



STATE OF WISCONSIN  
DEPARTMENT OF JUSTICE

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July 30, 2008

I—04—08

Mr. Jeffrey S. Kuglitsch  
Corporation Counsel  
Rock County  
51 South Main Street  
Janesville, WI 53545

Dear Mr. Kuglitsch:

You state that Rock County is considering a jail expansion project and as part of that project has published a Request for Qualifications for the position of construction manager for the project. The request for qualifications states that any individual or firm selected as the construction manager would not be allowed to bid as a contractor on the project. The construction manager would provide advice and ideas to the county and its architect in the development of plans, but the responsibility for the designs would rest with the county and the architect. When the design phase was complete the county would advertise for bids. The construction manager would be involved in helping the county evaluate bids from the various contractors. Finally, after the contracts were awarded, the construction manager would monitor the contractors' performance under those contracts.

A company that is interested in competing for both the construction manager and contractor contracts asked a law firm to research whether one company could serve in both roles. The company has shared that law firm's research and conclusions with you. That law firm's memorandum does not conclude that the county cannot separate the contracts for construction management and contractor. Rather, the law firm concluded that precluding the construction manager from bidding on work "would undermine and be inconsistent with an important public policy reflected in the public bidding statute." The law firm concluded that "a Wisconsin county is allowed to have a single entity perform construction management services under a negotiated contract and, on the same project, general construction work under a competitively bid contract." April 4, 2008, letter from Axley Brynerson to Mr. David J. Cullen.

Statutory bidding requirements are designed to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the public receives the best work or supplies at the most reasonable price practicable. *Aqua-Tech v. Como Lake Protect & Rehab, Dist.*, 71 Wis. 2d 541, 550, 239 N.W.2d 25 (1976). Wisconsin Stat. § 59.52(29)(a) requires counties to let by contract to the lowest responsible bidder "all public work, including any contract for the construction, repair, remodeling or improvement of any public work, building, or furnishing of supplies or materials of any kind where the estimated cost

of such work will exceed \$25,000.” In 76 Op. Att’y Gen. 182 (1987), this office concluded that the predecessor statute to Wis. Stat. § 59.52(29) did not apply to architectural and engineering services. The opinion concluded that because professional services were not included within the definition of public work, the county need not advertise its intent to let a contract involving professional services. The opinion noted that nevertheless, “[t]he county could decide that it is good public policy to advertise for proposals to provide architectural services.” 76 Op. Att’y Gen. at 183. Because the construction management services are professional services, the county is free to seek a construction manager outside of the constraints of Wis. Stat. § 59.52(29).

Nothing in Wis. Stat. § 59.52(29) or any other statute prohibits the county from imposing reasonable qualifications and conditions on the construction manager contract. The law firm’s letter to its client does not conclude or even suggest that there is any statutory prohibition. In *Power Systems Analysis v. City of Bloomer*, 197 Wis. 2d 817, 541 N.W.2d 214 (Ct. App. 1995), the court was asked to interpret Wis. Stat. § 62.15(1), which requires cities to let public construction contracts by contract to the lowest responsible bidder when the estimated cost of the contract exceeds a certain level. The city requested bids and stated that the bids were due at 1:00 p.m. on a certain date. The bids were opened after that time and Power Systems Analysis was the lowest bidder. At 2:30 p.m. the city received a late bid that was \$80,000 lower and subsequently awarded the contract to that late bidder. *Id.*

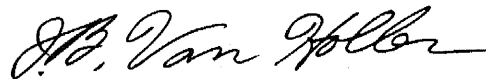
The court held that because the statute did not address the specific details of the bidding process or a city’s power to accept late bids, the city could accept the late bid. *Power Systems*, 197 Wis. 2d at 824. The court noted that the Legislature’s silence on the matter “signifies not ambiguity but a legislative decision to leave specific aspects of the bidding process to the discretion of each city.” Although the court was interpreting the bidding statute governing city public construction contracts, the analysis applies equally to Wis. Stat. § 59.52(29). The Legislature has not restricted a county’s discretion to hire a construction manager and impose reasonable conditions on the contract. While the statute does not explicitly authorize the county to split the construction manager contract from the construction contract, the county is not precluded from doing so under the statute. Like the city’s discretion to accept a late bid, a county’s decision to split the contracts is within its discretionary powers.

You also ask whether the positions of construction manager and construction contractor would be incompatible. The common law doctrine of incompatibility applies “where the nature and duties of two offices were such as to render it improper from considerations of public policy for one person to discharge the duties of both.” *Martin v. Smith*, 239 Wis. 314, 326, 1 N.W.2d 163 (1941). In *Otrodavoc v. City of Green Bay*, 118 Wis. 2d 393, 396, 347 N.W.2d 614 (Ct. App. 1984), the court held that the common law doctrine of incompatibility applies not only to public offices but also to positions of public employment. Therefore, a member of a common council could not also serve as the city’s residential appraiser in the assessor’s office. *Id.*

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Although the doctrine has been applied to positions of public employment, incompatibility of office or positions requires the involvement of two governmental offices or positions. 81 Op. Att'y Gen. 90 (1993), citing 63 Am. Jur. 2d *Public Officers and Employees* § 79 (1984). The construction manager and the construction contractor would be independent contractors, not county employees or officers. Therefore, the doctrine of incompatibility would not apply. The inapplicability of the doctrine, however, does not preclude the county from concluding that splitting the manager position from the construction contract would better protect the county's interests. It is within the county's discretion to decide to separate the positions of construction contractor and construction manager.

Sincerely,

A handwritten signature in cursive script that reads "J.B. Van Hollen". The signature is written in dark ink and is positioned above the typed name.

J.B. Van Hollen  
Attorney General

JBVH:AL:rk