

STATUTORY CONFLICTS OF INTEREST

Contracting with your own Town

1. INTRODUCTION

For town officers, the phrase “conflict of interest” is used in a number of different contexts. Two of the most common references relate to conflicts that prohibit a supervisor from voting on a particular issue because the supervisor has a direct interest in the outcome of the vote (referred to within the Association as “common law conflicts of interest”). The other type of conflict prohibits a supervisor from having a financial interest in a contract with the town (referred to as statutory conflicts of interest). The two types of conflict are often related, but this memo will only discuss statutory conflicts of interest. For information on common law conflicts of interest refer to Document Number: **TP7000**. Supervisors are strongly encouraged to take the application of the statutory conflict of interest prohibition seriously because violating the prohibition carries criminal penalties.

2. GENERAL RULE

The general rule that this paper is built around can be stated as follows:

A supervisor is prohibited from having a direct or indirect interest in a contract with the town unless a statutory exception is found allowing the interest and all of the requirements of the exception are followed.

3. CONFLICT PROHIBITION

For towns, there are two statutes that set out the conflict of interest prohibitions:

- “a supervisor or town board must not be a party to, or be directly or indirectly interested in, a contract made or payment voted by the town board.” Minn. Stat. § 365.37, subd. 1.
- “a public officer who is authorized to take part in any manner in making any sale, lease, or contract in official capacity shall not voluntarily have a personal financial interest in that sale, lease, or contract or personally benefit financially therefrom.” Minn. Stat. § 471.87.

Taking these statements together, the legislature has created a broad prohibition against public officers having an interest in a contract with their own community. The potential penalties involved with violating these sections include prosecution for a misdemeanor, a gross misdemeanor, and/or removal from office. Minn. Stat. §§ 365.37, subd. 5; 471.87. A misdemeanor carries a potential penalty of a fine of up to \$1,000 and up to 90 days in jail, and a gross misdemeanor carries a potential penalty of a fine of up to \$3,000 and imprisonment for up to one year. Minn. Stat. §§ 609.02, subd. 2 & 3. The Minnesota Court of Appeals has given some indication that an officer found to have violated the conflict prohibition might be removed from office even if the person has not been criminally prosecuted for the violation. *Elder v. La Crescent Township*, 2002 WL 1465954 (Minn. App. 2002)(unreported). Additionally, contracts made in violation of the rule will likely be considered void. Op. Atty. Gen., 90-A, July 11, 1957.

It is important to keep the general rule in mind because it forms the standard by which supervisors will be judged. However, the conflict of interest prohibition does not absolutely preclude a supervisor from ever having a financial interest in a contract with the town. There are limited exceptions to the rule set out in Minn. Stat. § 471.88 that do permit interests that would otherwise be prohibited.

a. **Buying Town Property.**

All town officers and employees should be aware of a separate, but related, prohibition that deals with town officers or employees purchasing property or materials from the town and perhaps other public entities. Under Minn. Stat. § 15.054, no officer or employee may sell to another officer or employee any publicly owned property or materials unless certain conditions are followed. This is a blanket rule for public officials and employees with very limited exceptions that are discussed below. A person who violates this section is guilty of a misdemeanor.

The statute allows for a sale to an *employee* (not an officer) if the property is not needed for public purposes, and it is sold at a public auction or by “sealed responses.” The employee may not directly involved in the auction or in the administration or collection of the sealed responses, and at least one week’s published notice is provided of the auction or sealed response request.

Another exception is that a sale can occur to an officer or employee if the items are for sale to the general public in the ordinary course of business or normal course of the employee’s duties.

4. **APPLICATION OF THE CONFLICT RULES**

a. **Who is Covered by the Conflict of Interest Prohibition?**

At the heart of the conflict doctrine is the idea that a person should not be permitted to use his or her public office to form a contract on behalf of their governmental entity that will benefit him or her personally. As such, conflicts are typically only applied to those members of the governing board that are authorized to make decisions regarding contracts (i.e., supervisors). While the clerk and treasurer should also not be allowed to unfairly benefit from contracts with the town by virtue of their positions, the conflict doctrine typically does not apply to those positions due to their lack of authority to actually vote on the contract. If the clerk or treasurer are actively involved in making the contract, however, they should be careful of conflicts of interest.

It is difficult to charge an officer with self-dealing when the officer had no authority to make the deal. However, supervisors should not be misled by this point – a supervisor does not avoid a conflict by simply not voting on who is awarded the contract. It is the authority to vote on a matter that creates a personal financial interest that matters, not whether the supervisor actually votes.

Because indirect interests in contracts are also covered by the prohibition, contracts with spouses and children of supervisors are also potentially covered under the doctrine. In each case, the board must make a factual determination of whether the supervisor would directly or indirectly receive a personal financial benefit from the contract. See, e.g., Op. Atty. Gen., 90e-5, May 25, 1966; Op. Atty. Gen. 90-E-5, Aug. 25, 1955. If the board proposes to contract with a supervisor’s spouse, it is safe to assume the supervisor will have a conflict. For children, the question of conflict usually turns on whether the child is emancipated from the parent who is a supervisor. See Op. Atty. Gen., 90a, Dec. 29, 1958; Op. Atty. Gen., 90A,

Aug. 14, 1957. If there is any doubt as to the existence of a financial interest, the contract should not be pursued with the spouse or child unless it falls within one of the exceptions discussed below.

It is important for the board to record its factual determinations as to the existence of a conflict in the minutes of the meeting. This explanatory record of the findings and conclusions can be critical to avoiding successful challenges to the contract as well as help defuse potential criminal charges.

b. When Does the Conflict Prohibition Apply?

The statutes prohibiting a conflict are worded so broadly that they seem to apply to all payments to supervisors, including payments made for activities such as attending meetings. While it is clear that the prohibitions are not that broadly applied, it is not always clear when a supervisor performing work for the town triggers the conflict prohibition.

Towns are unique in that supervisors often perform a variety of manual labor types of tasks for the town that elected officials in other forms of government usually do not perform. This often results from the fact that the town has no employees to perform the tasks and it is impractical to hire someone every time an odd job arises. Similarly, a supervisor may be assigned certain duties by the board that the other supervisors do not perform. For instance, many towns designate a road supervisor and assign certain additional duties regarding roads (e.g., inspections) that become part of his or her role as a supervisor. As such, the road supervisor will be compensated for work that the other supervisors do not perform, but which have been made part of the supervisor's position. The same could be true if the board designates a supervisor as a park supervisor, community center supervisor, etc. While none of these designations are based on statutory authority, they constitute a division of labor and convey a limited delegation of board authority onto the designated supervisor.

In the context of these expanded "job descriptions" in towns, the board should consider when a supervisor's activities go beyond the "normal" role of a supervisor. For instance, regularly operating town machinery, undertaking a large project, or otherwise regularly performing services more in the nature of a contractor or a town employee will likely trigger the conflict prohibition. Furthermore, being designated a road supervisor does not mean operating the town's grader becomes part of the supervisor's duties as a board member. It is not always easy to make the distinction, but generally speaking any time a supervisor is getting paid to do work outside the supervisor's role as an elected official, a conflict of interest exists. This is generally any time a supervisor is getting paid to do work that the town could hire someone else to do. If the board is not clear on which side of the line the work falls, it is better to err on the side of caution and assume the prohibition applies.

If a potential conflict of interest is identified, the supervisor may not perform the work unless one of the exceptions listed in Minn. Stat. § 471.88 applies to the services or goods to be supplied by the supervisor. If an exception covering the contract exists, the statutory requirements associated with the exception must be followed to the letter or the contract with the supervisor is prohibited. If an exception cannot be found for the particular contract (financial interest), a supervisor may not enter into the contract with the town.

It is important to realize that the conflict prohibition is not limited to written contracts. Even if a formal written contract is not developed related to the services or goods to be

provided by a supervisor, the prohibition still applies if the supervisor has a direct or indirect interest in the contract or a payment.

Furthermore, the prohibition applies even if the supervisor is paid less than market value for the services or goods. It is not the amount of money received that raises the concern, it is the fact that any money is being made from the town outside of the role of supervisor. This is perhaps the largest pitfall for supervisors. It is difficult for some supervisors to believe that there is something “wrong” with performing services for their town at far less than what it would cost to hire a contractor to perform the work. However, no matter how good of a deal the supervisor is giving the town (e.g., performing the services for pennies on the dollar) or how noble the intentions, an exception must be found and followed or the supervisor may not be paid for the work.

4. EXCEPTIONS – WHEN A CONTRACT IS ALLOWED

If a supervisor has a direct or indirect financial interest in a contract with the town, the contract may only be formed *if* it falls under one of the specific exceptions provided in the statutes. Minn. Stat. § 471.88. In order to rely on any of the exceptions, the board must *unanimously* vote, with the interested officer abstaining, to authorize the contract. The following will discuss the exceptions most applicable to towns. Remember, even if an applicable exception is identified, failure to follow all of the statutory requirements associated with the exception will likely be treated as though no exception exists allowing the contract. In other words, the supervisor and the board will be considered as having acted without authority in violation of the statute.

a. **Contracts Not Requiring Competitive Bids.** Minn. Stat. § 471.88, subd. 5.

This exception is very broad in that it allows any “contract for which competitive bids are not required by law.” Minn. Stat. § 471.88, subd. 5. Under Minn. Stat. § 471.345, subd. 3, competitive bids are required when a contract is estimated to exceed \$175,000. Therefore, any contract estimated not to exceed **\$175,000** is potentially permissible. (Updated 8/1/2018)

Keep in mind that the requirements of the municipal contracting law, as well as other procedural requirements, may also apply. For example, if a supervisor is a contractor and has expressed a willingness to undertake a culvert installation project for the town estimated to cost \$30,000, the board is required under the municipal contracting law to obtain at least two written quotes before it can award the contract. Minn. Stat. § 471.345, subd. 4. So, the supervisor would need to submit a written quote or he or she would not be eligible to receive the contract. There are other procedural requirements that may apply and will need to be satisfied as part of entering into the proposed contract. Board members should not develop tunnel vision in these situations, focusing only on the conflict of interest issue.

Because of this exception’s broad application, the legislature has imposed additional requirements that must be followed each time it is relied upon. Minn. Stat. § 471.89. The first of these requirements is that the board authorize the contract by *resolution* in advance of its performance. The resolution must contain certain information (see APPENDIX B for a sample resolution). Such prior authorization is not required in an emergency that makes such a procedure impracticable. Minn. Stat. § 471.89, subd. 2. In such emergencies, the resolution must be passed when payment on the contract is authorized and it must state the facts of the emergency. However, this after-the-fact process is only available in true emergencies in which public safety is at risk.

The second requirement is that before a claim on the contract is paid, the interested officer must file an *affidavit* with the clerk setting forth certain information. Minn. Stat. § 471.89, subd. 3 (See **APPENDIX C** for a sample affidavit). Such an affidavit must be submitted with *each* claim for payment on the contract. Failure to follow both of these requirements will render the contract void.

A summary of the procedure to exercise this exception is provided in **Appendix A**.

b. Contracts for Construction Materials or Services (population under 1,000).

An exception exists that applies only to cities and towns with a population of under 1,000. Minn. Stat. § 471.88, subd. 12. This exception allows contracts to provide construction materials or services, or both. Perhaps the most significant aspect of this exception is that it contains *no* restrictions on the amount of the contract.

To rely on this exception, *all* of the following must be true:

- i. The contract involves providing the town with construction materials and/or construction services;
- ii. The town has a population of 1,000 or less according to the last federal census;
- iii. The sealed bid procedure is used;
- iv. The board unanimously approves the contract; and
- v. The interested officer does not vote on the contract.

In order to satisfy the requirements of Minn. Stat. § 471.88, subd. 1 & 12, the minutes of meeting at which the supervisor's bid is accepted should reflect that the interested supervisor abstained from voting on the award of the contract and that the vote to award to the interested supervisor was unanimously approved by the other supervisors.

c. Supervisors Employed by Contractors

In 2003, the legislature added another exception to the list that only applies to towns. The exception, found in Minn. Stat. § 471.88, subd. 20, allows a town to enter into a contract governed by the uniform municipal contracting law (Minn. Stat. § 471.345) even if the town supervisor is an employee of the contractor. However, the supervisor must have "no role in preparing the contractor's bid or negotiation for the contract with the township." *Id.*

The exception indicates that the supervisor is not precluded from continuing to serve on the board, but the supervisor must: (1) abstain from voting on any official action relating to the contract; and (2) the supervisor must disclose his or her reason for the abstention in the official minutes of the town meeting. For example, on a motion to authorize a change order request on a contract, the supervisor employed by the contractor must abstain from voting on the issue and the minutes need to reflect an explanation of the abstention such as: "Supervisor John Doe abstained from voting on the matter because he is employed by the contractor that requested the change order."

d. **Miscellaneous Exceptions.**

The following are summaries of some additional exceptions that may apply. Always refer to the actual statute to confirm the exception and its requirements.

- i. Doing business with a **bank** that a supervisor has an interest in. Minn. Stat. § 471.88, subd. 2.
- ii. Designating an official **newspaper** that a supervisor is interested in. Minn. Stat. § 471.88, subd. 3.
- iii. Contract with a **cooperative association** of which a supervisor is a shareholder, but not an officer or manager. Minn. Stat. § 471.88, subd. 4.
- iv. Contract with a **volunteer fire department** for payment of compensation to its members or payment of retirement benefits. Minn. Stat. § 471.88, subd. 6.
- v. Contract with a **volunteer ambulance service** for payment of compensation to its members or payment of retirement benefits. Minn. Stat. § 471.88, subd. 6a.
- vi. Benefit from a **federal or state grant program** for housing, community, or economic development, but the officer must abstain from voting on measures related to the grant. Minn. Stat. § 471.88, subd. 17.

When relying on one of these exceptions, the minutes of the meeting at which the issue is addressed should indicate that the vote on authorizing the interest / relationship was unanimous with the interested officer abstaining from the vote.

Towns with questions regarding the application of the conflict of interest prohibitions need to seek legal assistance.

**PROCEDURAL SUMMARY FOR RELYING
ON THE MINN. STAT. § 471.88, SUBD. 5
CONFLICT OF INTEREST EXCEPTION**

The exception to the conflict of interest prohibition most often relied upon by town supervisors is found in Minn. Stat. § 471.88, subd. 5. This exception permits contracts that are otherwise prohibited as a conflict of interest if the law does not require the contract to be let by competitive bids. It is arguably the broadest of the exceptions, but it also involves the greatest number of procedural requirements.

The following provides an overview of the procedural requirements associated with relying on this particular exception. Remember, as is stated in the text of the paper, there may be other statutory requirements imposed by the municipal contracting law and other laws that must also be complied with in order to award a contract to a supervisor. *This summary only discusses the requirements associated with relying on the Minn. Stat. § 471.88, subd. 5 exception.*

Note:

- Refer to the text of the document for information on when a statutory conflict of interest exists.
 - A conflict can exist even if a formal written contract is not being used.
 - A conflict can exist even if the supervisor is providing the goods or services at far below market value.
 - Other contracting and legal requirements may apply in a given situation that are not discussed here.
 - The attached samples will need to be modified to fit the facts of the particular situation, but the statute requires them to contain certain information so do not delete sections of the forms unless you are certain the information is not required in Minn. Stat. § 471.89 or elsewhere.
1. **Identify Need.** The town is in need of goods or services that a supervisor could provide, but which would constitute a conflict of interest for the supervisor to provide without first identifying and relying on a statutory exception to the prohibition.
 2. **Determine Competitive Bids Not Required.** The board determines that the contract to obtain the goods or services does not require the solicitation of competitive bids. Refer to Information Library Document Number: **C4000** (Contracts and RFP's) for additional information. In most cases, the reason a contract does not require competitive bids is because the total estimated amount of the goods or services is below the bid threshold. In towns, competitive bids are not required unless the contract will exceed \$175,000. There are other situations in which competitive bids are not required, but the dollar threshold is the most common standard. It is critical that the board makes a good faith estimate of the total cost of the goods or services to be obtained from the supervisor. If the total is near the competitive bid threshold, it is better to look for another exception that may authorize the contract.
 3. **Contract Price.** The board needs to determine whether the price of the contract with the supervisor would be as low, or lower, than the price the board could obtain elsewhere.
 4. **Develop a Resolution.** Develop a resolution that satisfies the requirements of Minn. Stat. § 471.89, subd. 2. See Appendix B for a sample.

5. **Pass the Resolution.** At a board meeting, a non-interested supervisor makes a motion to adopt the resolution. Before voting, the interested supervisor should state, and the clerk should record in the minutes, that he or she is abstaining from voting on the resolution because they have a financial interest in the contract. The motion must be passed by a unanimous vote of the remaining supervisors.
6. **Complete Contracting Steps.** The board should complete whatever steps are normally taken with a contract of that type.
7. **Affidavit.** Before the town may pay the interested supervisor for the goods or services provided, the supervisor must submit an affidavit to the clerk that satisfies the requirements of Minn. Stat. § 471.89, subd. 3. Refer to **Appendix C** for a sample of an affidavit that would accompany a claim for partial payment and **Appendix D** for a sample affidavit to accompany a claim for payment in full. Though the law is not entirely clear on this point, it is strongly recommended that the supervisor submit an affidavit each time they submit a claim for payment for the goods or services covered by the resolution.
8. **Preserve Records.** The clerk needs to file and preserve a copy of the resolution and affidavits. If practicable, the interested supervisor may want to keep a copy of the documents as a backup for their own protection.

APPENDIX B

**RESOLUTION AUTHORIZING CONTRACT
WITH INTERESTED OFFICER UNDER
Minn. Stat. § 471.88, subd. 5**

WHEREAS, Town Board of _____ Township, _____ County, Minnesota is seeking the performance or acquisition of the following service or goods:

[describe the service or goods to be provided by the supervisor]

WHEREAS, _____ is a supervisor of said Township and will be financially interested in the contract for the following described reason: *[select one of the following descriptions and modify it as needed to fit the particular circumstances]*

- He or she is an (employee/owner) of (business name) which is the provider of the service or goods.
- He or she is directly providing the service or goods to the Township as an independent contractor.
- He or she is directly providing the service as an employee of the Township.

NOW, THEREFORE, BE IT RESOLVED that the Town Board, upon a unanimous vote of the supervisors with the interested officer abstaining, finds that the contract price of \$ _____ is as low as, or lower than, the price at which the services or goods could be obtained elsewhere at this time; and

BE IT FURTHER RESOLVED, that the Town Board, pursuant to Minn. Stat. §§ 365.37; 471.88, subd. 5; and 471.89, does hereby authorize a contract with _____ for a price of \$ _____; payment to occur on the contract as agreed and upon the filing of a proper affidavit by the interested officer.

Adopted this _____ day of _____, 20__.

Attest: _____
Town Clerk

BY THE TOWN BOARD

Chairperson or other if chair is contracting

**AFFIDAVIT OF OFFICIAL
INTEREST IN CLAIM
(Minn. Stat. § 471.89, subd. 3)**

State of Minnesota)
County of _____) ss.
Township of _____)

_____, being duly sworn states the following:
(officer name)

- 1) He/she is a supervisor of _____ Township, _____ County, Minnesota.
- 2) On *[list the date or range of dates the services or goods were supplied that are being supported by this affidavit]*, the following services were performed, or goods were supplied, by _____ for the Township:

[describe the services or goods provided]
- 3) This affidavit is being provided in support of a request for partial payment of the contract price for the services or goods provided on the date(s) indicated above
- 4) The contract price for such services or goods is \$ _____ and the reasonable value of the services or goods is \$ _____. The amount of the partial payment of the contract price being request in conjunction with this affidavit is \$ _____.
- 5) At the time such services were performed for, or goods provided to, the Township the affiant had the following interest in the contract: *[select one of the following descriptions and modify it as needed to fit the particular circumstances]*
 - He or she is an (employee/owner) of (business name) which is the provider of the service or goods.
 - He or she is directly providing the service or goods to the Township as an independent contractor.
 - He or she is directly providing the service as an employee of the Township.
- 6) Affiant further states that to the best of his/her knowledge and belief the contract price is as low as, or lower than, the price at which the services or goods could be obtained from other sources.
- 7) Affiant further states that this affidavit constitutes a claim against the township for partial payment of the contract price.

I declare under the penalties of law that this account, claim, or demand is just and correct and that no part of it has been paid.

Interested Supervisor Signature

Subscribed and sworn to before me this
____ day of _____, 20____.

**AFFIDAVIT OF OFFICIAL
INTEREST IN CLAIM
(Minn. Stat. § 471.89, subd. 3)**

State of Minnesota)
County of _____) ss.
Township of _____)

_____, being duly sworn states the following:
(officer name)

- 1) He/she is a supervisor of _____ Township, _____ County, Minnesota.
- 2) On *[list the date or range of dates the services or goods were supplied that are being supported by this affidavit]*, the following services were performed, or goods were supplied, by _____ for the Township:

[describe the services or goods provided]

- 3) This affidavit is being provided in support of a request for payment in full of the contract price for the services or goods provided on the date(s) indicated above
- 4) The contract price for such services or goods is \$ _____ and the reasonable value of the services or goods is \$ _____. The total contract price for the services or goods provided is \$ _____.
- 5) At the time such services were performed for, or goods provided to, the Township the affiant had the following interest in the contract: *[select one of the following descriptions and modify it as needed to fit the particular circumstances]*
 - He or she is an (employee/owner) of (business name) which is the provider of the service or goods.
 - He or she is directly providing the service or goods to the Township as an independent contractor.
 - He or she is directly providing the service as an employee of the Township.
- 6) Affiant states further that to the best of his/her knowledge and belief the contract price is as low as, or lower than, the price at which the services or goods could be obtained from other sources.
- 7) Affiant further states that this affidavit constitutes a claim against the township for the contract price, that the claim is just and correct, and that no part of the claim has been paid.

I declare under the penalties of law that this account, claim, or demand is just and correct and that no part of it has been paid.

Interested Supervisor Signature

Subscribed and sworn to before me this
_____ day of _____, 20____.
