

IBHE Trustee Training

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To begin...

THANK YOU

Session Overview

- I. Introduction
- II. Powers, Duties, and Guide Posts
- II. Transparency
- III. Ethical Guard Rails
- IV. Miscellaneous
- V. Higher Ed Procurement Road Map

Some Caveats...

- **General overview of concepts**
- **Not exhaustive presentation/analysis**
- **Emphasis on higher ed issues**
- **Always consult your university's legal counsel and/or ethics officer**

I. Trustee Training: Requirement

- Eff. 1-1-16, voting board members of public universities must complete a minimum of 4 hours of professional development leadership training within 2 years of beginning service and every 2 years thereafter. [Board of Higher Education Act, 110 ILCS 205/13]
 - Training should include, among other things: public university and labor law; contract law; ethics; sexual violence on campus; financial oversight and accountability; audits; and fiduciary responsibilities
 - Training may be provided by the Illinois Board of Higher Education (IBHE) or qualified provider approved by IBHE

Trustee Training: Compliance

- Universities must maintain on their websites the names of Trustees who have completed training
- Each year the Chair of each Board of Trustees must certify to IBHE the number of hours of training that each voting member received during the preceding fiscal year.
- If a member has not completed the required training, IBHE must notify the Governor and four legislative leaders, and the respective Board is to suspend the member, who then has 45 days to complete training.
- Failure of the board member to complete the training within the 45 day probationary period “constitutes a resignation from and creates a vacancy in the governing board....” [BHE Act].

II. ORIGIN OF BOARD AUTHORITY

- Each of the nine IL public universities has an “enabling” statute(s) that establishes each university and creates its respective Board of Trustees
 - These statutes delineate the powers and duties of the Board of Trustees
 - They also set forth provisions concerning Trustee eligibility, COI, student trustee selection, etc.

Fiduciary Duty

As a Trustee, you owe a *fiduciary* duty to the University that you serve

- Highest duty recognize by law
- A fiduciary must act in good faith with a high standard of care, trust, confidence, and candor *for the benefit and best interests of another*
- Judicial decisions typically recognize three aspects of fiduciary duty for board members: Duty of Care; Duty of Loyalty; Duty of Confidentiality

Fiduciary Duty (cont'd)

Duty of Care

- Attend meetings
- Be informed & prepared to participate
- Use your judgment
- Courts review board decisions under the “business judgment” rule, which presumes *in favor of* the board and asks whether board members i) acted in good faith ii) with the care that an ordinarily prudent person in a like position would exercise under similar circumstances
- Reliance on administrators’ expertise and advice is perfectly *acceptable and even expected* given that your Board has hired experienced & capable individuals to carryout the operations of the University (e.g., tenure decisions)

Fiduciary Duty (cont'd)

Duty of Loyalty

- Board members must put the University's interests first
- Especially important in regard to self interest, potential COI, etc.

Duty of Confidentiality

- Board members should not disclose/discuss non-public matters outside board setting

Conflict of Interest

A conflict of interest (COI) arises when any factual situation exists that does or may impair a Trustee's ability to discharge his/her duty of loyalty to the university. Several sources for COI principles:

- University-specific state statute
 - “[N]or shall any member of said board be directly or indirectly interested in any contract made by said board for any purpose whatever.” [UI Trustees Act, 110 ILCS 310/3].
- Other Statutes
 - Procurement Code
 - Public Officer Prohibited Activities Act
- Judicial Decisions, AG Opinions interpreting the above

Conflict of Interest Sources (cont'd)

- Board Policy

“Each Trustee has a fiduciary responsibility to the University, that each member is a steward of the public trust, that each member has a legal obligation to comply with relevant laws and regulations, and that each member has an ethical obligation to uphold the highest ethical standards in the conduct and discharge of the University business, academic, and service affairs. Further, each member of the Board acknowledges that each member should take reasonable steps to avoid even the appearance of a conflict of interest or something that might be perceived as improper or inappropriate.” [SIU BOT Conflict of Interest Policy].

Conflict of Interest (cont'd)

What can constitute a COI?

- Conflicts of interest are not just about contracting (addressed later)
- Though typically financial, a COI may be personal, political or other interest that impairs or might reasonably appear to impair a trustee's objectivity/judgment
- Also, consider not only yourself, but also spouse & family members/those who reside in your household
- Even situations that are not strictly a COI may constitute the “appearance of impropriety”

Conflict of Interest: Practice Tips

SO WHAT TO DO IF I THINK I **MAY** HAVE A COI?

- Consult your university's policies & legal counsel
- If arguably a COI, consider action to address & avoid -- e.g., recusal from discussion & abstention from voting
- ***When in doubt, **disclose, recuse and abstain** to avoid even the “appearance of impropriety”***
- Example of UI BoT members' process to avoid potential COI

III. Transparency: Illinois Freedom of Information Act

- IL FOIA declares that access to public records is a fundamental obligation of government to promote transparency [5 ILCS 140/1].
- “Public records” are any form of record – hard copy or electronic – that pertain to the transaction of public business “having been prepared by or for, or having been or being used by, received by, in the possession of, or under the control of any public body.” [5 ILCS 140/2(c)].
- Presumption is in favor of production and burden on public body to prove exemption applies by clear and convincing evidence. [5 ILCS 140/1.2].

FOIA (cont'd): Exemptions

FOIA has 36 separate exemptions. They include:

- “Private information” (e.g., SSN, driver's license number, employee ID number, home or personal telephone numbers, and personal email addresses)
- Information prohibited from disclosure by federal or State law or rules and regulations implementing same
- Preliminary drafts, notes, memoranda, etc. in which opinions are expressed or policies or actions are formulated
- Trade secrets and commercial or financial information
- Proposals and bids for contract or grant
- Minutes of meetings closed to public

FOIA (cont'd)

- Special rule for records in possession of a party with whom the agency has contracted to perform a governmental function on behalf of the public body: if record directly relates to the governmental function it “shall be considered a public record of the public body....” [5 ILCS 140/7(2)].
- Illinois courts have found personal emails, texts, etc. transmitted on personal devices to be subject to FOIA if they “relate to the transaction of public business” [City of Champaign Case; limited ruling by IL App Ct]

FOIA: Practice Tips

- Note the enormous scope/reach of FOIA
- Role of PAC & ease of challenge (vs. pre-2010)
- Consider the PR aspects of FOIA'd records
- Before creating a written communication, ask yourself: Is an email appropriate & prudent? Is this something that I should put in writing (possibly for the ages)?

Transparency: Illinois Open Meetings Act

- Intent of OMA is to “ensure that the actions of public bodies be taken openly and that their deliberations be conducted openly.” [5 ILCS 120/1]
- The OMA applies to a “meeting” of a public body: a “gathering” of a “majority of a quorum” of the members “for the purpose of discussing public business.” [5 ILCS 120/1.02]
- Special rule for 5-person body: Act triggered by quorum
- Does not include purely social events, BUT...

OMA (cont'd): Summary of Provisions

- Presumption of public discussion of university business absent specific exception for closed (executive) session
- 48 hours' advance notice of regular mtgs required; agenda is key; no "walk on" agenda items (*Rice* case); special rules for special mtg (24 hrs) or emergency mtg (as soon as practical); notice to be posted in physical location of mtg and website
- Verbatim record of exec. session required
- No final action in exec. session
- Trustees must complete online OMA training w/in 90 days of appointment

OMA (cont'd)

Special Approach While Disaster Declaration in Effect:

- The OMA was amended in 2020 to permit holding “virtual” meetings -- attendance by audioconference or videoconference -- during the period in which the Gov. or Dir. of IDPH has issued a disaster declaration under the Illinois Emergency Management Agency Act, so long as certain additional steps are taken; these include:
 - (i) Must ensure that members of the public can “contemporaneously hear all discussion”, etc. (via tel. dial-in or web-based link)
 - (ii) all votes taken are conducted by roll call
 - (iii) One key person must be physically present at regular mtg place unless unfeasible
 - (iv) Chair or Pres. must determine (and state on the record) that meeting in person is not “practicable or prudent.” [5 ILCS 120/7(e)]

OMA (cont'd):

Exceptions for Closed Session

- OMA allows for public bodies to enter into closed session. Commonly-used exceptions:
 - Appointment, employment, compensation, discipline, performance, or dismissal of specific university employees
 - Pending, probable or imminent litigation
 - Collective negotiating matters (only if ongoing)
 - Student disciplinary cases
 - Purchase or Lease of real property for use by the university
 - Setting the price for the sale or lease of property owned by the public body
 - Discussion of minutes of meetings lawfully closed under the Act

OMA: Practice Tips

- Rely on your Board Secretary and Legal Counsel, who are very familiar with OMA compliance & related issues
- For Exec. Sessions:
 - Construe exceptions narrowly and stay on topic
 - “The exceptions ... are to be strictly construed, extending only to subjects clearly within their scope.” [5 ILCS 120/2(b)].
 - Invoke *only* those exceptions you’ll use, and use *each of* the exceptions that you invoke
 - Board should empower its legal counsel to interrupt if discussion begins to wanders off topic
- Remember role of PAC in interpreting and enforcing OMA
- Intentional non-compliance is a Class C misdemeanor

Public Comment

- Mandated for all public bodies, including universities [5 ILCS 120/2.06(g)]
- Public bodies may adopt reasonable rules concerning, such as:
 - Amount of time allocated for that purpose
 - Number of speakers
 - Requiring would-be speakers to ask permission to speak is judicially disfavored as “prior restraint” but defensible
 - May require that proposed topic relate to matters within the Board’s jurisdiction
 - Deadline for request should be *after* meeting agenda published
 - Avoid “viewpoint discrimination” in considering requests

IV. State Officials and Employees Ethics Act: “SOEEA” or “Ethics Act” [5 ILCS 430]

- Signed into law & effective November 2003
- Massive legislation – 62+ single-spaced pages
- Ethics Act defines “State agency” to include the boards of the nine public universities [5 ILCS 430 /1-5]
- Section 5-10 requires university “employees” to complete Ethics training within 30 days after commencement of his or her office or employment and annually thereafter
- Employees who do not complete the training as directed may be subject to disciplinary action and may face administrative fines up to \$5,000 by the Illinois Executive Ethics Commission (EEC)
- **Note: Elected or appointed trustees of a board of a state agency are included in defn. of “employee,” so these provisions apply to them, too**

Ethics Act (cont'd)

Executive Ethics Commission

- The EEC promotes ethics in public service & ensures that the State's business is conducted with efficiency, transparency, fairness, and integrity
- Commission has nine members
 - Five Commissioners appointed by Governor
 - One Commissioner each appointed by Attorney General, Secretary of State, Comptroller and Treasurer
- Commission activities
 - Interprets & enforces (via hrgs, penalties) Ethics Act for all “employees” of the executive branch of State government
 - Oversees annual ethics training
 - Provides independent oversight of the procurement process

Ethics Act (cont'd)

Statement of Economic Interest

- Certain individuals, including Trustees, are required to file annually a Statement of Economic Interest with the Office of the Secretary of State
- Under Illinois Executive Order 15-09, certain individuals, including Trustees, also must submit a Supplemental Statement of Economic Interest (SSEI) form online with the Executive Ethics Commission

Ethics Act (cont'd)

Revolving Door Prohibition

- “Trustees may not within a period of one year immediately after termination of membership on the Board knowingly accept employment or receive compensation or fees for services from a person or entity having State contracts with a cumulative value of \$25,000 during the year immediately preceding termination of Board membership.” [State Officials and Employees Ethics Act, 5 ILCS 430/5-45][emphasis added].
 - Violation is a Class A misdemeanor
 - Executive Ethics Commission (more on that soon) may levy fine of up to 3 times the total annual compensation that would have been obtained in the position

Ethics Act (cont'd)

State Gift Ban

- Article 10 of the Ethics Act requires employees of the university or any state agency, as well as their immediate family members living with them, not to accept or solicit gifts from prohibited sources
- Gifts are defined as anything of value -- items with monetary value, entertainment, hospitality, gratuities, discounts, loans, or forbearance
- Prohibited Sources:
 - Current vendors (including spouses and immediate family members living with them)
 - Any individual or entity that seeks to conduct business with the university or any other state agency
 - Those seeking official action or who have interests that may be substantially affected by the performance or non-performance of the official duties of a university employee or the university

Gift Ban (cont'd): Exceptions

- Exceptions relevant to universities:
 - Travel expenses for meetings to discuss State or University business
 - Food, refreshments, lodging, transportation, and other benefits resulting from outside business or employment activities of the employee or his/her spouse
 - Educational materials and missions (Per E.O. 15-09, this exception must be approved in advance by the Executive Director of the EEC or the university Ethics Officer. Check with your university's Ethics Officer regarding that process.)
 - **Reminder: E.O.15-09 eliminated the “*de minimis*” exception for executive state agencies eff. Immediately (Jan. 2015)**
- For a full list, consult your Ethics Officer or training materials

Gift Ban (cont'd):

Possible Actions to Take

- Employees who unintentionally accept a gift from a prohibited source that does not fall within an exception should:
 - Return the gift to the prohibited source;
 - Make a monetary contribution to a 501(c)3 charitable organization equal to the market value of the gift and keep the gift; OR
 - Donate the gift itself to a 501(c)3 charitable organization

Gift Ban: Practice Tips

- Be cautious
- Maintain a copy of the donation receipt, cancelled check, or other form of support in the event your compliance is ever questioned
- “When in doubt, ask your Ethics Officer”
- Reliance on advice from your Ethics Officer is a defense to an alleged violation [5 ILCS 430/25-23(3)]

“PROHIBITED POLITICAL ACTIVITY”

- State employees are prohibited from engaging in certain political activities while on State time or State property, or using State property or resources
- Types of prohibited political activity include:
 - Planning or attending political events
 - Campaigning or working on a political campaign
 - Preparing or distributing political campaign literature
 - Making or soliciting political contributions
 - Attending or organizing political events
 - Preparing or circulating petitions on behalf of political candidate OR for/against any referendum
 - Soliciting votes on behalf of political candidate

PPA & Misuse of State Email

University Email:

- Do not use your university email account or other university resources to send or receive political email
- Do not use your private email account to send political messages to university employee's university email account
- If you receive a political email in your university email account, you should not forward it to anyone; instead, it is probably best to reply by asking the sender not to send such emails to your university email address
- If you have questions regarding any political activity/emails sent to your university email account, contact your university's Ethics Officer

PPA: Practice Tips

- Be careful; think before engaging in a potential PPA
- Perceived violations of law or rule, wrongdoing, fraud, misconduct, etc. should be reported to your University Ethics Officer and/or the OEIG based on your University policies and procedures
- Remember that all “employees” (incl. appointees) of exec. State agencies have an obligation to cooperate with OEIG investigations

Board Member Training re Harassment & Discrimination Prevention

- Beg. in 2020, each “employee” must complete annual harassment and discrimination prevention training; if filling vacancy, must do so w/in 30 days. [5 ILCS 430/5-10.5(a-5)]
- The Office of Executive Inspector General (OEIG) and Executive Ethics Commission (EEC) oversee the; required contents are in the statute
- Board members receive the same training as (other) university employees
- To report an incident:
 - Your university’s reporting mechanisms
 - Office of Access & Equity / Equal Opportunity
 - Ethics Office
 - Office of Executive Inspector General
 - Illinois Department of Human Rights (IHRA)

IV. Miscellaneous (but important) Material

- ❑ Attorney-Client Privilege
- ❑ Audit Function Summary
- ❑ Labor Law Summary

Attorney-Client Privilege

- ❖ *“The attorney-client privilege protects communications made in confidence by a client and a client’s employees to an attorney, acting as an attorney, for the purpose of obtaining legal advice.”* Upjohn Co. v. United States, 449 U.S. 383 (1981).
- ❖ The A/C privilege protects communications to legal counsel seeking legal advice *and* those from legal counsel providing legal advice.
- ❖ There are, however, limits...

Attorney-Client Privilege (cont'd)

- ❑ Who “owns” the A/C privilege – who is the Client?
 - ❑ Per the IL Rules of Professional Conduct, in-house attorneys “represent the organization acting through its duly authorized constituencies”
 - ❑ In other words, **the university, acting through its board of trustees, is the “client,”** not any one individual
 - ❑ Trustees & Administrators should bear this in mind
 - ❑ The A/C privilege applies equally to in-house attorneys and outside attorneys retained by the university to advise/represent it
 - ❑ Finally, per the *Upjohn* and other cases, the privilege is limited to high-level decision-makers (the so-called “control group” test)

Attorney-Client Privilege: Practice Tips

- Simply adding a “cc” to a university (or outside) attorney to an email does *not itself* confer the A/C privilege
- Forwarding non-privileged material to a university attorney does *not* confer privilege
- Trustees should avoid sharing/distributing any A/C privileged information to others as it likely would be deemed a waiver of the privilege

Audit Function Summary Overview

- Internal & External Audit functions ensure effective stewardship & regulatory compliance
- Internal audit role
 - Part of the organization
 - Support management and Board of Trustees
 - Comprehensive scope – governance, risk management, and internal control processes
 - Historical and prospective focus
- External audit role
 - External to the organization
 - Higher level scope – opinion on overall financial statements, State and Federal regulatory compliance
 - Historical focus only
- Board oversight responsibilities (via Audit Committee or its equivalent)
 - Integrity of university's financial statements
 - Performance of internal audit function
 - University's compliance with legal requirements

Audit Function Summary (cont'd)

Internal Audit Role

- **Fiscal Control and Internal Auditing Act [30 ILCS 10]**
 - Requires full-time internal audit function
 - Chief internal auditor reports directly to the President and has direct communication w/Bd
 - Five-year term for chief internal auditor (renewable)
 - President annually approves two-year audit plan before beg. of fiscal year
 - Chief internal auditor submits annual report by September 30
 - Requires adherence to Institute of Internal Auditors Internal Auditing Standards (per Sec. 2005, State Internal Audit Advisory Board promulgates standards to which all state internal auditors must adhere; SIAAB says IIA Standards)
- **Board Responsibilities via Audit Committee**
 - Review audit plans, activities, staffing, and organizational structure
 - Periodic review and approval of internal audit charter
 - Review significant findings, recommendations, & adequacy of management's corrective actions
 - Ensure no unjustified restrictions or limitations imposed by management
 - Concur in the appointment, replacement, or dismissal of chief internal auditor
- **FOIA exemption for Internal audit activities; OMA exception for disc. of internal control weaknesses & fraud issues**

Audit Function Summary (cont'd)

External Audit Role

- Illinois Office of the Auditor General (OAG) responsible for performing external audits
 - OAG (10-yr term) selects a public accounting firm to perform university's audits for 6 yrs.
 - The university does not participate in the selection of the external auditor
 - Annual financial statement audit
 - State and Federal compliance audits annual or biennial (depending on size of the agency)
- Legislative Audit Commission (LAC) oversees OAG's State Audit Program
 - 12 legislators apptd by Gov. equally apportioned between the two houses & political parties
 - Mandated by law to review all audits conducted by the OAG
 - University President generally requested to appear periodically before the LAC
- Board Responsibilities via Audit Committee – review annually:
 - External auditors' proposed audit scope and approach
 - Significant accounting and reporting issues and impact on financial statements
 - Results of the audits, including any restrictions on scope or significant disagreements with management
- External audit activities not exempt from FOIA

Labor Law Summary

- Illinois higher ed public sector institutions are covered by the Illinois Educational Labor Relations Act (“IELRA”)(1984), *not* Natl. Lab. Rel. Act
 - “Educational employer” includes governing bodies public school districts, combination of public school districts, public community college or State college or university
 - “Educational employee” includes all employees but excludes supervisors, managerial, confidential, short-term employees, students and part-time academic employees of community colleges
 - IELRA allows union organizing certification based on a card check majority interest petition process (vs. secret ballot election)
 - IELRA has clear statutory directive allowing for unionizing of graduate student employees
 - IELRA allows faculty to unionize

Labor Law Summary (cont'd)

Key Principles

- Exclusive Representation
 - Once a Union is certified, all employees w/in bargaining unit are covered by the collective bargaining agreement (CBA)
 - Such employees may not negotiate separate, individual contracts
- Mandatory Subjects of Bargaining
 - Parties must negotiate over wages, hours and other "terms and conditions of employment"
 - IL Sup Ct interprets broadly (e.g., parking increases on campus)
- Duty to Bargain in Good Faith
 - Parties need not reach agreement but must bargain in good faith
 - Typically means can't "stonewall" – must negotiate
 - Also requires employer to respond to union requests for information if relevant to representation

Labor Law Summary

Key Principles (cont'd)

- No Unilateral Changes by Employer
 - While CBA in effect, employer cannot change a working condition that is a mandatory subject of bargaining without first bargaining with the union
- Grievances, Unfair Labor Practices (ULPs) and Strikes
 - Grievance is when U. alleges employer's actions have violated CBA
 - Typically grievance process involves multi-step hearing process culminating in binding arbitration
 - ULPs are claims brought at the IELRB alleging a violation of the IELRA
 - Strikes are work stoppages by U. to exert pressure on employer if parties have bargained to impasse
- Collective negotiating matters are an exception to the OMA (must be "ongoing" negotiating, not general labor issues)

V. Illinois Higher Ed Procurement Roadmap

ILLINOIS PROCUREMENT CODE (30 IL Compiled Statutes 500)

Public Policy “It is the purpose of this Code and is declared to be the policy of the State that the principles of competitive bidding and economical procurement practices shall be applicable to all purchases and contracts by or for any State agency.”

Broad Applicability The Code applies to all Illinois public universities and “all types of State agreements, regardless of what they may be called, for the procurement, use, or disposal of supplies, services, professional or artistic services, or construction or for leases of real property where the State is the lessee, or capital improvements . . .”

Procurement Methods

- Competitive Sealed Bids (award to lowest responsible and responsive bidder)
- Requests for Proposals
- Small Purchases (under \$100K – competitive source selection not required)
- Sole Source (only one economically feasible source for the item)
- Emergency Purchases (threat to public health/safety; protect State property)

Procurement Code (cont'd)

General Exceptions: Procurement Code requirements do not apply to:

- Intergovernmental agreements
- Collective bargaining agreements and individual employment contracts
- Real estate purchases
- Contracts for legal counsel necessary to prepare for anticipated litigation, enforcement actions or investigations (must be pre-approved by chief legal counsel)
- Concession agreements -- use of university property for revenue generating activities such as space rental agreements and intellectual property licenses do not need to follow the Code's competitive bidding requirements; BUT good business practices and transparency may suggest a competitive process be followed for certain concessions
- Donor-Directed Procurements
 - Universities may comply with the terms and conditions of any grant, gift, or bequest that calls for the procurement of a particular good or service or the use of a particular vendor, provided that the grant, gift, or bequest provides majority funding for the contract (30 ILCS 500/20-95)

Procurement Code (cont'd)

Exemptions Specific to Higher Education (30 ILCS 500/1-13)

- Memberships in professional, academic, research, or athletic organizations
- Expenditures for publications for use by a university library or academic department
- Expenditures for events or activities paid for exclusively by revenues generated by the event or activity or by gifts or donations
- Expenditures necessary to provide athletic, artistic or musical events
- Expenditures for placement of students in externships, practicums, field experiences, and for medical residencies and rotations
- Expenditures necessary to perform sponsored research and other sponsored activities under grants and contracts funded by the sponsor or by sources other than State appropriations Contracts for medical supplies, and for medical services necessary for the delivery of care and treatment at any university-operated health care center or dispensary that provides care, treatment, and medications for students, faculty and staff
- Contracts with a foreign entity for research or educational activities, provided that the entity either does not maintain an office in the U.S. or is the sole source of the service

Procurement Oversight and Operations

Oversight Bodies

- Independent Chief Procurement Office Public Institutions of Higher Education
 - CPO for Higher Education: John Donato
 - State Purchasing Officers & Procurement Compliance Monitors
- Procurement Policy Board
 - Five-member board with rule/policy function, contract review function, procurement communication and clearinghouse function
- Executive Ethics Commission & Office of Executive Inspector General
- Business Enterprise Program (BEP) Council (for “MAFBE” purchasing)
- Capital Development Board

Day-to-Day Operations

- Handled by university purchasing directors and staff in coordination with State Purchasing Officers

Other Procurement-Related Considerations

Duration of Contracts

- Generally may not exceed 10 yrs. including renewals

Approvals and Signatures

- IL State Finance Act requires contracts in the amount of \$250K or more in a fiscal year to be signed or approved by President, CFO and General Counsel of the university (or their approved delegates)(30 ILCS 105/9.02)
- Universities may establish internal policies for trustee-level approval of procurements and contracts using dollar thresholds and/or other criteria
- In order to be binding and enforceable, university contracts must be signed by authorized officer such as the Comptroller

State Property Control Act (30 ILCS 605)

- Once goods, equipment, or real property is purchased, it becomes State property, and with certain limited exceptions, may only be sold or disposed of by a university in accordance with the Act and related administrative rules

Other Procurement-Related Considerations (cont'd)

Challenges to Procurement Actions

- Any person who has submitted a bid or proposal may protest a decision to reject the person's bid or proposal or to award to another person
- Protests are heard and resolved by the Chief Procurement Officer (or designated Protest Review Officer)
- Determinations made by a chief procurement officer, State purchasing officer, or a purchasing agency under the Code are final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law (30 ILCS 500/20-70)
- Vendors may file litigation before, during or after the protest process to try to overturn an award to another vendor

Other Procurement-Related Considerations (cont'd)

Joint Purchasing Opportunities

- The Governmental Joint Purchasing Act (30 ILCS 525) authorizes the Chief Procurement Officer to allow the purchase of personal property, supplies, and services jointly with a governmental unit of this state or another state, with a consortium of governmental entities of one or more other states, or to make purchases from a group purchasing organization as a member of that organization.
- Total spend in FY 20 for cooperative joint purchases was \$566 million.

Public Private Partnerships

- A structure by which private-sector funding is used through issuance of tax-exempt bonds by IFA to finance major capital projects on university-owned land under a “concession” lease
- Improvements are leased back to the university which pays rent to cover principal and interest on the bonds and the university becomes the owner of the improvements at the end of the term
- Construction of improvements is carried out by private developer so procurement is not implicated but certain State laws still come into play such as Prevailing Wage Act and others

Other Procurement-Related Considerations (cont'd)

Procurement Communications Reporting

State employees who have material knowledge concerning a procurement matter must report procurement communications with a vendor or prospective vendor that a reasonable person would believe was made for the purpose of influencing a procurement decision under consideration or to be considered in the near future. Such communications should be reported promptly to the Procurement Policy Board.

Examples of Reportable Communications (not exhaustive)	Examples of Exempt Communications (not exhaustive)
<ul style="list-style-type: none">• Establishing or defining a procurement need or method of selection.• Drafting or preparing specification or solicitation documents.• Evaluating bid/responses.	<ul style="list-style-type: none">• Unsolicited from potential vendors that are not further disseminated or used by the receiving employees in a procurement decision• Made in a public forum and/or during a meeting subject to the Open Meetings Act• Regarding the administration and implementation of an existing contract

Confidentiality

State employees, including university trustees, who have involvement, approval or oversight of procurements have confidentiality obligations

Pre-Award

- Until an award recommendation is made, no university personnel or contractual agents, other than the evaluation committee and assigned staff, may review the bids or offers, except with justification from the purchasing director and approved by the State Purchasing Officer.
- While the procurement is on-going, a university shall not disclose any information related to the procurement to any other person other than information that was recorded, read and made publicly available at the opening of the bids or offers.

Post-Award

- After completion of the evaluation and award recommendation, the university may conduct discussions with management and the board of trustees if necessary to obtain approval for award prior to publishing the award in the Bulletin.

Vendor Conflicts of Interest

Any bid, proposal, offer of acceptance, or proposed contract must be reviewed for conflicts of interest pursuant to Section 50-13 of the Code. If a potential conflict exists, no contract will be executed unless the CPO-HE requests and is granted an exemption by the Executive Ethics Commission.

Statutorily Defined Prohibited Vendor Conflicts of Interest (30 ILCS 50-13)

- Vendor is appointee or state employee whose compensation is in excess of 60% of Governor's salary.
- Appointee or state employee with direct financial interest in vendor entity entitled to receive more than 7½% of the total distributable income of the vendor, **or** an amount in excess of the salary of the Governor.
- It is unlawful for any firm, partnership, association, or corporation, in which any person listed above, together with his or her spouse or minor children, is entitled to receive more than 15%, in the aggregate, of the total distributable income of the entity, **or** an amount in excess of 2 times the salary of the Governor, to have or acquire any State contract or direct pecuniary interest therein.

Other Conflicts of Interest

- University enabling statutes and other State law prohibit any member of the university's governing board to be directly or indirectly interested in any contract to be made by the university for any purposes whatsoever.
- Any university that has its own policies regarding procurement conflict of interest relative to its own employees must provide notice of any potential conflict to the State Purchasing Officer along with the university's resolution. This information may be used by the State Purchasing Officer when considering whether to award the contract.

Business Enterprise Program for Minorities, Females and Persons with Disabilities (BEP)

Business Enterprise for Minorities, Females, and Persons with Disabilities Act (30 ILCS 575)

Public Policy “[I]t is the public policy of the State to promote and encourage the continuing economic development of minority-owned and women-owned and operated businesses and that minority-owned and women-owned and operated businesses participate in the State's procurement process as both prime and subcontractors.”

Applicability The Act specifically applies to all IL public institutions of higher education

Aspirational Goals Per Statute as a Percentage of All State Contracts in a Fiscal Year

- At least 11% (16% eff. 1/1/22) shall be awarded to BEP-certified businesses owned by minorities
- At least 7% (10% eff. 1/1/22) shall be awarded to BEP-certified women-owned businesses
- At least 2% (4% eff. 1/1/22) shall be awarded to BEP-cert. businesses owned by persons with disabilities

Spend In FY 20 public universities awarded a total of \$136 million in BEP contracts

Business Enterprise Program for Minorities, Females and Persons with Disabilities (BEP) (cont'd)

Key Requirements of the Act

- BEP utilization plans must be included in vendor responses to procurement solicitations and must be reviewed by university purchasing staff for compliance with the Act and accompanying administrative rules
- Universities must report their BEP goals and achievement to the State BEP Council

Legal Considerations

- Aspirational goals for BEP purchasing are acceptable
- Mandatory quotas or “sheltered markets” for BEP purchasing are not Constitutionally acceptable unless narrowly tailored to remedy specific identifiable past discriminatory conduct by the public body (typically must be supported by a “disparity study” that has qualitative and quantitative evidence of past discrimination)
- Commission on Equity and Inclusion Act (effective January 1, 2022)

President/Chancellor Contractual Restrictions

University enabling statutes require Board to approve employment contracts of the president or all chancellors

- Chancellor/president contracts must:
 - Not exceed 4 years, with determinate start/end dates
 - Not include any automatic rollover clause
- Board must approve president/chancellor contract & performance-based or incentive bonus in open meeting with prior notice describing action, details on proposed financial compensation structure, and the performance upon which the bonus is based, being made available to the public at least 48 hours in advance of meeting time.
- President's and chancellor's annual performance review must be considered when the Board contemplates a bonus, raise, incentive-based compensation, or severance agreement.

Contractual Restrictions (cont'd)

Government Severance Pay Act (5 ILCS 415)

- Contracts with public university officer, agent, employee that includes severance provision limits severance to:
 - An amount that does not exceed 20 weeks of compensation
 - Severance pay not permitted if officer, agent, employee fired for misconduct.
- Misconduct includes:
 - Deliberate violation or disregard for “reasonable standards of behavior”
 - Carelessness/negligence that shows intentional/substantial disregard of duties
 - Chronic absenteeism
 - Willful/deliberate violation of standard or regulation which would cause an employer to be sanctioned or have certifications suspended.
- Pay of president/chancellors transitioning to another dept. may not contractually exceed the annual compensation of highest paid employee in the dept.
- Does not apply to employment agreements for intercollegiate athletics if funded by non-appropriated funds.

Q&A
