

**CITY OF MADISON
CITY ATTORNEY'S OFFICE
Room 401, C.C.B.
266-4511**

June 2, 2000

OPINION 00-09

**TO: Mayor Bauman
Aldersperson Dorothy Borchardt**

FROM: Eunice Gibson, City Attorney

RE: Ethical Concerns Related to the Ice Arena Study Committee

You have asked for legal advice regarding the work of the Ice Arena Study Committee. I understand that the Committee was created by the 2000 Operating Budget. The Budget calls for the appointment of a committee to include staff from the Parks Division and Comptroller's Office, representatives from ice arena user groups, and Alders Bellman, Borchardt, and Poulson. The committee is directed to "explore alternative ownership and operating options regarding the two ice arenas." The Budget also states that "The goal of the study will be to reduce or stabilize the Ice Enterprise operating subsidy."

Members of the Committee were appointed by the Mayor and approved by the Council. The Committee prepared and issued a request for proposals (RFP). The RFP described the facilities, established criteria for evaluation of proposals, and set a deadline for responses.

You informed me that the Ice Enterprise Committee received several responses to its request for proposals. You said that one of the responses came from the spouse of a member of the Committee who is a Parks Division staff representative. That proposal has since been withdrawn and this opinion will not discuss it further. Another of the responses was signed by a Committee member. The other signer of that same proposal is the adult son of a third committee member.

Your request requires analysis of the City's Code of Ethics, Sec.3.47, Madison General Ordinances (MGO), the State of Wisconsin Code of Ethics for Local Government Officials, Employees and Candidates, Sec. 19.59, Wis.Stats., and another statute which forbids private interests in public contracts, Sec. 946.13, Wis. Stats.

It does not appear that any of these situations is intended to result in personal financial

gain for any individual. Rather, all of the proposers and, indeed, all of the committee members, are looking for ways to keep the ice arenas available and affordable.

That does not mean that these statutes and ordinances do not apply. Even though the user groups are nonprofit organizations, staffed by volunteers, they are still competing for a share of a scarce resource--the City's subsidy-- and they do have a financial interest in the decision to be made by the City on the future ownership and management of the ice arenas. The Committee and its members must comply with applicable statutes and ordinances.

Sec. 946.13, Wis.Stats. provides:

946.13 Private interest in public contract prohibited.

(1) Any public official or public employee who does any of the following is guilty of a Class E 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;...(Emphasis added.)

Violations of this section of the statutes cannot be avoided by abstention, since the violation consists in having a private pecuniary interest in a contract regarding which a person has authority to exercise discretion, whether or not that discretion is exercised. The committee member who signed a proposal probably does not, himself, have a "private pecuniary interest" in the proposed contract. The user groups involved in the proposal probably do have such an interest. Since Sec. 946.13, Wis. Stats., is strictly construed, the Committee member probably did not violate this statute. There is some risk of violation if this committee member performs any further Committee functions in connection with these proposals.

The City's Code of Ethics must also be considered.

Sec. 3.47 (5)(a)1. MGO provides:

1. Use of Office or Position. No incumbent may use or attempt to use her or his position or office to obtain financial gain or anything of value or any advantage, privilege or treatment for the private benefit of herself or himself or her or his immediate family, or for an organization with which she or he is associated....

All Committee members are "incumbents" within the meaning of the City of Madison Code of Ethics.

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The provisions of Sec. 19.59 (1)(a) Wis. Stats. are similar to Sec. 3.47 (5)(a)1., MGO. Sec. 19.59 (1)(a) Wis. Stats provides:

(a) No local public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated...

Sec. 3.47 (2)(b), MGO defines “associated” as follows:

(b) "Associated," when used with reference to an organization, includes any organization in which an individual or a member of her or his immediate family is a director or officer or owns or controls, directly or indirectly, and severally or in the aggregate, at least 2% of the outstanding equity...

Sec. 19.42 (2) Wis. Stats. defines “associated” as follows:

(2) “Associated”, when used with reference to an organization, includes any organization in which an individual or a member of his or her immediate family is a director, officer or trustee, or owns or controls, directly or indirectly, and severally or in the aggregate, at least 10% of the outstanding equity or of which an individual or a member of his or her immediate family is an authorized representative or agent.

This definition is similar to the definition in Sec. 3.47, MGO, except that it adds, “or of which an individual or a member of his immediate family is an authorized representative or agent”

It appears that the Committee member, by helping develop a request for proposals and then submitting a proposal in response to that same request, did “use...his office to obtain...financial gain oradvantage, privilege or treatment for the private benefit of....an organization with which...he is associated.” However, since the Committee member’s relationship to the organization which made the proposal is not entirely clear, it is not a certainty that he is “associated” with the organization. Since he acted as a “representative or agent” in signing the proposal, he would be “associated” with the organization within the meaning of Sec. 19.59(1)(a), Wis.Stats.

This is an additional basis for my advice that both Committee members who submitted proposals ought not take any further part in the Committee’s proceedings.

A third Committee member is the father of one of the proposers. This Committee member should not play any role in establishing additional criteria or evaluating any of the proposals.

Sec. 3.47 (5)(a) 3.a. provides, in relevant part:

3. Limitations on Actions... no incumbent may:

a. Take any official action affecting, directly or indirectly, a matter in which she or he, a member of her or his immediate family, or an organization with which she or he is associated has a financial or personal interest;

Sec. 3.47 (2)(d) provides:

(d)"Immediate family" means 1. An individual's spouse or designated family or registered domestic partner, or 2. An individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of her or his support from the individual or from whom the individual receives, directly or indirectly, more than one-half of her or his support.

Sec. 3.47 (2)(f) provides:

(f)"Personal interest" means any interest greater than nominal, direct or indirect, arising from blood, marriage, adoption, guardianship or designated family or registered domestic partner relations or from close business, political or other associations.

To the best of my knowledge, the Committee member's son is financially independent from his father. Thus, under Sec. 3.47(2)(d)MGO, the son is not a member of the father's "immediate family."

However, their relationship probably meets the definition of "personal interest" ... "any interest greater than nominal, direct or indirect, arising from blood... adoption...."

Thus, this Committee member should not "take any action affecting, directly or indirectly" the matter of the ice arena proposals. Establishing evaluation criteria constitutes "...any action affecting (the matter) directly or indirectly." as does evaluation of any of the proposals.

When a committee is comparing proposals for the purpose of selecting one of them, the committee is acting on all of the proposals. Therefore, it would not be permissible for a Committee member to abstain from consideration of just one of the proposals. A committee member who is forbidden by the Code of Ethics to act on the proposal in which he/she or his/her organization has a personal or financial interest is forbidden to act on the entire proposal evaluation process.

A person who has doubt about the application of the ethics ordinance may ask the Ethics

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Board for an advisory opinion under Sec. 3.47(11), MGO.

I express no opinion as to the process to be followed in evaluating the proposals and completing the Committee's work. That is a matter of policy.

Eunice Gibson
City Attorney

Caption: Committee members who have submitted proposals in response to a request for proposals approved by their Committee are advised not to participate further in the Committee's work. A Committee member whose adult child has submitted a proposal is advised not to take part in any Committee action having any relation to the proposal process.

EG:nje

cc: City Clerk
James Morgan, Parks Superintendent
Jim O'Keefe, Assistant to the Mayor
Tim Fruit, City Comptrollers Office

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bcc: As usual