

Client Alert

Current Issues Relevant to Our Clients

April 2, 2014

Utah Legislature Approves Ethics Amendments To Procurement Code

On March 29, Governor Herbert signed into law 2014 Senate Bill 179, which amends various provisions of the Utah Procurement Code, Title 63G, Chapter 6a, Utah Code Annotated (the "Procurement Code"). The amendments became effective upon the Governor's execution. Among other things, the amendments revise the ethics provisions in Part 24 of the Procurement Code (the "Ethics Chapter"), which are intended to ensure that public officials act with impartiality, independent judgment and integrity when a public entity (i) procures supplies or services, (ii) awards grants or contracts, or (iii) administers a grant or contract (collectively, the "Procurement and Administration Process"). The Ethics Chapter addresses this objective by prohibiting the giving and receiving of certain gifts, gratuities and kickbacks that could give rise to actual or perceived conflicts of interest between a public official's personal interests and his public duties.

What Public Entities are Subject to the Ethics Chapter?

The Ethics Chapter applies to the State of Utah (the "State"), State agencies, and all political subdivision of the State, including municipalities and counties (regardless of whether the municipality or county has adopted the other provisions of the Procurement Code).

What Public Officers and Employees are Subject to the Ethics Chapter?

The Ethics Chapter applies only to "contract administration professionals" and "procurement professionals." Contract administration professionals are independent contractors hired by a public entity to assist with the Procurement and Administration Process. A "procurement professional" is a public officer whose job title or primary responsibilities give the officer procurement decision-making authority. Conversely, even if a public official is involved in the Procurement and Administration Process, he is not subject to the Ethics Chapter if he does not have both (i) procurement decision-making authority and (ii) either a position or job title that focuses primarily on the Procurement and Administration Process.

Also, the following public officials are specifically excepted from the definition of procurement professional and are, therefore, not subject to the Ethics Chapter:

- Elected officials
- Chief executive of public entity (or chief assistant or deputy) that has a variety of duties and responsibilities in addition to procurement
- Members of public entity's governing body
- Superintendent, business administrator, principal, or vice principal of a school district or charter school (or chief assistant or deputy)
- Chief executive of local district, special service district, or interlocal agency
- University/college president, vice president, business administrator, or dean

Are Public Entities Subject to the Ethics Chapter at All Times, or Only When There is an Open Procurement?

The Ethics Chapter applies only during the Procurement and Administration Process (as defined above). Thus, even if a public employee is a "procurement professional," he will not be subject to the Ethics Chapter if there is no open procurement and he is not involved in administering a contract or grant.

Note, however, that procurement professionals as well as other public employees and officers are generally also subject to the applicable provisions of (i) the Public Officers' and Employees' Ethics Act (Title 67, Chapter 16 of the Utah Code, which applies to public entities other

than municipalities and counties); (ii) the Municipal Officers' and Employees' Ethics Act (Title 10, Chapter 3, Part 13, Utah Code, which applies to cities and towns); and (iii) the County Officers and Employees Disclosure Act (Title 17, Chapter 16a, Utah Code, which applies to counties). There is substantial overlap among the provisions of the Ethics Chapter and these other three statutes (the "*Government Ethics Acts*"), although the provisions of such statutes are not entirely consistent.

What Conduct Does the Ethics Chapter Prohibit?

The Ethics Chapter prohibits a person who has a contract or is seeking a contract with a public entity to knowingly give or offer to give a gratuity (anything of value) or kickback to (i) a procurement professional, (ii) a contract administration professional, (iii) a family member of a procurement professional or contract administration professional, or (iv) the public entity. Likewise, procurement professionals and contract administration professionals are prohibited from knowingly accepting or asking for a gratuity or kickback from a person who has a contract or is seeking a contract with a public entity.

However, the giving and receiving of gratuities is permitted if:

- (i) The conduct is not done with the intent to influence the Procurement and Administration Process;
- (ii) The gratuity involves certain hospitality gifts under \$10 and the aggregate value of all hospitality gifts from the person to the recipient in a calendar year is less than \$50;
- (iii) The item is included in the price of a procurement item or in the contract or grant;
- (iv) The item is a product sample or other item requested for the purpose of evaluating the award of a contract or grant; or
- (v) The gratuity is a political campaign contribution.

What Are the Consequences of Violating the Ethics Chapter?

The Ethics Chapter establishes criminal sanctions and other penalties for those who violate its provisions.

Procurement professionals with actual knowledge that a person has violated the Ethics Chapter are required to notify the attorney general of such violations and are subject to disciplinary action or civil penalties if they fail to do so.

In addition, a public entity's governing body or chief executive officer may, under certain circumstances declare a contract to be void and unenforceable if the contract was awarded following an Ethics Chapter violation.

Can I Take a Public Official to Lunch or Provide Him with a Marketing Trinket or Bond Closing Memento?

From a practical standpoint, most client/business development meals, marketing trinkets, and bond closing gifts given to public officials and employees do not fall within the scope of the Ethics Chapter because one or more of the following exceptions discussed above applies:

- (i) The recipient is not a procurement professional;
- (ii) The giving or receiving does not occur during or in contemplation of the Procurement and Administration Process;
- (iii) There is no intent (by the giver or recipient) for the gift to influence the Procurement and Administration Process; or
- (iv) One of the other exceptions listed under "What conduct does the Ethics Chapter Prohibit?" applies.

Accordingly, the Ethics Chapter is somewhat limited in its applicability. However, provisions of the applicable Government Ethics Acts also apply to public officers and employees, regardless of any Procurement and Administration Process. Those statutes generally prohibit gifts and gratuities that, objectively viewed, would (a) tend to influence their impartial decision-making, (b) reward them for taking favorable official action or (c) influence them to take favorable actions regarding the donor in the

future. The Government Ethics Acts provide a safe harbor for occasional non-cash gifts with a value under \$50. Thus, a public finance professional could, for example, take a public official to lunch or give him a modest marketing gift or closing memento (provided at least one of the exceptions listed above applies). Gratuities with a value of more than \$50 per person should be carefully considered, as they exceed the safe harbors provided by the Government Ethics Acts.

For More Information

For more information, please contact Jim Burr (801.536.1447) or Eric Hunter (801.536.1441).

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