

12.01 INDIVIDUAL CONFLICTS OF INTEREST

Commission members (“Members”), and the staff of the Commission, the Office of the State Architect, the State Procurement Agencies (“SPAs”), and the User Agencies participating in Commission procurements or contracts (collectively “Staff”), all serve the interests of the State of Tennessee and its citizens, and have a duty to avoid activities and situations which, either directly or indirectly, put personal interests before the professional obligations they owe to the State and its citizens.

It is the expectation of the Commission that its Members and that Staff adhere to the various statutes that exist in the Tennessee Code Annotated (T.C.A.) which are pertinent to individual, potential, or actual conflicts of interest, including but not limited to the following statutory sections, and any successor sections thereto:

- T.C.A. § 8-50-501, Disclosure statements of conflict of interests by certain public officials
- T.C.A. § 12-2-208, Purchase by officer unlawful – penalty for violation
- T.C.A. § 12-2-415, State surplus property disposition regulation
- T.C.A. § 12-2-416, Violation of § 12-2-415
- T.C.A. § 12-2-417, State employee violation – punishment
- T.C.A. § 12-4-101, Personal interest of officers prohibited
- T.C.A. § 12-4-102, Penalty for unlawful interest
- T.C.A. § 12-4-103, Bidding by state employees prohibited
- T.C.A. § 12-4-104, Penalty for unlawful transactions
- T.C.A. § 12-4-105, Grand jury investigations
- T.C.A. § 12-4-106, Prohibition against receiving rebates, gifts, money or anything of value

12.02 ORGANIZATIONAL CONFLICTS OF INTEREST

A. PURPOSE

The purpose of this policy Item 12 is to prescribe ethical standards of conduct applicable to the Members and Staff, and to inform Persons (as hereinafter defined), including Contractors/Consultants (as hereinafter separately defined), entering into State contracts that are subject to Commission approval and oversight, of the ethical standards of conduct applicable to procurements and to resulting contracts and all amendments thereto, all of which serves to:

- Promote full and open competition, integrity, and transparency in the procurement and contracting process;
- Prevent Persons from obtaining an unfair competitive advantage in the procurement and contract process;
- Promote an environment conducive to Contractors/Consultants providing services to the State in an impartial and objective manner;
- Provide guidance to enable Contractors/Consultants to make informed decisions while conducting business with the State; and
- Protect the validity of the State’s contracts, protect the State’s interests, and protect the State’s confidential and sensitive information.

B. POLICY

1. All Members, Staff, and Contractors/Consultants shall at all times conduct and carry out their duties and responsibilities in a manner intended to uphold high ethical standards and to comply

with this policy. If a Member, member of the Staff, or Contractor/Consultant has actual knowledge of an Organizational Conflict of Interest (as hereinafter defined, and hereinafter referred to as "OCI"), the OCI shall be disclosed to the State Architect and shall be avoided, mitigated or waived in accordance with Paragraph 4 below.

2. All SPAs must consider potential OCIs during preparation of all procurement solicitation documents, during the evaluation of all offers and proposals, and must disclose the existence of OCI's that become known or discovered at any time during the term of any contract resulting from a procurement. SPAs must include clauses in every procurement solicitation and in every contract resulting from a procurement that would appropriately identify known current and future OCIs. If an OCI is discovered during preparation of the procurement documents, the SPA must include a clause requiring offerors and proposers to make disclosures and representations, and to explain plans to resolve conflicts.
3. All Contractors/Consultants must disclose the existence of OCIs that are known or discovered at any time prior to award and during contract performance, and must, upon request, disclose all facts bearing on the OCI.
4. Upon identification of an OCI, the SPA shall, as soon as reasonably possible, simultaneously notify the State Architect of the OCI and submit to the State Architect a plan to address the OCI, which plan shall include actions and/or agreements necessary to avoid, mitigate, and/or waive the OCI.
 - a. Avoidance generally involves a Contractor/Consultant foregoing a contracting opportunity, or foregoing existing contractual rights, in order to remain eligible for future work, or involves a limitation on future contracting allowing the Contractor/Consultant to perform the initial contract, but precluding the Contractor/Consultant from submitting offers on future contracts. Avoidance may also involve the removal or limitation of an individual member of the Staff's involvement in the procurement, evaluation, and/or management of services performed by a Contractor/Consultant under an initial contract or under future contracts.
 - b. Mitigation may involve specific actions by a Contractor/Consultant and/or an SPA to limit the effect of a conflict, or mitigation may involve more general efforts and /or recognitions when the circumstances are covered by policy of the Commission and/or policy of the Office of the State Architect.
 - c. The SPA may, upon written approval of the State Architect, waive the requirement to resolve an OCI if the SPA determines that resolution is not feasible or is not in the best interest of the State, which determination must be documented in writing and maintained by the SPA.
 - d. No OCI occurs when (i) all material facts of the transaction and the basis for a possible OCI are disclosed and the contract, procurement or transaction is approved or (ii) the contract, procurement or transaction is fair to the State which such determination shall be documented in writing and filed with the State Architect.
 - e. The SPA shall not commence implementation of the plan to avoid, mitigate, and/or waive the OCI required by subparagraphs 4.a., 4.b. or 4.c. until the SPA has documented the basis for the plan in writing and has received written approval of the plan from the State Architect, or until documentation has been filed with the State Architect as required by subparagraph 4.d.

- f. In all instances where an OCI exists in a procurement or contract in which the State Architect participated, the use of the term “State Architect” in the first sentence of this paragraph 4, and in subparagraphs 4.d. and 4.e. above, shall be taken to mean the Commission or its designee[s].
- g. Any approval or failure to approve by the State Architect pursuant to subparagraphs 4.a., 4.b. or 4.c. may be appealed by any Member to the Commission or its designee(s).

C. DEFINITIONS:

- a. “Affiliate” of a Contractor/Consultant means (i) any member, partner or joint venture member of the Contractor/Consultant; (ii) any shareholder of the Contractor/Consultant having an interest of at least ten percent in any class of stocks; (iii) any Person which directly or indirectly through one or more intermediaries Controls (as hereinafter defined), or is Controlled by, or is under common Control with, the Contractor/Consultant or any of their shareholders, members, partners or joint venture members; and/or (iv) any entity for which ten percent or more of the equity interest in such entity is held directly or indirectly, beneficially or of record by (a) the Contractor/Consultant, (b) any of the shareholders, members, partners or joint venture members of the Contractor/Consultant, or (c) any affiliate of the Contractor/Consultant.
- b. “Biased Ground Rules” means the requirements for a contract or prerequisites for competition for a contract that have been written by a Person who, as a part of its performance of a State contract, directly or indirectly participates in writing statements of work or specifications for another contract for which the Person who established the requirements or prerequisites, or any of its Affiliates, seeks to compete.
- c. “Contractor” means any Person, or its Affiliates or subcontractors, retained by the State to perform program implementation services for the State, or proposing to perform such services.
- d. “Consultant” means any Person, or its Affiliates or sub-consultants, retained by the State to perform Procurement Services and also retained to perform, or proposing to perform, other services for the State, which other services performed or to be performed include, but are not limited to, architecture, safety, quality, information technology, real estate acquisition or disposal, leasing, engineering, environmental, systems integration, land surveying, project management, program management, planning, construction management, or management assistance.
- e. “Control” means the possession, directly or indirectly, of the power to cause the direction of the management of an entity, whether through voting securities, by contract, family relationship or otherwise.
- f. “Impaired Objectivity” means when a Person evaluates proposals or contract performance for its own products or services or for the products or services of competitors. Impaired Objectivity can exist where a contract requires the exercise of judgment, and the economic interests of the Person – as broadly construed- will be harmed through the free and unbiased exercise of that judgment.
- g. “Organizational Conflict of Interest” means, as to contracts or proposed contracts with the State, a circumstance arising out of a Contractor’s/Consultant’s existing or past activities, business or financial interests, familial relationships, contractual relationships, and/or organizational structure (i.e., parent entities, subsidiaries, Affiliates, etc.) that results in:

- (i) Impaired Objectivity of a Contractor/Consultant;
 - (ii) An Unfair Competitive Advantage (as hereinafter defined), for any bidder or proposer with respect to a State procurement;
 - (iii) Biased Ground Rules; and/or
 - (iv) A perception or appearance of impropriety, as determined by a Member or the State Architect, with respect to any of the State's procurements or contracts, or a perception or appearance of Unfair Competitive Advantage with respect to a State procurement.
- h. "Person" means any individual, corporation, limited liability company, partnership (general or limited), joint venture, association, joint stock company, trust, government (or any agency or political subdivision thereof), other business entity, or other organization recognized by law.
- i. "Procurement Services" mean services provided by a Contractor/Consultant for the benefit of the State that relate to, but are not limited to any of the following:
- (i) Development and preparation of procurement documents;
 - (ii) Development of offer/proposal evaluation criteria, processes and/or procedures;
 - (iii) Management of or administration of a procurement;
 - (iv) Evaluation of bidder/proposer submittals;
 - (v) Negotiation of a contract;
 - (vi) Advising the State or performing any other services that relate to any aspect of the procurement.
- j. "Unfair Competitive Advantage" exists when a Person competing for the award of a contract has obtained:
- (i) Access to proprietary and/or confidential information, or information that is not available to the public or other competitors, and that would assist the offeror or proposer in responding to a procurement solicitation or in obtaining the contract; and/or
 - (ii) Scoring criteria or points allocation information, or other source selection information, that is relevant to the contract but is not available to all offerors or proposers and that would assist the offerors or proposers in responding to a procurement solicitation or in obtaining the contract.

D. FURTHER POLICIES AND PROCEDURES

The Office of the State Architect may develop policies and procedures that further define requirements to fulfill this policy.

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18.01 PROTESTS

18.01 All construction and leasing procurements may be subject to an appeal process. Either The University of Tennessee, The Tennessee Board of Regents, or State of Tennessee Real Estate Asset Management will be the applicable State Procurement Agency (SPA) for these types of procurements.

- A. After a Request for Proposals (“RFP”) or a Request for Qualifications (“RFQ”) has been released to the public or posted on the SPA’s website, a potential proposer must submit any written questions and comments about the solicitation to the SPA no later than the questions and comments deadline set forth in the RFP or RFQ, as applicable. After the SPA responds in writing to any such written questions and comments, the State will allow seven calendar days for consideration of a protest from a potential proposer regarding any defects or ambiguities involving the RFP or RFQ, as applicable, the potential proposer knew or should have known giving rise to a protest. Any issues raised by the protesting party after the seven day period shall not be considered as part of the protest. No pre-proposal protest is allowed before a bid opening for design-bid-build construction projects or before the separate cost proposal phase of best value projects under this paragraph. A potential proposer must comply with the requirements set forth in subsections C through H below.
- B. After opening a procurement file for public inspection, which shall occur at least ten days prior to the date of the State Building Commission Executive Sub-Committee meeting at which approval will be sought, the State will allow seven calendar days for consideration of protests from an actual proposer based on facts the proposer knows or should have known giving rise to the protest. Any issues raised by the protesting party after the seven-day period shall not be considered as part of the protest.
- C. Protests and a protest bond in accordance with Subsection D shall be submitted to the Head of the SPA who will evaluate the merits of the protest. Only written protests shall be acknowledged and considered. Protests shall be addressed to the Commissioner of the Department of General Services, the President of the University of Tennessee, or the Chancellor of the Tennessee Board of Regents, submitted on company letterhead, and be signed by a principal or company officer empowered to bind the proposer to the provisions of the procurement document. At a minimum, a protest shall identify the specific issue[s] and state justification[s] for the protest. If the SPA decides in favor of the protest then (1) the result may be disqualification of the violative bidder[s], cancellation of the procurement or other resolution and (2) the protest bond shall be returned to the proposer. If the SPA denies a protest, then the contract process proceeds unless further appealed under Subsection F.
- D. Upon the filing of a protest by an actual proposer, a stay of award shall automatically be in place. Such stay shall become effective upon receipt by the SPA of the protest and a protest bond that is in accordance with Subsection E. The SPA shall not proceed further with the procurement process or with the award of the contract until the protest has been resolved by the State in accordance with the provisions of this Policy, unless the State Architect makes a written determination that continuation of the procurement process or the award of the contract without delay is necessary to protect substantial interests of the State. It shall be the responsibility of the SPA by written request to seek such a determination by the State Architect.

- E. Neither a protest nor a stay of award shall proceed under this Policy unless the protesting party posts a protest bond. The protesting party shall post with the SPA, at the time of filing a protest, a bond payable to the State in the amount of five percent (5%) of the protester's bid amount, or, if the protest is filed relating to a procurement pursuant to an RFQ or a RFP, the bond shall be payable to the State in the amount of five percent (5%) of the Bid Target, Guaranteed Maximum Price, or other estimated maximum contract liability provided in the construction procurement document. If the protest relates to a lease procurement, the bond shall be in an amount of the greater of the sum of \$40,000 or five percent (5%) of the total value of the lease, calculated by multiplying the applicable current Facilities Revolving Fund Rate by the square footage anticipated in the procurement document, and then by multiplying the resulting number by the shortest lease term in the procurement document, stated in years. The protest bond shall be in form and substance acceptable to the State. The protesting party shall post the protest bond strictly in accordance with all requirements of this paragraph, or the protest shall be summarily dismissed.
- F. A proposer may appeal its denied protest to the Office of the State Architect ("OSA"), for further review within seven calendar days of the SPA's written decision. If after review of the protest through appeal, the State Architect decides in favor of the protest then (1) the result may be disqualification of the violative bidder[s], cancellation of the procurement or other resolution and (2) the protest bond shall be returned to the proposer. If the OSA's review of the appeal concurs with the SPA's decision to deny the protest, then the protest is considered denied and the award process proceeds. The State Architect's written determination of a denial is deemed final.
- G. If a protest is denied (i) by the SPA and the protest is not appealed to the OSA or (ii) by the State Architect, the protest bond penal sum, or any lesser amount agreed to by the State and the protesting party pursuant to G.(3) below, shall be paid to the State upon final determination or after the seven (7) day period for the appeal, conditioned upon a written decision by the State Architect that the denial was a result of:
- (1) The protest being brought or pursued in bad faith; or
 - (2) The protest not stating on its face a valid basis for protest; or
 - (3) The State suffering monetary losses based on the filing of the protest that should be recoverable as reasonably determined by the SPA and approved by the State Architect at the full or lesser amount of the penal sum of the bond provided.
- H. The protesting party must exhaust all administrative remedies provided in this policy prior to the initiation of any judicial review of the protest. Protests appealed to the chancery court from the OSA's written determination of a denial shall be by common law *writ of certiorari*. The scope of review in the proceedings shall be limited to the record made before the OSA and shall involve only an inquiry into whether the OSA exceeded its jurisdiction, followed an unlawful procedure, or acted illegally, fraudulently, or arbitrarily without material evidence to support its action. Notwithstanding the foregoing two sentences, should a protest be received by an SPA or the State subsequent to a contract being completely executed pursuant to a procurement process, the Tennessee Claims Commission has exclusive jurisdiction to determine all monetary claims against the State.

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