

ROCK COUNTY, WISCONSIN

April 14, 2008



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Hon. J.B. Van Hollen
Wisconsin Attorney General
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

RE: Opinion Request

Dear Attorney General Van Hollen:

I am requesting an expedited informal Attorney General's Opinion on the question of whether a firm that the County hires as a construction manager can also serve as a construction contractor on the same project. Second, if the positions of construction manager and construction contractor are compatible. Finally, whether the County has discretion to be able to limit the two positions.

The questions we have deal with a potential jail expansion project. Rock County has put out a Request for Qualifications for those interested in the role of construction manager for the project. One of the provisions the County placed in the Request for Qualifications stated that it was understood that if selected as the construction manager, you will not be allowed to bid as a contractor on this project. One of the construction firms has questioned that and has asked that the provision prohibiting both roles be removed. In fact, that company hired another law firm to research the issue and they opined that if we did not allow the construction manager to bid on being a construction contractor, the County could be in violation of the bidding statutes. (copy enclosed) I do not agree with that assessment. I have done extensive research and can find no specific statute or case law that addresses these specific issues. While there are specific exceptions that prohibit the County from using a design build concept, I can find none of the same prohibition against having the same company serve as both construction contractor and construction manager. However, I do question whether or not the positions are compatible.

The Attorney General in 1956 stated that the rule of incompatibility of public offices is as follows:

"Incompatibility is not simply a physical impossibility to discharge the duties of both offices of the same time, it is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or were a contrariety and antagonism would result in the attempt by one person to discharge faithfully and impartially the duties of both..." 45 Op.Atty.Gen. 100 at 102.

The Wisconsin Supreme Court in *State v. Jones*, 130 Wis. 572 (1907) stated:

"...It was not an essential element of incompatibility in common law that the clash of duty should exist in all or in the greater part of the official functions. If one office was superior to the other in some of its principal and important duties so that the exercise of such duties might conflict, to the public detriment, with the exercise of the other important duties in the supported office, then the offices are incompatible. *Id.* at 575-576.

One of the construction manager's duties is to protect the County's interest in determining that the construction contractors are performing their duties as required by their respective construction contracts. To allow both a construction contractor and construction manager to be the same person or entity would essentially require the construction manager to watch themselves and it is questionable whether there could be compatibility to protect the County's interest. Also, the construction manager would be involved in helping the County evaluate bids from the construction contractors. To have the construction manager and contractor both be the same gives the appearance of impropriety and defeats one of the purposes of having a construction manager. In checking with other counties in the state, it appears that only one county, back in 2003, has ever used the same construction/general contractor and construction manager on a county public project. It is generally a practice that is not done by counties. I would suggest that even though they are not officially county positions, as both agents for the county, contracted construction manager and construction contractor positions because of their nature are incompatible.


Our next question would be whether or not the construction manager functions would even need to be bid out. It is arguable that the construction manager role involves only services to the County and there is a previous Attorney General's Opinion that indicated that professional services are not required to be bid. 76 Atty.Gen.Op 182 indicated section 59.08(1) now 59.52(29)(a) did not apply to architectural services.

If the construction manager is a service, then the County should be able to put whatever restrictions on the position it deems appropriate. As such, the County would be entitled to as a condition of its construction manager position, require that a construction manager not bid on construction contractor provisions. As indicated above, since the construction manager provisions may not even need to be bid at all, I believe the County is within its rights to put conditions on its construction manager. Nevertheless, the County, even it bids out the construction manager job, could set up conditions for the bid. The case of *DMK, Inc. v. Town of Pittsfield*, 290 Wis.2d 474, 711 N.W.2d 672 (Ct. App. 2006) upheld the discretion of municipalities in awarding bids with conditions. Further, because the bidding laws are designed to prevent fraud or collusion, it would appear that there is ample justification to disqualify a bidder who would be subject to having its own work reviewed by itself as the County's agent.

Based on all of the above, it is my belief that the construction contractor and construction manager positions could legally be the same. However, I believe the positions to be incompatible. Furthermore, the County is within its discretion to put conditions separating the two positions. Do you agree with my position in these matters? I look forward to an informal

reply since this County project is time sensitive. If you have any questions or need clarification, please do not hesitate to contact me.

Sincerely,



Jeffrey S. Kuglitsch
Corporation Counsel

cc: Craig Knutson, Rock County Administrator