



DELAWARE PUBLIC INTEGRITY COMMISSION

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State Contracts and the State Code of Conduct

The Procurement law states: "in addition to any other procedures" the remedies and penalties in the procurement law are not exclusive and shall be in addition to, among other things, "the provisions and penalties defined in Chapter 58 of this title [Title 29]." 29 *Del. C. § 6903(g)*. Title 29, Chapter 58, is the State Code of Conduct. The following overview of some Code of Conduct provisions, as they relate to State contracts, is to help those involved with issuing State contracts and/or State, officers or officials who seek to contract with the State to familiarize themselves with the Code of Conduct provisions dealing with such issues.

I. To Whom does the Code of Conduct Apply?

(A) State employees (includes all rank & file employees, including temporary, casual, seasonal, part-time, etc.), and appointees to Boards and Commissions who make more than \$5,000 per year;

(B) State officers (elected Executive Branch officials, Cabinet Secretaries, Division Directors and their equivalents); and

(C) Honorary State officials (appointees to Boards and Commissions who make less than \$5,000 per year). 29 *Del. C. § 5804(11), (12) and (13)*.

II. Restrictions on Conduct when Acting in an Official Capacity

State employees, officers, and honorary officials may not review or dispose of matters involving the State if they have a personal or private interest. 29 *Del. C. § 5805(a)(1)*. For State contracts, a public servant could not, for example, write, review, draft, award, etc., an RFP if they have a "personal or private interest" in the contract. A personal or private interest would be, among other things, if the public servant, a relative or friend, or a private business which the public servant, a relative, or friend owns, operates, or is an employee of, seeks the contract.

Examples:

(1) A State honorary official was on a State Board that gave a Division Director advice on whether private companies would receive certain certificates. One company seeking a certificate was in the process of entering a business alliance with the company that the honorary official worked for in his private capacity. The official said at the beginning that he "might" have a conflict, but participated in the discussions. When it was time to vote, he recused himself. After the Board issued the certificate, another company which was denied a certificate took the matter to court saying that the State official's

business relationship with the other applicant violated the Code of Conduct, and he should not have participated. The Court noted that the official's comments were "neutral and unbiased," and the official recused himself just before the vote. However, it said that because of the conflict, he should have recused himself "from the outset." Beebe Medical Center v. Certificate of Need Appeals Board, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), aff'd, Del. Supr., No. 304 (January 29, 1996). In Beebe, the applicant sought a certificate. However, the same law applies to a contract situation.

(2) Administrative Services asked a Department of Corrections (DOC) employee to give a list of DOC's employees to a contract selection Committee so it could select a DOC employee to serve on the Committee to award the contract. He provided the list. Later, the Committee met and the State employee participated. He was not on the Committee, so he could not, and did not vote on who would get the contract. The Committee awarded ARA the contract. When Prison Health Services did not get the contract, it asked for a court injunction against the contract on the basis that the State employee violated the Code of Conduct because his wife worked for ARA. The Court said that while the State employee's participation was "indirect" and "unsubstantial" and his wife was a "low-level employee" at ARA, his participation was "undoubtedly improper." Prison Health Services, Inc. v. State, Del. Ch., C.A. No. 13,010, Hartnett III, V.C. (July 2, 1993).

(3) A Department of Public Instruction (now Department of Education) employee issued agency contracts. She issued some contracts to her boyfriend, whom she later married. As a result of the conflict of interest, she lost her job after 18 years. The State could have prosecuted her under the Code of Conduct, but it prosecuted her under the "Misconduct in Office" criminal law, 11 Del. C. § 1211. She received a seven-year sentence. Ford v. Dep't. of Public Instruction, Del. Super., C.A.# 96A-01-009-RSG, Gebelein, J. (November 24, 1997); Ford v. Dep't. of Pub. Instruction, 720 A.2d 559 (S. Ct. 1998).

(4) Where local government officials participated in a decision, it was alleged they had a conflict because their relatives had an interest in their decision. The Court found no actual conflict, but said it would "be prudent" to recuse themselves. Harvey v. Zoning Board of Adjustment of Odessa, Del. Super., C. A. No. 00A-04-007 CG, Goldstein, J. (Nov. 27, 2000).¹

Lessons from these situations:

(1) public servants need to stay as far away from any official participation (even

¹In Harvey, the Court said local government officials were not subject to the State Code of Conduct, but it used the State Code as persuasive law. Contrary to the Court's comment, the State Code applies to all local governments unless they adopt their own Code which the Public Integrity Commission must approve as being at least as stringent as the State Code. 68 Del. Laws, c.433 § 1.

neutral, unbiased, indirect and insubstantial) as they can when they, their employer, a close relative, friend, etc., have an interest in the contract; and

(2) generally, public servants need to recuse themselves from the outset if they think they have a conflict because if they *think* it themselves, it is likely their conduct will, at a minimum, appear improper, even if there is no actual violation; and

(3) public servants need not be the final decision makers. As seen in *Beebe and Prison Health*, if they “review” the matter when they have a conflict it can be improper; and

(4) if there is any question on whether they should be involved, the individual or the State agency can ask the Public Integrity Commission for an advisory opinion. If they follow the Commission's advice, they are protected against disciplinary action. *29 Del. C. § 5807(a) and (c)*. If an issue arises at the last minute, with no time to come to the Commission, the public servant should consider following the general rule in (2).

III. Restrictions on Conduct when acting in a Private Capacity

State employees, officers and honorary officials may not represent or otherwise assist a private enterprise before the agency with which they are associated by employment or appointment. *29 Del. C. § 5805(b)(1)*. State officers are not only prohibited from representing or otherwise assisting a private enterprise before their own agency, they may not represent or otherwise assist a private enterprise before any State agency. *29 Del. C. § 5805(b)(2)*.

Example:

A State employee was reprimanded because his private enterprise contracted with the agency that employed him. He could have been prosecuted for violating that provision, but the Commission recommended a reprimand because, among other things, it was his first offense, and the agency also contributed to the problem. *Commission Op. No. 00-40*. Besides the reprimand, he was precluded from being paid from his agency, so he did not profit from violating the provision against business dealings with his own agency. The opinion addresses a number of mistakes by the State employee and the agency. First, the agency's policy on contracting with its own employees was not as stringent as the Code of Conduct. A State policy cannot be less stringent than State Law. Second, the procurement procedure required a purchase order; but none was issued. Third, there was a mandatory State contract for the particular services he offered, but the agency apparently did not even consider using the mandatory State contract. Fourth, under the Code of Conduct if a State employee or officer has a financial interest in a private enterprise that does business with, or is regulated by the State, they must file a full disclosure with the Public Integrity Commission. *29 Del. C. § 5806(d)*. That is a condition of commencing and continuing employment or appointment with the State. *Id.* He did not file. Fifth, his company did business with other State agencies. Again, he did not file a full disclosure. Sixth, if a State employee or officer, or a private enterprise in which they have a financial interest, seeks to contract with the State, under the Code of Conduct if the

contract is for more than \$2,000 it must be publicly noticed and bid. 29 Del. C. § 5805(c). His company had some State contracts for more than \$2,000. They were not publicly noticed and bid. If the contract is for less than \$2,000, the contract must reflect “arms’ length negotiations.” *Id.* Public notice and bidding and/or arms’ length negotiations are to insure contracts are not awarded out of favoritism, undue influence, preferential treatment, and the like. To help prevent such favoritism, etc., the Code of Conduct, among other things, prevents: (1) self-dealing (e.g., cannot award the contract to yourself or your own business); (2) using public office to obtain the contract for yourself, relatives, friends, etc., (3) representing or assisting before one’s own agency (co-workers, colleagues, etc., who make decisions will not be unduly influenced); and (4) State officers from representing or assisting before any State agency as there is a legal presumption that they have influence throughout all State agencies. There must also be a fair market price either through public notice and bidding or arms’ length negotiations. Agencies can help insure fair market prices by getting quotes from sources other than the public servant’s business, when the contract is for less than \$2,000.

If public servants seek contracts with a public school district and/or the State Board of Education for transporting school children, they must comply with the Procurement law in 29 Del. C. § 6923, *except* transportation supervisors may not seek such contracts. 29 Del. C. § 5805(c).

Lessons from this situation:

(1) Multiple Code of Conduct provisions restrict public servants in seeking State contracts. Because many provisions may apply, there must be “full disclosure” to the Commission when the State employee, officer or honorary official has a financial interest in doing business with the State. That enables the Commission to decide if the conduct violates any Code of Conduct provisions, including any appearance of impropriety. By filing the full disclosure, required by law, the public servant receives advice on how to proceed without violating the Code of Conduct. Again, if the advice is followed, they are protected against disciplinary action. A worksheet to assist in filing the full disclosure is on the web site at: <http://www.state.de.us/pic/fdwksht.htm>

(2) As compared to the Code of Conduct, the procurement laws and rules have a different dollar amount for when contracts must, by law, be publicly noticed and bid.

Examples:

Under the procurement law, if a professional contract is bid for more than \$50,000, it must be publicly noticed and bid. (Check with the your agency’s procurement officials or with the Division of Purchasing for current requirements of the procurement law). Assuming that amount is correct, the point is that the agency is not required by law to bid the contract until it reaches that amount. An example combining the procurement

law with the Code of Conduct is: An agency wants to contract for professional services for less than \$50,000. Under the procurement law it does not have to publicly notice and bid the contract. If the agency does not publicly notice and bid the contract and it is for less than \$50,000, but more than \$2,000, then under the Code of Conduct, no State employee or officer can seek the contract. Even if the contract is publicly noticed and bid, if the State employee or honorary State official is employed by or appointed to the agency offering the contract, then they cannot represent or otherwise assist the private enterprise in obtaining the contract with their own agency. (Again, for State officers, they can not represent or otherwise assist on a contract with any agency).

If the contract is publicly noticed and bid, and if the State employee or honorary State official is not employed or appointed to the agency offering the contract (e.g., DHSS publicly notices a contract for \$49,000 and the State employee or honorary official works for DNREC, then the State employee or honorary official could represent or otherwise assist the private enterprise (e.g., write the response to the RFP, etc.)). But they still must, by law, file a "full disclosure" with the Commission as a condition of commencing and continuing State employment or appointment, so the Commission can decide if any Code of Conduct provisions would be violated by the transaction.

For State officers, if they have a financial interest in the private enterprise that wants to seek that same DHSS contract, and they work for DNREC, they still cannot in any manner represent or otherwise assist the private enterprise in obtaining that contract (e.g., cannot help write the company's response to the RFP; cannot review the RFP before it goes to the agency; cannot work on the contract for the private enterprise if it is awarded to their company, etc.). If their private business is awarded the contract, they, too, must still file a "full disclosure" with the Commission because the private enterprise, in which they have a financial interest, would be doing business with the State.

IV. Restrictions after Terminating State Employment

Under the post-employment law, for two years after public servants leave State employment they cannot represent or otherwise assist a private enterprise on State matters where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. *29 Del. C. § 5805(d)*. In the context of contracts, the Commission looks at the contract process to see if while employed by the State the public servant was in any manner responsible for drafting the contract; reviewing the contract; administering the contract; assessing if the contractor is complying with the contract terms; etc. If the former employee was involved in the contract process, they could be prohibited from working on that contract for the private enterprise. Beyond looking at the contract process, the Commission looks to the substance of the contract to see if there is a "substantial overlap" between the work done for the State and the work the former employee will perform on the contract for the private company. *Commission Op. No. 96-75*. Some agencies include the post-employment

restriction as boiler plate language in their contracts.

Lessons:

The post-employment law does not apply if the former employee: (1) works for a government agency, not a private enterprise; (2) works for a private enterprise, that is not involved in any State matters; (3) works for a private enterprise that is involved in State matters, but does not work on State matters in the three discrete areas listed in the statute – areas where they: (1) gave an opinion; (2) conducted an investigation; or (3) were otherwise directly and materially responsible for while employed by the State. If it is unclear if their work falls within those three areas, the former employee or the State agency can seek an advisory opinion.

V. Restrictions on Improper Use and/or Disclosure of Confidential Information

The Code prohibits State employees, officers and honorary State officials from improperly using or disclosing confidential information gained from their public employment while employed by the State, and after leaving State employment. Current employees, officers and officials must comply with 29 *Del. C.* § 5806(f) and (g) restrictions on confidential information. Persons who terminate State employment must comply with 29 *Del. C.* § 5805(d) provisions on confidentiality. **Note:** Improper use or disclosure of confidential information after terminating State employment does not have a 2-year limit. That is because confidential information may remain confidential for more than 2 years. So the first question is whether the information is confidential. For example, if the procurement law provides that the amount bid for a contract is not "public information" until negotiations are completed, then a State employee could be prohibited from improperly disclosing to the public and/or to any contract competitors the amounts being bid. If you are not sure if information related to the contract is "non-public" under the procurement law, seek assistance from your procurement specialists, the Deputy Attorney General assigned to your agency, or the Deputy Attorney General assigned to dealing with procurement issues. Also, if it is non-public under the Freedom of Information Act, it generally cannot be disclosed. The Attorney General's office administers the Freedom of Information Act.

VI. Penalties for Violating the Code of Conduct

The public servant who violates the Code of Conduct may be subject to the following penalties:

(A) Administrative Penalties:

State employees, officers and honorary officials may be given a written reprimand or censure of conduct;

State employees and State officers, other than elected officials, may be subject

to: removal, suspension, demotion, or other appropriate disciplinary action, without regard to any limits imposed by the State Personnel Law;

Honorary State Officials are subject to a recommendation that they be removed from office. 29 Del. C. § 5810(d).

(B) Criminal Penalties:

Any person who knowingly and willfully violates 29 Del. C. § 5805(a) (reviewing or disposing of matters when they have a personal or private interest); 29 Del. C. § 5805 (b) (representing or otherwise assisting a private enterprise); 29 Del. C. § 5805(c) (contracting for more than \$2,000 when the State contract was not publicly notice and bid, or contracting for less than \$2,000 when there was no arms' length negotiations; 29 Del. C. § 5805 (d) (post-employment law); and/or 29 Del. C. § 5805 (e) (improperly using or disclosing confidential information), is guilty of a misdemeanor punishable for each violation by imprisonment of not more than one (1) year and by a fine not to exceed \$10,000. 29 Del. C. § 5805(f).

(C) Voiding Contracts

In addition to any other penalty provided by law, any contract entered into by the State agency in violation of Title 29, Subchapter I (Code of Conduct), shall be voidable by the agency; provided that in deciding if court action will be taken to void the contract, the agency considers the interests of innocent 3rd parties who may be damaged thereby. Court action to void the contract must be initiated within 30 days after the agency has, or should have, knowledge of the violation. 29 Del. C. § 5805(g).

For more information on the Code of Conduct, see our web site at www.state.de.us/pic. It has the statute, the Commission's opinions, etc. You should search for cases dealing with contracting with the State, filing "full disclosure" if you do business with a State agency, etc. If you need additional assistance, contact:

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