fide services from a commercial vendor?

Opinion One

No, the use of a third-party vendor is not required. The committees that jointly purchase the services are ultimately responsible for complying with the provisions of Chapter 10A. Committees that agree to make a joint purchase, and wish to avoid making an in-kind contribution, will need to determine beforehand that all committees have a bona fide use for the services and that each committee pays for an equal or proportionate share of the services. As documentation of their compliance the Board recommends that the participating committees keep as records the calculations and relevant communications used to determine that an in-kind contribution did not occur.

Issue Two

May committees directly contract with a vendor for services and split the costs, provided the other necessary conditions are met?

Opinion Two

Yes, both this opinion and Advisory Opinion 436 acknowledge that committees may jointly purchase services assuming that no unreported or impermissible in-kind contributions occur. The use of a third-party vendor to purchase the services is permissible, but not required.

Issue Three

If committees do contract directly with a vendor, does the administrative work of the committee acting as point of contact with the vendor constitute an in-kind contribution from that group to the other committees?

Opinion Three

No, a committee acting as the point of contact for a joint purchase is not reducing the cost of the service provided by the vendor to the other committee. The communications between the committees making the joint purchase will offset any potential savings by a committee not directly communicating with the vendor.

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 /s/ Margaret Leppik
Margaret Leppik, Acting Chair
Campaign Finance and Public Disclosure Board