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Ethical Considerations in Public Works Projects

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Topics Covered Today

- Prohibited Conduct for Municipal Officials and Employees
- Public Construction Law
- Competitive Bidding Procedures
- Best practices for Public Works Contracts
- Questions

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Prohibited Conduct for Municipal Officials and Employees

Prohibited Conduct

- Code of Ethics for Local Officials
 - Section 19.59 of Wisconsin Statutes
- Private Financial Interests in Public Contracts
 - Section 946.13 of Wisconsin Statutes
- Misconduct in Office
 - Section 946.12 of Wisconsin Statutes
- Bribery
 - Section 946.10(2) of Wisconsin Statutes

Code of Ethics

- Prohibits using your office or position for private gain
 - Sec. 19.59(1)(a) of Wisconsin Statutes

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.**

Code of Ethics

- Exception to Prohibition against using your office or position for private gain

Sec. 19.59(1)(a) of the Wisconsin Statutes, does not prohibit a local public official from using the title or prestige of his or her office **to obtain campaign contributions** that are permitted and reported.

Code of Ethics

- Prohibits Illegal Influence
 - Sec. 19.59(1)(b) of Wisconsin Statutes

No person may offer or give to a local public official, directly or indirectly, and **no local public official may solicit or accept** from any person, **directly or indirectly, anything of value if it could reasonably be expected to influence the local public official's vote, official actions or judgment**, or could reasonably be considered as a reward for any official action or inaction on the part of the local public official

What is “Anything of Value”?

- This means any **money** or **property**, **favor**, **service**, **payment**, **advance**, forbearance, **loan**, or **promise of future employment**
- Does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under sec. 19.56, Stats., political contributions which are reported, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

Code of Ethics

- Exception to Prohibition against Illegal Influence

Sec. 19.59(1)(b) of the Wisconsin Statutes does not prohibit a local public official from engaging in **outside employment.**

Code of Ethics

- Prohibits Making or Refraining from Making a Contribution or Vote
 - Sec. 19.59(1)(br) of Wisconsin Statutes

This also prohibits a local public official holding an elective office from **giving, offering or promising to give, or withholding** or offering or promising to withhold, his or her **vote or influence**, or promising to take or refrain from taking official action **with respect to any proposed or pending matter in exchange for any other person making or refraining** from making a political contribution or providing or refraining from providing any service or thing of value to or for the benefit of a candidate, a political party, any other person who is subject to registration, or any person making a communication that contains a reference to a clearly identified local public official holding an elective office or to a candidate for local public office.

Code of Ethics

- Prohibits Taking Action in a Matter in which the Public Official has an Interest.
 - Sec. 19.59(1)(c) of Wisconsin Statutes

No local public official may take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest; OR

use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the official's immediate family either separately or together, or an organization with which the official is associated.

What is “Immediate Family”?

- An individual's spouse; and
- An individual's relative by marriage, lineal descent or adoption who receives, directly or indirectly, more than one-half of his or her support from the individual.

What is “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**.

Code of Ethics

- Exception to Prohibition Against Taking Action in a Matter in which the Public Official has an Interest.

However, sec. 19.59(1)(c), Stats., does not prohibit a local public official from taking any action concerning the **lawful payment of salaries or employee benefits** or **reimbursement of actual and necessary expenses**, or prohibit a local public official from taking official action with respect to any proposal **to modify a county or municipal ordinance**. Sec. 19.59(1)(d), Stats.

Advisory Ethics Opinions

- Who may request an Opinion
 - Individuals may request an advisory opinion from the municipal ethics board or, if there is none, the municipal attorney on behalf of themselves, an organization or a governmental body. An appointing officer, with the consent of a prospective appointee, may request an opinion on behalf of that person.
- Format
 - Requests for advisory opinions and the opinions must be in writing.

Advisory Ethics Opinions

- Evidence of intent to comply
 - Compliance with an advisory opinion is prima facie (on its face) evidence of intent to comply with sec. 19.59, Stats., or a local ethics ordinance when the material facts are as stated in the opinion request.
- Confidentiality
 - The identity of the person requesting an advisory opinion is confidential and a municipal attorney or a member or agent of a municipal ethics board cannot reveal the person's identity.

Enforcement and Penalties

- Enforcement
 - By **district attorney** upon the verified complaint of any person.
 - If the district attorney fails to commence an action within twenty days after receiving a verified complaint or refuses to commence such an action, the **person making the complaint may petition the attorney general** to act upon the complaint. The attorney general may then bring an action.

Enforcement and Penalties

- **Civil**
 - Forfeit **not more than \$1,000** for each violation
- **Criminal**
 - Fined not less than **\$100 nor more than \$5,000** or imprisoned not more than **one year in the county jail or both**
 - A person who **intentionally violates** sec. 19.59(1)(br), Stats., is guilty of a **Class I felony** - a fine not to exceed \$10,000, or imprisonment not to exceed three years and six months, or both.
- **Costs**
 - If the district attorney prevails in an action, the court shall award any forfeiture recovered together with reasonable costs.

Private Financial Interests In Public Contracts

- Sec. 946.13, Stats., sometimes referred to as the "pecuniary interest" statute, prohibits public officials from having a private interest in a public contract.
- Strict liability statute meaning conviction does not require criminal intent.
- Prohibited Conduct:
 - Prohibition on Official Action
 - Prohibition on Private Action

Private Financial Interests In Public Contracts

- Prohibition on Official Action
 - Prohibits a public official, in his or her **official capacity**, from **participating in the making of a contract** in which the officer has a private **pecuniary interest, direct or indirect**, or performing in regard to that contract **some function requiring the exercise of discretion** on the officer's or employee's part.
 - Because the prohibition is on official action, abstaining from all discussion and votes relating to the matter will prevent a violation of this subsection.

Private Financial Interests In Public Contracts

- Prohibition on Private Action
 - Prohibits a public official, in his or her **private capacity**, from **negotiating, bidding for or entering into a contract** in which the officer has a **private pecuniary interest, direct or indirect**, if at the same time the officer is **authorized or required by law to participate in the officer's capacity as such officer 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.
 - Because the prohibition is on private action when an officer is authorized by law to participate in an official capacity, abstention cannot cure, although it may be that one of the exceptions set forth below applies.

Private Financial Interests In Public Contracts

- The prohibitions do not apply to contracts that:
 - do not involve receipts and disbursements aggregating more than \$15,000 in any year.
 - involving the deposit of public funds in public depositories
 - involving loans
 - for the publication of legal notices
 - tax titles, tax certificates, or instruments
 - for the sale of bonds or securities
 - with, or tax credits or payments, farmland preservation, soil and water resource management, soil erosion control, animal waste management, nonpoint source water pollution abatement.
- Two percent stock interest
 - There is an exception from the prohibition on official action, for persons who own no more than 2 percent of the stock of the corporation involved.

Misconduct in Office

- Any public officer or public employee who does any of the following is guilty of a Class I felony:
 - Intentionally fails or refuses to perform a nondiscretionary duty
 - Does an act which he or she knows is in excess of your lawful authority
 - Exercises a discretionary power in a manner inconsistent with the duties to obtain a dishonest advantage.
 - Falsifies an entry in an account or record book, etc.
 - Solicits or accepts for the performance of anything of value
- Sec. 946.12 of Stats.

Bribery

- Municipal officers and employees may not **accept any property or personal advantage**, pursuant to an **understanding that you will act in a certain manner** regarding any matter which is pending or might come before you **in your capacity** as an officer or employee or that you will do or omit to do any act in violation of your lawful duty. Sec. 946.10(2) of Wis. Statutes.
- **A Class H felony**
 - fine not to exceed \$10,000, or imprisonment not to exceed six years, or both.

Miscellaneous Statutes

- Prohibited from:
 - Accepting discounts related to certain stadiums. Sec. 19.451 of Wis. Statutes.
 - **May not accept any discount on the price of admission** or parking, including any discount on the use of a sky box or private luxury box, **at a stadium that is exempt from general property taxes** under sec. 70.11(36), Stats.
 - \$500 forfeiture per violation.
 - Purchasing items at less than full value. Sec. 946.14 of Wis. Statutes.
 - May not **intentionally purchase for less than full value or discount any claim** held by another against the state or a political subdivision thereof or against any public fund.
 - Class E Felony, a fine not to exceed \$50,000 or imprisonment not to exceed 15 years, or both.

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Public Construction & Competitive Bidding

Public Works Bidding Process

- Identify and design project
- Create bid documents including bidder qualifications and project specifications
 - Providing detail allows
- Advertise Project
- Publish Bid Materials
- Accept and review bidder qualification materials
- Bids open
- Contract Awarded

Public Construction

- The term “public construction” is not defined in the state bidding statutes.
- Wisconsin law requires state agencies, counties, cities, villages, and towns to engage in competitive bidding when the estimated cost of a public works project exceeds a specified dollar amount.
 - State: \$50,000 and above
 - Cities and Villages: \$25,000 and above
- Projects between \$5,000 and \$25,000 require Class I notice before contract executed.

Bidding Methods

Bidding Methods for Cities and Villages

Contracts less than \$5,000	State bidding regulations not mandated by law.
Contracts greater than \$5,000 but less than \$25,000	Board of public works shall give a Class 1 notice, under ch. 985, of the proposed construction before the contract for the construction is executed. Wis. Stat. § 62.15(1)
Contracts greater than \$25,000	All public construction, the estimated cost of which exceeds \$25,000, shall be let by contract to the lowest responsible bidder. Wis. Stat. § 62.15(1)

Proof of Responsibility

- Pre-Qualify Potential Bidders under Sec. 66.0901(2)
 - Municipalities may require a potential bidder to submit a sworn affidavit that consists of information relating to:
 - financial ability
 - Bonded, delinquent taxes, liens and judgements
 - equipment
 - experience in the work prescribed in the public contract
 - Claims against retainage and bonds, termination, lawsuits
 - References
 - Experience of project manager/superintendents
 - and other matters that the municipality requires for the protection and welfare of the public in the performance of a public contract.
 - License, certification, legal organization
 - Safety procedures and program, OSHA citations

Proof of Responsibility

- Pre-Qualify Potential Bidders under Sec. 66.0901(2)
 - The statement shall be in writing on a standard form of a questionnaire that is adopted and furnished by and filed with the municipality.
 - No more than 5 days before opening of bids. Statement shall be confidential except my written order by potential bidder, municipal need, or a court order.
 - Municipality shall properly evaluate the statement and determine whether the potential bidder is qualified or unqualified.
- Best Practice Point
 - Ask yourself, why does this question, request, or denial help the Municipality get the best bid for the job?

Proof of Responsibility

- Bidder Qualification Condition Precedent to Submission
 - Bids received without a qualification are not considered received. Wis. Stat. 66.0901(3)
 - Once qualified on one project, the bidder need not qualify for each project, unless required to do so by the Municipality. Wis. Stat. 66.0901(3)
- Reject or Disregard Bids
 - Municipality may reject or disregard a bid when the answers to the pre-qualification questionnaire are insufficient. Wis. Stat. 66.0901(4).
- If rejecting a bidder's qualifications, create a record of why they are rejected.

Responsible Bidder Database

- Responsible Bidder Database is a collaborative effort with:
 - Construction Business Group
 - League of Wisconsin Municipalities
 - Wisconsin Counties Association
 - Wisconsin Towns Association
- You may visit the database at: <https://cbgwi.com/bidder-database/>

Bidding Requirements

- Section 66.0901(1m) of Wisconsin Statutes provides the procedural requirements for the bidding process:
 - Sealed Competitive Bids
 - Lowest Responsible Bidder
 - Except when necessary to secure federal aid, Municipalities may not give preference towards geographic location or other criteria other than the lowest responsible bidder method.
 - For example, labor agreements.

Public Construction Exceptions

- **Public Emergency Exception**
 - Public construction contracts for the “repair and reconstruction of public facilities” may be done without bidding when damage or threatened damage creates a public emergency as determined by the appropriate body. Wis. Stat. secs. 61.54 and 62.15(1b)
- **Work done completely by Municipality**
 - State bid law allows cities and villages, by a three-fourths vote of all the members-elect of the council/board, to provide by ordinance that any class of work may be done directly by the city/village without bidding. Wis. Stat. secs. 61.54 and 62.15(1)
- **Donated Improvement**
 - Bidding requirements does not apply to projects that are donated to the municipality after completion. Wis. Stat. sec.62.15(1e)

Advertisement, Notice, and Bid Bond

- Advertisement
 - Publish a class 2 notice under Wis. Stats. secs. 61.54 and Sec. 62.15(3).
 - A class 2 notice requires two insertions or publications of the notice occurring one week apart.
 - The last notice must be published at least one week before the bid opening. Wis. Stat. Sec. 985.01(1).
- Bids must be accompanied by a certified check or bid bond equal to at least 5% but not more than 10% of project cost as a guaranty. Wis. Stat. sec. 62.15(4) and 61.54

Competitive Bidding

- When do the competitive bidding requirements not apply?
 - State law only requires competitive bidding for municipal contracts involving public construction with an estimated cost exceeding \$25,000.
 - Examples include contracts for the purchase or sale of real estate; contracts for ambulance, refuse pickup, recycling or similar services.
 - *Aqua-Tech, Inc. v. Como Lake Protection and Rehabilitation District*, 71 Wis.2d 541, 239 N.W.2d 25, 28 (1976).

Prohibited Bidding Practices

- Municipality may not require any of the following:
 - A bidder to enter into or adhere to an agreement with a labor organization.
 - Consider whether a bidder has entered into or adheres to an agreement with a labor organization.
 - Require a bidder to enter into or adhere to an agreement with a labor organization.

State Prevailing Wage

- In 2015, the Wisconsin legislature repealed prevailing wage protections on local public works projects.
- Federal Davis Bacon prevailing wage may still apply to state and local projects in Wisconsin

Federal Prevailing Wage

- Davis Bacon Act and Related Acts require all contractors and subcontractors performing work on federal construction contracts or federally assisted contracts in excess of \$2,000 to pay their laborers and mechanics not less than the prevailing wage rates and fringe benefits for corresponding classes of laborers and mechanics employed on similar projects in the area.
- Includes transportation, housing, air, water pollution reduction and health.

Bidding Best Practices

- Municipalities cannot evade the statutory bid requirements by dividing a public construction project into a series of smaller projects to that fall under the \$25,000 statutory bidding threshold.
 - *Menzl v. City of Milwaukee*, 32 Wis.2d 266, 274, 145 N.W.2d 198, 202 (1966)
- Municipalities may use the competitive bidding procedures when it is not strictly necessary, but may not abandon or change the procedure during the bidding process.
 - *Waste Management v. Wisconsin Solid Waste Recycling Authority*, 84 Wis.2d 462, 267 N.W.2d 659 (1978)

Bidding Best Practices

- Receiving No Bids
- Identical Bids
 - Most advantageous for municipality, by lot, or rebid.
- Late Bids
- Amending the Project
 - Negotiating Changes
 - Increased Costs
 - Cost Escalation Clauses are limited to 15% of the contact price. Wis. Stat. sec. 62.15(1c); *Probst v. City of Menasha*, 345 Wis. 90, 13 N.W.2d 504 (1944).

Bidding Best Practices

- Goal of the bidding process is to get the best bid from a contractor who is able to deliver a quality project that is completed on-time and on budget.
- Municipalities should set objective, impartial, project-specific criteria to help bidders understand expectations and requirements.
- When in doubt, have a conversation with your municipal attorney or League staff.

Questions?



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