

I. STATE CONFLICT OF INTEREST LAWS

A. Prohibition Against Contracting with the Board for One's Own Benefit.

1. Prohibitions.

- a. No public officer or employee who is involved in making or administering a contract on behalf of a public agency (which includes community colleges) may derive a direct benefit from the contract (except as allowed under section 2 below or otherwise allowed by law) N.C. Gen. Stat. 14-234(a)(1).
- b. A public officer or employee who will derive a direct benefit from a contract with the 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. N.C. Gen. Stat. 14-234(a)(2).
- c. No public officer or employee may solicit or receive any gift, reward or promise of reward in exchange for recommending, influencing, or attempting to influence the award of a contract by the public agency he or she serves. N.C. Gen. Stat. 14-234(a)(3).

2. Definitions.

- a. Public officer defined. "Public Officer" is an individual who is elected or appointed to serve or represent a public agency, other than an employee or independent contractor. (this includes community college trustees) N.C. Gen. Stat. 14-234(a1) (1).
- b. "Administering" a contract. 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. Trustees are deemed to always "administer" a contract. N.C. Gen. Stat. 14-234(a1) (2).
- c. "Making" a contract. A public officer or employee is involved in making a contract if he or she participates in the development of specifications or terms 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 the section under which the public officer is allowed to benefit and it prohibited from voting. N.C. Gen. Stat. 14-234(a1) (3).
- d. Deriving a "Direct Benefit." A public officer or employee derives a direct benefit from a contract if the person or his/her spouse:
 - i. Has more than 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.

N.C. Gen. Stat. 14-234(a1) (4).

3. Recusal Requirement. For any contract entered into under an exception above, the trustee who will derive a direct benefit from a contract may not vote on the contract or attempt to influence any other person who is involved in making or administering the contract. Trustee should not be present for discussion/deliberation on the topic.

4. Sanctions.

a. Any public official violating these prohibitions is guilty of a Class 1 misdemeanor criminal offense. N.C. Gen. Stat. Sec. 14-234(e).

b. Contracts entered into in violation of these requirements are void.

B. Prohibition Against Misuse of Confidential Information.

1. Prohibition. Trustees and all officers and employees of the board are prohibited from using confidential information acquired by virtue of membership on a board or employment with the board:

a. to acquire a financial interest in any property transaction, or enterprise; or

b. to gain any pecuniary (financial) benefit which may be affected by such information or official action; or

c. to intentionally aid another in doing so.

2. Sanction. Violation of these provisions is a Class 1 misdemeanor.

C. Accepting Gifts and Favors from Contractors with the Board.

1. Prohibition.

a. Generally. Board members and certain employees are prohibited from accepting “gifts and favors” from contractors and potential contractors with the board.

b. Officials Covered. This prohibition applies to trustees and any officers or employees of a community college who are charged with the duty of:

(1) Preparing plans, specifications, or estimates for public contracts;

(2) Awarding or administering public contracts; or

(3) Inspecting or supervising construction.

2. Exceptions.

The following acts are exempted from the statute and therefore permitted:

- a. Gifts and honorariums for participating in meetings;
- b. Advertising items or souvenirs of nominal value;
- c. Meals furnished at banquets;
- d. Donations to professional organizations to defray meeting expenses where governmental employees are members of such professional organizations; and
- e. Customary gifts and favors between employees or officers and their friends, relatives, spouse, minor children or members of their household where it is clear that it is the relationship rather than the business of the individual that is the motivating factor for the gift or favor, and
- f. Gifts permitted to legislators, legislative employees and other state agency officials and employees covered by the State Ethics Act, N.C. Gen. Stat. Section 138A-32, including.
 - (1) Food and beverages for immediate consumption in connection with public events;
 - (2) Informational materials relevant to the official's duties; or
 - (3) Reasonable actual expenses for attending educational meetings, speaking at a meeting, attending organizational meetings of which the official's organization is a member
 - (4) A plaque or non-monetary memento;
 - (5) Gifts accepted on behalf of the school system for the benefit of the school system;
 - (6) Anything made available to or distributed to the general public;
 - (7) Gifts from family members or members of the same household;
 - (8) Gifts of expenses related to industry recruitment or promotion of international trade, tourism or travel (provided it was not solicited and is disclosed);
 - (9) Gifts of less than \$100 given as a personal gift as part of an overseas trade mission if customary;
 - (10) Gifts given as part of a business, civic, religious, fraternal, personal or commercial relationship if not related to the public service and the gift was not given for the purposes of lobbying
 - (11) Food and beverages for immediate consumption if not given by a lobbyist, is provided during a conference or meeting under certain circumstance.
 - (12) Food and beverages for immediate consumption at an organized gathering which the individual is invited to attend for purposes related to his or her official duties.

N.C. Gen. Stat. 133-32.

3. Sanctions.

- a. Violation is a Class 1 misdemeanor for both the public official and the public official or employee.
- b. Prohibited gifts and favors cannot be claimed as a tax deduction. N.C. Gen. Stat. 133.-32

4. Interpretations.

The North Carolina Attorney General has interpreted this statute as prohibiting those doing business or seeking to do business with the board, *including your board attorney and other independent contractors*, from taking board members or other public official out for meals. (See May 13, 1993 Attorney General opinion)

II. RECIPIENTS OF FEDERAL GRANT FUNDS

Grants Management Common Rule is a set of federal regulations that apply to the management of federal funds, and include conflict of interest provisions. Grantees are typically required to adopt policies that (1) address real and apparent conflicts of interest, (2) imposes prohibitions against accepting gifts and favors from vendors and contractors, (3) establishes disciplinary actions for violations.

GMCR also prohibits all officers, employees and agents of grantees from accepting gifts and favors from current or future contractors. A violation can result in disciplinary action and loss of funding.

GMCR prohibitions are broader than those in state statute, and cover real or apparent financial or other interests, vendors used within the last year and all current or future vendors/contractors, and all agents and employees of a grantee.

III. CONFLICTS OF INTEREST AND SUBCONTRACTORS

- A. Will the Public Official derive a “direct benefit” from the (sub)contract with a General Contractor entering into a direct contract with College?

EXAMPLE: Trustee is an electrician and owns their own business. Trustee/electrician often subcontracts with one of the bigger reputable general contractors in the area. Your college is getting ready to build a new building and as it turns out, that particular general contractor receives the award for the new project. Can the Trustees award the contract knowing that one of their own members is routinely an electrical subcontractor on projects built by this general contractor?

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. **Trustees are deemed to always “administer” a contract.** N.C. Gen. Stat. 14-234(a1) (2).

No public officer or employee who is involved in making or administering a contract on behalf of a public agency (which includes community colleges) may derive **a direct benefit from the contract.** N.C. Gen. Stat. 14-234(a)(1).

So we’re talking about 2 contracts here, one between the Trustees and General Contractor, and another between General Contractor and Trustee/electrician. Trustee/electrician will derive income under Contract #2, but **indirectly – not directly** – from Contract #1. In 2004, the Court of Appeals held that this was a violation where a county awarded a construction contract to a contractor who then subcontracted the work to the chair of the county board of commissioners. However that case was decided on an earlier and different version of G.S. 14-234, which was more inclusive of **anyone** deriving a benefit, **directly or indirectly**, from a contract with the public body. Also the facts were unique in that the chair of the commissioners actually did most of the work on the project and the General was listed as the contracting party to “launder” the project in an attempt to skirt G.S. 14-234.

While a contract probably could be awarded here without technically violating G.S. 14-234, no court has decided this under the newer version of the statute and depending on the facts, if a General Contractor was asked to list its proposed subcontractors on its bid (and Trustee was one of those listed subs), then a court may be more likely to find that Trustee/electrician would receive a “direct” benefit from Contract #1 between the General Contractor and the College.

Even if no direct benefit is found, the prohibition against gifts and favors by a contractor or potential contractor could be implicated if there any indication that Trustee/electrician has attempted to influence the award of a contract to General Contractor with whom Trustee/electrician regularly does subcontracting work? Has Trustee/electrician shared information about the upcoming letting of bids on this project to General contractor to help encourage their bid or benefit them in their bid submittal.

Another practical issue which could arise is if General Contractor fails to pay Trustee/electrician for work they completed on the project. Trustee/electrician says they aren’t getting paid, and the General Contractor says they won’t pay for the shoddy work that they’ve been seeing from Trustee/electrician on the job. Where does this put Trustee? Their duties to the Board are coming into conflict with their role as the owner of an electrical contracting business doing work for General Contractor on the college’s project.

IV. STATE GOVERNMENT ETHICS ACT

- A. College Trustees are also covered by the State Government Ethics Act
 - 1. Must file statement of economic interests

2. Be subjected to additional (but similar) ethical standards for covered persons, which include:
 - a. Not use public position for private gain
 - b. Not knowingly, directly or indirectly, ask, accept, demand, exact, seek, assign, receive, or agree to receive anything of value in return for being influenced in the discharge of the covered person's responsibilities
 - c. Not use or disclose non-public information gained in the course of or by reason of their official responsibilities in a way that would affect a personal financial interest of the covered person, a member of their extended family, or a business with which the covered person is associated
 - d. To make due and diligent effort before taking any action, including voting or participating in discussions with other covered persons on the Board to determine whether the covered person has a conflict of interest. If unable to determine if they have a conflict, the covered person has a duty to inquire of the State Ethics Commission as to that conflict. (*your board chair reads a Miranda warning of sorts at start of your trustee meetings I assume that asks you to consider this before taking any action at a board meeting*)