CERTIFICATION PROGRAM MUNICIPAL LAW

Mississippi Office of the State Auditor
Technical Assistance Division

CONTENTS

OFFICIAL OATH AND SURETY BOND

Taking an oath of office and posting a required surety bond qualifies a person to assume the duties of a public office. This oath and bond require the person to faithfully perform these duties.

OATH OF OFFICE

Section 268, Mississippi Constitution of 1890, provides:

All officers elected or appointed to any office in this state, except judges and members of the legislature, shall, before entering upon the discharge of the duties thereof, take and subscribe the following oath: "I, _____________, do solemnly swear (or affirm) that I will faithfully support the Constitution of the United States and the Constitution of the State of Mississippi, and obey the laws thereof; that I am not disqualified from holding the office of _____________; that I will faithfully discharge the duties of the office upon which I am about to enter. So help me God."

OFFICIAL OATH AND SURETY BOND

OFFICIAL SURETY BOND – Surety bonds posted by elected and appointed official must be in the following form.

Miss. Code Ann. Section 25-1-15 (1972) provides:

(1) The bonds of all public officers required to give individual bond shall be conditioned in the following form, to-wit:

"Whereas, the above bound A B was duly elected (or appointed) to the office of __________ on the _______ day of _______, for the term of _______ years from the ____ day of __________; therefore, if he shall faithfully perform all the duties of said office during his continuance therein, then the above obligation to be void."

UNDERSTANDING SURETY BONDS

A surety bond is a "fidelity bond" where the public official promises to faithfully perform all the duties of his or her office and the surety agrees to pay for a loss accruing due to a breach of the public official's promise, recoverable up to the face amount of the bond.

<u>What Duties Do Surety Bonds Cover</u>

1. Failure to perform prescribed duties, i.e., statutory duties, state regulations, and those imposed by ordinances and policies.
2. Violations of official obligations, i.e., abuse of the public trust.

<u>What Protection A Surety Bond Provide You</u>

A surety bond is <u>designed to protect the **governing authority** from a failure of the public official to faithfully perform his or her duties</u>. However, the surety may provide legal assistance if a claim is disputed.

UNDERSTANDING SURETY BONDS

When a Surety Bond Pays

MCA §25-1-45 provides that public officials who are required to execute a surety bond for faithful performance of their duties shall be liable under the bond. This means when a financial loss results from an official's faithful performance failure to perform duties (and the official does not pay the loss), the surety must pay for the loss (up to the bond amount for each term in office).

When the Public Official Has To Pay

Losses to a governing authority, due to an official's faithful performance failure to perform duties are the obligation of the public official. If surety pays a loss claim against a public official, the public official is subject to an action by the surety to recover the amount of the paid claim.

OFFICIAL DUTIES AND FAITHFUL PERFORMANCE

For a public official to satisfy the sworn obligation to public office, the duties of office and the meaning of faithful performance must be understood.

A. KNOW THE DUTIES OF OFFICE

1. Officials must identify and understand the legal duties of their office. Research and education are the best methods.
2. Official should also know and respect the duties of other officers in the municipality (mayor, board members, chief of police, city clerk, etc.). Each officer is responsible for his or her duties, and should be free to exercise those duties without being subservient to the whims of another.
3. Do not assume you know the duties of a public office. Misinformation and changing laws may result in misunderstanding of authority and responsibility. The oath of office and surety bond may result in personal liability and more importantly, inability to provide public services.

UNDERSTAND FAITHFUL PERFORMANCE RESPONSIBILITY

General Explanation of Faithful Performance Expectation:

Faithful performance is the level of accomplishment required of a public official in the performance of official duties. Accomplishment is measured in view of reasonable responsibility and effort.

What this means is a public official is expected to make a reasonable effort to know his or her duties and to perform those duties in a reasonable manner.

LEGAL REQUIREMENTS OF FAITHFUL PERFORMANCE

General Requirement - the action causing the breach is not one of a discretionary nature but is ministerial (duty imposed by law to be carried out in a specific manner and under designated conditions). [State v. McRael]

Strict Requirement - a public official is an insurer of the safety of public money received by virtue of office and is liable in all cases of its loss. [Adams v. Lee]

Dishonesty in Public Office Requirement - A state official (public official or employee) has a power to obtain monies (anything of value) wrongfully; it is the corruption of power that causes those monies to be obtained by virtue of office. [Gerrard V. State]

Other Requirement - Diversion of public funds from their legitimate object. [Goldina v. Slater. et al]

HOW TO KNOW YOUR DUTIES AND AVOID LIABILITY

A. Familiarize yourself with the statutes establishing the duties and responsibilities for your position.

B. State Your Position. Document your position in the board minutes or other record.

C. Check It Out

1. Read laws and regulations related to your official position.
    a. Law books are assigned to all judges.
    b. Law books and regulations are searchable on the internet.
2. Check with authorities before acting. (Examples)
    a. Board Attorney
    b. Attorney General's Office
    c. Office of the State Auditor
    d. State Ethics Commission
    e. Other appropriate authorities.

3. Check with your auditor. Check with the audit firm employed by your governing authority to see what suggestions they may have for establishing internal audit controls.

HOW TO KNOW YOUR DUTIES AND AVOID LIABILITY

D. Have Good Internal Control Policies (examples)

1. Cash:
   a. Deposit Collections on a Daily Basis.
   b. Maintain Separate Cash Drawers For Each Person.
2. Personnel Policies (examples)
   a. Define Duties Of Employees.
   b. Separate employee duties that create theft opportunities.

E. Computer Security. For example, make sure your computer system has individual passwords for each user that remain confidential and that any information entered is evidenced by the password of the individual entering the information.

F. Insurance

1. Surety Bonds for Employees.
2. Errors and Omissions Coverage. [MCA §21-15-6]
3. Real and Personal Property
4. Liability [MCA §11-46-17]

G. Board/Council members Should Vote Decisively. Majority voters are liable for actions taken. Vote no or leave the meeting to avoid liability. Remember abstentions go with the majority.

H. Document Your Efforts To Do The Right Thing. (Faithful Performance)

HOW TO KNOW YOUR DUTIES AND AVOID LIABILITY

I. Adopt Policies [Polices Are Necessary To Direct Your Authority (Day To Day Procedures), and To Assure You Have The Information Necessary To Make Legal Decisions (Motions and Votes).]

1. Board Meeting Procedures(How are motions made, how are votes taken, may the public speak, what is recorded in the minute, who approves the minutes, etc.?)
2. Purchasing and Contracting Procedures [Who may contract/purchase, how is the contract (purchase order, etc.) documented, who may declare emergency purchases?]
3. Employee Personnel Policies (Is leave earned, are holidays allowed, how is hourly pay documented, And how are employees hired and fired, etc.?)
4. Claim Verification Procedure [biggest liability exposure](Does the city owe this bill? Who contracted obligation, who received the service, was the service received as specified, were purchase laws followed, is the payment within the budget, etc.?)
5. Budget Procedure. Who verifies that procedures follow state law (Municipal Audit and Accounting Guide, etc.),who prepares a proposed budget, do departments heads know what information to provide and to who, who works out a timing schedule for publications and hearing, who calculates proposed tax levy, etc.?]
6. New Laws and Obligations. Who develops proposals for legally required changes and updates procedures.

HOW TO TELL WHEN EXPENDITURES ARE LEGAL

Functions of Government - Section 88, Ms. Constitution provides for general and special charter state laws to define functions of municipal government. These laws address general functions or services such as public safety (police dept., fire dept., etc.), recreation, streets, utility systems, etc. Sometimes these laws go into detail how these services will be performed. However, when a service is authorized and no procedure is mandated, local policy determines procedure. For example, if state law does not address what may be purchased to provide a municipal service, any expenditure that would be reasonable (good faith judgment) to provide the purpose would be legal.

HOW TO TELL WHEN EXPENDITURES ARE LEGAL

Limitations and Procedures – Some state laws limit how money may be spent and/or require specific procedures when money is spent.

Revenue Laws – Start with where the money comes from; it takes money to provide services. Laws and contracts providing revenues for these services should be reviewed for authorizations and limitations on types of expenditures. For example, the law for City Fire Insurance Rebate Money (Section 83-1-37) specifies the money must be spent in accordance with the Commissioner of Insurance's guidelines.

Expenditure Laws - Laws don't always list or explain how money may be spent, sometimes what you may purchase is simply implied. For example, Section 21-37-3 says a city authority has power to exercise jurisdiction in the matter of streets, sidewalks, sewers, and parks; to open and lay out and construct the same; and to repair, maintain, pave sprinkle, adorn and light the same. The law doesn't mention hiring people or buying materials; these things are implied.

Procedure Laws – Authority to enter a contract must be clearly authorized, and legal procedures understood. Section 25-1-43 requires an employee to be authorized by his/her board to enter a contract for the city. Section 31-7-13 requires bids for certain purchase. Section 21-35-17 imposes liability if a purchase is made in excess of the budget.

HOW TO TELL WHEN EXPENDITURES ARE LEGAL

Records - If there is concern about the appearance of a purchase, notation should be made to document its relevance to the governmental purpose (city benefit).

EXAMPLES:

Microwaves, refrigerators, etc. are justified by authority to furnish break rooms.

Bottled water is justified if a source of safe and reliable drinking water is not available.

Gatorade, etc. is justified if personnel are involved in work where replacement of fluids is necessary for their health and well being. See the Attorney General's Opinion of Christopher D. Hemphill, issued 8/23/93.

HOW TO TELL WHEN DONATIONS CAN BE MADE

Donations Require Specific Authority

- Donations - Section 66 Miss. Constitution prohibits donations without specific statutory authority from the legislature. Section 96 Miss. Constitution prohibits compensation to an employee other than what is earned. Section 100 Miss. Constitution prohibits the release obligations to the state, county or city. Home rule laws (Section 19-3-41 counties and 21-17-5 cities) make clear they do not allow donations.

- Donations must be supported by specific legal authority or they are illegal. Care should be taken to support that all expenditures are legal donations or a legal obligation. Put simply, if you don't owe it, it's a donation that requires legal authorization.

EXAMPLES OF DONATION AUTHORITIES:

- Municipal school program and building support (Sec. 21-17-1 & 21-19-49)
- County/municipal equipment loans to each other (Sec. 17-5-15)
- County/municipal support of arts (Sec. 39-15-1)
- County/municipal libraries (Sec. 39-3-5 & 7)
- County/municipal planning and development districts (Sec. 17-19-1)
- Domestic violence Shelters [Sec. 19-5-93 (o) & 93-21-115]
- Various municipal donation authorities (Bands, Fairs, Red Cross, Social and Community Service Programs, etc.) may be found from Sec. 21-19-41 to 21-19-65.
- Various county donation authorities are found under Sec. 19-5-93.
- (Note: In kind services may be used to meet dollar for dollar donation matching requirements, see A. G. opinion to Frank G. Power dated 9-18-98)

EXAMPLES OF WHERE CONTRACT OBLIGATIONS ARE REQUIRED:

- Volunteer Fire Departments - There is no authority to donate to a volunteer fire department, therefore a contract for their services is required to give them money or allow them to use public property.

- Recreational Associations - There is no authority to give money or allow exclusive use of public property to recreational associations. A contract for their services to the public must be entered; otherwise, they have no more rights than any other group or citizen.

SOME EXPENDITURES APPEAR TO BE DONATIONS

- Expenditures for municipal purposes with incidental benefit to others should be clarified.

- Work On Private Property is the same as a donation and must be justified by specific law. However, if the work is for the benefit of the municipality and private benefit is coincidental it may be done. An example of coincidental benefit is cutting a tree on private property to improve public safety, such as where the tree blocks view of oncoming vehicle traffic or may fall on public interest (property, people, etc.).

EMERGENCY AUTHORITY (Sections 33-15-17 and 33-15-31)

Allows work on private property and exceptions to normal legal procedure in cases of defined emergencies (disasters). See routine purchasing emergency procedures under Sections 31-7-1 and 31-7-13 (k). See budget emergency procedures and loan authority under Sections 21-35-19 and 21-35-21. [See the "Emergency Accountability Plan for Local Governments" at the State Auditor's web site under downloads: http://www.osa.state.ms.us/downloads.htm for further guidance.

HOW TO TELL WHEN PROPERTY AND SERVICE TRANSFERS ARE LEGAL DONATIONS

Property and services are the same as money where donation authority is concerned. Therefore, specific authority must exist for property or services to be donated or transferred without consideration. This means there must be a law that authorizes donation.

A. PRIVATE APPROPRIATIONS - Laws that authorize the appropriation of money are generally interpreted to allow transfers of property or services. (A. G. Danny Welch, 9/8/20)

B. GOVERNMENTAL - Sec. 31-7-13 (m)(vi) allows personal property donations or sales below market value between governing entities. Dept of Finance and Administration approval is required for agencies, and governing authorities must justify transactions in their minutes.

C. FIREARM SALE TO RETIRING POLICE OFFICER - Sec. 45-9-131. A municipal board may sale one fire arm to an officer retiring from a state retirement system for FMV as determined by the governing authority or the spouse of an officer killed in the line of duty for an amount determined by the board.

HOW TO TELL WHEN PROPERTY AND SERVICE TRANSFERS ARE LEGAL DONATIONS

D. SERVICE CONTRACTS - Service contracts may provide for the contractor to take title to or control of specified personal property or benefit from municipal services as a necessity to or consideration for the contract. Care should be taken to assure security and proper use of such property.

Examples are: Contracts with volunteer fire departments (Sec. 83-1-37 & 39)
Contracts with recreation associations (Sec. 17-1-3)
Operational contracts, such as feeding prisoners.

E. SALE OF SURPLUS (JUNKED) PROPERTY – Sec. 17-25-25 - provides uniform requirement for the sale or disposal of personal property and real property for counties, municipalities and school boards.

- Public sale - declare surplus and post notice for at least 10 days in 3 public places, one of which must be at the governing authority's main office.
- Private sale - if personal property does not exceed $1,000 in value, the governing authority, by a unanimous approval of its member, may sell or dispose of the property at a private sale.
- Public auction - declare surplus and may sell or dispose of personal property or real property at a public auction conducted by an auctioneer, hired by the governing authority that meets standards established by the department of audit.
- If the governing authority finds that the Fair Market Value (FMV) of the personal property or real property is zero and this finding is entered on the minutes then the governing authority may dispose of the personal property in the manner it deems appropriate and in its best interest, but no official or employee of the governing authority shall derive any personal economic benefit from such disposal.

THE STATE AUDITOR'S INVESTIGATIVE DUTIES

- The State Auditor is charged with recovering public funds improperly withheld, misappropriated and/or otherwise illegally expended, and recover public property illegally disposed of by public officers and employees.

- MCA § 7-7-211 and other laws explain the powers and responsibilities of the Office of the State Auditor when public officers and employees breach their promises and obligations to faithfully perform their duties and thereby incur civil or criminal liability.

- Perform Investigations: Determine through sworn statements, written documentation, physical evidence, and reports and findings of other governmental or law enforcement agencies, if a loss or violation has occurred.

THE STATE AUDITOR'S INVESTIGATIVE DUTIES

Issue Demands for Repayment

The State Auditor may issue written demands to the responsible party or parties for the repayment of the loss of public funds, plus interest at 1% per month and investigative cost.

Institute Civil Lawsuits

Provide evidence to the Attorney General to recover public funds. The Attorney General's Office prosecutes the civil suits at the request of the State Auditor if the responsible party or parties has not repaid the public funds demanded by the State Auditor within thirty (30) days of issuance of the written demand.

Assist Criminal Prosecution

Make arrest, serve and execute warrants and other legal process. Notify the District Attorney and Governor, when embezzlement occurs and provide assistance in the prosecution of the responsible party or parties by attending the grand Jury or trial and providing evidence.

MUNICIPAL COMPLIANCE QUESTIONNAIRE

MUNICIPAL AUDIT AND ACCOUNTING GUIDE (PAGE IV – B5)
ISSUED BY THE STATE AUDITOR SECTION 21-35-31

As part of the municipality's audit, the governing authorities of the municipality must make certain assertions with regard to legal compliance. The municipal compliance questionnaire was developed for this purpose. This questionnaire can be found in the Municipal Audit and Accounting Guide and may be found on the State Auditor's Website at:

www.osa.ms.gov then Resources then Local Governments
Municipal Audit and Accounting Guide

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