

Chapter 9

Ethics in Public Contracting

Introduction

This chapter is provided for guidance and information only and shall not be considered as superseding any laws or regulations administered and enforced by the State Ethics Commission. Please refer to [Sections 25-4-101 through 25-4-119, Mississippi Code of 1972, Annotated.](#)

9.101 Definitions of Terms Used in this Chapter

- (1) Confidential Information – any information which is available to an employee only because of the employee's status as an employee of Mississippi and is not a matter of public knowledge or available to the public on request.
- (2) Conspicuously – written in such special or distinctive format, print, or manner that a reasonable person against whom it is to operate ought to have noticed it.
- (3) Direct or Indirect Participation – involvement through decision, approval, disapproval, recommendation, preparation of any part of a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity.
- (4) Financial Interest –
 - (a) Ownership of any interest or involvement in any relationship from which, or as a result of which, a person within the past year has received, or is presently or in the future entitled to receive, monetary compensation or material gratuity;
 - (b) Ownership of such interest in any property or any business as may be specified by the Ethics Commission; or
 - (c) Holding a position in a business such as an officer, director, trustee, partner, employee, or the like, or holding any position of management.
- (5) Gratuity – a payment, loan, subscription, advance, deposit of money, services, or anything of more than nominal value, present or promised, unless consideration of substantially equal or greater value is received.
- (6) Immediate Family – a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by the Ethics Commission.
- (7) Official Responsibility – direct administrative or operating authority, whether intermediate or final, either exercisable alone or with others, either personally or through subordinates, to approve, disapprove, or otherwise direct Mississippi action.
- (8) Purchase Request – that document whereby a using agency requests that a contract be entered into for a specified need, and may include, but is not limited to, the technical description of the requested item, delivery schedule, transportation, criteria for

evaluation, suggested sources of supply, and information supplied for the making of any written determination required by this Code.

9.101.01 Definitions

- (1) Bona Fide Employee – a person employed by a prospective contractor and subject to the prospective contractor's supervision and control as to the time, place, and manner of performance, who neither exerts nor proposes to exert improper influence to solicit or obtain Mississippi contracts. In determining whether a bona fide employment relationship exists, the following factors should be considered:
 - (a) Whether the employment is continuous.
 - (b) Whether the person is subject to the supervision and control of the prospective contractor.
 - (c) Whether the size of any contingent fee is reasonable in relation to the service performed.
 - (d) Whether the method of payment of the contingent fee is customary in the trade.
 - (e) Whether the person is employed solely by the prospective contractor.
- (2) Bona Fide Established Commercial Selling Agency – a business that neither exerts nor proposes to exert improper influence to solicit or obtain public contracts. In determining whether a business is a bona fide established commercial selling business, the following factors should be considered:
 - (a) Whether the business is one which has either been active for a considerable period of time or is presently an on-going concern and is likely to continue as such.
 - (b) Whether the business uses its own name and is characterized by the customary indicia of the conduct of a regular business.
 - (c) The degree to which the business' activities are directed toward the solicitation of contracts of the State.
 - (d) Whether the size of any contingent fee is reasonable in relation to the services performed.
 - (e) Whether the method of payment of the contingent fee is customary in the trade.
- (3) Business Employee – a person, whether compensated or not, who performs personal services for a business.
- (4) Employee – as defined in Subsection 1.107(2)(n), Definitions, Employee, is hereinafter referred to as "Mississippi Employee." As used throughout this section, the term "Mississippi Employee" shall include:
 - (a) A person elected to a Mississippi office;
 - (b) A non-elected person, whether appointed or selected through a personnel

selection procedure, receiving a salary, wages, or other compensation from the State; and

- (c) A non-compensated or minimally compensated person who is performing personal services for the State.

The term "Mississippi Employee" does not include a person who, as an independent contractor, performs professional, scientific, technical, or advisory service for a state agency and who receives a fee, honorarium, or similar consideration for the services performed.

9.102 Statement of Policy

Public employment is a public trust. It is the policy of the State of Mississippi to promote and balance the objective of protecting government integrity and the objective of facilitating the recruitment and retention of personnel needed by the State. Such policy is implemented by prescribing essential standards of ethical conduct without creating unnecessary obstacles to entering public service.

Public employees must discharge their duties impartially so as to assure fair competitive access to governmental procurement by responsible contractors. Moreover, they should conduct themselves in such a manner as to foster public confidence in the integrity of the State procurement organization.

To achieve the purpose of this chapter, it is essential that those doing business with the State of Mississippi also observe the ethical standards prescribed herein.

9.103 General Standards of Ethical Conduct

- (1) General Ethical Standards for Employees

Any attempt to realize personal gain through public employment by conduct inconsistent with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this general prescribed standard, employees must also meet the specific standards set forth in: Section 9.104, Employee Conflict of Interest; Section 9.105, Gratuities; Section 9.106, Prohibition Against Contingent Fees; and Section 9.107, Restrictions on Employment of Present Employees.

- (2) General Ethical Standards for Non-employees

Any effort to influence any public employee to breach the standards of ethical conduct set forth in this section and Section 9.104, Employee Conflict of Interest; Section 9.105, Gratuities; Section 9.106, Prohibition Against Contingent Fees; Section 9.107, Restrictions on Employment of Present Employees; and Section 9.108, Restriction on Employees Purchasing Under Terms of a State Contract is also a breach of ethical standards.

Commentary

The head of each governmental body or such official's designee is encouraged to explain and to discuss at least annually with such official's employees the provisions of these regulations.

9.104 Employee Conflict of Interest**(1) Conflict of Interest**

It shall be a breach of ethical standards for any employee to participate directly or indirectly in a procurement when the employee knows that:

- (a) The employee or any member of the employee's immediate family has a financial interest pertaining to the procurement;
- (b) A business or organization in which the employee, or any member of the employee's immediate family, has a financial interest pertaining to the procurement; or
- (c) Any other person, business, or organization with whom the employee or any member of the employee's immediate family is negotiating or has an arrangement concerning prospective employment is involved in the procurement.

(2) Discovery of Actual or Potential Conflict of Interest, Disqualification, and Waiver

Upon discovery of an actual or potential conflict of interest, an employee shall promptly file a written statement of disqualification and shall withdraw from further participation in the transaction involved. The employee may, at the same time, apply to the Ethics Commission for an advisory opinion as to what further participation, if any, the employee may have in the transaction.

(3) Notice

Notice of this prohibition shall be provided in accordance with regulations promulgated by the Ethics Commission.

Commentary

Section 9.104, Employee Conflict of Interest, covers instances in which a state employee involved in procurement is actively negotiating for employment with a contractor or prospective contractor. Such an employee must recuse himself or herself from participation in a procurement involving such contractor or prospective contractor and apply to request an advisory opinion from the Ethics Commission for a waiver of the conflict of interest prohibition regarding any further participation in that procurement. Offers of employment under certain circumstances may also be gratuities which are prohibited by Section 9.105, Gratuities.

9.105 Gratuities

It shall be a breach of this regulation for any person to offer, give, or agree to give any employee or former employee, or for any employee or former employee to solicit, demand, accept, or agree to accept from another person, a gratuity or an offer of employment in connection with any decision, approval, disapproval, recommendation, preparation of any part of a program requirement or a purchase request, influencing the content of any specification or procurement standard, rendering of advice, investigation, auditing, or in any other advisory capacity in any proceeding or application, request for ruling, determination, claim or controversy, or other

particular matter, pertaining to any program requirement or proposal thereof.

9.105.01 Gratuities Prohibition

9.105.01.1 Relationship of Gratuity

In addition, the gratuity or offer of employment must be made in relation to any proceeding or application, request for a ruling, determination, claim or controversy, or other particular matter, to constitute a breach, and in connection with any:

- (1) Decision;
- (2) Approval;
- (3) Disapproval;
- (4) Recommendation;
- (5) Preparation of any part of a program requirement or a purchase request;
- (6) Action to influence the content of any specification or procurement standard;
- (7) Rendering of advice;
- (8) Investigation;
- (9) Auditing; or
- (10) Other advisory capacity.

9.105.01.2 Family

This prohibition extends to the giving of gratuities to anyone on the state employee's or former state employee's behalf such as a member of that employee's immediate family.

9.105.02 When Prohibition Against Gratuities Not Applicable

Section 9.105, Gratuities, does not prohibit:

- (1) The solicitation or acceptance of anything of monetary value from a friend, parent, spouse, child, or other close relative when the circumstances make it clear that the motivation for the transaction is unrelated to any procurement or program requirement with the State and is based upon a personal or family relationship;
- (2) The participation in the activities of, or the acceptance of an award for, a meritorious public contribution or achievement from a charitable, religious, professional, social, or fraternal organization, or from a non-profit educational, recreational, public service, or civic organization;
- (3) Acceptance only on current customary terms of finance of a loan from a bank or other financial institution for proper and usual activities of state employees, such as home mortgage loans; or

- (4) Acceptance of unsolicited advertising products or promotional material, such as pens, pencils, note pads, calendars, and other such items.

9.106 Prohibition Against Contingent Fees

It shall be a breach of ethical standards for a person to be retained, or to retain a person, to solicit or secure a state contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or bona fide established commercial selling agencies for the purpose of securing business.

9.106.01 Influence Peddling

The prohibition in Section 9.106, Prohibition Against Contingent Fees, covers influence peddling and particularly that which might occur when a former state official is hired on a contingent basis by a business seeking state contracts.

9.106.02 Improper Influence

A business employee or a commercial selling business should be conclusively presumed not to be bona fide if the Ethics Commission determines that improper influence has been or is being used to secure a state contract.

9.107 Restrictions on Employment of Present Employees

Except as may be permitted by advisory opinions regulations or rulings of the Ethics Commission, it shall be a breach of ethical standards for any employee who is participating directly or indirectly in the procurement process to become or be, while such an employee, the employee of any person contracting with the governmental body by whom the employee is employed. Notice of this provision shall be provided in accordance with opinions promulgated by the Ethics Commission.

9.108 Restriction on Employees Purchasing Under Terms of a State Contract

[Section 25-4-105\(1\), Mississippi Code of 1972, Annotated](#), states, "No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain or attempt to obtain pecuniary benefit for any relative or any business with which he is associated."

In layman's terms, this means that anyone purchasing a product is free to negotiate the best price possible with the seller but any attempt to tie the sale to a state contract based upon employment with a governmental entity could be considered to be a violation of the ethics law.

9.109 Restriction on Employees Buying Surplus Property

[Section 25-4-105\(3\)\(b\), Mississippi Code of 1972, Annotated](#), states, "No public servant shall be a purchaser, direct or indirect, at any sale made by him in his official capacity or by the governmental entity of which he is an officer or employee, except in respect of the sale of goods and services when provided as public utilities or offered to the general public on a uniform price schedule." In the case of a sale by a state agency, no state employee, regardless of the agency affiliation of the selling party or the purchaser, may participate in the sale as a purchaser.

9.110 Contractor/Consultant Conflict of Interest

It is the policy of the State of Mississippi to identify, avoid or mitigate conflicts of interest in contracting with independent contractors and consultants for services related to the subsequent competitive acquisition of commodities as defined in [Section 31-7-1\(e\), Mississippi Code of 1972, Annotated.](#)

The underlying principles of this policy are:

- (1) Preventing the existence of conflicting roles that may bias a contractor's or consultant's judgment in its work for the State; and
- (2) Preventing unfair competitive advantage.

An independent contractor or consultant hired by any state agency for the purpose of preparing or furnishing complete or essentially complete specifications which are to be used in competitive acquisition for the furnishing of the same services or equipment shall not:

- (1) Be awarded a contract in the subsequent competitive acquisition of commodities; or
- (2) Be a subcontractor or consultant to a bidder participating in the competitive acquisition of the same.

The Chief Procurement Officer may waive this policy by determining that its application in a particular situation would not be in the best interest of the State of Mississippi. Any request for a waiver must be in writing, shall set forth the extent of the conflict, and requires approval by the Chief Procurement Officer.