
**TOWN OF FALMOUTH
OFFICE OF TOWN COUNSEL
MEMORANDUM**

TO: HEATHER B. HARPER, ASSISTANT TOWN ADMINISTRATOR
FROM: FRANK K. DUFFY, JR., TOWN COUNSEL
SUBJECT: CONFLICT OF INTEREST LAW
DATE: 9/18/2002
CC:

Section 20 of Chapter 268A prohibits a municipal employee from having a direct or indirect financial interest in a contract made by a municipal agency. This section is intended to prevent municipal employees from using their positions to obtain contractual benefits from the city or town and to avoid any public perception that municipal employees have an “inside track” on such opportunities. In Section 20 the term “contract” refers not only to a formal, written document setting forth the terms of two or more parties’ agreement, but also has a much more general sense. Basically, any type of agreement or arrangement between two or more parties of the promises made by the other (s) constitutes a contract. The word thus includes employment arrangements, contracts for the sale of goods, contracts to provide services, grants awarded by the city or town to individuals or corporations, contracts between a municipal agency and a state agency, construction contracts, consulting contracts, etc.

The fact that a spouse of a municipal employee has a financial interest in a municipal contract does not automatically place the municipal employee in violation of Section 20 since the spouse’s financial interest is not necessarily attributed to the state employee. However, a municipal employee will not avoid the Section 20 prohibition merely by having the contract “technically” in a spouse’s name.

After setting out the flat prohibition, Section 20 goes on to list a number of exceptions. Some of these exceptions turn on the relationship between the agency the municipal employee regularly works for and the contracting agency. Others turn on whether the employee qualifies as a “special municipal employee.” As a general proposition, there will be very few instances when an employee will be able to contract with his own agency. However, there will be instances where an employee will be able to contract with other agencies as long as certain conditions (discussed below) are met.

a) The most far-reaching exception is that found in Section 20(b). It states that a municipal employee may have a financial interest in contracts made by a municipal agency if 1) he or she is not employed by and does not participate in or have official responsibility for any of the activities of the contracting agency or an agency which regulates the activities of the contracting agency; 2) the contract is made after public notice or competitive bidding;

and 3) the municipal employee files with the clerk of the city or town a disclosure of his or her financial interest and those of immediate family members in the contract. If the contract is for personal services;

- the services must be provided outside normal working hours;
- they may not be required as part of his or her regular duties;
- the municipal employee may not be compensated for those services for more than 500 hours in a calendar year;
- the head of the contracting agency must file a written certification with the clerk of the city or town that no employee of the agency is available to perform those services as a part of his or her regular duties; and
- the city council, board of selectmen or board of aldermen must approve the exemption of the interest from this section.

Please note that this contract must be awarded after public notice or competitive bidding. Any contract awarded without this procedure is a violation of the conflict of interest law. So if the Uniform Procurement Act exempts the contract from public bidding and allows the awarding authority to award the contract on telephone solicitation, the contract cannot be awarded to a municipal employee unless public notice is served or there is competitive bidding.

b) Section 20 does not apply to a special municipal employee in the following circumstances:

(1) the special municipal employee does not participate in or have official responsibility for any of the activities of the contracting agency, and has filed with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract;

or

(2) the special municipal employee has filed with the clerk of the city or town a statement making full disclosure of his interest and the interests of his immediate family in the contract and the city council, board of selectmen or board of aldermen has approved the exemption of his interest from this section.

For example, under (b) above, a member of a town board such as the board of appeals or school committee and who is a special municipal employee could have a contract with another department if he/she has filed with the town clerk a disclosure required by law.