



Ethics and Conflicts of Interest Part 2: Private Interest in Public Contracts*

Claire Silverman, Legal Counsel, League of Wisconsin Municipalities

*Author's Note: *This is the second article in a 3-part series covering (1) the state ethics code applicable to local public officials, (2) the law prohibiting private interests in public contracts, and (3) the Compatibility of Offices doctrine and miscellaneous statutes prohibiting certain conduct.*

Last month's article focused on the state ethics code which sets minimum standards of ethical conduct for local public officials. This month we turn our attention to Wis. Stat. § 946.13, often referred to as the "pecuniary interest" statute. "Pecuniary" means relating to money. With limited exceptions, § 946.13 prohibits public officials and public employees from having a *private* pecuniary interest in *public* contracts.¹

There are two important reasons why public officials and employees need to understand and avoid violating § 946.13. First, it is a felony criminal statute. Second, it is a strict liability statute which means that conviction does not require the state to prove knowledge of wrongdoing or criminal intent.² According to the Wisconsin Supreme Court, § 946.13 "is directed not at corruption but at conduct presenting an opportunity for corruption."³

Prohibited Conduct

Section 946.13(1) contains two subsections that apply when an official or employee has a private pecuniary interest in a public contract. Subsection (1)(a)

prohibits a public official or employee from acting in a private capacity. Subsection (1)(b) prohibits them from acting in their official capacity. To better understand the prohibitions, it is helpful to examine their component parts.

Private capacity prohibition

Section 946.13(1)(a) prohibits public officials and employees, in their *private* capacity, from engaging in the following conduct:

- Negotiating, bidding for or entering into;
- a contract in which the official or employee has a direct or indirect private pecuniary interest;
- if the official or employee is *authorized* or required by law to participate in their capacity as officer or employee in the making of the contract.

Significantly, this private capacity prohibition does not require that an official or employee actually take any official action in regard to the contract. The statute imposes liability simply when an official or employee is authorized to participate in the making of the contract and takes any of the prohibited actions in their private capacity. Abstaining from voting on or refraining from acting with regard to the contract does not prevent a violation. Additionally, violation of § 946.13(1)(a) does not require that a contract be executed. Negotiation or bidding for the contract is enough to violate the restriction.⁴

Understanding this prohibition on private action is key because this is the part of the pecuniary statute most likely to be inadvertently violated. However, as noted earlier, inadvertent violations are still violations given that § 946.13 is a strict liability statute.

A public official or employee with a private pecuniary interest in a public contract cannot avoid violating § 946.13(1)(a) by having someone else negotiate or bid for the contract on their behalf. The law "forbids a public officer or employee from accomplishing through an agent that which the law prohibits [the officer or employee] from doing directly."⁵ This means that if another person or entity is acting as agent for the public official or employee, then the actions of that person or entity will be deemed those of the official or employee for purposes of § 946.13(1).

Official capacity prohibition

Section 946.13(1)(b) prohibits a public official or employee from engaging in the following conduct:

- Participating in the making of a municipal contract in his or her official capacity or performing some function requiring the exercise of discretion in regards to a municipal contract;
- if the official has a direct or indirect financial interest in the contract.

In contrast to (1)(a), (1)(b) requires some affirmative act such as a vote or some other participation in the making or execution of the contract in order

for there to be a violation. Accordingly, refraining from acting in all official or authorized capacities on the contract will prevent violation.

Exceptions

There are a number of statutory exceptions to § 946.13(1).⁶ This article does not review them all. Probably the most important exception is for contracts in which any single public officer or employee is privately interested that do not involve receipts and disbursements by the municipality aggregating more than \$15,000 in any year.⁷ Another important exception provides that the prohibition on official action (946.13(1)(b)) does 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 the contract.⁸

These exceptions should not be viewed as authorizations. They remove the conduct from the scope of § 946.13, but do not immunize the behavior from other applicable restrictions such as the state ethics code for local officials, common law rules, or local ordinances and rules.

Enforcement and Penalties

A contract entered into in violation of § 946.13 is void and the municipality in whose behalf the contract was made incurs no liability thereon.⁹ Violation of Wis. Stat. § 946.13 is a Class I felony and subjects the person to a fine of not more than \$10,000, imprisonment for not more than three years and six months, or both.¹⁰ A conviction would also lead to an automatic vacation of an elective office since the official would be constitutionally and statutorily barred from holding public office.¹¹

Hypothetical Pecuniary Interest Statute Problems¹²

1. *You are a member of the city council and are employed by a local engineering firm. Your city recently decided to solicit bids from qualified engineering firms to study its municipal water system. The council appropriated \$50,000 for the contract. You are not involved in any management decisions at your engineering firm, but a major portion of your work with the firm relates to design and operation of municipal water systems. In fact, you are the firm's expert on municipal water systems. Your firm intends to submit a bid for the water system study contract with your city and you intend to work on the contract if it is awarded to your firm. Do you have a problem with Wis. Stat. § 946.13(1)?*

► p.30

AUDIT+ACCOUNTING SOLUTIONS
FOR YOUR MAINSTREET

HAWKINS ASH
CPAs

Part of your business. Part of your life.

AICPA
GAQC Member

Kevin Behnke, CPA
920.684.2542
kbehnke@hawkinsashcpas.com

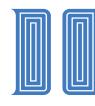
Monica Hauser, CPA
608.793.3142
mhauser@hawkinsashcpas.com

No time? No worries.
We bring the bank to you.



We know you're busy, so let us bring the bank right to your office. Our Treasury Management team makes it easy.

Contact treasurymanagement@icbk.com or visit InvestorsCommunityBank.com/muni.html



INVESTORS
COMMUNITY BANK
we walk in your shoes

Member FDIC



SCAN ME

Appleton / Green Bay / Manitowoc / Stevens Point

No case law or legal authority provides a clear answer, but given your employment by the firm and your status as the firm's expert on municipal water systems, you likely have an indirect private pecuniary interest in the contract. To avoid violating § 946.13(1)(b), you should not participate in your official capacity. If any evidence suggests that the engineering firm is acting as your agent for purposes of the contract, then an attempt by the firm to negotiate or bid for or enter into the contract to study the city's water system would violate § 946.13(1)(a).

What if you do not do any work on the contract?

If you do not do any work on the contract, it seems less likely that the firm is acting as your agent.

What if, instead of employment, you are a senior partner in the firm but will do not do any work on the contract?

If being a senior partner means you have a say in the firm's management decisions, the firm is likely to be viewed as acting as your agent and the firm's submission of a bid likely violates § 946.13(1)(a).

2. You are a nominee for a position on a city's redevelopment authority. You are also director of a local nonprofit organization which received a \$25,000 development loan from the authority one year ago. Can you serve on the authority?

Yes. Since the loan was negotiated, bid for, and entered into before appointment to the redevelopment authority and before you had any authority to participate as a public official in the making of the loan, there is no violation of § 946.13(1). However, if your organization attempts to renegotiate the terms of the existing loan or seeks a new loan while you serve on the authority,

that would violate § 946.13(1)(a). Moreover, § 946.13(1)(b) prohibits you from taking any action regarding the current administration of the existing loan while you serve on the authority.

3. Two years ago you were elected as a village trustee. You are a mechanic and own the only vehicle repair shop within 60 miles of the village. As long as anyone can remember, village vehicles have been serviced at your shop. As a trustee, you always abstain from voting on bills and any claims or other matters relating to your store. Last year, total sales to the village amounted to \$12,000. Did you violate § 946.13(1) last year?

No. Contracts involving receipts and disbursements taken all together and less than \$15,000 in any year do not violate § 946.13(1).

This year, sales to the village are approaching \$17,000 dollars. Are you in violation of § 946.13(1) this year?

Yes. The sales transaction that pushed you over the \$15,000 limit of § 946.13(2)(a) was an impermissible contract under § 946.13(1)(a). While abstention protected you from violating the prohibition on official action on a contract where you have a financial interest, it does not prevent you from violating the provision prohibiting private involvement in a contract where you have official authority to act.

4. You are a city council member. The city's human resources director is retiring and the position will be vacant in the near future. The position pays an annual salary of \$68,000. Can you apply for the position before you resign from the city council?

No. Submission of an application for employment is a bid for a contract. Since

the position will pay an annual salary in excess of \$15,000, you must resign from the city council before you can apply for the position so that you have no authority to take action on the contract when you throw your hat in the ring.

You intend to resign from office before you submit your application. However, you know the mayor will nominate the new director to the city council for approval and want to talk to her about your options. Can you talk to the mayor while you are still a member of the city council and let her know that you are interested in the position?

No. Such discussion probably constitutes negotiation or bidding for the employment and would violate § 946.13(1)(a). The discussion with the mayor is also arguably an improper use of your office under § 19.59(1)(a) of the state ethics code for local government officials.

Would you violate § 946.13(1) if you applied before resigning but withdrew your application before the city acted on it?

Yes. Section 946.13(1)(a) prohibits a public official, in his or her private capacity, from negotiating or bidding for a contract in which the official has a financial interest if the official is authorized to participate in his or her official capacity in the making of the contract. Applying for the position in your private capacity while authorized to exercise official discretion regarding the contract technically violates the statute; it does not matter that you have withdrawn your application before it was acted on. However, withdrawing your application may reduce the risk of being prosecuted for the violation.

Pecuniary Interest 395

1. Contract includes a conveyance, which is a transfer of property from one owner to another. Wis. Stat. § 946.13(4).

2. *Id.*

3. *State v. Stoehr*, 134 Wis. 2d 66, 79, 396 N.W.2d 177, 182 (1986).

4. *State v. Venema*, 2002 WI App 202, 257 Wis. 2d 491, 650 N.W.2d 898

5. 75 Op. Att'y Gen. 172, 174 (1986).

6. See Wis. Stat. § 946.13(2), (5), (6), (7), (8), (9), (10), and (11).

7. Wis. Stat. § 946.13(2)(a).

8. Wis. Stat. § 946.13(5).

9. Wis. Stat. § 946.13(3).

10. Wis. Stat. § 939.50(3)(i).

11. Wis. Const. art. XIII, sec. 3(3) and Wis. Stat. § 17.03(5).

12. These hypotheticals are only intended to educate how we believe the law would apply to certain fact situations. We emphasize that League attorneys' interpretations are educated guesses; they do not carry the weight of authority.