

CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511

DATE: March 31, 2005

OPINION #05-003

TO: Larry D. Nelson, City Engineer

FROM: Michael P. May, City Attorney

SUBJECT: Conflicts of Interest Under Sec. 946.13, Wis. Stats.

You have asked my opinion on the possible application of sec. 946.13, Stats., to the actions of members of boards, committees and commissions who are also professionally affiliated with businesses with which the City may ultimately contract through those boards, committees and commissions.

This request arose out of a training seminar conducted for City staff, in which I discussed the broad reach of sec. 946.13, Stats. A member of the Engineering staff inquired about how this statute might impact the Board of Public Works. As my opinion indicates, this statute could have broad implications city-wide, and I believe it important to explain the potential impacts in this formal opinion so that all City managers are aware of the law. I believe that without very careful consideration in the appointment process for membership on City boards, committees and commissions and close attention to the actions of and by members in their professional dealings and as members, the potential for violation of the statute is very real.

CONFLICTS OF INTEREST AND SECTION 946.13

Issues regarding conflicts of interest for city officials and employees are governed by a number of statutes and ordinances, including secs. 19.59 and 946.13, Stats., and sec. 3.47, Madison General Ordinances. In most instances where a disqualifying conflict of interest exists, the conflict can be avoided under the law by a full recusal by the official, that is, the official takes no part in the deliberation or decision on the matter. See, e.g., sec. 3.47(5)(f), MGO.

Sec. 946.13, Stats., is a broader criminal law that often requires more than recusal in certain circumstances, and that provides for significant potential liability for both the official and the city. This section of the statutes reads:

- (1) Any public officer or public employee who does any of the following is guilty of a Class I felony:
 - (a) In the officer's or employee's private capacity, negotiates or bids for or enters into a contract in which the officer or employee has a private pecuniary interest, direct or indirect, if at the same time the officer or employee is authorized or required by law to participate in the officer's or employee's capacity as such officer or employee in the making of that

contract or to perform in regard to that contract some official function requiring the exercise of discretion on the officer's or employee's part; or

- (b) In the officer's or employee's capacity as such officer or employee, participates in the making of a contract in which the officer or employee has a private pecuniary interest, direct or indirect, or performs in regard to that contract some function requiring the exercise of discretion on the officer's or employee's part.

ANALYSIS AND APPLICATION OF SEC. 946.13

The first clause, sec. 946.13(1)(a), applies to actions taken by a "public officer" in his or her private capacity in a contract in which he or she has a monetary interest and in which he or she is "authorized" to act in his or her official capacity. Non-participation (recusal) in the official action is not sufficient to prevent a violation of the provision. The key is whether the person is *authorized* to act, not whether he or she *does* act.

The second clause, sec. 946.13(1)(b), applies to actions taken by the official only in an official capacity in the making of the contract in which he or she has a monetary interest. In this case, recusal is sufficient to avoid violation.

The results or impacts of violations of the section are severe indeed. A violation is a criminal act subjecting the violator to a maximum penalty of \$10,000 and/or imprisonment of up to 3 years and 6 months and is a felony.¹ The section is one of "strict liability" meaning it is not an element of the crime that the officer or employee have an intentionally corrupt motive in acting. The act, without more, constitutes the violation.²

The impact on the City and on the contractor are also significant. sec. 946.13(3) reads:

- (3) A contract entered into in violation of this section is void and the state or the political subdivision in whose behalf the contract was made incurs no liability thereon.

In 1953, the criminal code underwent a complete revision which led, with various other amendments not relevant here, to the present sec. 946.13. The Comment to the Report of the Judiciary Committee on the Criminal Code (1953) at pages 180 and 181 regarding some of these provisions explained in more detail:

The consequences of the rule stated in subsection (4) (now (3)) are not readily apparent from merely reading the statute. The contract is neither "void" nor "voidable" in the proper sense of those terms, but it carries some of the attributes of each. The contract is completely void in the sense that the state

1 Sec. 939.50(3)(i), Stats.

2 *State of Wisconsin v. Stoehr*, 134 Wis. 2d 66, 78-79, 396 N.W. 2d 177 (1986)

or municipality incurs no liability even for unjust enrichment. Thus, the state or municipality may refuse to pay for services rendered or goods sold and it may even recover money which has been paid out of the public treasury on such contracts without making restitution of any sort. On the other hand, if the state or municipality desires to enforce the contract, the other party is bound thereby, and from this standpoint the contract is merely voidable. The rule can perhaps be justified on the ground that it is not intended to do equity but to provide an additional sanction against the officials who violate the law. (cites omitted.)

The *Stoehr* case reinforced the reliance on the Judiciary Committee Report for interpreting the current iteration of the subject section. The Supreme Court affirmed the Report's statement of the purpose of the section, saying at 134 Wis. 2d at 79-80:

According to the Judiciary Committee Report, the goal of sec. 946.13 is to enforce a prescribed standard of conduct. Sec. 946.13 is directed not at corruption but at conduct presenting an opportunity for corruption. Report, p. 179. Because a public officer's judgment may be impaired when the officer transacts government business in which he or she has a personal economic interest, the statute attempts to prevent public officers from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with the danger that they will advance a private interest rather than a public good.

In this context, it is important to understand that "public officer" is defined very broadly. Sec. 939.22.(30), Stats., reads, in pertinent part:

"... A "public officer" is any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units...."

Clearly, the phrase includes all members of City boards, committees and commissions whose duties and responsibilities include the making of discretionary decisions relating to contracts with the City. I note further that "contracts" should be broadly construed to avoid possible violations of the section.

The statute provides for several exemptions from the application of sec. 946.13(1). Sec. 946.13(2)(a) sets a dollar maximum on exempt contracts and reads:

- (a) Contracts in which any single public officer or employee is privately interested that do not involve receipts and disbursements by the state or its political subdivisions aggregating more than \$15,000 in any year.

Sec. 946.13(5) reads:

- (5) Subsection (1)(b) shall not apply to a public officer or public employee by reason of his or her holding not more than 2% of the outstanding capital stock of a corporate body involved in such

contract.

The other exemptions are more technical in nature and are beyond the scope of this opinion. If questions other than those addressed here arise, please contact my office.

Both secs. 946.13(1)(a) and (b) require *action* on the part of the official or employee. The Judiciary Report, at page 179, puts it this way:

“The officer or employe³ may be guilty under this section even though he does not actively participate on both sides of the transactions. However, he must actively participate on one side or the other. He is guilty under subsection (1)(a) if he acts in a private capacity and under subsection (1)(b) if he acts in his official capacity.”

I suggest this is reason the official’s recusal is not sufficient to forestall a violation of (1)(a) if he has “actively participated” on the private side of the deal because he is *authorized* to act in his official (board member) capacity. If the official has not in any way participated on the private side of the deal, he may recuse himself from all participation in official (board) side and thereby comply with both (1)(a) and (1)(b).

Members of boards, committees and commissions who are also officers or directors of corporations, or who are corporate employees whose monetary interests may be enhanced by the corporation getting the contract beyond only a salary, need to be particularly mindful of the intricacies of the section. Referring again to the Report’s Comments at page 180:

Whether the officer or employe has a private pecuniary interest in the contract for which he is negotiating or bidding or into which he enters or in regard to which he performs some function requiring the exercise of discretion is a question of fact in each case. The private pecuniary interest may be either direct or indirect, i.e., it may be a pecuniary interest which the actor as an individual expects to get directly, or it may be one which he expects to get indirectly, as when he is an officer or stockholder of a corporation in whose behalf the contract is made. It is generally held that an officer, director, or stockholder of a corporation has a pecuniary interest in the contracts of that corporation, but that an employe of the corporation on a straight salary basis does not. However, this is a question of fact and not a rule of law, and consequently the facts of the particular case may show that a pecuniary interest existed even though the person in question was employed on a salary basis. See *Edward E. Gillen Co. v. Milwaukee*, 174 Wis. 362, 183 N.W. 679 (1921).

The importance of compliance with sec. 946.13 has been emphasized in other contexts. In 1971, Attorney General Robert Warren issued an opinion cautioning a county to be very careful in allowing someone employed in an engineering firm from also acting on the County highway committee. The opinion states in part:

³ Antiquated spelling now out of favor.

One of the burdens of public office can be the foreclosure of participation in certain public contracts which might otherwise be available. On the one hand, the supervisor may avoid possible violation of sec. 946.13, Stats., by abstention from voting or other participation in making a contract in which he is directly or indirectly interested. On the other hand, he may avoid making proposals in areas in which he is financially interested. And, lastly, the board or its committee may reasonably in certain cases choose to do business with individuals or firms which are known to be free from potential conflict.

60 O.A.G. 98, 100-101 (1971).

In at least two other opinions from this office, issued on particular facts, one of my predecessors warned that persons in official positions must not only recuse themselves when a possible conflict exists, but cannot have any involvement in their private capacity in bidding for or negotiating for a public contract over which they have authority to award. See Opinion No. 99-008 and Opinion No. 01-006.

CONCLUSION

I have offered this extended analysis to emphasize the seriousness of violation of the section for both the official, the City and the involved corporate body and to hopefully clarify why I have reached conclusions in this important and sensitive area. It is my opinion, then, that members of boards, committees and commissions are “public officers” subject to sec. 946.13, Stats., because they are either authorized to act or may act in their official discretionary capacities involving contracts with the City. If they also have personal monetary interests in those contracts, either personally or through a corporate body, they may, depending on their activities on the private side of the transaction, subject themselves to liability under the section. Such officials should take particularized steps to avoid participating in the preparation of or negotiating for public contracts over which they have some public authority.

Michael P. May
City Attorney

MPM:LOB:ph

cc: City Department / Division Heads
Mayor Cieslewicz

SYNOPSIS: Members of City boards, committees and commissions are “public officers” subject to sec. 946.13, Stats., because they are either authorized to act or may act in their official discretionary capacities involving contracts with the City. If they also have personal monetary interests in those contracts, either personally or through a corporate body, they may, depending on their activities in their private capacities in those contracts, subject themselves to liability under the section. Such officials should take particularized steps to avoid participating in the preparation of or negotiating for

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