



North Carolina Department of Commerce Division of Workforce Solutions

DWS Policy Statement Number: PS 11-2017

Date: May 17, 2017

Subject: Conflict of Interest Requirements for Workforce Development Boards and Staff

From:

A handwritten signature in blue ink, appearing to read 'William H. Collins, Jr.'.

William H. Collins, Jr.

Assistant Secretary for Workforce Solutions

Purpose: To provide additional guidance for Policy Statement 22-2015, Procurement and Contracting. This supplemental information includes possible scenarios and exceptions from North Carolina General Statute (NCGS) 14-234.

Background: Workforce Development Boards were provided guidance in the form of Policy Statement 22-2015, Procurement and Contracting, on December 2, 2015. Several general requirements were listed that included the requirement that all Workforce Development Boards must have a written Code of Conduct. The Code of Conduct applies to the behavior of staff and Board members before, during, and after any Workforce Innovation and Opportunity Act (WIOA) procurement event. This Policy Statement includes additional guidance and includes a North Carolina general statute that prohibits public officers or employees from benefitting from public contracts.

Action: Local Workforce Development Boards and contractors must follow and be aware of all applicable federal, state and local conflict of interest requirements when providing services (directly or indirectly) funded by Workforce Innovation and Opportunity Act (WIOA) resources. Workforce Development Board members and staff must be committed to maintaining the highest standards of ethical conduct and to guard against problems arising from real, perceived, or potential conflicts of interest. Guidance for procurements and conflicts of interest can be found in the following documents: 2 C.F.R. § 200.318, Public Law 113-128 Workforce Innovation and Opportunity Act Section 107(h), and North Carolina General Statute 14-234.

Potential conflict scenarios have been developed that relate to Workforce Development Board members and NCGS 14-234 and are included as a guide.

Effective Date: May 17, 2017

Expiration: Indefinite

Contact: Field Services Monitors

Attachments Attachment 1 – NC General Statute 14-234
Attachment 2 – Potential Conflict Scenarios

Rescinded

North Carolina General Statute 14-234

§ 14-234. Public officers or employees benefiting from public contracts; exceptions.

(a) (1) No public officer or employee who is involved in making or administering a contract on behalf of a public agency may derive a direct benefit from the contract except as provided in this section, or as otherwise allowed by law.

(2) A public officer or employee who will derive a direct benefit from a contract with the public agency he or she serves, but who is not involved in making or administering the contract, shall not attempt to influence any other person who is involved in making or administering the contract.

(3) No public officer or employee may solicit or receive any gift, favor, reward, service, or promise of reward, including a promise of future employment, in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves.

(a1) For purposes of this section:

(1) As used in this section, the term "public officer" means an individual who is elected or appointed to serve or represent a public agency, other than an employee or independent contractor of a public agency.

(2) A public officer or employee is involved in administering a contract if he or she oversees the performance of the contract or has authority to make decisions regarding the contract or to interpret the contract.

(3) A public officer or employee is involved in making a contract if he or she participates in the development of specifications or terms or in the preparation or award of the contract. A public officer is also involved in making a contract if the board, commission, or other body of which he or she is a member takes action on the contract, whether or not the public officer actually participates in that action, unless the contract is approved under an exception to this section under which the public officer is allowed to benefit and is prohibited from voting.

(4) A public officer or employee derives a direct benefit from a contract if the person or his or her spouse: (i) has more than ten percent (10%) ownership or other interest in an entity that is a party to the contract; (ii) derives any income or commission directly from the contract; or (iii) acquires property under the contract.

(5) A public officer or employee is not involved in making or administering a contract solely because of the performance of ministerial duties related to the contract.

(b) Subdivision (a)(1) of this section does not apply to any of the following:

(1) Any contract between a public agency and a bank, banking institution, savings and loan association, or with a public utility regulated under the provisions of Chapter 62 of the General Statutes.

(2) An interest in property conveyed by an officer or employee of a public agency under a judgment, including a consent judgment, entered by a superior court judge in a condemnation proceeding initiated by the public agency.

(3) Any employment relationship between a public agency and the spouse of a public officer of the agency.

(4) Remuneration from a public agency for services, facilities, or supplies furnished directly to needy individuals by a public officer or employee of the agency under any program of direct public assistance being rendered under the laws of this State or the United States to needy persons administered in whole or in part by the agency if: (i) the programs of public assistance to needy persons are open to general participation on a nondiscriminatory basis to the practitioners of any given profession, professions or occupation; (ii) neither the agency nor any of its employees or agents, have control over who, among licensed or qualified providers, shall be selected by the beneficiaries of the assistance; (iii) the remuneration for the services, facilities or supplies are in the same amount as would be paid to any other provider; and (iv) although the public officer or employee may participate in making determinations of eligibility of needy persons to receive the assistance, he or she takes no part in approving his or her own bill or claim for remuneration.

(b1) No public officer who will derive a direct benefit from a contract entered into under subsection (b) of this section may deliberate or vote on the contract or attempt to influence any other person who is involved in making or administering the contract.

(c) through (d) Repealed by Session Laws 2001-409, s. 1, effective July 1, 2002.

(d1) Subdivision (a)(1) of this section does not apply to (i) any elected official or person appointed to fill an elective office of a village, town, or city having a population of no more than 15,000 according to the most recent official federal census, (ii) any elected official or person appointed to fill an elective office of a county within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, (iii) any elected official or person appointed to fill an elective office on a city board of education in a city having a population of no more than 15,000 according to the most recent official federal census, (iv) any elected official or person appointed to fill an elective office as a member of a county board of education in a county within which there is located no village, town or city with a population of more than 15,000 according to the most recent official federal census, (v) any physician, pharmacist, dentist, optometrist, veterinarian, or nurse appointed to a county social services board, local health board, or area mental health, developmental disabilities, and substance abuse board serving one or more counties within which there is located no village, town, or city with a population of more than 15,000 according to the most recent official federal census, and (vi) any member of the board of directors of a public hospital if all of the following apply:

(1) The undertaking or contract or series of undertakings or contracts between the village, town, city, county, county social services board, county or city board of education, local health board or area mental health, developmental disabilities, and substance abuse board, or public hospital and one of its officials is approved by specific resolution of the governing body adopted in an open and public meeting, and recorded in its minutes and the amount does not exceed twenty thousand dollars (\$20,000) for medically related services and forty thousand dollars (\$40,000) for other goods or services within a 12-month period.

(2) The official entering into the contract with the unit or agency does not participate in any way or vote.

(3) The total annual amount of contracts with each official, shall be specifically noted in the audited annual financial statement of the village, town, city, or county.

(4) The governing board of any village, town, city, county, county social services board, county or city board of education, local health board, area mental health, developmental disabilities, and substance abuse board, or public hospital which contracts with any of the officials of their governmental unit shall post in a conspicuous place in its village, town, or city hall, or courthouse, as the case may be, a list of all such officials with whom such contracts have been made, briefly describing the subject matter of the undertakings or contracts and showing their total amounts; this list shall cover the preceding 12 months and shall be brought up-to-date at least quarterly.

(d2) Subsection (d1) of this section does not apply to contracts that are subject to Article 8 of Chapter 143 of the General Statutes, Public Building Contracts.

(d3) Subsection (a) of this section does not apply to an application for or the receipt of a grant under the Agriculture Cost Share Program for Nonpoint Source Pollution Control created pursuant to Article 72 of Chapter 106 of the General Statutes, the Community Conservation Assistance Program created pursuant to Article 73 of Chapter 106 of the General Statutes, or the Agricultural Water Resources Assistance Program created pursuant to Article 5 of Chapter 139 of the General Statutes by a member of the Soil and Water Conservation Commission if the requirements of G.S. 139-4(e) are met, and does not apply to a district supervisor of a soil and water conservation district if the requirements of G.S. 139-8(b) are met.

(d4) Subsection (a) of this section does not apply to an application for, or the receipt of a grant or other financial assistance from, the Tobacco Trust Fund created under Article 25 of Chapter 143 of the General Statutes by a member of the Tobacco Trust Fund Commission or an entity in which a member of the Commission has an interest provided that the requirements of G.S. 143-17(h) are met.

(d5) This section does not apply to a public hospital subject to G.S. 131E-14.2 or a public hospital authority subject to G.S. 131E-21.

(d6) This section does not apply to employment contracts between the State Board of Education and its chief executive officer.

(e) Anyone violating this section shall be guilty of a Class 1 misdemeanor.

(f) A contract entered into in violation of this section is void. A contract that is void under this section may continue in effect until an alternative can be arranged when: (i) immediate termination would result in harm to the public health or welfare and (ii) the continuation is approved as provided in this subsection. A public agency that is a party to the contract may request approval to continue contracts under this subsection as follows:

(1) Local governments, as defined in G.S. 159-7(15), public authorities, as defined in G.S. 159-7(10), local school administrative units, and community colleges may request approval from the chair of the Local Government Commission.

(2) All other public agencies may request approval from the State Director of the Budget.

Approval of continuation of contracts under this subsection shall be given for the minimum period necessary to protect the public health or welfare. (1825, c. 1269, P.R.; 1826, c. 29; R.C., c. 34, s. 38; Code, s. 1011; Rev., s. 3572; C.S., s. 4388; 1929, c. 19, s. 1; 1969, c. 1027; 1975, c. 409; 1977, cc. 240, 761; 1979, c. 720; 1981, c. 103, ss. 1, 2, 5; 1983, c. 544, ss. 1, 2; 1985, c. 190; 1987, c. 570; 1989, c. 231; 1991 (Reg. Sess., 1992), c. 1030, s. 5; 1993, c. 539, s. 145; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 519, s. 4; 2000-147, s. 6; 2001-409, s. 1; 2001-487, ss. 44(a), 44(b), 45; 2002-159, s. 28; 2006-78, s. 2; 2009-2, s. 2; 2009-226, s. 1; 2010-169, s. 2(a); 2011-145, ss. 13.22A(dd), 13.23(b).)

Potential Conflict Scenarios Due to NCGS 14-234

(Responses provided by Frayda S. Bluestein, David M. Lawrence Distinguished Professor of Public Law and Government, University of North Carolina at Chapel Hill, School of Government)

All Workforce Development Board (WDB) members are considered public officers appointed to serve or represent a public agency under an interpretation of NCGS 14-234. Local Workforce Development Board members, who are unpaid volunteers, provide oversight to local activities funded with federal Workforce Innovation & Opportunity Act (WIOA) resources.

General Comments:

Responses below are based on North Carolina Statutes, mainly G.S. 14-234 and 234.1. Since there is federal money involved in this program, you would also want to look at any federal or state regulations that deal with conflicts of interest in contracting and voting. Sometimes they are broader than what we have in state law. Also, some of these scenarios do not involve legal issues but may create ethical or perception issues. In general, it is a good policy to avoid the appearance that businesses have connection to people who are on the board derive some advantage from that connection. It's a good practice to make sure the WDB undertakes steps to avoid that perception, for example, by opening contracting and training opportunities broadly and avoiding board members voting on matters involving their employers or business associates.

Possible scenarios:

1. A WDB member, who is also the owner of a private company, wins the bid through a WDB competitive procurement to provide training services to customers. He has abstained from any discussion or voting on the WDB decisions regarding the procurement.

If the WDB awards this contract, and it is a contract with that entity, then there would be a violation of G.S. 14-234, since a prohibited contract occurs if a person has a "direct benefit". One definition of direct benefit is that the person owns 10% or more of the company that is contracting with the agency. It is not possible to avoid liability under this statute by abstaining from voting. If there is an exception that applies, then the person with the direct benefit is required to refrain from voting and participation in a discussion. I don't know of an exception that would apply here so the contract would be void, and the member would be subject to prosecution for a misdemeanor. That is not likely to happen but obviously this should be avoided.

2. During an on-the-job training period, a company providing the training pays wages to the WIOA participant and is then reimbursed by the WDB with WIOA funds. A WDB member is a senior executive within the company that trains the participant and receives the wage reimbursement.

I don't see legal violation here. The payment is a reimbursement, and there is no evidence that the WDB members owns the company or derives income or commission directly from the contract. Indeed, even G.S. 14-234 has an exception that allows reimbursement under public assistant programs if certain protections are in place. (See subsection (b)(4).) Along those lines, I would note that if there was a decision by the WDB regarding the selection of the company to provide the training, this board member should probably not participate in that process or vote. As noted above, I do not know if these boards have procedural rules or conflict of interest policies, but it might good to consider some rules about participation in these decisions when there is connection, even if it is not a legal conflict.

WDB has staff from a local bank to present at a financial management workshop where customers are allowed to sign up for bank services. A representative from that local bank is a WDB member.

This situation might invoke the prohibition in G.S. 14-234.1 if it could be shown that the board member used his WDB position or information he had because of his service on the WDB to benefit his employer or himself. Even if there is no violation of the statute, it seems to me that this person should not be involved in the process of choosing the bank and that the board should take steps to avoid the appearance of favoritism.

3. WDB offers a job/ health fair and uses a local healthcare provider to provide free screenings to the public. A representative of the local healthcare provider is a WDB member.

It is not clear that the member in this scenario benefits from the arrangement, but it seems possible that the provider might benefit from the exposure to new clients/patients. If that is correct then the issue is whether the member/representative was involved in the decision to choose the provider in violation of G.S. 14-234.1 and even if not, did the process create an appearance of favoritism.

4. WDB offers a job/ health fair and uses a local healthcare provider to provide screenings to the public for a minimal fee. A representative of the local healthcare provider is a WDB member.

Same as above, although in this case there is a benefit to the provider so again, possible violation of 14-234.1 or possible appearance of favoritism.

5. WDB hosts a workforce summit and provides door prizes - free tickets from a well-known amusement park and a complimentary stay at a local resort. Both businesses have members on the WDB.

I don't know of any legal problem with this. I suppose some might feel that they are using this opportunity to promote their businesses. The matter might look bad if they are the only ones allowed to provide door prizes. If there are other businesses that provide door prizes, it seems to me there is less of an appearance issue.

6. WDB has competitively procured the purchase of t-shirts for WIOA program participants. The successful bidder is a WDB member. He has abstained from any discussion or voting on the WDB decisions regarding the procurement.

See answer to question #1. It doesn't matter that the contract was competitively bid or that the person didn't participate in voting or discussion. It's still a violation of G.S. 14-234.

7. WDB members use the services of public Career Centers (which WDBs oversee) to screen potential employees. (This is a free service provided to all employers.)

I don't see any legal problem with this. It could be awkward if there was a dispute about an employee and the member ends up in an adversarial position with the WDB, but that seems unlikely.

In which scenario(s) should only a conflict of interest policy be employed; rather than disqualifying the citizen from being a WDB member?

None of the statutes require a citizen to be removed, but in some cases, a person might have to make a decision about whether they want to have the contract or be on the board. Scenarios 1 and 8 involve that kind of issue. I do think that it is important to make sure that members understand the limitations serving on the board might create. It's good to have business people on the board but a good policy and a good understanding of the legal and perception issues will be important to maintain credibility of the board and its work.

Rescinded