



Office of the Inspector General

Commonwealth of Massachusetts

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Inspector General

A Review of the Contract Between the New Bedford Oceanarium and the Oceanarium Planning and Development Corporation

November 2003

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Executive Summary

In March 2003, State Representative Marie Parente requested that the Office of the Inspector General and the Office of the State Auditor conduct a formal review of the New Bedford Oceanarium finances and operations. The Inspector General and State Auditor agreed to cooperate in a review of the Oceanarium.

The Inspector General's review focused on a contract between the Oceanarium and a firm called Oceanarium Planning and Development Corporation (OPDC). Peter Nessen, a former state employee and most recently Governor Romney's Special Advisor for Education and Workforce Development, is OPDC's founder, president, and sole stockholder. Part of OPDC's Oceanarium contract required Mr. Nessen and his associates to plan and negotiate for the creation of a joint marine sciences research institute with the University of Massachusetts at Dartmouth (UMass/Dartmouth).

Mr. Nessen's work to create this institute appears to have constituted a potential violation of Massachusetts' conflict of interest law. During the period when Mr. Nessen negotiated with UMass/Dartmouth on behalf of the Oceanarium as a paid consultant he also served on the Board of Higher Education overseeing the state university and college system.

Mr. Nessen claimed that he received a favorable State Ethics Commission opinion that allowed him to maintain his OPDC contract while serving as a special state employee on the Board of Higher Education.

This Office found, however, that Mr. Nessen failed to disclose to the State Ethics Commission that on behalf of the New Bedford Oceanarium he would be negotiating directly with UMass/Dartmouth to establish the joint marine sciences research institute.

This Office also found that Mr. Nessen failed to abide by the State Ethics Commission's guidance; and failed to disclose potential conflict of interest issues to the Governor and the Board of Higher Education as required by statute.

This Office concludes that Mr. Nessen appears to have violated the conflict of interest law and breached his responsibility as a special state employee and member of the Board of Higher Education. This Office recommends that the State Ethics Commission revisit this case to determine whether Mr. Nessen's activities were contrary to the conflict of interest law.

This Office also found that the Oceanarium poorly documented the OPDC contract, that the Oceanarium may have paid multiple times for the same or similar services, and that Mr. Nessen worked for significant periods without a signed contract.

Background

By letter dated March 19, 2003, State Representative Marie Parente, Chair of the House Committee on Long-term Debt and Capital Expenditures, requested that the Office of the Inspector General and the Office of the State Auditor investigate the finances of the New Bedford Oceanarium (NBO). The Office of the Inspector General and the Office of the State Auditor have cooperated in this review.

The NBO is a not-for-profit corporation created in 1993 that has developed plans for an oceanarium on the New Bedford waterfront. No facility exists currently. After ten years, the NBO has developed detailed plans, but funding for constructing a facility remains unsecured. The current estimated cost of a scaled down facility is nearly \$70 million. The former larger scale project had an estimated cost of nearly \$130 million. According to NBO officials, the NBO scaled down the facility to improve its chances of securing the needed funding.

The Inspector General's report addresses specific allegations concerning a contract between the NBO and a corporation created by Peter Nessen, a former state official.¹ The report also examines certain contract management issues.

In July 2001, Mr. Nessen formed an organization known as the Oceanarium Planning and Development Corporation (OPDC) and became the sole stockholder. OPDC's articles of organization state that the purpose of the corporation is: "To assist in the development and implementation of a master plan for an oceanarium project in New Bedford and to engage in any other lawful business permitted by federal law and the Commonwealth of Massachusetts."² The corporation negotiated an initial \$400,000 contract (plus expenses) with the NBO with a \$400,000 renewal option. The initial contract spanned the time period from August 2001 to June 2002.

¹ Peter Nessen has held numerous state appointments under the last four governors, most recently as Governor Romney's Special Advisor for Education and Workforce Development.

² The articles of organization identified Peter Nessen, Robert Nessen (Mr. Nessen's brother), and Gerry Studts (former U.S. Congressman) as officers of the corporation.

The contract's scope of work called for OPDC to create a master plan covering:

- Program development;
- Real estate development;
- Project financing options;
- Finding joint venturers for the NBO; and,
- Assisting the NBO in implementing the master plan.

In addition, the contract called for OPDC to evaluate "previous plans and proposals," prepare an "action plan" for the NBO, and for OPDC to be "actively involved in the selection" of the Oceanarium's Chief Operating Officer and other key staff. During the ten-month contract term, OPDC apparently:

- Developed a draft master plan;
- Identified a financial advisor;
- Identified financing options;
- Identified potential investors and partners;
- Assisted in the identification and hiring of key staff including a Chief Operating Officer (Executive Director);
- Negotiated for the creation of a research institute with the University of Massachusetts at Dartmouth;
- Negotiated real estate issues relating to the NBO site; and
- Crafted a marketing plan.

At the end of the first 10 months, OPDC received \$364,000³ and the NBO opted to renew the contract.

The scope of work for the one-year contract renewal required OPDC to continue to seek out eligible funding sources for the NBO project. The contract cites "negotiating,

³ The contract value remained \$400,000; however, the NBO paid \$36,000 directly to Mr. Studds.

obtaining and closing debt and equity financing" for NBO as the purpose of the renewal. Under the renewal, the NBO changed OPDC's compensation from a negotiated fee plus expenses to a contingency fee. According to NBO officials, they established a contingency fee to reduce costs, improve accountability, and give OPDC a greater incentive to achieve the contract goals. In accordance with the renewal terms, OPDC could only receive \$400,000 if the NBO actually secured financing, regardless of the source.

The NBO planned to apply for more than \$100 million in federal tax credits.⁴ The NBO also hoped to persuade the State to contribute financing, including \$17 million made available by a 1997 bond issuance.⁵ In theory, OPDC could have earned the \$400,000 fee by securing State financing.

NBO officials stated that their involvement with Mr. Nessen began after an executive search firm recommended that he replace Gerry Studds⁶ as NBO's Executive Director. The NBO paid this search firm nearly \$120,000. According to NBO officials, since a number of trustees knew or knew of Mr. Nessen, the Board accepted the recommendation. The NBO offered Mr. Nessen the Executive Director's position with a salary of more than \$100,000 per year. However, Mr. Nessen declined the offer.

According to NBO officials, Mr. Nessen requested a consulting contract, instead of the salaried position, that included the scope of work referred to previously. In summary, the search firm's original candidate, Peter Nessen, declined to take the position of Executive Director after the NBO paid a search firm \$120,000 to find Mr. Nessen. Instead of paying an Executive Director approximately \$100,000 per year, the NBO agreed to give Mr. Nessen and OPDC a 10-month \$400,000 contract. The NBO then added the renewed search for an Executive Director to OPDC's scope of services.

⁴ The tax credits could be exchanged with private businesses for NBO financing.

⁵ Governor Romney announced recently that the funds would not be used for the NBO.

⁶ Mr. Nessen subsequently hired Mr. Studds as his self-described "link to Washington."

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Findings

The Board of Higher Education

In August 2001, Mr. Nessen signed a contract for services with the New Bedford Oceanarium (NBO). According to NBO officials, he worked from May through July 2001 without a signed contract.

For the period of this contract, Mr. Nessen continued to serve on the Board of Higher Education (BHE). The BHE has budget setting and policymaking authority over public colleges and universities in Massachusetts. BHE approves campus budgets, ensures accountability, develops policies, and provides oversight and guidance for the university system.

In July 2001, before the Oceanarium Planning and Development Corporation's (OPDC) official organization date, Mr. Nessen requested and received a written advisory opinion from the State Ethics Commission (the Commission) concerning potential conflicts of interest under M.G.L. c. 268A regarding his position on the BHE and his NBO contract. It appears that Mr. Nessen failed to disclose to the Commission that as part of the OPDC contract with the NBO, he would be negotiating an agreement with the University of Massachusetts at Dartmouth (UMass/Dartmouth) for the creation of a joint research institute. Mr. Nessen also failed to disclose this information to the Governor's Office as required by Massachusetts' law (M.G.L. c. 268A, §6).

This joint venture that Mr. Nessen worked to create would establish a private research partnership to initiate, develop, and commercialize marine science research. The Board of Directors would include UMass/Dartmouth and NBO representatives. As a result of the Commission's written opinion, Mr. Nessen reported to the NBO Board of Governors that the Commission gave him a favorable opinion. This meant that he could maintain an NBO contract while serving on the BHE.

Finding 1. Mr. Nessen’s Oceanarium activity while a member of the State Board of Higher Education appears to have created a conflict of interest.

The “favorable opinion” from the Commission that Mr. Nessen reported to the NBO Board of Governors stated in part:

In your capacities as a member of the Board of Higher Education . . . you may generally not participate in a particular matter that will affect the financial interests of OPDC.

However, it appears that Mr. Nessen did not disclose his complete involvement in this partnership to the Commission. While a member of the BHE, but representing the NBO, Mr. Nessen planned, pursued, and negotiated the development of a partnership between the NBO and UMass/Dartmouth's Center for Marine Science and Technology.

During his pursuit of a private research partnership between UMass/Dartmouth and the NBO, the BHE reviewed, discussed, and ultimately voted (in October 2001) to create a Master of Science and Doctor of Philosophy degree in Marine Sciences and Technology through a joint program between the UMass campuses at Amherst, Boston, Dartmouth, and Lowell. According to BHE documents, this program, voted for by Mr. Nessen, intended to “maximize utilization” of the marine sciences resources throughout the university system. This action could have had a direct impact upon the finances of OPDC. The NBO and potential investors in the research partnership being developed by Mr. Nessen would benefit from the merger of the resources of four university campuses. The Commission opinion did not offer advice about this activity.

The Commission’s written opinion also reveals that Mr. Nessen only disclosed that in his capacity as a member of the BHE he would be voting on a budget that includes “funds for a joint venture between UMass and the Oceanarium.” And further, that although the BHE votes “the entire budget for UMass/Dartmouth,” the BHE does not comment on such line items within the budget.” In response, the Commission opinion included the following: “[I]f the Board were to consider a line item from the UMass/Dartmouth budget that involved the joint venture between UMass and the Oceanarium, you [Mr. Nessen] would be required to abstain from discussing that line item if it affected OPDC’s financial interest.”

According to BHE meeting minutes reviewed by this Office, BHE members do more than simply vote on entire budgets. In fact, the Chancellor of Higher Education commended Mr. Nessen by name for his work to "craft" the budget. The December 2001 BHE minutes state that: "The Chancellor thanked Board member Peter Nessen and Chairman Tocco for working with the staff **to craft this budget presented today.**" [Emphasis added.] Mr. Nessen did not disclose the extent of his involvement on budget matters to the Commission.

According to the July 2001 Commission opinion:

[T]he conflict of interest law prohibits you [Mr. Nessen] from acting "in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy [Mr. Nessen's] favor in the performance of [Mr. Nessen's] official duties, or that [Mr. Nessen is] likely to act or fail to act as a result of kinship, rank, position, or undue influence of any party or person."

In the course of this Office's review, we learned that through direct negotiations with the UMass/Dartmouth Chancellor, Mr. Nessen developed and formalized a business relationship between UMass/Dartmouth and the NBO. When the UMass/Dartmouth Chancellor or her staff engaged in negotiations about the business relationship between UMass/Dartmouth and the NBO with Mr. Nessen, a BHE member, they were not negotiating on a level playing field. Mr. Nessen was, in fact, negotiating with the Chancellor of an entity over which he had oversight responsibilities. As a result, Mr. Nessen's role in negotiating a business relationship between the Oceanarium and UMass/Dartmouth may have been a violation of the law.

Finding 2. Mr. Nessen appears to have breached his responsibility as a member of the Board of Higher Education and appears to have violated the ethics law.

As a BHE member, Mr. Nessen had a responsibility to safeguard UMass assets and intellectual property, including that of UMass/Dartmouth. Instead, he accepted compensation from a private institution seeking to leverage these assets. The July 2001 Commission opinion stated that:

You may not receive compensation from, nor act as agent for, OPDC in relation to any particular matter either in which you participate, as a member of the Board of Higher Education . . . or for which you have official responsibility in your state capacities.

Mr. Nessen's planning and negotiating for this joint venture between UMass/Dartmouth and NBO had, at a minimum, an appearance of impropriety. Mr. Nessen had certain responsibilities as a special state employee, BHE member, and future BHE vice-chair. The issue of propriety is further highlighted in a November 2001 report prepared by OPDC for the NBO wherein OPDC outlines how UMass/Dartmouth can assist the NBO in developing a research component. The report states how negotiations had been on-going for much of 2001 and that the time had come to "explore a more formalized partnership." OPDC documents identify the following as the benefits, identified by Mr. Nessen, for UMass/Dartmouth in this joint venture:

- The avoidance of state/federal restrictions and limitations attached to resources;
- The avoidance of restrictive state statutes regarding contracts;
- The avoidance of governmental bureaucratic processes;
- The avoidance of confusion over the "ownership" of intellectual property developed through the joint venture;
- The avoidance of the "cumbersome bureaucratic processes inherent in public higher education;"
- The Chancellor could create a "corporation without having to justify such action within the larger University system;"
- The joint venture would operate as a business in order to "commercialize the most promising research;"
- The profits from commercialized research would not be siphoned to pay for University overhead;
- "State policy makers" would not determine the direction of the research; and
- Staff would not be subject to collective bargaining.

These purported benefits for UMass/Dartmouth are not necessarily in the best interests of the UMass system or the Commonwealth. However, these benefits would assist a private entity, seeking to commercialize the intellectual and physical resources of a public institution. The advice provided by Mr. Nessen appears inappropriate for a special state employee, BHE member, and future BHE vice-chair.

Mr. Nessen's plan for the joint venture also included giving the NBO management control and possibly ownership control by giving majority control of the proposed not-for-profit research institute's Board of Trustees to the NBO.

A draft plan for the UMass/NBO joint venture states that "any future profits generated from technology licensing will be shared by both partners." However, "the distribution of profits is to be determined." The plan continues by stating: "activities entered into by the new entity will be shared by both parties, **even though the University may have opted to pass on the opportunity** [for profit-sharing]." [Emphasis added.] It remains unclear as to how UMass/Dartmouth would financially benefit, if at all, from the joint venture. Even if UMass/Dartmouth did not "opt out" of profit sharing in this new entity, its stake in any intellectual property developed by the joint venture could be in jeopardy.

OPDC documents imply that the "commercialized" products of this research partnership could provide a revenue stream for the NBO. NBO's need for revenue coupled with an organizational structure that would eliminate significant government oversight and control raise questions about the advantages and protections offered UMass/Dartmouth from the affiliation and raises concerns about Mr. Nessen's role as a special state employee and BHE member.

Other UMass schools, such as the UMass Medical School, have clear and stringent guidelines surrounding the use of UMass research and intellectual property. This Office found no discussion of such policies regarding marine sciences research in the planning for the joint venture. It appears that the intellectual property of UMass may presently be vulnerable to exploitation under the plans for the joint venture. The BHE has a statutory mandate to "encourage collaboration between educational institutions and business." This Office does not dispute that this type of collaboration has great potential benefits.

However, this Office believes that the BHE has a responsibility to protect the taxpayers and the system of higher education by creating parameters that guarantee fairness and reasonable compensation for public educational institutions regarding any business collaboration.

Mr. Nessen's actions to negotiate with UMass/Dartmouth appear to have undermined his commitment to the BHE, the system of higher education, and the Commonwealth. Mr. Nessen received payment from a private entity to negotiate with an institution he performed oversight of as a member of the BHE. As a member of the BHE and as a special state employee Mr. Nessen was entrusted with safeguarding educational resources and upholding the public trust. His actions on behalf of the NBO appear to have created a conflict of interest.

This Office is also concerned by evidence that Mr. Nessen failed to disclose a potential conflict of interest to the BHE or to the Governor's office as required by M.G.L. c. 268A, §6. This section of the law states that:

[A]ny state employee who participates as such employee in a particular matter in which to his knowledge, he, his immediate family, or partner, a business organization in which he is serving as officer, director, trustee, partner or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest, shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than two years, or both. Any state employee whose duties otherwise require him to participate in such a particular matter shall advise the official responsible for appointment to his position and the state ethics commission of the nature and circumstances of the particular matter and make full disclosure of such financial interest . . . the appointing official shall thereupon either (1) assign the particular matter to another employee; or (2) assume responsibility for the particular matter; or (3) make a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the commonwealth may expect from the employee, in which case it shall not be a violation for the employee to participate in the particular matter. Copies of such written determination shall be forwarded to the state employee and filed with the state ethics commission by the person who made the determination. Such copy shall be retained by the commission for a period of six years.

This Office requested that Mr. Nessen provide all conflict of interest disclosures made pursuant to M.G.L. c.268A by Mr. Nessen to former Governor Cellucci and former Acting Governor Swift. According to Mr. Nessen's attorney, Mr. Nessen does not have any documents that are responsive to our information request. This Office requested the same information from the Governor's Office. According to the Governor's Office, any disclosures made before the Romney Administration have been archived. To date, no disclosures have been located in the archives.

Oceanarium Contract Management Issues

The Office identified the following contract management issues while reviewing the NBO's contract with OPDC.

Finding 3. The Oceanarium poorly documented Mr. Nessen's contract.

Poor documentation of the OPDC contract by the NBO makes it difficult to determine why the NBO hired OPDC, how the NBO determined OPDC's compensation, and what negotiations took place for this contract. A troubling absence from the incomplete OPDC contract file is any reference to the fee negotiations for both the original \$400,000 OPDC contract and the \$400,000 contract renewal. According to NBO staff, they engaged in lengthy negotiations over the renewal and Mr. Nessen wanted much more than the \$400,000 contingency fee eventually settled upon. Unfortunately, NBO staff did not memorialize any of these conversations or negotiations in the official record. Although staff can recount some of the information, this is not a substitute for adequate documentation.

The NBO's current Chief Operating Officer offered, as one reason for the existence of incomplete files, that before 2002 the NBO did not have a central repository for records or a staff dedicated to this type of record keeping. He continued by saying that the older records are scattered and some may even be "in the garages of some of the trustees."

Finding 4. Oceanarium records fail to indicate whether or not Mr. Nessen met his contractual obligations but suggest double payment for services.

NBO records fail to indicate whether or not OPDC met its obligations under the contract, met contractual deadlines, or supplied the NBO with the deliverables specified by the contract.

However, NBO records suggest that the NBO may have contracted with others to perform some of the work that the NBO hired OPDC to perform. As a result, the NBO may have paid twice for the same service. For example:

- Strategic Planning: The OPDC contract required the creation of a master plan that included strategies for education, research, real estate development, financing, partnerships, marketing, and fundraising. Before executing the OPDC contract, the NBO had a \$5,000 contract with a firm for strategic planning. In addition, former Congressman Gerry Studds had previously been paid \$135,000 to develop a strategic plan during his tenure as NBO Executive Director.
- Fundraising: A year before entering into the OPDC contract, the NBO paid nearly \$23,000 for a fundraising plan. Concurrently with the OPDC contract, the NBO paid another consultant nearly \$57,000 to develop a fundraising plan. After OPDC withdrew from its NBO contract, the NBO paid another \$23,000 for a new firm to "identify fundraising sources." The NBO paid more than \$100,000 for fundraising planning that OPDC's contract appears to have required.
- Executive Search: The OPDC contract also called for the provision of executive search services to identify a candidate for NBO Chief Operating Officer (Executive Director). According to NBO officials, the NBO hired a Chief Operating Officer based upon the recommendation of an executive search firm -- the same firm that recommended Mr. Nessen for his contract. OPDC may have assisted the executive search process but did not act exclusively to provide this service.

In total, the NBO paid \$327,000 for services that may have been in the scope of OPDC's original \$400,000 NBO contract.

Finding 5. Mr. Nessen began work for the Oceanarium before having an executed contract.

Allowing a contractor to begin work without a contract is not a sound business practice. NBO officials signed the OPDC contract on August 3, 2001. For the month of August 2001, OPDC received payment of \$100,000 or 25 percent of the entire value of the ten-month contract. The reason given by NBO officials for this payment is that Mr. Nessen had been working for three months (May – July 2001) before having an executed contract. OPDC again worked without a signed contract for the months of May through September 2002. OPDC began performance in May 2002, but the contract renewal was not executed until September 2002.

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Conclusion

This Office has reviewed and reported upon several issues concerning Peter Nessen's contract with the New Bedford Oceanarium.

Part of Mr. Nessen's contract required that he and his associates plan and negotiate for the creation of a joint marine sciences research institute with the University of Massachusetts at Dartmouth (UMass/Dartmouth). This Office believes that Mr. Nessen's work to create this institute constituted a potential violation of Massachusetts' conflict of interest law.

When Mr. Nessen negotiated with UMass/Dartmouth on behalf of the Oceanarium as a paid consultant he also served on the Board of Higher Education overseeing UMass/Dartmouth. Although Mr. Nessen received a written opinion from the State Ethics Commission, Mr. Nessen's failure to fully disclose all relevant facts to the State Ethics Commission renders the opinion unreliable.

This Office concludes that Mr. Nessen appears to have violated the conflict of interest law and breached his responsibility as a special state employee and member of the Board of Higher Education. This Office recommends that the State Ethics Commission revisit this case to determine whether Mr. Nessen's activities were contrary to the conflict of interest law.