

**UTAH ASSOCIATION OF SPECIAL DISTRICTS
PROCUREMENT CODE TRAINING
A NARRATIVE OF ETHICAL AND UNLAWFUL PROHIBITED ACTIVITIES
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The Differences between ethical, unethical and criminal activities related to procurement activities are defined in three legislative statutes:

1. Title 76, Criminal Code, Chapter 8, Offenses Against the Administration of Government.
2. Title 67, Chapter 16, Utah Public Officers' & Employees' Ethics Act.
3. Title 63G, Chapter 6a, Part 23, Unlawful Conduct and Penalties.

The Utah Procurement Code establishes a procurement process for State and certain additional forms of government. It does not apply yet to Counties, Municipalities or political subdivisions created under Title 11, Chapter 13, Interlocal Cooperation Act. The Procurement Code is an attempt to define ethical procurement practices. Failure to comply with ethical procurement practices outlined in the Utah Procurement Code is either unethical or criminal.

The following is a narrative overview of the provisions of ethics and criminal activities from the three chapters cited above:

TITLE 63G-6a-Part 23: UNLAWFUL CONDUCT & PENALTIES. (The actual text is included in the Integrated Procurement Code prepared by the author. It will soon be available from the Office of Legislative Research and General Counsel and will then be available of the Legislative Web page. The following narrative is prepared as an aid to understanding the text of the legislation. It is not a replacement for the actual code.

Section 2301. Title.

Section 2302. Factual information to attorney general if collusion suspected. The procurement unit is required to report anticompetitive practices among bidders or offerors to the Attorney General's office.

Section 2303. Repealed.

Section 2304. Repealed.

Section 2304.5. Gratuities – Kickbacks – Unlawful use of position or influence. This is the main section defining unethical and criminal conduct. It has a definition section that has been refined significantly from 2012 SB 153. The definitions include: Contract Administrator, Contribution, Gratuity, Family Members, Hospitality gift, Kickback, Pending Procurement, and Procurement Participant.

- (1) It is unlawful to:
 - i. For an interested party to give a gratuity to a procurement participant or procurement participant family member.
 - ii. For a procurement participant to ask or receive a gratuity from an interested person.
 - iii. For a contractor to give a gratuity to a contract administrator.
 - iv. For a contract administrator to ask or receive a gratuity from a contractor.
 - v. For a person to give a kickback to a procurement participant.

- vi. for a procurement participant to ask or receive a kickback from an interested party.
 - vii. For a contractor to give a gratuity to a contract administrator.
 - viii. For a contract administrator to ask or receive a gratuity from a contractor.
 - ix. For a procurement participant to use its position to obtain a personal benefit.
- (2) This section was clarified by the addition of situations that do not violate this provision. A person is not guilty of violating this section if:
- i. The hospitality gift is less than \$10 with an annual limit of \$50.
 - ii. The contribution to the public entity was not given with the intent to induce a person to make a procurement decision.
 - iii. The receipt of the contribution was not accepted in exchange for a favorable procurement decision.
- (3) The penalties for violating Section 2304.5 are:
- i. 2nd degree felony if the total value is greater than \$1,000.
 - ii. 3rd degree felony if more than \$250 and less than \$1000.
 - iii. Class A Misdemeanor if more than \$100 and less than \$250.
 - iv. Class B Misdemeanor if less than \$100.

Section 2305. Penalties for artificially dividing purchase. The procurement code makes it unlawful to divide a purchase to avoid the standard procurement practices. The penalties for dividing to avoid the procurement process are as follows:

- i. 2nd degree felony if the value of both contracts is greater than \$1,000,000.
- ii. 3rd degree felony if the value of both contracts is more than \$250,000 and less than \$1,000,000.
- iii. Class A Misdemeanor if more than \$100,000 and less than \$250,000.
- iv. Class B Misdemeanor if less than \$100,000.

Section 2306. Penalties. A public officer or employee who violates Section 2304.5 or Section 2305 shall be dismissed from office and if an elected officer, removed from office as provided by law. Violation of the other provisions of this section, the officer or employee may incur disciplinary action including dismissal or removal.

Section 2307. Contract awarded in awarded in relation to criminal conduct is void. A contract obtained by a person who violates Section 2304.5 is void and unenforceable.

Section 2308. Exemption. The provisions of Part 23 do not apply to a county, municipality, a local district, a special service district, a conservation district, a political subdivision created under Title 11, Chapter 13. The persons in the exempt procurement units are still subject to Title 67, Chapter 16, Utah Public Officers' and Employee's Ethics Act and Title 76, Chapter 8, Offenses Against the Administration of government.

TITLE 67, CHAPTER 16, UTAH PUBLIC OFFICERS' AND EMPLOYEES' ETHICS ACT.

67-16-1. Title.

67-16-2. Purpose of chapter. The purpose of the chapter is to set forth standards of conduct for officers and employees of local and state government. It does not intend to deny any public officer or

employee the opportunities available to all other citizens of the state to acquire private economic or other interests so long as this does not interfere with his full and faithful discharge of his political duties.

67-16-3. Definitions. Definitions are provided for the following terms: Agency, Agency head, Assist, Business entity, Compensation, Controlled, private, or protected information, Governmental action, Improper disclosure, Legislative employee, Legislator, Political subdivision, Public employee, Public Officer, State, and Substantial interest.

67-16-4. Improperly disclosing or using private, controlled, or protected information – Using position to secure privileges or exemptions – Accepting employment which would impair independence of judgment or ethical performance – Exception. The use of private, controlled or protected information to obtain a personal benefit, or using position to secure privileges or exemptions is prohibited. There is a floor for the personal benefit, but anything in excess of the occasional gift of not more than \$50 may trigger a violation of this provision. This section was amended by SB 190 so that it becomes an entry level violation. More serious violations are to be prosecuted under Section 2304.5 or Section 76-8-105.

67-16-5. Accepting a Gift, compensation or loan – When prohibited. It is an offense for both an officer or employee to receive a gift of substantial value that would tend improperly to influence when the officer or employee knows that the gift is a reward for official action taken, or that may be involved in the future with an action involving the donor of the gift. This does not apply to the occasional gift of \$50 or less. This section was amended by SB 190 so that it becomes an entry level violation. More serious violations are to be prosecuted under Section 2304.5 or Section 76-8-105.

67-16-5.3. Requiring a donation, payment or service to government agency in exchange for approval - When prohibited. It is an offense to link governmental approval to demand for a donation to the agency. The donation is allowed if voluntarily and the agency acknowledges the donation in the granting of approval. This section was amended by SB 190 so that it becomes an entry level violation. More serious violations are to be prosecuted under Section 2304.5 or Section 76-8-105.

67-16-5.6. Offering a donation, payment or service to government in exchange for approval. This is a flip from the provision in 5.3 above. This section was amended by SB 190 so that it becomes an entry level violation. More serious violations are to be prosecuted under Section 2304.5 or Section 76-8-105.

67-16-6. Receiving compensation for assistance in transaction involving an agency – Filing a sworn statement. It is an offense to receive compensation for assisting a person obtain approval of an agency. This section was amended by SB 190 so that it becomes an entry level violation. More serious violations are to be prosecuted under Section 2304.5 or Section 76-8-105.

67-16-7. Disclosure of substantial interest in regulated business. Officers and employees are required to disclose ownership of substantial value (10% including amounts owned by family members) that is regulated by the entity or a procurement provider. The Disclosure statement is to be filled with the head of the agency and the disclosure statements are public information. This section was amended by SB 190 so that it becomes an entry level violation. More serious violations are to be prosecuted under Section 2304.5 or Section 76-8-105.

67-16-8. Participation in transaction involving business as to which public officer or employee has an interest – Exception. This action is prohibited unless the disclosure statement required by Section 67-16-7 is one file. Golf pros are exempt from this provision when employed by municipalities.

67-16-9. Conflicts of Interest Prohibited. No public officer or employee shall have personal investments in any business entity which will cause a substantial conflict between his private interests and public duties.

67-16-10. Inducing other to violate the Chapter. This action is prohibited.

67-16-11. Applicability of provisions. All of the provisions apply to public officers and employees.

67-16-12. Penalties for violations – Removal from office or dismissal from employment. Any public officer or public employee who knowingly violates this chapter with the exception of Sections 6 or 7, shall be dismissed from employment or removed from office as provided by law. In addition the public officer, employee or other person violating the provisions of the chapter shall be punished as follows:

- i. 2nd degree Felony if the value exceeds \$1,000.
- ii. 3rd degree Felony if the value exceeds \$250 or is less than \$1000; or if the violation follows two convictions where the value was less than \$250.
- iii. Class A Misdemeanor if the value exceeds \$100 or is less than \$250.
- iv. Class B Misdemeanor if the value is less than \$100.

67-16-14. Unethical transactions – Duty to dismiss officer or employee – Right to rescind or void contract. If the transaction violates section 6, 7, or 8, the agency involved shall dismiss the public officer or public employee and may rescind or void the contract without returning any part of the consideration the agency has received.

67-16-15. Complaint – Political Subdivisions Ethics Review Commission. A person may file a complaint for an alleged violation of this chapter by a political subdivision officer or employee in accordance with title 11, Chapter 49, Political Subdivisions Ethics Review Commission.

TITLE 76, CHAPTER 8, OFFENSES AGAINST THE ADMINISTRATION OF GOVERNMENT

76-8-101. Definitions. The following terms are defined: Candidate for electoral office, Party official, Peace officer, Pecuniary benefit, Public Servant. “Public Servant” is a broad term that includes elected and appointed officers and all employees. Pecuniary benefit is a broad term fully consistent with the other defined terms for personal benefit.

76-8-103. Bribery or offering a bribe. A person is guilty of bribery or offering a bribe if that person, promises, offers or agrees to give, directly or indirectly, any benefit to another...with the intent to influence ...a public servant, party official or voter. Bribery is a 3rd degree felony if the bribe is less than \$1000 and a 2nd degree felony when the value of the benefit is more than \$1000.

76-8-104. Threats to influence official or political action. A person is guilty of a Class A misdemeanor if he threatens a public servant, party official or voter with a purpose of influencing his action.

76-8-105. Receiving or soliciting bribe or bribery by public servant. A person is guilty of receiving or soliciting a bribe if that person asks for...or receives, directly or indirectly, any benefit with the understanding...that the purpose...is to influence an action. Receiving or soliciting a bribe is a 3rd degree felony if the value of the benefit asked for is less than \$1000 and a 2nd degree felony when the value of

the benefit is more than \$1000. (This is the section referred to in the new Procurement Code as the primary criminal violation related to procurement activities.)

76-8-109. Failure to disclose conflict of interest. As currently drafted, this applies only to “regulated officeholders” which means state constitutional officers (governor, the lieutenant governor, the state auditor, the state treasurer, or the attorney general), legislators, and State Board of Education members. A regulated officeholder who violates this provision is guilty of a Class B misdemeanor.

76-8-201. Official misconduct – Unauthorized acts or failure of duty. A public servant is guilty of a class B misdemeanor if, with an intent to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office, or knowingly refrains from performing a duty imposed on him by law.

76-8-202. Official misconduct – Unlawful acts based on “inside” information. A public servant is guilty of a class A misdemeanor if, knowing that an official action is contemplated or in reliance on information which he has acquired by virtue of his office...which has not been made public: he acquires or divests himself of a pecuniary interest...which may be affected by such action or information, he speculates or wagers on the basis of such information; or knowingly aids another to do any of the above.

76-8-203. Unofficial misconduct. A person is guilty of unofficial misconduct, a class B misdemeanor, if the person exercises or attempts to exercise any of the functions of a public office before actually being sworn into office or after no longer a public servant.

76-8-301. Interference with a public servant. A person is guilty of interference with a public servant, a class B misdemeanor, if he uses force..intimidation..with a purpose to interfere with...the performance of an official function.

76-8-308. Acceptance of bribe or bribery to prevent criminal prosecution – Defense. A person is guilty of a class A misdemeanor if he...accepts...or agrees to accept any benefit as consideration for his refraining from initiating or aiding in a criminal prosecution; or confers any benefit...as consideration for the person refraining from initiating or aiding in a criminal prosecution.

76-8-401. “Public funds,” “public money” and “public officer” defined. These terms are defined, it is interesting that public money remains public money even after being transferred as payment for programs or services by private contractors.

76-8-402. Misusing public money. Anybody entrusted with public funds misuses the public’s money is guilty of a 2nd degree felony if the amount in question is greater than \$5000, a 3rd degree felony if the amount is less than \$5000 and shall be disqualified to hold public office.

76-8-403. Failure to keep and pay over public money. Every person who involved with public money who neglects or fails to keep and pay over the money in the manner prescribed by law is guilty of a 3rd degree felony.

76-8-404. Making profit from or misusing public money – Disqualification from office – Criminal penalty. Any public officer...with a fiduciary relationship with public money, who makes a profit from...public money...is guilty of felony as provided in 76-8-402 and shall, in addition to the punishment provided by law, be disqualified to hold public office.

Additional miscellaneous provisions of note are identified, but not narrative is provided. For further information refer to the actual provisions in the code as cited:

- i. **Stealing, destroying or mutilating public records:** 76-8-412 and 76-8-413.
- ii. **Recording false or forged instruments:** 76-8-414.
- iii. **False or inconsistent statements:** 76-8-502 and 76-8-503.