

## CHAPTER VII

### Ethics in Contracting for Personal and Professional Services

**Introduction:** This chapter is intended to be applied in conjunction with 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 of the Mississippi Code Annotated (1972) for applicable statutes.

#### 7-101 Definitions of Terms Used in this Chapter

- (1) *Confidential Information* means 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* means 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* means 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* means:
  - (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 or income received from any property or 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* means 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* means a spouse, children, parents, brothers and sisters, and such other relatives as may be designated by the Ethics Commission.
- (7) *Official Responsibility* means 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* means 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 description of the requested service, expected length of service, criteria for evaluation, and information supplied for the making of any written determination required by this Code.

#### 7-101.01 Definitions

- 7-101.01.1 **Bona Fide Employee** means 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:
- (1) whether the employment is continuous;
  - (2) whether the person is subject to the supervision and control of the prospective contractor;

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- (3) whether the size of any contingent fee is reasonable in relation to the service performed;
- (4) whether the method of payment of the contingent fee is customary in the trade;
- (5) whether the person is employed solely by the prospective contractor.

7-101.01.2 **Bona Fide Established Commercial Selling Agency** means 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:

- (1) whether the business is one which has either been active for a considerable period of time or is presently a going concern and is likely to continue as such;
- (2) whether the business uses its own name and is characterized by the customary indicia of the conduct of a regular business;
- (3) the degree to which the business' activities are directed toward the solicitation of contracts of the State;
- (4) whether the size of any contingent fee is reasonable in relation to the services performed; and
- (5) whether the method of payment of the contingent fee is customary in the trade.

7-101.01.3 **Business Employee** means a person, whether compensated or not, who performs personal services for a business.

7-101.01.4 **Employee**, as defined in Section 1-201 (12) (Definitions, Employee), is hereinafter referred to as "Mississippi Employee." As used throughout this section, the term "Mississippi Employee" shall include:

- (1) a person elected to a Mississippi office;
- (2) a non-elected person, whether appointed or selected through a personnel selection procedure, receiving a salary, wages, or other compensation from the State; and
- (3) 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, or contract worker as defined in Section 25-9-120 (1) of the Mississippi Code, performs professional, scientific, technical, or advisory service for a state agency and who receives a fee, honorarium, or similar consideration for the services performed.

**7-201 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. Additionally, Section 25-4-101 of the Mississippi Code states that "the legislature declares that elective and public office and employment is a public trust and any effort to realize personal gain through official conduct, other than as provided by law, or

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as a natural consequence of the employment or position, is a violation of that trust. Therefore, public servants shall endeavor to pursue a course of conduct which will not raise suspicion among the public that they are likely to be engaged in acts that are in violation of this trust and which will not reflect unfavorably upon the state and local governments.”

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

**7-202 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 7-203 (Employee Conflict of Interest); Section 7-204 (Gratuities); Section 7-205 (Prohibition Against Contingent Fees); Section 7-206 through 7-208 (Restrictions on Employment of Present and Former Employees); Section 7-210 (Restrictions on Employees Purchasing Under Terms of a State Contract); and Section 7-211 (Use of Confidential Information).
- (2) *General Ethical Standards for Non-Employees:* Any effort to influence any public employee, or contractor with the State, to breach the standards of ethical conduct set forth in this section and Section 7-203 through Section 7-211 of this Article 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.

**7-203 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 shall, at the same time, apply to the Ethics Commission for an official 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 official opinions promulgated by the Ethics Commission.

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**COMMENTARY:**

Section 7-203 (Employee Conflict of Interest) of the Mississippi Personal Service Contract Regulations 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 disqualify himself or herself from participation in a procurement involving such contractor or prospective contractor and apply to the Ethics Commission for an official opinion of the statutory conflict of interest prohibition relating to that procurement. Offers of employment under certain circumstances may also be gratuities which are prohibited by Section 7-204 (Gratuities) of the Mississippi Personal Service Contract Procurement Regulations.

- 7-204** (1) **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 therefor.
- (2) **Contract Clause.** The prohibition against gratuities prescribed in this section shall be conspicuously set forth in every contract and solicitation therefor.

7-204.01 *Gratuities Prohibition*

7-204.01.1 *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.

7-204.01.2 *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.

7-204.02 *When Prohibition Against Gratuities Not Applicable:*  
Section 7-204 (Gratuities) does not prohibit:

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- (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 nonprofit 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.

7-204.03

**Contract Clause**

The following clause shall be conspicuously set forth in every contract and solicitation therefor requiring Personal Service Contract Review Board approval:

***"REPRESENTATION REGARDING GRATUITIES***

*The bidder, offeror, or contractor represents that it has not violated, is not violating, and promises that it will not violate the prohibition against gratuities set forth in Section 7-204 (Gratuities) of the Mississippi Personal Service Contract Procurement Regulations."*

7-205

**Prohibition Against Contingent Fees:**

- (1) **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, unless such an arrangement is fully disclosed in writing.
- (2) **Representation of Contractor.** Every person, before being awarded a state contract, shall represent, in writing, that such person has not retained anyone in violation of subsection (1) of this section. Failure to do so constitutes a breach of ethical standards.
- (3) **Contract Clause.** The representation prescribed in subsection (2) of this section shall be conspicuously set forth in every contract and solicitation therefor.

7-205.01

**Influence Peddling:** The prohibition in Section 7-205 (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.

7-205.02

**Relationship of Commercial Selling Business to the Prospective Contractor:**

The relationship between a bona fide established commercial selling business and the prospective contractor should be characterized by the following:

- (1) the fees charged by the business are commensurate with the nature and extent of the business's services actually rendered to the prospective contractor;
- (2) the business has adequate knowledge of the service of the prospective contractor which it represents to judge whether the item may be able to meet the state's

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requirements; and

- (3) the relationship between the business and the prospective contractor is or is contemplated to be continuing.

7-205.03 *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.

7-205.04 *Solicitation Clause:* Every solicitation for a service shall conspicuously set forth the following provision to be completed and submitted with every prospective contractor's bid or proposal for those contracts which require Personal Service Contract Review Board approval:

*"Prospective Contractor's Representation Regarding Contingent Fees*

*The prospective contractor represents as a part of such contractor's bid or proposal that such contractor has/has not (use applicable word or words) retained any person or agency on a percentage, commission, or other contingent arrangement to secure this contract."*

7-205.05 *Information on Contingent Fees:* Any prospective contractor who has completed the clause set forth in Section 7-205.04 (Solicitation Clause) in the affirmative and is the apparently successful bidder or offeror shall submit the following information:

- (1) the full name and business address of the business or person retained, and the type of business organization;
- (2) the relationship of the business or person to the prospective contractor;
- (3) the terms of the retention agreement or a copy of such agreement;
- (4) if such person is a business employee:
  - (a) the duration of employment;
  - (b) whether that employee is on the contractor's payroll for purposes of social security and federal income tax withholding;
  - (c) whether that employee represents other businesses and, if so, the names and addresses of such businesses;
- (5) whether the business or person represents the prospective contractor on:
  - (a) both government and commercial business;
  - (b) only government business; or
  - (c) only the present contract;
- (6) the extent of the duties of the business or person; and
- (7) the duration the business or person has been engaged in a particular type of work and has performed this type of work for the contractor.

7-205.06 *Contract Clause:* The following clause shall be conspicuously set forth in every contract and solicitation therefor requiring Personal Service Contract Review Board approval:

*"Representation Regarding Contingent Fees*

*The contractor represents that it has not retained a person to solicit or secure a State contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, except as disclosed in the contractor's bid or proposal."*

**7-206 Restriction on Employment of Present Employees:** Except as may be permitted by 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. Additionally, Section 25-4-105 (3) (a) of the Mississippi Code states that "no public servant shall be a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent, other than in his contract of employment; or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member, officer, employee or agent except as may be permitted by Section 25-4-105 (4) (d) of the Mississippi Code Annotated (1972).

**7-207 Restriction on Former Employees in Matters Connected with Their Former Duties:**

- (1) *Permanent disqualification of former employee personally involved in a particular matter:* It shall be a breach of ethical standards for any former employee knowingly to act as a principal, or as an agent for anyone other than the State in connection with any:
  - (a) judicial or other proceeding, application, request for a ruling, or other determinations;
  - (b) contract;
  - (c) claim; or
  - (d) charge or controversy,in which the employee participated personally and substantially through decision, approval, disapproval, recommendation, rendering of advice, investigation, or otherwise while an employee, where the State is a party or has a direct and substantial interest.
- (2) *One year representation restriction regarding matters for which a former employee was officially responsible.* It shall be a breach of ethical standards for any former employee, within one year after cessation of the former employee's official responsibility, knowingly to act as a principal, or an agent for anyone other than the state, in connection with any:
  - (a) judicial or other proceeding, application, request for a ruling, or other determination;
  - (b) contract;
  - (c) claim; or
  - (d) charge or controversy, in matters which were within the former employee's official responsibility, where the State is a party or has a direct or substantial interest. Additionally, Section 25-4-105 (3) (e) of the Mississippi Code states that "no public servant shall perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in which he personally participated during the period of his service or employment."

- 7-208 Disqualification of Business When an Employee has a Financial Interest.** It shall be a breach of ethical standards for a business in which an employee has a financial interest knowingly to act as a principal, or as an agent for anyone other than the state, in connection with any:
- (1) judicial or other proceeding, application, request for a ruling, or other determination;
  - (2) contract;
  - (3) claim; or
  - (4) charge or controversy, in which the employee either participates personally and substantially through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of the employee's official responsibility, where the state is a party or has a direct and substantial interest.
- 7-210 Restriction on Employees Purchasing Under Terms of a State Contract:**  
Section 25-4-105 (1) of the Mississippi Code 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 pecuniary benefit for any relative or any business with which he is associated."
- In layman's terms, this means that anyone purchasing services 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.
- 7-211 Use of Confidential Information:** It shall be a breach of ethical standards for any employee or former employee knowingly to use confidential information for actual or anticipated personal gain, or for the actual or anticipated personal gain of any other person. Additionally, Section 25-4-105 (5) of the Mississippi Code states that "no person may intentionally use or disclose information gained in the course of or by reason of his official position or employment as a public servant in any way that could result in pecuniary benefit for himself, any relative, or any other person, if the information has not been communicated to the public or is not public information."