

SB 399 – AS AMENDED BY THE SENATE

03/27/14 1120s

2014 SESSION

14-2833
05/08

SENATE BILL **399**

AN ACT relative to ethics in public contracting and establishing a committee to study state procurement.

SPONSORS: Sen. Carson, Dist 14

COMMITTEE: Executive Departments and Administration

AMENDED ANALYSIS

This bill regulates ethics in public contracting and establishes a committee to study state procurement.

Explanation: Matter added to current law appears in ***bold italics***.
 Matter removed from current law appears [~~in brackets and struck through~~].
 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Fourteen

AN ACT relative to ethics in public contracting and establishing a committee to study state procurement.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 1 New Chapter; Ethics in Public Contracting. Amend RSA by inserting after chapter 21-U the
2 following new chapter:

3 CHAPTER 21-V

4 ETHICS IN PUBLIC CONTRACTING

5 21-V:1 Statement of Policy.

6 I. Public employment is a public trust. It is the policy of the state of New Hampshire to
7 promote and balance the objective of protecting government integrity and the objective of facilitating
8 the recruitment and retention of personnel needed by the purchasing agency. Such policy is
9 implemented by prescribing essential standards of ethical conduct without creating unnecessary
10 obstacles to entering public service.

11 II. Public employees must discharge their duties impartially so as to assure fair competitive
12 access to governmental procurement by responsible contractors. Moreover, they should conduct
13 themselves in such a manner as to foster public confidence in the integrity of the purchasing agency
14 procurement organization.

15 III. To achieve the purpose of this chapter, it is essential that those doing business with the
16 purchasing agency also observe the ethical standards prescribed in this chapter and in rules adopted
17 under RSA 541-A by the executive branch ethics committee, established in RSA 21-G:29.

18 21-V:2 General Standards of Ethical Conduct.

19 I. Any attempt to realize personal gain through public employment by conduct inconsistent
20 with the proper discharge of the employee's duties is a breach of a public trust. In order to fulfill this
21 general prescribed standard, employees shall also meet the specific standards set forth in RSA 21-
22 V:4 through RSA 21-V:10.

23 II. Any effort to influence any public employee to breach the standards of ethical conduct set
24 forth in this section and in RSA 21-V:4 through RSA 21-V:10 is also a breach of ethical standards.

25 21-V:3 Criminal Sanctions. To the extent that violations of the ethical standards of conduct set forth
26 in this chapter constitute violations of the state criminal code, they shall be punishable as provided
27 therein. Such sanctions shall be in addition to the civil remedies provided in this chapter.

28 21-V:4 Employee Conflict of Interest.

29 I. It shall be a breach of ethical standards for any employee to participate directly or

1 indirectly in a procurement when the employee knows that:

2 (a) The employee or any member of the employee's immediate family has a financial
3 interest pertaining to the procurement;

4 (b) A business or organization in which the employee, or any member of the employee's
5 immediate family, has a financial interest pertaining to the procurement; or

6 (c) Any other person, business, or organization with whom the employee or any member
7 of the employee's immediate family is negotiating or has an arrangement concerning prospective
8 employment is involved in the procurement.

9 II. Where an employee or any member of the employee's immediate family holds a financial
10 interest in a blind trust, the employee shall not be deemed to have a conflict of interest with regard
11 to matters pertaining to that financial interest, provided that disclosure of the existence of the blind
12 trust has been made to the executive branch ethics committee.

13 III. Upon discovery of an actual or potential conflict of interest, an employee shall promptly
14 file a written statement of disqualification and shall withdraw from further participation in the
15 transaction involved. The employee may, at the same time, apply to the executive branch ethics
16 committee in accordance with RSA 21-V:13, II for an advisory opinion as to what further
17 participation, if any, the employee may have in the transaction.

18 IV. Notice of this prohibition shall be provided in accordance with rules adopted under RSA
19 541-A by the executive branch ethics committee.

20 21-V:5 Employee Disclosure Requirements.

21 I. Any employee who has, or obtains any benefit from, any purchasing agency contract with
22 a business in which the employee has a financial interest shall report such benefit to the executive
23 branch ethics committee; provided, however, this section shall not apply to a contract with a
24 business where the employee's interest in the business has been placed in a disclosed blind trust.

25 II. Any employee who knows or should have known of such benefit, and fails to report
26 such benefit to the executive branch ethics committee, is in breach of the ethical standards of
27 this section.

28 III. Notice of this requirement shall be provided in accordance with rules adopted under
29 RSA 541-A by the executive branch ethics committee.

30 21-V:6 Gratuities and Kickbacks.

31 I. It shall be a breach of ethical standards for any person to offer, give, or agree to give
32 any employee or former employee, or for any employee or former employee to solicit, demand,
33 accept, or agree to accept from another person, a gratuity or an offer of employment in
34 connection with any decision, approval, disapproval, recommendation, preparation of any part of
35 a program requirement or a purchase request, influencing the content of any specification or
36 procurement standard, rendering of advice, investigation, auditing, or in any other advisory
37 capacity in any proceeding or application, request for ruling, determination, claim or

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1 controversy, or other particular matter, pertaining to any program requirement or a contract or
2 subcontract, or to any solicitation or proposal therefor.

3 II. It shall be a breach of ethical standards for any payment, gratuity, or offer of employment
4 to be made by or on behalf of a subcontractor under a contract to the prime contractor or higher tier
5 subcontractor or any person associated therewith, as an inducement for the award of a subcontract
6 or order.

7 III. The prohibition against gratuities and kickbacks prescribed in this section shall be
8 conspicuously set forth in every contract and solicitation therefor.

9 21-V:7 Prohibition Against Contingent Fees.

10 I. It shall be a breach of ethical standards for a person to be retained, or to retain a person,
11 to solicit or secure a purchasing agency contract upon an agreement or understanding for a
12 commission, percentage, brokerage, or contingent fee, except for retention of bona fide employees or
13 bona fide established commercial selling agencies for the purpose of securing business.

14 II. Every person, before being awarded a purchasing agency contract, shall represent, in
15 writing, that such person has not retained anyone in violation of paragraph I. Failure to do so
16 constitutes a breach of ethical standards.

17 III. The representation prescribed in paragraph II shall be conspicuously set forth in every
18 contract and solicitation therefor.

19 21-V:8 Restrictions on Employment of Present and Former Employees.

20 I. Except as may be permitted by rules adopted by the executive branch ethics committee
21 under RSA 541-A, it shall be a breach of ethical standards for any employee who is participating
22 directly or indirectly in the procurement process to become or be, while such an employee, the
23 employee of any person contracting with the governmental body by whom the employee is employed.
24 Notice of this provision shall be provided in accordance with rules adopted under RSA 541-A by the
25 executive branch ethics committee.

26 II.(a) Permanent disqualification of former employee personally involved in a particular
27 matter. It shall be a breach of ethical standards for any former employee knowingly to act as a
28 principal, or as an agent for anyone other than the purchasing agency, in connection with any:

29 (1) Judicial or other proceeding, application, request other determination;

30 (2) Contract;

31 (3) Claim; or

32 (4) Charge or controversy, in which the employee participated personally and
33 substantially through decision, approval, disapproval, recommendation, rendering of advice,
34 investigation, or otherwise while an employee, where the purchasing agency is a party or has a direct
35 and substantial interest.

36 (b) One year representation restriction regarding matters for which a former
37 employee was officially responsible. It shall be a breach of ethical standards for any former

1 employee, within one year after cessation of the former employee's official responsibility,
2 knowingly to act as a principal, or as an agent for anyone other than the purchasing agency, in
3 connection with any:

4 (1) Judicial or other proceeding, application, request for a ruling, or other
5 determination;

6 (2) Contract;

7 (3) Claim; or

8 (4) Charge or controversy, in matters which were within the former employee's
9 official responsibility, where the purchasing agency is a party or has a direct or substantial interest.

10 III. It shall be a breach of ethical standards for a business in which an employee has a
11 financial interest knowingly to act as a principal, or as an agent for anyone other than the
12 purchasing agency, in connection with any:

13 (a) Judicial or other proceeding, application, request for a ruling, or other determination;

14 (b) Contract;

15 (c) Claim; or

16 (d) Charge or controversy, in which the employee either participates personally and
17 substantially through decision, approval, disapproval, recommendation, the rendering of advice,
18 investigation, or otherwise, or which is the subject of the employee's official responsibility, where the
19 purchasing agency is a party or has a direct and substantial interest.

20 IV. Selling to the purchasing agency after termination of employment is prohibited. It shall
21 be a breach of ethical standards for any former employee, unless the former employee's last annual
22 salary did not exceed the amount specified by the executive branch ethics committee to engage in
23 selling or attempting to sell supplies, services, or construction to the purchasing agency for one year
24 following the date employment ceased.

25 V. The term "sell" as used in this section means signing a bid, proposal, or contract;
26 negotiating a contract; contacting any employee for the purpose of obtaining, negotiating, or
27 discussing changes in specifications, price, cost allowances, or other terms of a contract; settling
28 disputes concerning performance of a contract; or any other liaison activity with a view toward the
29 ultimate consummation of a sale although the actual contract therefor is subsequently negotiated by
30 another person; provided, however, that this section is not intended to preclude a former employee
31 from accepting employment with private industry solely because the former employee's employer is a
32 contractor with this purchasing agency, nor shall a former employee be precluded from serving as a
33 consultant to this purchasing agency.

34 21-V:9 Use of Confidential Information. It shall be a breach of ethical standards for any
35 employee or former employee knowingly to use confidential information for actual or anticipated
36 personal gain, or for the actual or anticipated personal gain of any other person.

37 21-V:10 Civil and Administrative Remedies Against Employees Who Breach Ethical Standards.

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1 I. Civil and administrative remedies against employees which are in existence on the
2 effective date of this chapter shall not be impaired.

3 II. In addition to existing remedies for breach of the ethical standards of this chapter or
4 rules adopted by the executive branch ethics committee under RSA 541-A, the committee may
5 impose any one or more of the following:

6 (a) Oral or written warnings or reprimands;

7 (b) Recommend suspension with or without pay for specified periods of time; and

8 (c) Recommend termination of employment.

9 III. The value of anything received by an employee in breach of the ethical standards of this
10 chapter or rules adopted by the committee under RSA 541-A shall be recoverable by the purchasing
11 agency as provided in RSA 21-V:12.

12 IV. All procedures under this section shall be in accordance with due process requirements
13 and existing law. In addition, notice and an opportunity for a hearing shall be provided prior to
14 imposition of any suspension or termination of employment.

15 21-V:11 Civil and Administrative Remedies Against Non-Employees Who Breach Ethical Standards.

16 I. Civil and administrative remedies against non-employees which are in existence on the
17 effective date of this chapter shall not be impaired.

18 II. In addition to existing remedies for breach of the ethical standards of this chapter or
19 rules adopted by the executive branch ethics committee under RSA 541-A, the executive branch
20 ethics committee may impose any one or more of the following:

21 (a) Written warnings or reprimands;

22 (b) Termination of transactions; and

23 (c) Debarment or suspension from being a contractor or subcontractor under purchasing
24 agency contracts.

25 III. The value of anything transferred in breach of the ethical standards of this chapter or
26 rules adopted by the committee under RSA 541-A by a non-employee shall be recoverable by the
27 purchasing agency as provided in RSA 21-V:12.

28 IV. Debarment or suspension may be imposed by the executive branch ethics committee in
29 accordance with due process procedures established by the committee, provided that such action may not
30 be taken without the concurrence of the attorney general.

31 V. All procedures under this section shall be in accordance with due process requirements,
32 including, but not limited to, a right to notice and an opportunity for a hearing prior to imposition of
33 any termination, debarment, or suspension from being a contractor or subcontractor under a
34 purchasing agency contract.

35 21-V:12 Recovery of Value Transferred or Received in Breach of Ethical Standards.

36 I. The value of anything transferred or received in breach of the ethical standards of this
37 chapter or rules adopted by the executive branch ethics committee under RSA 541-A by an employee

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1 or a non-employee may be recovered from both the employee and non-employee.

2 II. Upon a showing that a subcontractor made a kickback to a prime contractor or a higher
3 tier subcontractor in connection with the award of a subcontract or order thereunder, it shall be
4 conclusively presumed that the amount thereof was included in the price of the subcontract or order
5 and ultimately borne by the purchasing agency and will be recoverable hereunder from the recipient.
6 In addition, said value may also be recovered from the subcontractor making such kickbacks.
7 Recovery from one offending party shall not preclude recovery from other offending parties.

8 21-V:13 Oversight and Enforcement by the Executive Branch Ethics Committee.

9 I. The executive branch ethics committee, established in RSA 21-G:28, shall adopt rules
10 under RSA 541-A relative to implementation of this chapter.

11 II. On written request of employees or contractors, the executive branch ethics committee
12 may render written advisory opinions regarding the appropriateness of the course of conduct to be
13 followed in proposed transactions. Such requests and advisory opinions shall be duly published in
14 the manner in which interpretive rulings and advisory opinions of the committee are published.
15 Compliance with requirements of a duly promulgated advisory opinion of the executive branch ethics
16 committee shall be deemed to constitute compliance with the ethical standards of this chapter.

17 III. On written request of an employee, the executive branch ethics committee may grant an
18 employee a written waiver from the application of RSA 21-V:4 and grant permission to proceed with
19 the transaction to such extent and upon such terms and conditions as may be specified. Such waiver
20 and permission may be granted when the interests of the purchasing agency so require or when the
21 ethical conflict is insubstantial or remote.

22 21-V:14 Appeal of Decisions of the Executive Branch Ethics Committee. A decision of the
23 executive branch ethics committee under RSA 21-V:10 or RSA 21-V:11 shall be subject to rehearing
24 and appeal in accordance with the RSA 541.

25 2 Executive Branch Ethics Committee. Amend RSA 21-G:29, II to read as follows:

26 II. The jurisdiction of the committee shall consist of matters arising under the executive
27 branch code of ethics, RSA 21-G:21-27, RSA 15-A, RSA 15-B, and rules or guidelines adopted
28 thereunder, as applied to executive branch officials who are not classified employees. ***The***
29 ***committee also shall have jurisdiction over matters arising under RSA 21-V, relative to***
30 ***ethics in public contracting.***

31 3 New Paragraph; Duties of the Executive Branch Ethics Committee. Amend RSA 21-G:30 by
32 inserting after paragraph I the following new paragraph:

33 I-a. The committee shall adopt rules under RSA 541-A relative to administration and
34 enforcement of RSA 21-V, regarding ethics in public contracting.

35 4 Committee to Study State Procurement Established. There is established a committee to
36 study state procurement.

37 I. The members of the committee shall be as follows:

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1 (a) Two members of the senate, appointed by the president of the senate, one of whom
2 shall be a member of the senate executive departments and administration committee and one of
3 whom shall be a member of the senate finance committee.

4 (b) Three members of the house of representatives, appointed by the speaker of the
5 house of representatives, 2 of whom shall be members of the house executive departments and
6 administration committee and one of whom shall be a member of the house finance committee.

7 II. Members of the committee shall receive mileage at the legislative rate when attending to
8 the duties of the committee.

9 III. The committee shall study and develop standards and methods for a centralized system
10 of state procurement. The study shall include examination of procurement procedures of other
11 states; identification of potential conflicts within New Hampshire state procurement laws; and
12 consideration of the State of New Hampshire Service Contracting Performance Audit Report, dated
13 March 2009.

14 IV. The members of the study committee shall elect a chairperson from among the members.
15 The first meeting of the committee shall be called by the first-named senate member. The first
16 meeting of the committee shall be held within 45 days of the effective date of this section. Three
17 members of the committee shall constitute a quorum.

18 V. The committee shall report its findings and any recommendations for proposed legislation
19 to the president of the senate, the speaker of the house of representatives, the senate clerk, the
20 house clerk, the governor, and the state library on or before November 1, 2014.

21 5 Effective Date.

22 I. Section 4 of the act shall take effect upon its passage.

23 II. The remainder of this act shall take effect 60 days after its passage.