

**1742 PRIVATE INTEREST IN A PUBLIC CONTRACT: PERFORMING A DISCRETIONARY FUNCTION IN REGARD TO A CONTRACT IN WHICH ONE HAS A PRIVATE PECUNIARY INTEREST<sup>1</sup> — § 946.13(1)(b)**

**Statutory Definition of the Crime**

Private interest in a public contract, as defined in § 946.13(1)(a) of the Criminal Code of Wisconsin, is committed by a public officer or public employee who, in a capacity as a public officer or public employee, performs some function requiring the exercise of discretion in regard to a contract in which the officer or employee has a private pecuniary interest.

**State's Burden of Proof**

Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following three elements were present.

**Elements of the Crime That the State Must Prove**

1. The defendant was a public (officer) (employee).

[A \_\_\_\_\_ is a public (officer) (employee).]<sup>2</sup>

2. The defendant in a capacity as a public (officer) (employee), performed a function requiring the exercise of discretion<sup>3</sup> in regard to a contract.<sup>4</sup>

IF THERE IS EVIDENCE THAT THE CONTRACT DID NOT INVOLVE RECEIPTS OR DISBURSEMENTS OF MORE THAN \$15,000<sup>5</sup> IN ANY YEAR ADD THE FOLLOWING:<sup>6</sup>

[This element also requires that the contract involved receipts or disbursements of more than \$15,000 in any year.]

3. The defendant had a private pecuniary interest in the contract.

A "pecuniary interest" is one involving money (or one that can be valued in money).<sup>7</sup>

### Jury's Decision

If you are satisfied beyond a reasonable doubt that all three elements of this offense have been proved, you should find the defendant guilty.

If you are not so satisfied, you must find the defendant not guilty.

### COMMENT

This instruction was originally published as Wis JI Criminal 1741B in 1988. It was revised and the number changed to 1742 in 1995. This revision was approved by the Committee in December 2008.

This instruction is for one type of violation of subsection (1)(b) of § 946.13. For a second type, see Wis JI Criminal 1741. Violations of subsection (1)(a) are covered by Wis JI Criminal 1740.

The offenses defined in § 946.13(1)(b) were discussed by the Wisconsin Supreme Court in State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986). The case involved a director of a state technical institute who received payments in excess of his regular salary from a contract between the institute and entities representing foreign nations. The court held that § 946.13(1)(b) is a strict liability statute in the sense that it does not require the proof of any unlawful intent or corrupt purpose. (The specific offense involved in Stoehr was the type covered by Wis JI Criminal 1742, but the court's holding applies to the statute generally.)

For a discussion of the defense of good faith reliance on the advice of governmental counsel in connection with a violation of § 946.13, see State v. Davis, 63 Wis.2d 75, 216 N.W.2d 31 (1974).

The scope of § 946.13 appears to be very broad. The extent of its application is discussed in several Opinions of the Attorney General. See Op. Att'y Gen. 44 87 (August 24, 1987), Op. Att'y Gen. 42 87 (August 21, 1987), Op. Att'y Gen. 22 87 (April 21, 1987), Op. Att'y Gen. 4 87 (February 25, 1987), Op. Att'y Gen. 33 86 (September 12, 1986), 64 Op. Att'y Gen. 108 (1975), 63 Op. Att'y Gen. 44 (1974), 60 Op. Att'y Gen. 98, 310, and 367 (1971), and 52 Op. Att'y Gen. 367 (1963). One point emphasized by several of the opinions is that a county board member, for example, would be able to avoid liability under

§ 946.13(1)(b) by abstaining from voting on matters relating to their private contracts. See, for example, Op. Att'y Gen. 44 87, Op. Att'y Gen. 42 87, and Op. Att'y Gen. 22 87. However, those opinions advise that abstaining from voting does not avoid a violation of subsec. (1)(a) of the statute (which is covered by this instruction).

A number of exceptions are provided in subsections (2), and (5) - (12). The most common exception is the one found in subsection (2)(a), which excludes contracts which do not involve public receipts or disbursements of more than \$15,000 in any year. See notes 5 and 6, below.

1. Section 946.13(1)(b) prohibits two types of activities on the part of public officers or employees: participating in the making of a contract in which one has a private pecuniary interest (Wis JI-Criminal 1741 is drafted for this situation); and performing a discretionary function with regard to a contract in which one has a private pecuniary interest (Wis JI-Criminal 1742 is drafted for this situation).

2. In the Committee's judgment, the jury may be told, for example that a member of the county board is a public officer. It is still for the jury to be satisfied that, in fact, the individual was a member of the county board.

"Public officer" and "public employee" are defined as follows in § 939.22(30):

"Public officer" means any person appointed or elected according to law to discharge a public duty for the state or one of its subordinate governmental units.

"Public employee" means any person, not an officer, who performs any official function on behalf of the state or one of its subordinate governmental units and who is paid from the public treasury of the state or subordinate governmental unit.

3. The "discretionary acts" requirement was discussed briefly in State v. Stoehr, 134 Wis.2d 66, 396 N.W.2d 177 (1986). The criminal complaint alleged that the defendant, as a director of a state technical institute, "authorized and received . . . monies, over and above his normal salary, for work performed in connection with" four public contracts. The court in Stoehr held that the words "authorized and received" denote the performance of a function requiring the exercise of discretion.

If a definition of "discretionary" is necessary, an adaptation of the following might be helpful: "A public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction." Davis, Administrative Law, § 4.02 (3d ed. 1972).

4. Section 946.13(4) provides that "contract," as used in this section, includes a conveyance.

5. 1995 Wisconsin Act 435 (effective date: June 25, 1996) increased the amount from \$7,500 to \$15,000.

6. A number of exceptions are set forth in subsections (2), and (5) - (12) of § 946.13. Most are quite specialized and are unlikely to apply to most cases. However, the exception that will apply to all cases is the one found in subsec. (2)(a), excluding contracts which do not involve public receipts or disbursements of more than \$15,000 in any year.

The general rule in Wisconsin is that an exception which appears in a separate section of the statute is a matter of defense which the prosecution need not anticipate in the pleadings. State v. Harrison, 260 Wis. 89, 92, 150 N.W.2d 38 (1951); Kreutzer v. Westfahl, 187 Wis. 463, 477, 204 N.W. 595 (1925).

These situations are best handled, in the Committee's judgment, in the same manner as "affirmative defenses." That is, they are not issues in the case until there is some evidence of their existence. Once there is evidence sufficient to raise the issue, the burden is on the state to prove, beyond a reasonable doubt, that the defense, or the exception, is not present. See Moes v. State, 91 Wis.2d 756, 284 N.W.2d 66 (1979); State v. Schulz, 102 Wis.2d 423, 307 N.W.2d 151 (1981).

7. Webster's Third New International Dictionary (Unabridged) defines "pecuniary" as follows: "taking the form of or consisting of money; of or relating to money." Black's Law Dictionary (Fourth Edition) adds: "consisting of money or that which can be valued in money." Although "pecuniary" has apparently not been defined in Wisconsin case law, the Committee believes the meaning should include not only actual money but also "that which can be valued in money" per the Black's definition. For example, if a public officer exchanged land parcels with the county, such an exchange might not involve the transfer of money but "could be valued in money."

The statute extends to both "direct and indirect" pecuniary interests. In a case involving an indirect interest, it may be helpful to elaborate. The 1953 Report on the Criminal Code stated: "The private pecuniary interest may be either direct or indirect, *i.e.*, it may be a pecuniary interest which the actor as an individual expects to get directly, or it may be one which he expects to get indirectly, as when he is an officer or stockholder of a corporation in whose behalf the contract is made." 1953 Report, page 180.