

The State and Local Government Conflict of Interests Act and the Ethics in Public Contracting Provisions of the Virginia Public Procurement Act

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State and Local Government Conflict of Interests Act

- The State and Local Government Conflict of Interests Act is the primary law governing the **financial interests** of public officers and employees in contracts and transactions that involve their agency.
- The Act's provisions are complex, and application of the Act is fact-specific.

Potential Conflicts

A City employee may have a prohibited conflict arising from:

- A personal interest in a contract
- A personal interest in a transaction
- Business opportunities tied to official acts
- Misuse of confidential information
- Receipt or solicitation of gifts

“Personal Interest”

“**Personal interest**” means a financial benefit or liability accruing to an employee or a member of his or her “immediate family.”

Va. Code § 2.2-3101.

“Immediate Family”

“**Immediate family**” means (i) the employee’s spouse and (ii) any person who resides in the home *and* is a dependent.

Va. Code § 2.2-3101.

“Personal Interest”

“Personal interest” exists by an employee’s or immediate family member’s

- Ownership of a business (> 3%)
- Annual income > \$5,000 from ownership in property or a business
- Annual salary/compensation/benefits > \$5,000
- Ownership of property if interest is > \$5,000
- Option to own business or property if ownership interest > 3% (business) or > \$5,000 (property)
- Personal liability, assumed on behalf of a business, that exceeds 3% of business’s total equity

Va. Code § 2.2-3101.

Personal Interest in a Contract (or Subcontract)

An employee will have a “personal interest in a contract” with the City if she, a family member, or a business in which she has a “personal interest” is a party to the contract.

For employees, the restriction applies only to contracts with their own department.

Va. Code § 2.2-3101.

Personal Interest in a Contract: Exceptions

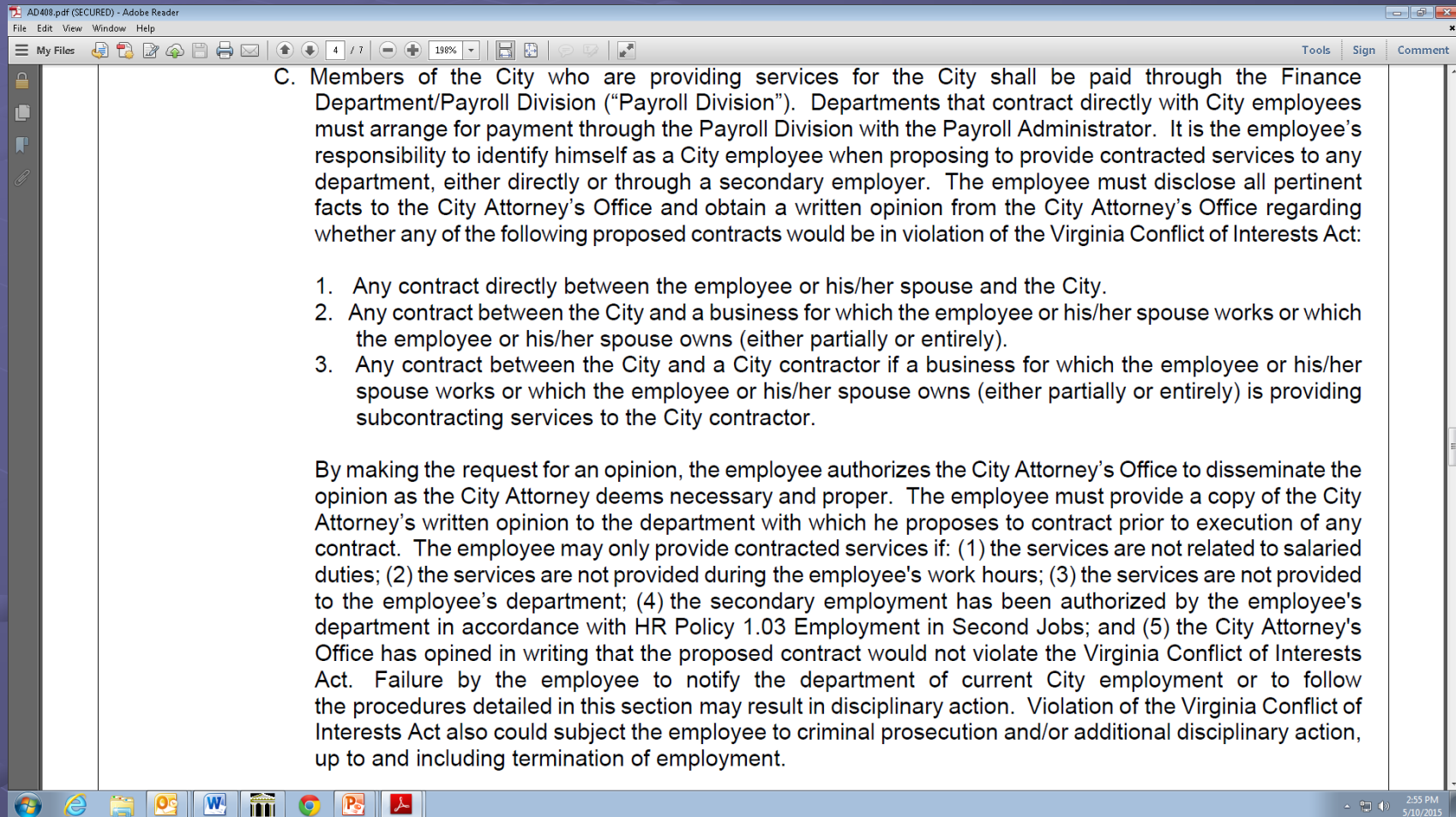
Exceptions to the prohibition include:

- An employee's interest in additional contracts of employment or for goods or services that *accrue via an immediate family member* if the employee does not exercise control over the employment of the family member and the employee is not in a position to influence the award of the goods or services contract.
- Employee's **sole** personal interest in a contract is by reason of income from the contracting firm or governmental agency and the employee does not participate in the procurement of the contract on behalf of either party (disclosure may be required).

Best Practices

- Require employees to obtain annual written approval from their supervisors for all secondary employment.
- Train employees and supervisors to recognize potential conflicts arising from not only their own personal interests but also those of their spouse/“immediate family member.”
- Include in financial policies a requirement that employees seek a conflict of interests opinion prior to contracting with their government employer.

A.D. 4.08: Purchasing and Payment Requirements



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C. Members of the City who are providing services for the City shall be paid through the Finance Department/Payroll Division (“Payroll Division”). Departments that contract directly with City employees must arrange for payment through the Payroll Division with the Payroll Administrator. It is the employee’s responsibility to identify himself as a City employee when proposing to provide contracted services to any department, either directly or through a secondary employer. The employee must disclose all pertinent facts to the City Attorney’s Office and obtain a written opinion from the City Attorney’s Office regarding whether any of the following proposed contracts would be in violation of the Virginia Conflict of Interests Act:

1. Any contract directly between the employee or his/her spouse and the City.
2. Any contract between the City and a business for which the employee or his/her spouse works or which the employee or his/her spouse owns (either partially or entirely).
3. Any contract between the City and a City contractor if a business for which the employee or his/her spouse works or which the employee or his/her spouse owns (either partially or entirely) is providing subcontracting services to the City contractor.

By making the request for an opinion, the employee authorizes the City Attorney’s Office to disseminate the opinion as the City Attorney deems necessary and proper. The employee must provide a copy of the City Attorney’s written opinion to the department with which he proposes to contract prior to execution of any contract. The employee may only provide contracted services if: (1) the services are not related to salaried duties; (2) the services are not provided during the employee’s work hours; (3) the services are not provided to the employee’s department; (4) the secondary employment has been authorized by the employee’s department in accordance with HR Policy 1.03 Employment in Second Jobs; and (5) the City Attorney’s Office has opined in writing that the proposed contract would not violate the Virginia Conflict of Interests Act. Failure by the employee to notify the department of current City employment or to follow the procedures detailed in this section may result in disciplinary action. Violation of the Virginia Conflict of Interests Act also could subject the employee to criminal prosecution and/or additional disciplinary action, up to and including termination of employment.

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Personal Interest in a Transaction

“Personal interest in a transaction” exists when an employee/“immediate family” member:

- (1) has a “personal interest” in property or a business OR
- (2) represents or provides services to an individual or business

AND the property, business, or represented or served individual or business

- (i) is the subject of the transaction OR
- (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction.

Va. Code § 2.2-3101.

Related Business Entities

If you have a “personal interest” in a business, you also have a “personal interest” in any related business entity for purposes of “personal interest in a transaction” analyses:

- Parent-subsidiary (> 50% voting power)
- Affiliated (shared owner, management, support staff, facilities, etc.)

Va. Code § 2.2-3112(A)(1).

Personal Interest in a Transaction

An employee with a “personal interest in a transaction” will

- be required to disclose the interest and abstain from participating in the transaction

OR

- be allowed to participate, upon disclosure of the interest.

THIRD POSSIBILITY:

- An exception may apply.

Va. Code § 2.2-3112.

Prohibited Conduct

An employee may not accept anything of value for:

- Offering or considering obtaining governmental employment, appointment, or promotion of any person
- Using his or her public position to obtain a contract with the City for any person or business

Va. Code § 2.2-3103(1)-(3).

Insider Information

No employee may use for his or her own economic benefit, or that of another party, confidential information, not available to the public, that was learned because of his or her public position.

Va. Code § 2.2-3103(4).

Business/Professional Opportunities

No employee may accept any business or professional opportunity that is being afforded to him to influence him in the performance of his official duties.

Va. Code § 2.2-3103(6).

Gifts

A “gift” is “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as gifts of transportation, local travel, lodgings and meals, whether provided in-kind, by purchase of a ticket, payment in advance or reimbursement after the expense has been incurred.”

Va. Code § 2.2-3101.

Gifts

No employee may accept a gift from a person who has interests that may be substantially affected by the performance of the employee's official duties, where the timing and nature of the gift would cause a reasonable person to question the employee's impartiality. Additionally, gifts may not be accepted on a basis so frequent as to raise the appearance that the employee is using his public office for private gain.

Va. Code § 2.2-3103 (8)-(9).

Enforcement

The Commonwealth's Attorney enforces the Act with respect to local employees and officers.

Va. Code § 2.2-3126.

Opinions of a Local Government Attorney or Commonwealth's Attorney

A written advisory opinion from the City Attorney, made after a full disclosure of the facts, could be introduced as evidence that the employee did not *knowingly* violate the Act. The same opinion from a Commonwealth's Attorney provides immunity from prosecution for a knowing violation.

Va. Code § 2.2-3121.

Ethics in Public Contracting

Virginia Public Procurement Act

- The Ethics in Public Contracting provisions of the Virginia Public Procurement Act supplement the provisions of the Conflicts Act.
- Applies to employees with intermediate or final authority to initiate, approve, disapprove, or otherwise affect a procurement transaction.

Va. Code §§ 2.2-4367 to -4368.

Ethics in Public Contracting

Virginia Public Procurement Act

“Procurement transaction” refers to obtaining goods, services or construction, and it includes description of requirements, selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration.

Va. Code § 2.2-4368.

Ethics in Public Contracting

Virginia Public Procurement Act

- Among other things, an employee is prohibited from participating in a procurement transaction if he or she, an immediate family member, or partner is employed by a bidder, offeror or contractor involved in the transaction, or he or she (or a family member or partner) otherwise has a financial interest in the transaction.
- “Immediate family” = spouse, child, parent, sibling, and anyone else living in the same household.

Va. Code §§ 2.2-4368 to -4369.

Ethics in Public Contracting

Virginia Public Procurement Act

Also prohibited:

- acceptance of *anything* of more than a nominal value from a bidder, offeror or contractor
- employee/family member/partner negotiating prospective employment with bidder/offeror/contractor
- person who prepares RFP/ITB submitting bid or proposal or disclosing to any bidder or offeror information that is not publicly available

Va. Code §§ 2.2-4369 and -4371 to -4373

Ethics in Public Contracting

Virginia Public Procurement Act

Required Disclosures:

- Acceptance of employment with any bidder/offeror/contractor with whom the employee dealt in an official capacity concerning a procurement transaction for a period of one year—written notification
- Public bodies may require employees with procurement responsibilities to annually certify that they complied with the Act.

Va. Code §§ 2.2-4370, -4375.

Questions?

