



Ethics in Government

2021 Fall Conference

Disclaimer

- This is not legal advice. This presentation will be a general discussion of legal topics relevant to interactions with state and local government.
- If you need legal advice on a specific topic, please contact me after the presentation

Mississippi Ethics in Government Act

- **Section 25-4-101 – Declaration of Public Policy**
- 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 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.

Mississippi Ethics in Government Act

- **WHO ARE PUBLIC OFFICIALS AND GOVERNMENTAL ENTITIES?**
- **“Public servant”** means:
 - i. Any elected or appointed official of the government;
 - ii. Any officer, director, commissioner, supervisor, chief, head, agent or employee of the government or any agency thereof, or of any public entity created by or under the laws of the State of Mississippi or created by an agency or governmental entity thereof, any of which is funded by public funds or which expends, authorizes or recommends the use of public funds; or
 - iii. Any individual who receives a salary, per diem or expenses paid in whole or in part out of funds authorized to be expended by the government.

Mississippi Ethics in Government Act

- **“Government”** means the state and all political entities thereof, both collectively and separately, including, but not limited to:
 - i. Counties;
 - ii. Municipalities;
 - iii. All school districts;
 - iv. All courts; and
 - v. Any department, agency, board, commission, institution, instrumentality, or legislative or administrative body of the state, counties or municipalities created by statute, ordinance or executive order including all units that expend public funds.

Mississippi Ethics in Government Act

- **“Governmental Entity”** means the state, a county, a municipality or any other separate political subdivision authorized by law to exercise a part of the sovereign power of the state.
 - All definitions are found in Miss. Code Section 25-4-105(3).

Ethics Prohibition

Two Prohibitions

- Constitutional Prohibition
 - Section 109
- Legislative Prohibition
 - Miss. Code Section 25-4-105

Section 109, Miss. Constitution of 1890

- No public officer or member of the legislature shall be
 - **interested, directly or indirectly**, in any
 - **contract** with the state, or any district, county, city, or town thereof,
 - **authorized** by any law passed or order made by any board of which he may be or may have been a member,
 - **during the term** for which he shall have been chosen, **or within one year** after the expiration of such term.

▸ Section 109

- Section 109 only applies to members of boards and the Legislature.
- There must be some sort of contract but does not have to be a written contract.
- The conflict arises when the board funds or otherwise authorizes the contract.
 - Even if the individual member does not vote, he or she may be in violation.
 - Recusal or absentee does not cure a Section 109 Violation
- The prohibition continues until a board member has been out of office for one year.

▸ **Basic Prohibitions for Public Servants Miss. Code Ann 25-4-105**

- Use of Office
- Contracting
- Purchasing Goods and Services
- Purchasing Securities
- Insider Lobbying
- Post Government Employment
- Insider Information

▸ Use of Office

- No **public servant** shall **use his official position** to obtain, or attempt 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**.

▸ Use of Office

- 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.

▸ Use of Office

“**Relative**” is the public servant’s

- spouse,
- child,
- parent,
- sibling (brothers and sisters) or
- spouse of a relative (in-laws).

▸ Use of Office

‘**Business with which he is associated**’ means public servant or his relative is

- officer, director, owner, partner, employee
- holder of more than ten percent (10%) of the fair market value or
- from which he or his relative derives more than \$2,500 in annual income or
- over which such public servant or his relative exercises control.

Contract Prohibition

- No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member

Contract Prohibition

- No public servant may 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
- No public servant may 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.

The Purchaser Prohibition

- 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 or services when provided as public utilities or offered to the general public on a uniform price schedule.
 - Public Servant may not purchase items at auction of the governmental entity for which they are employed

Influence of Government Decision

- Perform any service for any compensation during his term of office or employment by which he attempts to influence a decision of the authority of the governmental entity of which he is a member

Post Government Employment

- 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.**

Exceptions to the Rules

A public servant or his relative:

- May be an officer or stockholder of banks or savings and loan associations or other such financial institutions bidding for bonds, notes or other evidences of debt or for the privilege of keeping as depositories the public funds of a governmental entity thereof or the editor or employee of any newspaper in which legal notices are required to be published in respect to the publication of said legal notices.

Exceptions to the Rules

A public servant or his relative:

- May be a contractor or vendor with any authority of the governmental entity other than the authority of the governmental entity of which he is a member, officer, employee or agent or have a material financial interest in a business which is a contractor or vendor with any authority of the governmental entity other than the authority of the governmental entity of which he is a member, officer, employee or agent where such contract is let to the lowest and best bidder after competitive bidding and three (3) or more legitimate bids are received or where the goods, services or property involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws.

Exceptions to the Rules

A public servant or his relative:

- May be a subcontractor with any authority of the governmental entity other than the authority of the governmental entity of which he is a member, officer, employee or agent or have a material financial interest in a business which is a subcontractor with any authority of the governmental entity other than the authority of the governmental entity of which he is a member, officer, employee or agent where the primary contract is let to the lowest and best bidder after competitive bidding or where such goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws.

▸ Exceptions to the Rules

A public servant or his relative:

- May purchase securities issued by the governmental entity of which he is an officer or employee if such securities are offered to the general public and are purchased at the same price as such securities are offered to the general public.

▸ Exceptions to the Rules

A public servant or his relative:

- May have an interest less than a material financial interest in a business which is a contractor, subcontractor or vendor with any governmental entity.

▸ Exceptions to the Rules

A public servant or his relative:

- May contract with the Mississippi Veteran's Home Purchase Board, Mississippi Housing Finance Corporation, or any other state loan program, for the purpose of securing a loan; however, public servants shall not receive favored treatment.

▸ Exceptions to the Rules

A public servant or his relative:

- May be employed by or receive compensation from an authority of the governmental entity other than the authority of the governmental entity of which the public servant is an officer or employee.

▸ Exceptions to the Rules

A public servant or his relative:

- If a member of the Legislature or other public servant employed on less than a full-time basis, may represent a person or organization for compensation before an authority of the governmental entity other than an authority of the governmental entity of which he is an officer or employee.

▸ Avoidance of Violation

- A public servant **must totally and completely recuse** themselves from the matter giving rise to the conflict.
- A board member must leave the board meeting before the matter comes up for discussion, may only return after the matter is concluded, and must not discuss the matter with anyone.
- An abstention is considered a vote with the majority and is not a recusal.
- The minutes of the meeting should accurately reflect the recusal.
- **Recusal does not prevent other violations**

Impact of Violation

- Any contract made in violation of this section may be declared **void** by the governing body of the contracting or selling authority of the governmental subdivision or a court of competent jurisdiction and
- The contractor or subcontractor shall retain or receive only the reasonable value, with no increment for profit or commission, of the property or the services furnished prior to the date of receiving notice that the contract has been voided.

Impact of Violation

- Upon a finding by clear and convincing evidence that any Person has violated any provision of this article, the commission may:
 - Censure the person or
 - Impose a civil fine of not more than Ten Thousand Dollars (\$ 10,000.00), or both.
 - May further recommend to the Circuit Court for Hinds County that
 - Elected public servant be removed from office.
 - Non-elected public servant be removed from office, suspended, or subjected to a demotion or reduction in pay.

Impact of Violation

- The commission may order restitution or other equitable or legal remedies to recover public funds or property unlawfully taken, as well as unjust enrichment, although not public funds.
- Any pecuniary benefit received by a public servant in violation of this article may be declared forfeited by the commission for the benefit of the governmental entity injured.

Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**
 - All agencies and governing authorities shall purchase
 - Their commodities and printing;
 - Contract for garbage collection or disposal;
 - Contract for solid waste collection and disposal;
 - Contract for sewage collection and disposal;
 - Contract for public construction; and
 - Contract for rentals

Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**
 - Purchases of \$5,000 and less, exclusive of freight and shipping charges
 - i. No competitive bids required;
 - ii. No advertising required;
 - iii. Does not prohibit from seeking bids or advertising

Public Bidding Laws

- **SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT**
 - Purchases of over \$5,000 but not over \$50,000, exclusive of freight and shipping charges
 - i. May be made from the **lowest and best bidder** without publishing or posting advertisement for bids; provided that;
 - ii. Obtain two competitive written bids
 - Governing Authorities purchasing commodities may authorize its purchasing agent or clerk, or his designee, to accept the lowest and best competitive written bid.
 - Authorization shall be made in writing by the governing authority
 - Purchasing agent or clerk shall be liable for any penalties or damages imposed by law for a violation of this act.

Public Bidding Laws

• SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT

- Bidding procedure for purchases over \$50,000.00. (i) Publication requirement.
 1. Purchases which involve an expenditure of more than Fifty Thousand Dollars (\$50,000.00), exclusive of freight and shipping charges, may be made from the lowest and best bidder after advertising for competitive bids once each week for two (2) consecutive weeks in a regular newspaper published in the county or municipality in which such agency or governing authority is located. However, all American Recovery and Reinvestment Act projects in excess of Twenty-five Thousand Dollars (\$25,000.00) shall be bid. All references to American Recovery and Reinvestment Act projects in this section shall not apply to programs identified in Division B of the American Recovery and Reinvestment Act

Public Bidding Laws

• SECTION 31-7-13 – PURCHASE PROCEDURE PER AMOUNT

- 2. Reverse auctions shall be the primary method for receiving bids during the bidding process. If a purchasing entity determines that a reverse auction is not in the best interest of the state, then that determination must be approved by the Public Procurement Review Board. The purchasing entity shall submit a detailed explanation of why a reverse auction would not be in the best interest of the state and present an alternative process to be approved by the Public Procurement Review Board. If the Public Procurement Review Board authorizes the purchasing entity to solicit bids with a method other than reverse auction, then the purchasing entity may designate the other methods by which the bids will be received, including, but not limited to, bids sealed in an envelope, bids received electronically in a secure system, or bids received by any other method that promotes open competition and has been approved by the Office of Purchasing and Travel. However, reverse auction shall not be used for any public contract for design or construction of public facilities, including buildings, roads and bridges and term contracts as provided in paragraph (n) of this section. The Public Procurement Review Board must approve any contract entered into by alternative process. The provisions of this item 2 shall not apply to the individual state institutions of higher learning.

Public Bidding Laws

- Bidding process amendment procedure. If all plans and/or specifications are published in the notification, then the plans and/or specifications may not be amended. If all plans and/or specifications are not published in the notification, then amendments to the plans/specifications, bid opening date, bid opening time and place may be made, provided that the agency or governing authority maintains a list of all prospective bidders who are known to have received a copy of the bid documents and all such prospective bidders are sent copies of all amendments. This notification of amendments may be made via mail, facsimile, electronic mail or other generally accepted method of information distribution. No addendum to bid specifications may be issued within two (2) working days of the time established for the receipt of bids unless such addendum also amends the bid opening to a date not less than five (5) working days after the date of the addendum.

Public Bidding Laws

- Filing requirement. In all cases involving governing authorities, before the notice shall be published or posted, the plans or specifications for the construction or equipment being sought shall be filed with the clerk of the board of the governing authority. In addition to these requirements, a bid file shall be established which shall indicate those vendors to whom such solicitations and specifications were issued, and such file shall also contain such information as is pertinent to the bid.

Public Bidding Laws

- Specification restrictions. 1. Specifications pertinent to such bidding shall be written so as not to exclude comparable equipment of domestic manufacture. However, if valid justification is presented, the Department of Finance and Administration or the board of a governing authority may approve a request for specific equipment necessary to perform a specific job. Further, such justification, when placed on the minutes of the board of a governing authority, may serve as a filing requirement. In all cases involving governing authorities, before the notice shall be published or posted, the plans or specifications for the construction or equipment being sought shall be filed with the clerk of the board of the governing authority. In addition to these requirements, a bid file shall be established which shall indicate those vendors to whom such solicitations and specifications were issued, and such file shall also contain such information as is pertinent to the bid.

Public Bidding Laws

- Specifications for construction projects may include an allowance for commodities, equipment, furniture, construction materials or systems in which prospective bidders are instructed to include in their bids specified amounts for such items so long as the allowance items are acquired by the vendor in a commercially reasonable manner and approved by the agency/governing authority. Such acquisitions shall not be made to circumvent the public purchasing laws.

Public Bidding Laws

- Electronic bids. Agencies and governing authorities shall provide a secure electronic interactive system for the submittal of bids requiring competitive bidding that shall be an additional bidding option for those bidders who choose to submit their bids electronically. The Department of Finance and Administration shall provide, by regulation, the standards that agencies must follow when receiving electronic bids. Agencies and governing authorities shall make the appropriate provisions necessary to accept electronic bids from those bidders who choose to submit their bids electronically for all purchases requiring competitive bidding under this section. Any special condition or requirement for the electronic bid submission shall be specified in the advertisement for bids required by this section. Agencies or governing authorities that are currently without available high speed Internet access shall be exempt from the requirement of this subparagraph (v) until such time that high speed Internet access becomes available. Any county having a population of less than twenty thousand (20,000) shall be exempt from the provisions of this subparagraph (v). Any municipality having a population of less than ten thousand (10,000) shall be exempt from the provisions of this subparagraph (v). The provisions of this subparagraph (v) shall not require any bidder to submit bids electronically. When construction bids are submitted electronically, the requirement for including a certificate of responsibility, or a statement that the bid enclosed does not exceed Fifty Thousand Dollars (\$50,000.00), on the exterior of the bid envelope as indicated in Section 31-3-21(1) and (2) shall be deemed in compliance with by including same as an attachment with the electronic bid submittal.

Public Bidding Laws

- Decision procedure. Purchases may be made from the lowest and best bidder. In determining the lowest and best bid, freight and shipping charges shall be included. Life-cycle costing, total cost bids, warranties, guaranteed buy-back provisions and other relevant provisions may be included in the best bid calculation. All best bid procedures for state agencies must be in compliance with regulations established by the Department of Finance and Administration. If any governing authority accepts a bid other than the lowest bid actually submitted, it shall place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid, including the dollar amount of the accepted bid and the dollar amount of the lowest bid. No agency or governing authority shall accept a bid based on items not included in the specifications.