DEPARTMENT OF ADMINISTRATION
STATE PROCUREMENT

Procurement Code of Ethics Policy – 21-02

From the Office of State Procurement, State of Minnesota

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Approval: Betsy Hayes, Chief Procurement Officer

Policy Objective

State employees must avoid any action which might result in a conflict of interest. Several conflict of interest guidelines exist in Minnesota statutes, and most state agencies have additional rules and policies. This document focuses on identifying procurement-related conflicts of interest and the obligations and responsibilities that flow from them.

Application:

These policies apply to employees directly and indirectly involved in the following acquisition-related activities:

- Acquiring goods, services and utilities
- Developing requests for proposals
- Evaluating bids or proposals
- Awarding a contract
- Selecting the final vendor
- Drafting and entering into contracts
- Administering a contract
- Evaluating performance under these contracts
- Authorizing payments under a contract

Description: General Principles

As individuals, all state employees must ensure that neither they nor their agency are put in a situation where a conflict of interest, actual or potential, exists or gives the appearance of existing.

This policy and the relevant statutes affect all action, input and influence related to the acquisition process. It runs the gamut from the creation of an idea to approving payment, and includes everything in between.

When anyone in a state agency becomes aware of a potential conflict of interest, they must act immediately to remove the conflict, and if necessary, separate the employee from the acquisition. For examples, please see the Appendix at the end of this document.

Definitions

Commissioner: All references to "commissioner" in Chapter 16C refer to the commissioner of the Department of Administration. The Office of State Procurement administers this code of ethics policy and all policies and procedures related to professional/technical services contracts for the commissioner.

Acquisition of goods, services, construction and utilities: "Acquisition" is purchasing, procuring, contracting, buying, selling or trading anything with value. "Goods" and "services" include utilities used by state agencies, nonprofessional/technical or professional/technical services that either come into the possession of the state or leave the possession of the state. Acquisition includes all kinds of contracts, agreements and orders to which the state or a state agency may be a party. Further, if funds involved in the acquisition are, were, or should have been in accounts belonging to the State of Minnesota, the process is covered by this policy. Only in cases where federal or state law adopts more specific, stringent or demanding requirements, do those requirements supersede this policy.

State employee: For the purposes of this policy, a "state employee" is an employee of a state agency.

State agency: A "state agency" for the purposes of this policy is any authority, agency, committee, council, entity, board, department, organization or task force of the executive branch of state government subject to Minn. Stat. ch. 16C.

Immediate Family and Partner: "Immediate family" are the employee's spouse, children, children-in-law, parents, parents-in-law, siblings, and siblings-in-law. "Partner" includes romantic partners and outside business partners.

Actual conflict of interest: An "actual conflict of interest" occurs when a decision or action would be compromised without taking appropriate action to eliminate the conflict. If an employee has an outside interest that conflicts with her/his public responsibilities to the extent that her/his public responsibilities or decisions are influenced to the detriment of the public for the benefit of the employee or her/his immediate family or partners, that is an actual conflict of interest. Such action may include an employee or her/his immediate family or partners receiving a direct or indirect financial benefit or a tangible personal benefit, as a result of using the public position and/or influence; or the outside influence could be so prevalent that the public decision is influenced or dictated by an employee's outside interest.

An actual conflict of interest also occurs when an employee participates in the selection, award, or administration of a contract when the employee, any member of their immediate family, their partner, or an organization which employs or is about to employ them, their immediate family or their partner, has a financial or other interest in or a tangible personal benefit from an entity considered for a contract.

Potential conflict of interest: A "potential conflict of interest" is a situation in which an employee has outside, private influence and/or interests that could influence public decisions, actions or responsibilities. This differs from an actual conflict of interest in that actions have yet to occur where the outside influence and/or interests of the employee affect or dictate public decisions, actions or responsibilities.

Appearance of conflict of interest: An "appearance of conflict of interest" is any situation in which a reasonable person, with knowledge of the relevant facts, would conclude that an employee has an outside influence and/or interest that conflicts with his/her public duties or responsibilities.

General Information

The commissioner establishes the following policies designed to prevent conflicts of interest regarding the acquisition of goods, services, construction and utilities, pursuant to Minn. Stat. §16C.04.

Knowledge of Ethical Code

Based on a policy requirement of the commissioner of Minnesota Management and Budget (MMB), each state agency is responsible for ensuring that employees are informed of the provisions of the Code of Ethics for employees in the executive branch (*see* Minn. Stat. §43A.38).

Affirm Knowledge of Policy and Laws

Each state agency is responsible to ensure that all employees directly and indirectly involved in the acquisition process has read and understands this policy and relevant statutes including Minn. Stat. §16C.04 and §43A.38.

If an employee is only occasionally involved in an acquisition (e.g., developing specifications for or evaluation of a single RFP), it is acceptable for them to read and understand the policy and laws at the beginning of the process.

Ethics Officer Designation

Each state agency must designate an ethics officer who is responsible for providing advice, assistance and training to agency staff on ethical practices and conflicts of interest. This employee may be an internal auditor or a member of the agency's human resources division. Notice of this designation should be disseminated throughout the agency and identification of the ethics officer included in the employee's required knowledge of this policy, the code of ethics for executive branch employees and the laws previously described.

Identifying Conflicts of Interest

Each state agency should establish a policy creating an internal mechanism for employees' use in identifying an actual conflict of interest or potential conflict of interest. Notice of this policy should be disseminated throughout the state agency and included in the employee's required knowledge of this policy, the code of ethics for executive branch employees and the laws previously described.

Immediate Action Required

A state agency or employee must immediately act upon any suggestion, inquiry or intimation that an actual conflict of interest exists. Upon identification, such matters are referred to the agency ethics officer and to a supervisor, manager, director, assistant commissioner or agency head. It is appropriate for small agencies having no internal auditors or human resources staff to refer suspected conflicts to the Department of Administration's Office of State Procurement. Agencies receiving federal funds must disclose in writing to the U.S. Department of Treasury or the pass-through entity, as appropriate, any potential conflict of interest affecting awarded federal funds in accordance with 2 C.F.R. § 200.112.

Transfer Responsibility If Conflict Exists

If a state employee, supervisor, manager, appointing authority or agency head determines that an actual, potential or the appearance of a conflict of interest exists, as defined by this policy or relevant law, responsibilities for the acquisition must be assigned to an employee having no conflict of interest. If the agency head determines that assigning those duties to another employee within the agency is not possible, they must contact the commissioner of Administration, who will assist in finding personnel to perform the acquisition.

Policy Application to Non-State Employees

State agencies should consider establishing a policy for non-state employee participation in the acquisition process. Agencies routinely use non-state employees to assist in creating requests for proposals, evaluating responses and in making contract award recommendations. (In some cases, legislation may dictate the participation of representative from certain groups.)

Ideally, this policy should require that non-state employees read, understand and agree to be bound by the mandates of the statutes and this policy relevant to their participation in the state acquisition process. A record of this agreement should be kept with the official agency copy of activity related to the acquisition or the resulting contract. To protect the state, its agencies and employees, everyone involved in the acquisition process must be held to the same standards.

Training Opportunities

The commissioner of Administration offers training to state employees, explaining and reviewing ethics, conflicts of interest, and related statutes and policies. The training is not intended to replace any of the above requirements. The training schedule is published on the OSP website. By request, special or customized training on this policy and related issues will be considered by the OSP. Minnesota Management and Budget also offers code of ethics training for executive branch employees, which has a broader scope than the procurement-related conflict of interest training.

References

Minnesota Statutes

10A.07 – **CONFLICTS OF INTEREST**
15.054 – **PUBLIC EMPLOYEES NOT TO PURCHASE MERCHANDISE FROM GOVERNMENTAL AGENCIES; EXPECTATIONS; PENATLY**
16C.04 – **ETHICAL PRACTICES AND CONFLICT OF INTEREST**
43A.38 – **CODE OF ETHICS FOR EMPLOYEES IN THE EXECUTIVE BRANCH**
471.87 – **PUBLIC OFFICERS, INTEREST IN CONTRACT; PENALTY**
609.43 – **MISCONDUCT OF PUBLIC OFFICER OR EMPLOYEE**

History

Version	Description	Date
1.0	Code of Ethics Policy	12/29/1998
2.0	Code of Ethics Policy – Procurement - Updated	06/14/2021

Contact

If you have questions concerning this policy, please contact the OSP Helpline at 651.296.2600. If you have questions about specific conflict of interest situations, contact your agency's ethics officer.

Appendix

A conflict of interest is any situation in which your judgment, action or nonaction benefits you. A conflict of interest situation can exist directly (when you gain personally) or indirectly (when a friend, relative or acquaintance does). Some clear-cut examples of conflicts of interest and violations of law include buying from your brother, sister, or spouse with state funds; buying from a firm and then accepting a job from that firm; buying from a firm that has taken you to dinner, flown you to Boston for a vacation or bought you a new car. Other conflict of interest situations are not as clear-cut.

<u>Example 1</u>

You have known Jane, owner of Jane's Garage, a long time – she has worked on your family cars for years. You know she performs good work at a reasonable price, so why not just take state vehicles to her to work on? If Jane says, "I'd really like the state's business and if I get it, you'll get a discount on work on your car," the situation is obvious: this is clearly a potential conflict of interest. But what if Jane has not said a thing and you get a reduced charge on personal work or what if your daughter or nephew works for Jane? What if Jane rents her garage property from your mother-in-law? These situations are not as clear. How do you benefit, if at all? In the first instance, if it is your daughter who works at Jane's garage, an indirect benefit exists – your family makes money directly from Jane's business. On the other hand, the situation of your nephew working for Jane may appear to be different, but only by degree. You might not directly get money from Jane's business, but you could be considered indirectly involved. These are all examples of situations that have the appearance of a conflict of interest. What to do?

- Because there is potential for conflict of interest, remove yourself from the acquisition and report it immediately. Be sure that your supervisor, manager, director, etc., knows exactly why you are extracting yourself from the process.
- Make sure that the new agency representative carefully defines the agency's needs and puts the requirements "on the street" by preparing a request for proposal (RFP).
- Have the responses evaluated by individuals who do not know of your involvement and who have no similar personal conflicts of interest.
- Have your supervisor or a neutral entity make the final award.
- Avoid any involvement with the contract or its future evaluation.

Assuming these procedures are followed and Jane's Garage ultimately gets the business, it is likely that the process was correct, above board and beyond reproach. However, the appearance of a conflict of interest may remain, even with these recommended actions. By carefully documenting what you and the agency did and when you did it, you will have the information necessary to dispel the appearance of a conflict of interest. In some cases, the appearance of a conflict may be unavoidable. The documentation recording the actions you and your agency take will be the only evidence that such an appearance did not evolve into a potential or actual conflict of interest. The process does not have to be time consuming and complex if everyone associated with the acquisition understands the rules and abides by them.

<u>Example 2</u>

An employee suggests that your division purchase a piece of equipment so that they can do a better job. Division management agrees that the equipment would be useful. The employee happens to have just such a piece of used equipment and is willing to sell it to the state for a very reasonable price.

Buying used equipment may be a good purchasing decision and should be considered when an agency needs equipment. The issue is not whether to purchase used equipment or not, but rather where the equipment comes from and how to determine its reasonable value. Assuming that you think the employee's idea is a good one, and if the piece of equipment is available, in good condition, with a warranty and at a good price, then the purchase may be wise. The answer to the conflict question is that a potential conflict does exist, due to the proximity in the relationship of the purchaser to the seller. What to do?

- Procedurally remove yourself and the employee from the acquisition
- Identify someone else to proceed: another office, district, region, the central office or even the Office of State Procurement. The most appropriate person is someone who has no awareness of the employee and their relationship to the purchase.
- Request that this individual develop an RFP for a used piece of equipment, being very thorough about specifications, conditions and warranties. Publish the RFP as a formal solicitation (regardless of its dollar value).
- Ensure that someone else opens the responses and makes the award decision.

Assuming that these steps are taken and the employee happens to "win" the award, it would be difficult to argue that the employee's situation affected the outcome because the entire process was conducted "in the open". Some caution is appropriate, however. High point-value items in an evaluation, such as a warranty, are unlikely to be something an employee could reasonably provide. An actual used equipment dealer might provide a warranty, which has real economic value. As an individual, the employee would have a hard time providing the same level of protection for the state as a dealer would. For example, how likely would you be to take the employee to court to enforce a warranty?

The appearance of a conflict of interest in this example could probably never be dispelled by any amount of documentation or action by the agency. The agency must make the decision to proceed very carefully, with full awareness of issues involved.

<u>Example 3</u>
You are offering employment to an individual whose husband is employed by Widgets-R-Us. Your agency has made purchases from Widgets-R-Us in the past and may do so in the future.

This is not a conflict of interest. The potential employee and her relationship to the company have obviously not affected state acquisitions in the past. Once hired, the relationship has no impact as long as the employee does not directly or indirectly participate in any decisions to make purchases from Widgets-R-Us. However, the question is how to define "indirect" participation.

(A) *Widgets-R-Us makes widgets. Your agency uses widgets and routinely orders them from OSP's widget contract. There is no conflict of interest regardless of the relationship. OSP chose to carry the product on contract independent of the individual's employment with your agency. The product is a common item and was used before the new employee arrived. It is reasonable to continue to use widgets.*

(B) *Widgets-R-Us creates a new product and offers it to its employees to test and informally market outside the company. If the new state employee brings the product to your agency and decides that it should be purchased, there is an appearance of a conflict. Since the product is not publicly available and the purchase decision is made by the spouse of the benefitted company's employee, the appearance of conflict of interest* *exists and the acquisition should not proceed. Even if the product is available publicly, the appearance of a conflict of interest exists. What to do?*

- Once the new Widgets-R-Us product becomes available publicly, only an employee having no actual financial relationship with the company could take steps to procure the product.

(C) *The new employee is the program manager responsible for all agency systems development and purchasing activity. The program manager also has authority to sign contracts for the agency head. The employee's spouse is a systems integration and services executive for Widgets-R-Us, which provides consulting and development as part of its services. The agency has published an RFP to develop a new system; responses have been received and the evaluation completed. The evaluation team recommended that Widgets-R-Us get the award and completed contract negotiations, but the contract has not yet been signed. The new program manager did not serve on the evaluation team and must not sign the contract. Doing either would create the appearance of a conflict of interest. The program manager has a potential conflict of interest if she is involved with administration of the contract, evaluation of the contractor's performance, approval of invoices or recommendations to accept the final product.*

(D) Two further variations*:*

- *The RFP has been sent out, responses received and evaluation completed, but no recommendation has been made to the agency head. The program manager is involved in the recommendation.*
- *The RFP has been sent out and responses received, but the evaluation has not been completed and no recommendation has been made. The new program manager is involved in both.*

All of the Scenarios described in "C" and "D" have the potential for an appearance of a conflict of interest because of the likely financial interest of the program manager in her spouse's employment. The acquisition process should not continue without reporting the appearance of a conflict.

<u>Example 4</u>
An employee serves as a compensated board member of a local nonprofit organization that provides social services and counseling. Your department needs a local source of social services case management.

It would be impossible for the employee to avoid the appearance of conflict of interest if the agency wants to enter into a sole source agreement with a nonprofit organization from which the employee benefits financially. If the nonprofit is determined to be the only source of the needed service, someone other than the conflicted employee must conduct the acquisition process.

What if the employee is an uncompensated member of the board? The issue of compensation does not remove the appearance of a conflict. Participation on the board brings some benefit, although it is more implied than actual. In addition, as a board member, the employee has a fiduciary duty to the nonprofit that calls into question the employee's independence of judgment in the employee's decisionmaking on behalf of your agency. Mere association with this nonprofit's decision-making raises the appearance of a conflict which must be managed.