

WELCOME TO
THE 2024
STATE
CONTRACTS
SEMINAR

**TO INFINITY &
BEYOND...**

**BEYOND THE
BASICS**



INDIANA DEPARTMENT OF ADMINISTRATION

Commissioner Dr. Rebecca Holwerda

Erin Kellam, Deputy Commissioner Procurement
Tammera Glickman, Deputy General Counsel



Provide service excellence and support to our partner agencies by:

Ensuring **effective** and **efficient management** of state resources

While providing **transparency** and **accountability** to Hoosiers



Our
Mission





**Accountability
Ethics
Impartiality
Professionalism
Service
Transparency**

Our
**Guiding
Principles**



IDOA's Duties IC 4-13-1-4



PUBLIC WORKS

Inspect/regulate power, heating, lighting plants owned by state agencies



PROCUREMENT CONTRACTS

Copying, printing, mailing services



FLEET TRAVEL



DCS Ombudsman
IDOC Ombudsman
Code Adam



Property management

Leases
Rent out state property -
Real & personal
Surplus property

Procurement & Contracts

WHERE DO I START?

Procurement Training & Resources

<https://www.in.gov/idoa/procurement/procurement-training/>

Delegation of Purchasing Authority Program (DPAP)
Manual

<https://www.in.gov/idoa/procurement/procurement-training/delegation-of-purchasing-authority-program>

Stay informed... sign up for SCM Newsflash updates

SCMNewsflashSubscrip@idoa.IN.gov



Procurement

CAN I JUST PURCHASE WHATEVER MY AGENCY NEEDS?

IDOA is the official procurement agent for all executive branch agencies. IC 5-22-4-1.

State agencies have delegated procurement authority under specific dollar amounts.

Any amount over agency delegation - IDOA Procurement Division is responsible for the bidding process.



Procurement

Procurement Methods:

<https://www.in.gov/idoa/procurement/how-to-build-a-request-for-proposal-rfp/solicitation-methods/>

- IC 5-22-7 Competitive Bidding
- IC 5-22-7.3 Negotiated Bidding
- IC 5-22-9 Request for Proposals
- IC 5-22-10 Special Purchasing Methods



Request for Proposal (RFP) Process

WHAT IS AN RFP?

- *Primarily used for contracts above \$75,000*
- *Entire process can take 9-12 months*
- *Most often used for services*
- *Considers cost and quality*
- *Award based on most responsive/best value to the State*
- *Advertised in publications for 2 weeks*
- *“On the street” for 8-12 additional weeks*
- *Evaluation criteria is identified in the RFP*
- *See IC 5-22-9*



Special Purchasing Methods

Special Procurement

Special/Emergency purchasing methods may be used when unique circumstances exist, as provided for by Indiana Code IC 5-22-10, allowing standard practices to be circumvented. The need for this type of purchase must qualify under at least one of the criteria defined in IC 5-22-10, sections 4 to 19, and justification must be provided explaining why this type of purchasing method applies.

- *Request for Special Procurement Form is located within PeopleSoft*
- *eSPR Guide https://www.in.gov/idoa/procurement/files/eSPR_Guide.pdf*
- *Contract term – identify with specificity, **including potential extensions***
- *Save online form, e-approval chain, and supplemental justification to include in Contract file (Supplemental Documents folder in SCM)*



The eSPR "Form" (electronic submission)

Form	Instructions	Attachments
Special_Procurement_Request		
Seq #	3089	
Subject	061 Starkey Hearing Aids QPA 43565	
Priority	2-Urgent	
Status	Approved	
	Due Date	Approver Status
AGENCY INFORMATION		JUSTIFICATION
Agency / Division	IDOA/ Procurement	
PS Bus Unit	00061	
PS Requisition ID	IDOA QPA	
Agency SBA Analyst	Shurkan Wang	
Contact Person	Kelsie Baire	
Contact Phone	3174989762	
Contact email	kbaire1@idoa.in.gov	
Please select the checkbox below if this request is COVID 19 related.		
<input type="checkbox"/> Yes, this is COVID 19 related!		
Will this request result in a one-time purchase or a term contract?		
<input type="checkbox"/> One-Time Purchase		
<input checked="" type="checkbox"/> Term Contract		
Please select the checkbox below if this purchase was previously approved as a Special Procurement. *A copy of the prior approval must be attached to this request.		
<input checked="" type="checkbox"/> Prior Special approved; copy attached!		
SPECIAL PROCUREMENT		VENDOR RESPONSES & RECOMMENDATION
Justification documenting the specific needs, research, and analysis done supporting the request to make this purchase under the IC Special Procurement provisions is required.		
The Special Procurement Supplemental Justification (found on the Attachments tab of this PS form) must be downloaded, completed with specific details requested in each section, and the completed document uploaded and attached to be submitted with this request. If more space is needed, additional attachments may be uploaded.		
<i>The justification supplement is required; failure to include this information with your request will delay approval and/or be cause for rejection.</i>		
Provide the names of all vendors contacted and prices quoted (or associated value) for each one. A certified minority-owned, woman-owned, or veteran-owned business should be included.		
VENDOR 1		



QUALIFYING PROVISION

INDIANA CODE (IC) 5-22-10

SPECIAL PURCHASING METHODS

Allows for purchases without a competitive process provided the facts support the requirements of the code section cited. The information required in this form is intended to document those facts.

Review the IC on the Instructions Tab.

Select the appropriate IC provision for this request. (If citing 5-22-10-13, a letter from the vendor must be attached to support the Sole Source designation.)

IC Provisions for Special Procurement 10-09 Agency Impairment

PURCHASE DETAILS

Describe the products/services to be purchased under this request.

Purchase Description QPA provides all state entities with Hearing Aid Devices, Supplies and Services.

174 characters remaining

If this approval/award will result in a contract, provide a brief summary of the contract scope (including modifications represented in amendment/renewal).

Scope Summary The amendment is to extend the contract for 2 more years and is transferring the contract to FSSA.

Name Starkey Laboratories Inc
Price/Value 0.00

VENDOR 2

Name
Price/Value

VENDOR 3

Name
Price/Value

VENDOR 4

Name
Price/Value

Fewer than three vendors contacted?

If fewer than three quotes are included, please explain why.

254 characters remaining



From the list of options below, select the type of award that will result if this request is approved.

- A new contract or new PO for commodity/service not competitively procured.
- A term extension or scope modification beyond what was described in the original procurement or existing contract provisions.
- A new \$0 contract with payment or revenue to the supplier from a source other than the State.
- A new contract that generates revenue for the State.

Award Type Existing Cntrct Extend or Mod

If Amendment (extend/modify existing contract) was chosen as the Award Type, enter the original contract number/ID.

Prior Contract ID 0000000000000000000000000000000043565

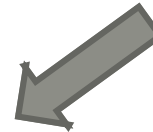
A copy of the prior contract and all amendments must be attached to this request!

PURCHASE VALUE

Enter the value of this purchase according to these guidelines.

- **NEW CONTRACT OR 1-TIME PO:** Expenditure or Remuneration Amount by Fiscal Year.
- **AMENDMENT/EXTENSION:** Expenditure or Remuneration Amount of Contract *by Fiscal Year* **BEFORE** Amendment or Renewal **AND AFTER** Amendment or Renewal.
- **\$0 CONTRACT:** Value of Contract to Contractor by Fiscal Year.
- **REVENUE GENERATING:** Revenue Amount by Fiscal Year.

Purchase Value 50000.0000
Currency Code USD



CONTRACT TERM

- If the approval/award will result in a new contract, enter the term including options to renew.
- If the approval/award will result in an amendment, enter the total term of the agreement; the original contract term plus renewals/amendments, plus options to renew.

Contract Term 5 years



eSPR Approval Chain

Special_Procurement_Request

Subject 061 Starkey Hearing Aids QPA 43565

Review/Edit Approvers

Special_Procurement_Request: 3089:Approved [View/Hide Comments](#)

1

Approved ✓ Denise Erna May Chadwick-00061 Head Procurement Agent 05/15/23 - 12:08 PM	→	Approved ✓ Sample, Arthur-061 IDOA Account Manager 05/15/23 - 3:30 PM	→	Approved ✓ Christina Garcia-00061 Inserted Approver 05/19/23 - 12:28 PM	→	Approved ✓ Shukun Wang - 00057 Inserted Approver 05/22/23 - 9:02 AM
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Comments

OK



eSPR Supplemental Justification

SPECIAL PROCUREMENT REQUEST Supplemental Justification

INSTRUCTIONS: Please provide a detailed response in each blue-shaded section. If additional space is needed, please add a separate document as an attachment to this Special Procurement Request (SPR) and reference that attachment in the appropriate answer field below. NO QUESTION SHOULD BE LEFT BLANK as doing so will result in an automatic DENIAL of the request. More detailed guidance can be found on the Instructions Tab. f

IDOA SECTION:

1. Provide a detailed description of the product or service being procured including a description of the SDW. Response should include description of any unique features, characteristics or capabilities of the product(s) or service(s) and how they are necessary, critical, and beneficial for the agency.

Hearing Aid devices, supplies and services.

2. Describe why the service or commodity is currently critical to the mission of your agency.

Allows state entities to receive free or discounted hearing aid needs.

3. Explain why a competitive procurement method are not appropriate for this need. Response should include a detailed justification of the Indiana Code provision cited.

- NOTE: The following are unlikely to be sufficient Special Procurement justifications:
- Personal or agency preference for a vendor
 - Agency perception that the vendor is the best qualified (this should be determined through a competitive process)
 - Lack of agency planning resulting in limited time to conduct a competitive procurement
 - Past or existing relationship with the vendor
 - Special incentive or deal offered (can be assessed in open and competitive solicitation)
 - Agency convenience

This eSPR is to extend the contract to 2025 and to transfer the contract to FSSA-DHHS.

4. Describe market research conducted. Response should include AT LEAST:

- a list of other vendors that operate in this industry that offer similar services or commodities
- a list of vendors that you engaged before finalizing your decision
- an explanation of why other vendors were not selected to supply the requested products and/or services
- an explanation of why the chosen vendor was selected

This contract as well as 5 others were awarded the Hearing Aid CPAs where extensive market research was conducted.

5. Provide detailed pricing information. Response should include:

SPECIAL PROCUREMENT REQUEST Supplemental Justification

- An attached quote and/or a detailed breakdown of cost components and quantities, including a description of how both were determined.
- a description of the basis for determining that the pricing is competitive.
- a description of pricing negotiations conducted (even if unsuccessful in lowering the price, what was tried, were ANY concessions made by the vendor? If not, why?), and any savings created.
- "Pricing agreed to with vendor" is NOT an acceptable answer.

Prices were negotiated during the last amendment and will remain in effect.

6. Provide a comprehensive summary that explains why the selected section of IC 5-22-10 is applicable and that the vendor selection is the best value to the State. Justify why the SPR should be approved.

This contract needs to be renewed for a longer period of time and transferred to FSSA-DHHS.

IOT SECTION:

IF THIS REQUEST DOES NOT REQUIRE IOT REVIEW AND APPROVAL, TYPE "NOT APPLICABLE" IN THE BOX BELOW AND SKIP QUESTIONS 7 – 10.

7. Confirm the understanding, that if this purchase involves a cloud-based product or solution, the agency is aware IOT Cloud Terms & Conditions are required in the contract.

Requesting Agency Confirms

8. Confirm the understanding, that if this purchase involves a cloud-based product or solution, the agency is aware IOT must have a Cloud Security Questionnaire on file for this vendor.

Requesting Agency Confirms

9. If this project is more than \$1,000,000, confirm the IOT Project Risk Management Team has been engaged.

Requesting Agency Confirms

10. Provide any other information it would be helpful for the IOT Reviewer to know.

SPECIAL PROCUREMENT REQUEST Supplemental Justification

Request Acknowledgement Statement:

By signing below, you are acknowledging that your Agency Head, CFO, or their designee(s) have approved this request to be submitted and will also sign or approve the contract or purchase that results from this process. Further, you are acknowledging you understand IOT and SIA must also (in most cases) approve this request.

Requestor's Signature -- this often will not be the Head Procurement Agent (type out name and title in the box below):

Kelsie Baire- Vendor Manager



IDOA's Division of Supplier Diversity (DSD)

IC 4-13-16.5 Governor's Commission on Supplier Diversity

- IDOA's new Deputy Commissioner of DSD, Kesha Rich
- Authority encompasses Indiana Veteran Owned Small Businesses since 2020 (IC 4-13-16.5-1.5)
- Mission is to provide equal opportunity to minority, women, and veteran owned enterprises in the state's procurement and contracting process
- Actively promote, monitor and enforce the standards for certification of minority, women, and veteran business enterprises
- Core functions:
 - Certification
 - Contract Compliance
 - Business Outreach



DSD Goals, effective since July 1, 2021

Construction	Goods and Services	Professional Services	Weighted Average Goal
Minority 7%	Minority 8%	Minority 8%	Minority 8%
Women 5%	Women 13%	Women 11%	Women 10%
Veteran 3%	Veteran 3%	Veteran 3%	Veteran 3%

Contractor Compliance

IC 4-13-16.5-8 Contractor notice to minority, women's, and veteran business enterprises

...

(f) Before beginning work on a contract, a contractor **shall do the following**:

(1) Notify in writing each minority business, women's business enterprise, and veteran owned small business designated in the contractor's offer that the contractor has been awarded the contract.

(2) Give copies of each notification to the state agency that awarded the contract.

(g) If a contractor fails to comply with subsection (f), the awarding state agency may consider the failure a breach of contract and do any of the following:

(1) Cancel the contract.

(2) Collect from the contractor all funds paid to the contractor under the contract.

(3) Exercise any of the state's rights set out in the contract.

(4) Use the failure as a basis for finding the contractor not responsible when awarding other contracts.

As added by P.L.228-2007, SEC.6. Amended by P.L.15-2020, SEC.7.



Contractor Compliance

WHAT ABOUT CONTRACT AMENDMENTS AND CHANGE ORDERS?

25 IAC 5-6-2 Monitoring MBE and WBE participation as subcontractors

...

(b) All contract amendments and change order requests **must include the following:**

- (1) An explanation of how MBEs and WBEs will be used.
- (2) The percentage represented above the current contract amount.

25 IAC 9-4-1 Monitoring IVOSB participation

...

(b) All change orders, amendments, and other modifications to the contract that affect value **must include an explanation of the following:**

- (1) How IVOSB will be utilized.
- (2) Any IVOSB percentage changes to the original contract amount.



Templates – where to find them

Contracts

SCM or

IDOA's website

<https://www.in.gov/idoa/state-purchasing/contract-administration/>

Public Works

<https://www.in.gov/idoa/state-property-and-facilities/public-works/general-forms-and-manuals/>

Leases

SCM or

Leasing

Form & Manuals

(link at the bottom)

<https://www.in.gov/idoa/state-property-and-facilities/government-office-space/real-estate-leasing/>

Fleet & Travel

Fleet information

<https://www.in.gov/idoa/state-resource-management/fleet-services/>

Travel Services

<https://www.in.gov/idoa/state-purchasing/travel-services/>



IDOA Review of Contract Documents

IC 4-13-2-14.1(a)(1)

25 IAC 1.1

BY THE NUMBERS:

Contracts Approved in SCM
by IDOA Legal

Jan. 1, 2024, thru July 8, 2024:
4,035

Total # of documents approved in
Calendar year 2023 = **8,034**

The state no longer maintains its former system for tracking paper documents. Therefore, the number of paper contracts, amendments, grants, and leases approved by IDOA is not known.





**EMPOWERING
YOU IN YOUR
CONTRACT
NEGOTIATIONS
AND
BEYOND**

Definition of “negotiation”

n. **1.** A consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter.

2. (*usu. pl.*) Dealings conducted between two or more parties for the purpose of reaching an understanding; esp. official discussions between the representatives of opposing groups that are trying to reach an agreement, esp. in politics or business.

Black's Law Dictionary (12th ed. 2024)



Negotiation Styles

Black's Law Dictionary (12th ed. 2024)

- **Adversarial negotiation** (1976) Negotiation conducted at arm's length to obtain the best deal for oneself while giving as little as possible to the other party. — Also termed *distributive bargaining*; *competitive negotiation*; *zero-sum negotiation*; *win-lose negotiation*; *distributive negotiation*; *individualistic negotiation*.

- **Collaborative negotiation** (1977) Negotiation in which the parties are thought to deal openly and fairly to effectively resolve problems and reach a mutually satisfactory outcome. — Also termed *collaborative bargaining*; *problem-solving negotiation*; *integrative negotiation*; *principled negotiation*.



- 1- BE EMPOWERED**
- 2- BE PREPARED**
- 3- BE SUCCESSFUL**



1 - BE EMPOWERED

- Have a strong foundation.

TRAINING

PROCUREMENT

Knowledge

- Approving agencies are your allies not your enemies.
- You work for the **STATE OF INDIANA** so put on your superhero cape!



2- BE PREPARED

- Why does your agency want this contract? What is the purpose of the contract?
- What is your goal in this negotiation?
- What is the timeline? Be realistic. Set appropriate expectations and respect the State process.
- Anticipate questions and know your responses.
- Know the law & regulations behind the state boilerplate clauses.
- Have a PLAN B.



3- BE SUCCESSFUL

- Don't give away your negotiating power
- Listen – what are the vendor's real concerns
- Be responsive
- Avoid indecision and endless rounds of redlined drafts

Remember the quote from Harvey Cox, American Theologist:
“NOT TO DECIDE IS TO DECIDE.”



WHAT IS YOUR SUPERPOWER?



PLAN B

AKA the Exit Plan

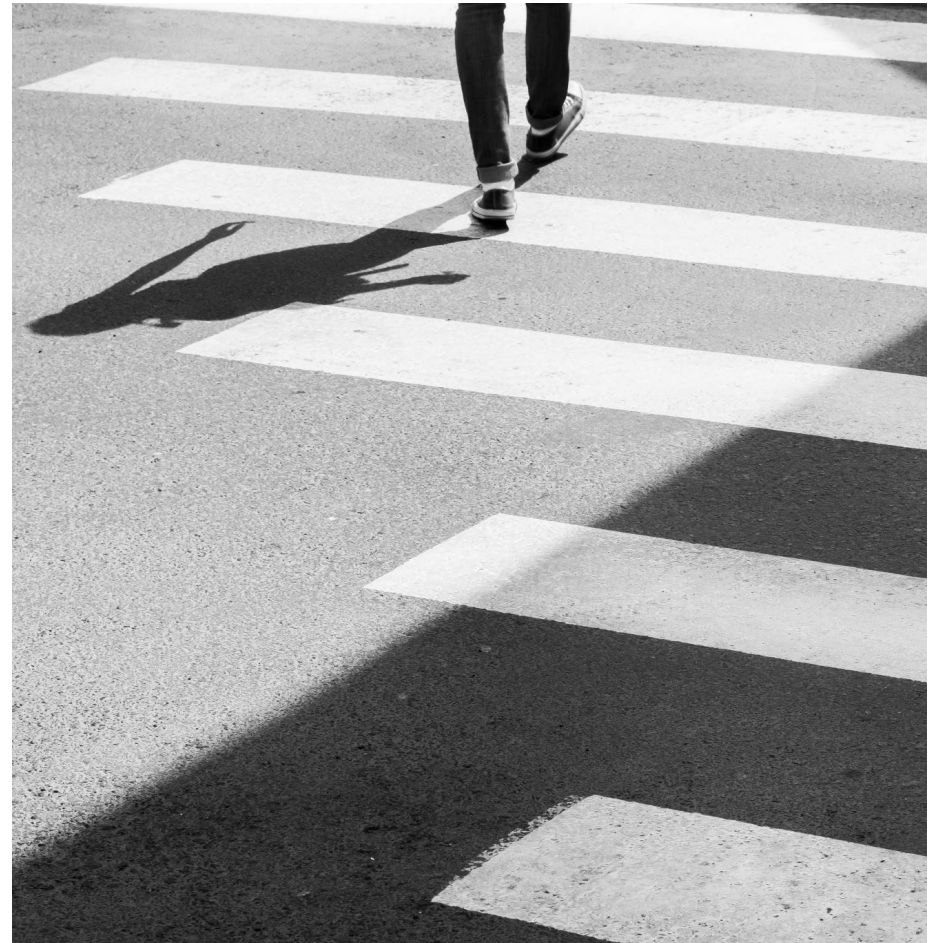
No spur of the moment decisions. This was always an option.

Always be respectful.

Clearly communicate the failure to reach an agreement on terms.

Move on to the next responsible & responsive bidder/vendor/contractor.

JUST DO IT.



THINGS TO CONSIDER

- Notice the red flags – share your knowledge & concerns with your team
- Understand that exceptions may set a precedent
- Set your agency up for success. Ensure your contract has:
 - A well-drafted statement of work/duties
 - Clearly defined payment schedule
 - Unambiguous contract terms



POST-CONTRACT EXECUTION ASSISTANCE

- Compliance Issues
- Continuity of Services
- Key Persons Clause
- Disputes
- Termination for Default
- Termination for Convenience

“The Important Thing is That We
Stick Together.” Toy Story 3 (2010)



Document Review at IDOA

Before submitting your document for approvals please ensure:

- The procurement method is well documented and meets IDOA requirements.
(IC 5-22 and 25 IAC 1.1).
- The contractor's duties & deliverables are clearly defined. (25 IAC 1.1-1-16(b))
- The consideration is clear and concise detailing payment per hour/per day/per month, etc. and the total \$\$.
- You are using the TEMPLATES approved by IDOA & OAG.
- All signatures are present.
- The exhibits are properly labeled, referenced in the contract and attached.
- Changes to the boilerplate are clearly identified **in Section 50. State Boilerplate Affirmation Clause.**



What might delay IDOA's review?

- #1 Delay – your document is a hard copy/paper contract
- #2 Delay – no procurement documentation or insufficient documentation
- #3 Delay – no clearances or insufficient documentation of clearances



Where can I find helpful checklists?

“Before you send your contract through the approval process, check it against the following list. If all items are completed, your contract should not encounter any problems during the approval process.”

1. DPAP Manual - page 53
2. Professional Services Contract Manual
 - Contract checklist - page 25
 - Amendment checklist – page 45



More About Clearances

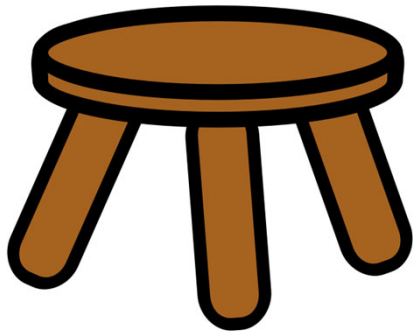
Clearances are required by law, the terms of the Contract/Grant/Lease, and IDOA Policy.

- Department of Workforce Development (DWD)
- Department of Revenue (DOR) IC 4-13-2-14.5
- Secretary of State (SOS) IC 5-22-16-4(a)
- IDOA's list of suspended or debarred vendors
- SAM – federal government's list of suspended or debarred vendors



Contract Drafting

Three Essential Elements of a Contract
Offer – Acceptance – Consideration



Make sure your contract identifies some form of consideration whether monetary \$ or other.

*state contracts must be in writing
IC 4-13-2-14.2



Making Changes to the Templates

- Identify those changes clearly in the Boilerplate Affirmation Clause in the contract, addendum, and grant templates.
- Section heading may reflect “modified” or “revised.”

For example: “**28. Insurance [Modified]**”

- Some agencies have identified small changes in **bold** within the clause.
- Consult with your agency legal for risk assessment and risk tolerance. Document agency legal approval within SCM via Supplemental Documents.
- Pre-review by IDOA (please allow 2 weeks for review & comments).
- Thank you for using form approved documents.



Speaking of Templates...

Using the Addendum Template for Software as a Service agreements

Section 2. Duties must be clearly defined. Include:

- *the software trade name being purchased.*
- *purpose of the software (why/how does your agency use the software).*
- *software support services or maintenance, describe them briefly.*
- *enhancements provided by the Contractor, describe.*

Real Estate Transactions and Public Works

▪ State real property transactions are governed by IC 4-20.5 and most often administered by IDOA.

**Steve Harless, Deputy Commissioner State Resource Management*

▪ Public Works are governed by IC 4-13.6 and are generally administered by IDOA.

**Robert Grossman, Director Public Works Division*

These types of transactions are subject to procurement laws and an approval process but are beyond the scope of this presentation.



Resources for Leasing and Public Works

Templates, Policies, and Manuals for these transactions are on IDOA's website and standard templates are in SCM.

Leasing <https://www.in.gov/idoa/state-property-and-facilities/government-office-space/real-estate-leasing/>

Public Works <https://www.in.gov/idoa/state-property-and-facilities/public-works/general-forms-and-manuals/>



Fleet Services



IDOA Fleet Services provides a variety of vehicle services to state agencies.

Fleet Services is divided into two sections: Vehicle Administration and Vehicle Maintenance.

Fleet Services website:

<https://www.in.gov/idoa/state-resource-management/fleet-services/>

**Nate Oliver, Director of Fleet Services*



THANK YOU

Contact us:

Erin Kellam

EKellam@idoa.IN.gov

Tammy Glickman

TGlickman@idoa.IN.gov

Contracts@idoa.IN.gov

Contract_Termination@idoa.IN.gov





NextLevel IOT
INDIANA

IOT Contract Approval

How to Clear



the Hurdles

And Not Break a Sweat!

Engaging IOT

Why? When? How?

“Cloud services” includes any hosting that is NOT in IOT’s physical data centers or IOT-controlled cloud tenants.

IOT cloud security questionnaires should be submitted for all purchases including **cloud services** *as IOT defines the term*.

IOT cloud terms should be included in contracts including **cloud services** *as IOT defines the term*.

Target Timelines for Approval Decisions or Information Requests

Operational guidance from COO Team: varies widely

Archer: 2-5 days, plus time to gather additional info as needed

Cloud questionnaires: 14 days, plus TTGAIAN

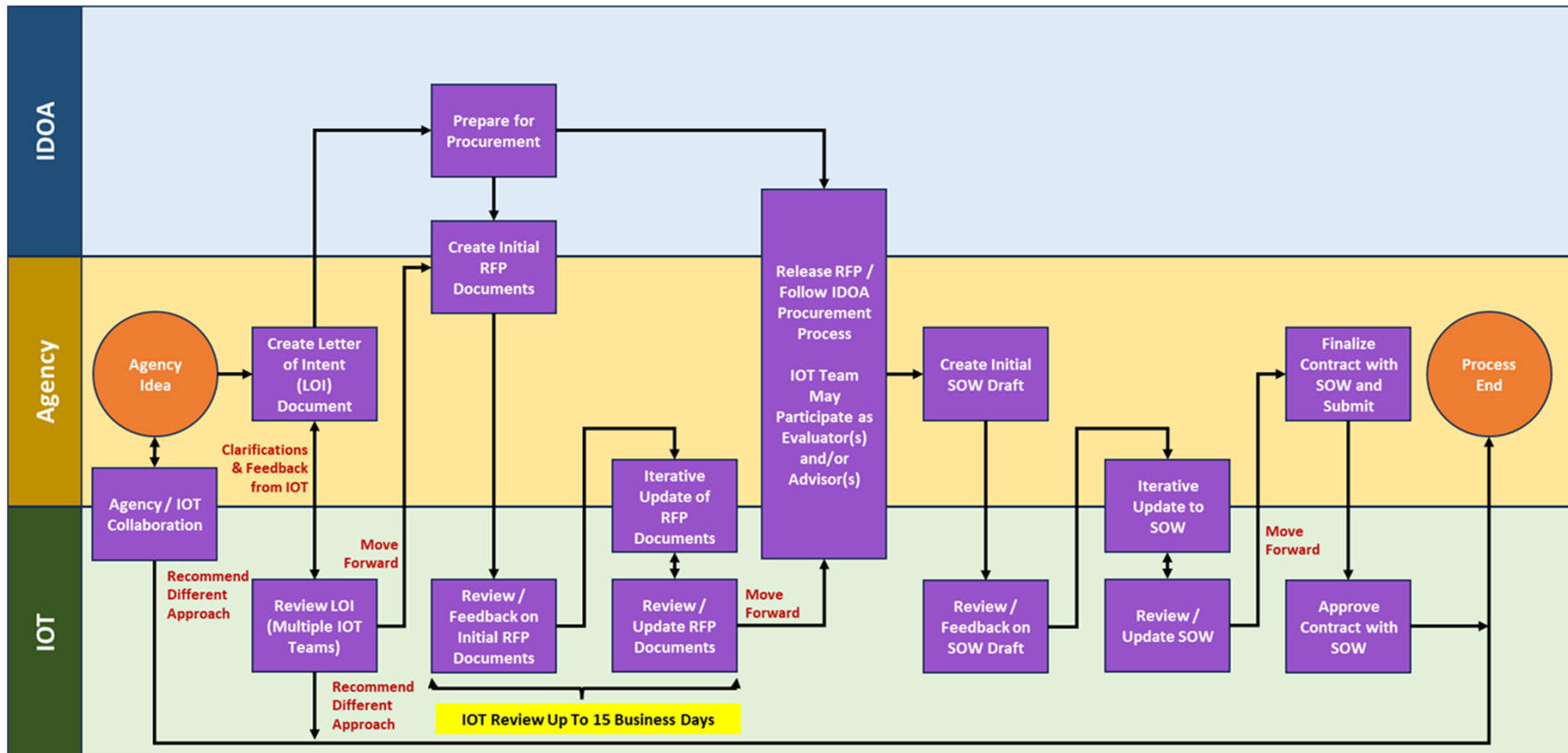
Requisitions: 2-5 days +

SPRs: 21 days +

Contract exceptions: 21 days +

Contract approval decisions: 7 days, often, if the above processes have already been completed.

IOT's IT Procurement Process (RFP Example)



Key Solicitation Take Aways & Helpful Links

RFPs and Related Solicitations

- IDOA requests IOT review of all IT solicitations prior to posting to vendor community.
- IOT approves all IT contracts.
- Engage IOT PRM team early and share near final drafts of procurement & SOW documents.
- Utilize PRM team's "Agency IT Procurement Tool Kit" to enhance procurement documents.
- Allow 15 business days for IOT PRM team's review and feedback of procurement documents.
- Obtain and submit IOT Cloud Security Questionnaire from vendor if not hosted with IOT.

Helpful Links / References

- PRM Team Email: ProjectRiskManagement@iot.IN.gov.
- Agency IT Procurement Tool Kit: [Agency IT Procurement Tool Kit](#).
- PRM Policy: IOT-CS-OPS-014 in [Archer](#).
- IOT Cloud Security Questionnaire Team Email: iotcloudsecurityquestionnaire@iot.in.gov.

IT Requisitions

Who reviews agency IT requisitions for approval?

- IOT Procurement and IOT Operations approve most requisitions.
- IOT Architecture and Security Teams, IOT Project Risk Management, and IOT CIO provide final approval as needed.

How long does it take for a requisition to be approved?

- Reviews start within 1-2 business days.
- Speed of review depends on how much information is provided.

When IOT approvers review a contract, they look at the status of the requisition (if there is one). Providing clear and sufficient information at the requisition stage helps speed contract review and approval.

Right from the Start: IT Requisitions

Provide the following information in the “approval justification” section of IT requisitions:

- What business problem is this procurement meant to solve?
- Name of IOT staff with background
 - Were comparable IOT services considered?
 - If IOT products/services were considered and not chosen, describe the reason.
 - Name of agency technical contact.
- If making a QPA purchase, provide QPA name and/or number.
- List Supplier, if known.
- Is this requisition being issued as the result of an RFP?

IT Requisitions

- Name and description of product or service
 - Software—what is being bought, for what purpose?
 - Licenses? Maintenance/support? Hosting? Cloud services?
 - New or renewal?
 - Hardware
 - Desktop? Laptop? Peripherals? Printers? Server? Storage?
 - Professional services or projects
 - Via MSP?
 - Development?
 - New or continuation?
 - Staff augmentation
 - Via MSP?
 - New or renewal?
 - Telecom?

Special Procurement Requests

SPRs are reviewed for approval by:

- IOT Procurement, IOT PRM Team, IOT Architects/CTO, IOT Security/CISO, IOT CIO.
- IOT Operations, MPH (as needed).

For ease of review:

- **Complete** the IOT section of the form. Requests to approve incomplete forms may be denied.
- Ensure your responses support the chosen Indiana Code provision.

Of Note: IOT routinely needs up to 21 days to make an approval decision for an SPR, and IOT may require up to 45 days to complete a review of an SPR.

When IOT approvers review a contract, they look at the status of the SPR (if there is one). Providing clear and sufficient information at the SPR stage helps speed contract review and approval.

IT Contracts and Contract Exception Requests

- IOT will conduct a pre-review of an IT contract upon request. Please submit specific questions along with your request.
- IOT does not comprehensively review EULAs or other exhibits from a legal or operational standpoint during the contract approval process.

Agencies should complete their own legal and operational reviews of these documents.
- **Requests for document pre-reviews should be sent to IOTProcurement@iot.IN.gov, to the attention of Mady Alexander.**
- If IOT receives a contract for approval and the IOT paragraph, IOT cloud terms, or the cyber-liability insurance provision have been modified or deleted, and those mods or deletions have not been pre-approved, contract approval may be denied. At best, a delay will result.
- Requests involving AI receive additional levels of review.
- **Rush contract approval requests should be sent to IOTProcurement@iot.IN.gov, to the attention of Dawn Cumston. Please include a description of the circumstances creating the need for rush review.**
- **Rush requests** will be prioritized at the discretion of the IOT stakeholders, but please be aware that the full approval process within IOT will still be conducted.

IT Contracts and Contract Exception Requests

Agencies must request IOT approval to change or delete the IOT paragraph, the IOT cloud terms, or the cyber liability insurance provision.

Tips for successful review and approval:

- Be clear about the reason for the exception request. The more detail provided about the data, the vendor, and the reason the exception is needed, the better IOT can evaluate the request.
- Only substantive changes need to be submitted for approval. For example, if the vendor wants to capitalize something throughout the contract, make the change.
- IOT does a review, but the agency is responsible for risk created by the changes.
- Agencies need to negotiate with the vendor themselves before presenting proposed changes to IOT.
 - **Redlines should include vendor comments related to the request and should include the agency's position on the vendor's redlines.**
- Requests to **remove** the IOT paragraph, the IOT cloud terms, or the cyber liability insurance provision must include the agency's position on the request.
- Target for completing reviews for exceptions is 21 days.

IT Contracts and Contract Exception Requests

Information to include as a part of your exception request:

- Describe the product or service that you are buying, and what it will do for your agency, with sufficient detail (but using simple terms) so that the IOT Security Team will have a basic understanding of what is going on and can legitimately consider whether the changes that you have proposed are acceptable and appropriate under the circumstances.
- Clearly identify the changes that you propose to make. *(IOT prefers redlines made to Word versions of the State's templates.)*
- Explain why your agency thinks your proposed changes are acceptable and appropriate under the circumstances. *(IOT prefers marginal comments inserted directly into Word versions of the State's templates.)*
- Acknowledge that your agency is responsible for any harm that comes to the State which would have been prevented if your proposed changes hadn't been made.
- Provide details about the contract: Length of contract, new or renewal, consideration, etc.
- If cloud services are included, has an IOT cloud security questionnaire been completed by the vendor for this engagement within the last 12 months?



RESOURCES

To access the **Cloud Security Questionnaire**:

IOTCloudSecurityQuestionnaire@iot.in.gov

To request approval to modify or remove the **IOT paragraph** or **cyber liability insurance provision** of the State contract templates, or to request approval for a waiver or a modification of the **IOT cloud terms**:

IOTContractExceptions@iot.in.gov

For assistance with **IT QPA vendors**:

IOTVendorManagement@iot.in.gov

Also join us each month for IOT Procurement's "**Office Hour**".

Questions should be submitted in advance to IOTProcurement@iot.in.gov.

OFFICE OF THE INDIANA



ATTORNEY GENERAL

To Infinity & Beyond... Beyond the Basics

Presented by:
Christopher Anderson, Assistant Chief Counsel
James Harry, Deputy Attorney General

07/24/2024



TODD ROKITA



Welcome

Since taking office in 2021, Attorney General Rokita has taken strong actions to protect liberty and the rule of law. Employing nearly 400 staff members, the Office of the Indiana Attorney General serves with a servant's heart to ensure Hoosiers' voices are heard and protected.

Our Services to Hoosiers

- As attorney for the State of Indiana, we represent state agencies and officeholders. With nearly **20,000 active cases** at any given time, our office defends laws passed by the legislature and challenges federal overreach harmful to Hoosiers.
- We protect consumers from illicit business practices, cybersecurity and data privacy violations, and ID Theft. We have obtained **nearly \$1 billion in settlements** for Hoosiers - including hundreds of thousands from annoying and illegal robocallers.
- **We return over \$ 1 million** in Unclaimed property to Hoosiers every week – achieving a **record \$76.8 million** returned in fiscal year 2023.
- Since taking office, **we have recovered \$85.5 million** from entities allegedly engaged in Medicaid fraud.
- We handle more than **1,000 criminal and civil appeals** each year – successfully upholding the convictions of child abusers, murderers and rapists.





Office of the Indiana Attorney General

I know what IDOA reviews for – what role does the OAG play in this process?

- The OAG reviews for form and legality: “The attorney general must review for form and legality contracts to which a state agency is a party” and, if the contract “does not meet the requirements of law,” the OAG must disapprove the contract in writing and “assist the agency to remedy defects that are found, if possible.” IC § 4-13-2-14.3.
- The OAG has 45 days to review; if the OAG does not respond within 45 days of submission, the contract is deemed approved.
- The OAG is always the last step in the process – it will **always** be approving the final document to which all other parties have agreed.



OAG ROLE DEFINED

4-13-2-14.3 Contracts of state agencies; review by attorney general of form and legality; advice to agency; forms

(a) Except as provided in subsection (e), **the attorney general must review for form and legality contracts to which a state agency is a party**, unless the contract is not required to be in writing under section 14.2 of this chapter.

(b) If the attorney general finds that a contract does not meet the **requirements of law**, the attorney general **shall**:

(1) disapprove the contract;

(2) explain in writing to the contracting agency how the contract is legally defective; and

(3) assist the agency to remedy defects that are found, if possible.

(c) If the attorney general finds that the **form of a contract** is inappropriate but that the contract is legal, the attorney general **may** disapprove the contract and shall advise the agency how the form is defective and how the form may be improved.

OAG ROLE DEFINED

(d) The attorney general shall advise the contracting agency as to the form and legality of the contract within **forty-five (45) days** after its submission for review. **If the attorney general does not advise the agency within forty-five (45) days after submission, the contract is considered to be approved.**

(e) The attorney general may approve contract forms or, by rules adopted under IC 4-22-2, contract types to be used by a state agency and specify the conditions under which the approved forms or types may be used. An agency using a contract form or contract type approved by the attorney general is not required to submit individual contracts using the forms or types for review by the attorney general under this section. Changes in an approved form or type must:

- (1) be approved by the attorney general; and
- (2) be made in accordance with IC 5-15-5.1-5.

(f) The attorney general may delegate to a deputy a power or responsibility given to the attorney general under this section.

CONTRACT BASICS

What is a Contract?

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. Black's Law Dictionary (11th ed. 2019).

CONTRACT BASICS

What is the importance of a good contract?

When construing the meaning of a contract, our primary task is to determine and effectuate the intent of the parties. First, we must determine whether the language of the contract is ambiguous. The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. If the language of the instrument is unambiguous, the parties' intent will be determined from the four corners of the contract. If, on the other hand, a contract is ambiguous, its meaning must be determined by examining extrinsic evidence and its construction is a matter for the factfinder. When interpreting a written contract, we attempt to determine the intent of the parties at the time the contract was made. We do this by examining the language used in the instrument to express their rights and duties. We read the contract as a whole and will attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. We must accept an interpretation of the contract that harmonizes its provisions, rather than one that places the provisions in conflict.

***Ryan v. Lawyers Title Ins. Corp.*, 959 N.E.2d 870, 875 (Ind. Ct. App. 2011)**
(internal citations omitted)



CONTRACT BASICS – Development Reminders

GOALS IN CONTRACT DRAFTING:

- (1) Be Clear (unambiguous).
- (2) Be Concise (don't get too “wordy”).
- (3) Don't agree to prohibited terms.
- (4) Include all necessary boilerplate terms.
- (5) Perform proper risk assessment when negotiating terms.
- (6) When in doubt, contact the IDOA and the OAG.

OAG REVIEW FOR BASIC INFORMATION

- Term – the timeframe.
- Consideration – what I get in exchange for a good or service that has been bargained.
- Parties – who is signing the contract?
- Signatures – binding the parties to the contract.
- Exhibits – clearly labeled and incorporated.
- Mandatory clauses included.
- Prohibited clauses excluded.

OAG REVIEW FOR BASIC INFORMATION – REQUIRED CLAUSES

- Compliance with laws – state and federal
- Ethics IC 4-2-6 *et seq* & IC 4-2-7 *et seq*
- Telephone Privacy (IC 5-22-3-7)
- Electronic Payment (IC 4-13-2-14.8, & -20)
- E-Verify (IC 22-5-1.7-11, -12, & -13)
- Drug-free Workplace (EO 90-05)
- Governing law (IC 34-13-2-3(d))
- Funding Cancellation (IC 5-22-17-5 & FMC 3.3)
- Non-Discrimination (IC 22-9-1-10)
- Non-Collusion

OAG REVIEW FOR BASIC INFORMATION – PROHIBITED CLAUSES

Any provision:

- requiring the State of Indiana to provide insurance
- requiring the State of Indiana to provide indemnity
- providing that the Contract be construed in accordance with laws other than those of the State of Indiana
- providing that suit be brought in any state other than Indiana
- providing for resolution of contract disputes
- requiring the State of Indiana to pay any taxes
- requiring the State of Indiana to pay penalties, liquidated damages, interest or attorney's fees

OAG REVIEW FOR BASIC INFORMATION

– PROHIBITED CLAUSES 2

Any provision:

- modifying the applicable Indiana statute of limitations.
- relating to the time within which a claim must be made.
- requiring payment of consideration in advance unless authorized by an exception listed in IC § 4-13-2-20.
- limiting disclosure of the contract in violation of the Access to Public Records Act, IC § 5-14-3. This is a Public Contract and will be posted on the transparency portal as required by Executive Order 05-07 and IC § 5-14-3.5-2.
- requiring payment in less than 35 days.
- providing for automatic renewal – instead, execute an Amendment extending the term if the contract has not expired.

LET'S DIG A LITTLE DEEPER INTO CERTAIN IMPORTANT CONTRACT PROVISIONS

- Termination for Convenience
- Indemnification
- Limitation of Liability
- Assignment of Antitrust Claims



TERMINATION FOR CONVENIENCE

What is a Termination for Convenience clause?

- The termination for convenience (“TFC”) clause allows the State to end a contract when it finds it “convenient,” without needing to establish that the other party is in default of its obligations. This could be because the State’s needs have changed, or to allow another party to complete the contract.

What exactly does the State’s boilerplate clause cover?

- WHO can invoke the clause.
- WHY it can be invoked.
- WHEN it becomes effective.
- DUTIES of the parties when invoked.



TERMINATION FOR CONVENIENCE

“This Contract may be terminated, in whole or in part, by the State, which shall include and is not limited to IDOA and the State Budget Agency....”

- Only the State can terminate for convenience. If a contract includes a clause giving the contractor the right to terminate for convenience, this will most likely result in a rejection of the contract by OAG.
- Derives from the State’s sovereign immunity and considers the State’s size and unique duty to act in the public interest.
- The TFC clause can be invoked by the “State,” not just the individual agency entering into the contract.
- Termination is not all or nothing. State can choose to terminate only part of the contract.

TERMINATION FOR CONVENIENCE

“...whenever, for any reason, the State determines that such termination is in its best interest....”

- Extremely broad language is used; means no compelling reason needed by the State.
- In contrast, most private contracts only allow for termination for default, where one party has substantially breached its obligations under the contract.

TERMINATION FOR CONVENIENCE

- The State's right to terminate for convenience is not absolute. Standard of good faith applies. When is there a lack of good faith?
 - Some courts have held that “the contractor must present clear and convincing evidence that the government's termination was made with the **'intent to injure'** the contractor.” *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1240 (Fed.Cir.2002).
 - “[I]f we must presume that government officials act in good faith to contract in their best interest at the time of the agreement... then a **change in circumstances** is necessary for the contract to no longer be in the government's best interest when terminating for convenience.” *RAM Eng'g & Const., Inc. v. Univ. of Louisville*, 127 S.W.3d 579, 585 (Ky. 2003).

TERMINATION FOR CONVENIENCE

“Termination of services shall be effected by delivery to the Contractor of a Termination Notice at least thirty (30) days prior to the termination effective date, specifying the extent to which performance of services under such termination becomes effective....”

•Termination requires written notice to the contractor 30 days prior to termination date.

•When drafting contracts, parties have some discretion on how long the notice period is, but if too short, contract may be found “illusory.”

TERMINATION FOR CONVENIENCE

- A contract is illusory when the promises under the contract appear to be **so insubstantial as to impose no obligation** at all on the promisor-who says, in effect, 'I will if I want to.'" *Princeton Homes, Inc. v. Virone*, 612 F.3d 1324, 1331 (11th Cir.2010).

- In the Florida case of *Handi-Van, Inc. v. Broward County*, the court held that the contract was not illusory because the contract had a 90-day notice requirement.

TERMINATION FOR CONVENIENCE

“The Contractor shall be compensated for services properly rendered prior to the effective date of termination. The State will not be liable for services performed after the effective date of termination. The Contractor shall be compensated for services herein provided but in no case shall total payment made to the Contractor exceed the original contract price or shall any price increase be allowed on individual line items if canceled only in part prior to the original termination date.”

- State is only responsible for paying for services performed before the termination date.
- Only services that are “properly rendered” will be paid for. The Contractor cannot try to fit in extra, unnecessary work leading up to termination date.
- If only partially terminated, the Contractor cannot try to make up for loss by bumping up prices elsewhere.

TERMINATION FOR CONVENIENCE

“For the purposes of this paragraph, the parties stipulate and agree that IDOA shall be deemed to be a party to this Contract with authority to terminate the same for convenience when such termination is determined by the Commissioner of IDOA to be in the best interests of the State.”

- Reiterates that IDOA is a party who can terminate the contract.
- Reflects fact that IDOA might choose to terminate even when agency does not.

CONCLUSION on TFC clauses:

- Important tool for State given its unique position.
- Helps protect the public interest.
- Part of the cost of doing business with the State.



INDEMNIFICATION

"[Indemnity] is a topic so deadly dull that it makes insurance look interesting."

Crawford v. Weather Shield, 38 Cal.Rptr.3d 787 (2006).



DIGGING DEEPER- INDEMNIFICATION

Standard State Language:

“The Contractor agrees to indemnify, defend, and hold harmless the State, its agents, officials, and employees from all third-party claims and suits including court costs, attorney’s fees, and other expenses caused by any act or omission of the Contractor and/or its subcontractors, if any, in the performance of this Contract. The State will not provide indemnification to the Contractor.”

Key Elements:

- **The Action:** Indemnify – Defend - Hold Harmless
- **The Parties:** Contractor, subcontractors, the State, agents, officials, employees, etc.
- **The Claims:** All third-party claims
- **The Damages:** “Includes” ... Court costs, attorney’s fees, expenses
- **The Scope:** Acts or omissions arising from performance of the contract
- **The Shift:** Liability shifts only from the State to the Contractor, never the reverse

WHAT IS “INDEMNIFICATION?”

An indemnity agreement involves “a promise by one party (the indemnitor) to reimburse another party (the indemnitee) for the indemnitee's loss, damage, or liability.” Mead Johnson & Co. v. Kenco Grp., Inc., 899 N.E.2d 1, 3 (Ind. Ct. App. 2009).

“The general legal understanding of indemnity clauses is that they cover ‘the risk of harm sustained by third persons that might be caused by either the indemnitor [Contractor] or the indemnitee. It shifts the financial burden for the ultimate payment of damages from the indemnitee [the State] to the indemnitor.’” BioConvergence, LLC v. Menefee, 103 N.E.3d 1141, 1169 (Ind. Ct. App. 2018).

We construe an indemnity agreement “to cover all losses and damages to which it reasonably appears the parties intended it to apply.” Zebrowski & Associates, Inc. v. City of Indianapolis, 457 N.E.2d 259, 261 (Ind.Ct.App.1983).

“Stand in the Shoes” of the Indemnified.



WHY CAN'T THE STATE INDEMNIFY CONTRACTORS?

The State cannot provide “cross indemnification” to contractors.

1. Constitutional Concerns

- Indiana Constitution Article 10, Section 3, provides “no money shall be drawn from the Treasury, but in pursuance of appropriations made by law.”
- Were the State to offer indemnity to contractors, the State would be accepting liability to keep the contractor free from loss.
- A third-party judgment against the contractor would result in the State being liable to cover the costs of the judgment on Contractor's behalf.
- The State would be agreeing to pay money that has not been allocated, budgeted, and distributed for public spending pursuant to law.

WHY CAN'T THE STATE INDEMNIFY CONTRACTORS?

2. Statutory Concerns

- The State may still be liable for its own negligence or other tort liabilities.
- State Tort Liability is governed by statute, I.C. 34-13-3 (the "Tort Claims Act").
- The Tort Claims Act:
 - Provides the State immunity for enumerated actions;
 - Provides a procedure for raising claims against the State; and
 - Provides capped damages amounts for which the State may be liable.
- If the State agrees to indemnify contractors and accept liability, the State is contracting away the protections and procedures of the Tort Claim Act.
- Indemnifying contractors eliminates protections from liability that the Legislature intentionally reserved for the State.
- The statutory responsibility to defend suits against the State falls to the Attorney General. There is no statutory authorization for the Attorney General to defend third-party interests due to indemnity.

EXAMPLE:

The OAG contracts with D- Construction to build Bill Anthony a new, big desk to hold voluminous stacks of contracts submitted for his review. D- Construction builds a hastily constructed desk that soon collapses due to the excessive weight of contracts piled on top. Unfortunately for Bill, he was sitting at the desk when the desk collapsed, and he sustained substantial injuries to his big toe. Understandably, Bill is upset because he now limps when he walks down to James Harry's office to give him assignments. Bill sues the State for negligence and creating an unsafe work environment. After an arduous court battle, Bill wins monetary damages against the OAG. Who is responsible for the damages, courts costs, and attorney's fees?



NEGOTIATING INDENMIFICATION

- Explain the scope of indemnification to contractors.
- Remind contractors of the benefits from doing business with the State of Indiana.
- Explain the legal prohibitions for the State, and the State's inability to provide cross indemnification.
- Allow minor modifications to exclude instances of the State's proven liability, such as willful and intentional conduct.



LIMITATION OF LIABILITY

Contractors may request a limitation of liability clause be added.

Limitations of Liability (LOL) clauses are not prohibited in State contracts but can be risky.

LOL clauses *create a contractual ceiling on the amount of damages* that may be awarded if a plaintiff prevails in litigation between the parties.

An Example:

“Notwithstanding anything else in this Contract to the contrary, including all attachments, the liability of the Contractor on account of any actions, damages, claims, liabilities, costs, expenses or losses in any way arising out of or relating to the Contract or the services performed under the Contract shall be limited to \$5,000,000. The provisions of this paragraph shall apply regardless of the form of action, damage, claim, liability, cost, expense, or loss asserted, whether in contract, statute, rule, regulation or tort (including but not limited to negligence) or otherwise.”

Other versions of LOL clauses are often tied to the total remuneration of the contract.



A CASE STUDY...



SAMS Hotel Grp., LLC v. Environs, Inc., 716 F.3d 432, 434 (7th Cir. 2013)

- Hotel group filed suit for breach of contract and negligence against contractor for faulty design work and demolition of the building. Alleged damages totaled \$4.2 Million.
- The contract had a LOL clause that limited the Hotel's loss to \$70,000.

“The Owner [SAMS] agrees that to the fullest extent permitted by law, Environs Architects/Planners, Inc. total liability to the Owner shall not exceed the amount of the total lump sum fee due to negligence, errors, omissions, strict liability, breach of contract or breach of warranty.”

CASE STUDY CONTINUED

SAMS Hotel Grp., LLC v. Environs, Inc., 716 F.3d 432, 434 (7th Cir. 2013)

- Hotel argued that the LOL did not apply to contractor's *own* negligence because it did not specifically refer to Contractor's negligence.
- "The Indiana courts have long recognized and respected the freedom of parties to enter into contracts and have presumed that those contracts represent the freely bargained agreements of the parties."
 - "...key contractual language must " '*clearly* and *unequivocally* manifest a commitment by [the plaintiff], knowingly and willing[ly] made, to pay for damages occasioned by [the defendant's] negligence."
 - "[T]he general rule of freedom of contract includes the freedom to make a bad bargain."
- **Held:** LOL clause is valid, it applied to contractor's own negligence, and the Hotel knowingly agreed to limit its recovery to only \$70,000.

TAKEAWAYS FOR NEGOTIATIONS

- BEWARE of LOL clauses!!!
- Perform a risk analysis – consider the potential losses at stake.
- Ask whether there are potential damages beyond the contract total.
- Weigh whether the available insurance coverage and limit to liability adequately covers the State's interests.
- Pay attention to the specific words.
- Pay attention to the scope of the clause.
- Just because you “can” does not mean you “should” agree to limit liability...

ASSIGNMENT OF ANTITRUST CLAIMS

- What is the Assignment of Antitrust Claims clause?
 - This clause ensures that the State may recover monetary damages for antitrust claims that arise between the contractor and its vendors or subcontractors.
- What does the State's boilerplate clause say?
 - **Assignment of Antitrust Claims.** As part of the consideration for the award of this Contract, the Contractor assigns to the State all right, title and interest in and to any claims the Contractor now has, or may acquire, under state or federal antitrust laws relating to the products or services which are the subject of this Contract.

ASSIGNMENT OF ANTITRUST CLAIMS

What are antitrust laws?

- Antitrust laws are federal and state laws that regulate the conduct and organization of businesses in order to prevent fraud and collusion in the letting of contracts and to protect trade and commerce against unlawful restraints and monopolies. *Skyline Roofing & Sheet Metal Co. v. Ziolkowski Const., Inc.*, 26 N.E.3d 1024, 1029 (Ind. Ct. App. 2015).

ASSIGNMENT OF ANTITRUST CLAIMS

- **Federal laws**

- Sherman Act

- Prohibits price fixing and other practices that restrict trade

- Clayton Act

- Restricts mergers and acquisitions of organizations that may substantially lessen competition or tend to create a monopoly

- Federal Trade Commission Act

- Prohibits monopolies

- **State laws**

- Ind. Code 24-1-1 Prohibits contracts to prevent competition

- Ind. Code 24-1-2 Prohibits combinations restraining trade

- Ind. Code 24-1-3 Prohibits combinations to prevent the sale of supplies

- Ind. Code 24-1-4 Prohibits combinations compelling manufacturers to close



REAL-LIFE EXAMPLE OF HOW ANTI-TRUST VIOLATIONS MAY IMPACT A STATE

• *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)

- Several manufacturers of concrete blocks (“manufacturers”) in the Chicago area conspired to “fix” the prices of the concrete blocks. This conspiracy resulted in the price of the blocks being artificially inflated.
- The manufacturers then sold these blocks (at the inflated price) to masonry contractors, who then sold the blocks to general contractors.
- The general contractors in turn submitted bids to the State of Illinois for construction projects. The State and the general contractors entered into contracts for the construction of buildings utilizing those blocks.
- As a result of the manufacturers’ conspiracy to inflate the prices, the State of Illinois, and indirectly, the public, were charged higher prices for the services (more than \$3 million higher!).



ASSIGNMENT OF ANTITRUST CLAIMS

- **Enforcement of antitrust laws**

- Enforced by the DOJ, the Federal Trade Commission, state attorneys general, and private individuals/businesses who are directly hurt by antitrust violations.

- Why do we need a clause assigning antitrust claims in our contracts?

- **First reason:** In *Illinois Brick Co. v. Illinois*, which is the concrete block manufacturing example, the Supreme Court held that the State of Illinois could not bring federal antitrust claims against the manufacturers because the state was not the “direct purchaser” of the blocks, but instead it was an “indirect purchaser” that did not have standing to sue for damages.

- **Second reason:** Even under Indiana laws, where the State is authorized to bring antitrust claims as an “indirect” purchaser, each plaintiff that brings a claim potentially reduces the amount of damages recovered by any one plaintiff. By having contractors assign their rights to the State, the State stands in the shoes of the contractor (direct purchaser) and can recover the maximum amount of damages that are available.

Office of the Attorney General – Advisory Division

- **William Anthony:** William.Anthony@atg.in.gov
- **Christopher Anderson:** Christopher.Anderson@atg.in.gov
- **James Harry:** James.Harry@atg.in.gov
- **ATG Contracts Email:** Contracts@atg.in.gov

STATE BUDGET AGENCY

Prepared By: Eric Klinefelter, Director of Centralized Accounting

Ensuring that Indiana's priorities are funded today and tomorrow



SBA BACKGROUND

- The State Budget Agency is charged with the duty and responsibility of serving as fiscal analyst, administrative budget officer, fiscal forecaster and fiscal policy advisor to the Governor. By statute, the Governor appoints the State Budget Director and two Deputy Directors.
- The Budget Agency facilitates the processes of revenue forecasting and budget development and implementation. The agency is also responsible for evaluating the fiscal and policy impacts of legislative proposals and making this information available to decision makers. Each biennium, the agency compiles fiscal data from state agencies and works with the legislature to develop the State's budget.
- More information about the State Budget Agency can be found in Title 4, Article 12, Chapter 1 of the Indiana Code.



SBA BACKGROUND

- IC 4-12-1-13 allows the State Budget Agency (SBA) to adopt and enforce financial guidelines for state agencies to follow. The Office of Management and Budget (OMB) has similar authority under IC 4-3-22-4. We refer to this guidance as Financial Management Circulars (FMCs)
- Primarily applies to only executive branch agencies IC 4-12-1-13(g)
- For today's purposes, we will be discussing some of the Financial Management Circulars (FMCs) found here –

<https://www.in.gov/sba/budget-information/financial-management-circulars/>



FMC 3.1 – Contract Management

- **Section 1 – Purpose**: This policy advises agencies on the minimum requirements of managing state contracts consistent with the responsible stewardship of State resources.
- **Section 4 – Authority to Sign Contracts**: Only staff designated in writing by the agency head have the authority to bind the State and sign contracts on behalf of an agency.
- **Section 5 – Contract vs. Grant**: A contract and a grant contain the same essential elements: competent parties, lawful subject matter, sufficient consideration, and consent of minds. However, contracts create “State procurement relationships” and grants create “State assistance relationships.”
 - The Contract Manual provides agencies with the required clauses of any contract and additional guidance on the contract vs grants determination.
 - Each agency is responsible for reviewing the funding source that supports the grant or contract to assure the proper agreement is utilized.



FMC 3.1 – Contract Management

- **Section 7 – Accounting for Contracts**: Budget accounting for contracts should follow the principles established in the State Board of Accounts (SBOA) Manual, including:
 - **Encumbering Contracts**: Section 3.2.4 of the SBOA Manual provides: “The total amount on a vendor contract should be encumbered on a purchase order, including amount to be paid in future years, unless a specific exception is granted by the State Budget Agency and the Auditor of State.”
 - **Multi-Year Contracts/Leases**: Section 5.4.1.8 of the SBOA Manual provides: “All contracts and commitments must be entered in the PeopleSoft financial system in order to create an encumbrance for the funds committed. For contracts (or leases) spanning more than one fiscal year, all years should be accounted for in the initial requisition by using a separate line for each fiscal year.”
- **Section 11 – Contract Close-Out**: A contract is completed when:
 1. All goods/services have been received and accepted as paid in full.
 2. All reports were provided and accepted.
 3. Final payment is made to the Contractor.



FMC 3.3 – Language for Cancellation for Contracts for Lack of Funds

- Section 1 – Required Language: The following language for cancellation of contracts must be in any contract. Contracts will not be approved by the State Budget Agency without this cancellation language.

“When the Director of the State Budget Agency makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of this contract, the contract shall be canceled. A determination by the Director of the State Budget Agency that funds are not appropriated or otherwise available to support continuation of performance shall be final and conclusive.”



FMC 3.4 – MOUs and MOAs

- Effective March 1, 2024.
- Memorandums of Understanding are generally considered formalized written agreements between State agencies that cannot be enforced in court and which involve programmatic and/or fiscal issues and enunciate mutual understandings, agreements, duties, responsibilities, policies, procedures, time frames, and other matters as necessary and appropriate.
- Memorandums of Agreements are generally considered formalized written agreements between a State agency and another party, including a private entity, that does not contain enforceable promises. These agreements include things such as letters of intent or letters of agreement that memorialize the intention of the parties to collaborate. Agreements between a State agency and another entity that include provision(s) that could be enforced in court must be memorialized by a contract that is subject to review under IC 4-13-2-14.1.



FMC 3.4 – MOUs and MOAs

- **Section 2 – General Policy:** Due to the possibility of direct or indirect State fiscal impact, the State Budget Agency's (SBA) general policy is that all MOUs between State agencies require SBA review and approval.
- **Section 4 – Duration:** Generally, no MOU should extend for a term of more than 4 years (original term plus renewals). Exceptions may be approved by SBA.
- **Section 7 – Federal Sub-State Awards:** If a State agency (Granting Agency) awards federal funds to another State agency ("SubState" Agency), the agencies must enter into an MOU that provides the Sub-State Agency with specific federal information, which listed in this FMC.



FMC 4.1 – Federal Grants Management Guidelines

- Effective July 1, 2024.
- **Section 2**. Enterprise Grants Management System: The State Budget Agency (SBA) has implemented a statewide grants management system known as Enterprise Grants Management System. This system shall be used by all executive branch agencies to track federal and state grants throughout the lifecycle of a grant.
- **Section 9**. Failure to Comply – The purpose of the FMC is to make sure agencies have internal controls in place to successfully manage federal assistance. It is important to reiterate that each federal award may have unique rules or regulations that are not covered in this FMC. Therefore, agencies must read and understand the unique requirements of its federal award and create internal controls to support the effective management of the federal assistance.



What are the “Fiscal Issues” SBA is Looking for in a Contract?

- Financial impact of the contract to the agency
 - Total cost of contract, fiscal year by fiscal year impact, funding sources, etc.
 - Impact of contract to the agency’s budget and spending plan, CFO sign off
 - Cost per unit, per hour, per product, etc.
 - SBA will work with agency financial staff or controllers to understand the financial impact of the contract



SBA CONTRACT APPROVAL PROCESS

- SBA tries to review each contract within five (5) working days of receipt
- High priority contracts coming through for approval
 - Advanced notice and information is helpful to SBA
- SBA Contract Approval Delegation:
 - Total considerations \$2,000,000 or less are approved by the Budget Analysts
 - Total considerations greater than \$2,000,000 but less than \$10,000,000 are approved by the Division Directors
 - Total considerations \$10,000,000 or greater are approved by the Deputy Budget Director



Contact Us

Website:

<https://www.in.gov/sba/>

Office Phone Number:

(317) 232-5610

Grants Management Team e-mail:

<https://www.in.gov/sba/grants/contact-grants-management-team/>





INDIANA OFFICE OF INSPECTOR GENERAL (OIG)

Inspector General David Cook

Tiffany Mulligan; Chief of Staff/Chief Legal Counsel
Doreen Clark; Staff Attorney
Hope Blankenberger; Staff Attorney

Today's Agenda

1. Overview of OIG Duties and Jurisdiction
2. Specific Ethics Rules and Examples
 - Gifts
 - Conflicts of Interests in Decisions and Votes
 - Conflicts of Interests in Contracts
 - Post-Employment Restrictions
3. Potential Penalties for Violations
4. Reminder on the Importance of Ethics
5. Quiz



Office of the Inspector General Duties



Establish
Code



Educate



Investigate



Adjudicate



Advice

1. Agency Ethics Officer

- Appointed by and within each agency
- Familiar with your agency's internal policies and duties

2. Informal Advisory Opinions

- Fast guidance from OIG attorney
- Confidential

3. Formal Advisory Opinions

- Public
- Conclusive
- Issued by the State Ethics Commission



Advice

IN.GOV An official website of the Indiana State Government Accessibility


Indiana Office of Inspector General

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- Contact Us
- Request Advice
 - Informal Advisory Opinions
 - Formal Advisory Opinions
- Holline
- News Room
- Reports
- Ethics training links for:


State Ethics Commission

- Commission
- Ethics Code
- Opinions
- Meeting Information




State Employees: Need an Informal Opinion?


[Request an Informal Advisory Opinion here](#)




Auditor & Investigator Conference:
June 20, 2024
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Disclosure



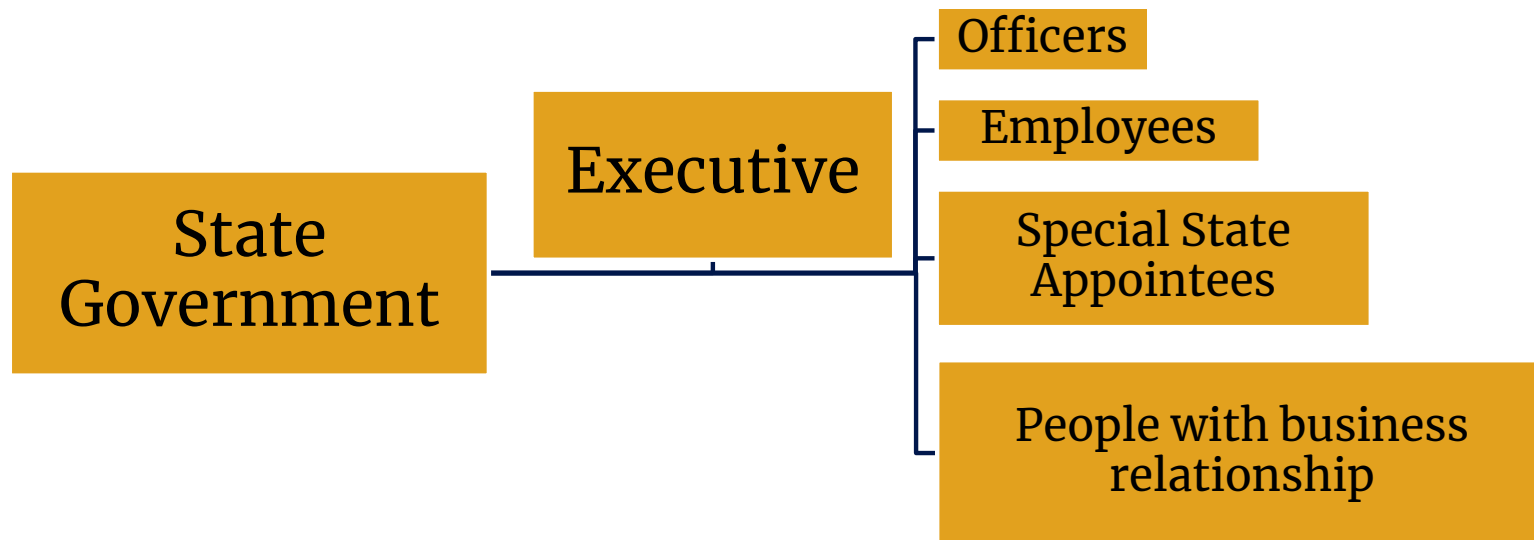
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ETHICS



OIG and Code of Ethics Jurisdiction



The Code of Ethics

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State Ethics Commission

- Commission
- Ethics Code**
- Opinions

Ethics Code

For the Executive Branch of State Government

Click on a link below for more information on the ethics rules. For your convenience, a printer-friendly [executive summary](#).

- [IC 4-2-6-17 Use of state property](#)
- [42 IAC 1-5-1 Gifts; travel expenses; waivers](#)
- [42 IAC 1-5-2 Donor restrictions](#)
- [42 IAC 1-5-3 Honoraria](#)
- [42 IAC 1-5-4 Political activity](#)
- [42 IAC 1-5-5 Moonlighting](#)
- [42 IAC 1-5-6 Conflicts of interest; decisions and voting](#)
- [42 IAC 1-5-7 Conflicts of interest; contracts](#)
- [42 IAC 1-5-8 Additional compensation](#)
- [42 IAC 1-5-9 Bribery](#)
- [42 IAC 1-5-10 Benefiting from confidential information](#)
- [42 IAC 1-5-11 Divulging confidential information](#)
- [42 IAC 1-5-12 Use of state property](#)
- [42 IAC 1-5-13 Ghost employment](#)
- [42 IAC 1-5-14 Post-employment restrictions](#)
- [42 IAC 1-5-15 Nepotism](#)
- [42 IAC 1-4-1 Ethics training](#)

Indiana Code
§ 4-2-6-1 to 17

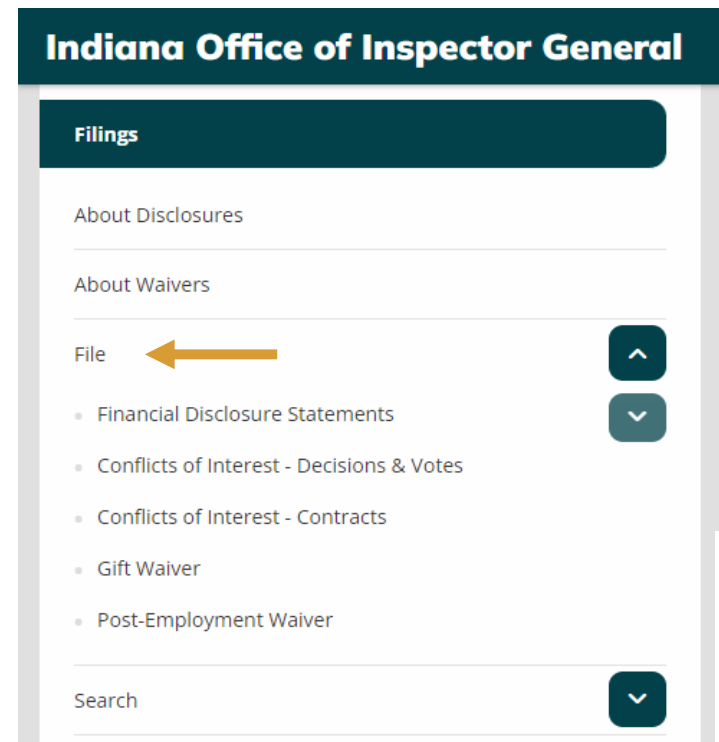
42 IAC
§ 1-1-1 to 1-11-1



If you have Final Purchasing Authority

You MUST file a Financial Disclosure Statement:

- See IC 4-2-6-8.
- Who is required to file?
- What is “Final Purchasing Authority”?
- When to file?



The Code of Ethics:

- Gifts
- Donor Restrictions
- Honoraria
- Political Activity
- Moonlighting
- Conflicts of Interests; Decisions and Voting
- Conflicts of Interests; Contracts
- Additional Compensation
- Bribery
- Benefitting from Confidential Information
- Divulging Confidential Information
- Use of State Property
- Ghost Employment
- Post-Employment
- Nepotism



Gifts: 42 IAC 1-5-1

TO WHOM

- You, your spouse, and your child (unemancipated)



WHAT

- Gift, favor, service, entertainment, food/drink, travel expenses, registration fees



FROM WHOM

- Person with a business relationship with your agency



Gifts: 42 IAC 1-5-1

EXCEPTIONS

- Memento/souvenir of nominal value
- Relative or ongoing social relationship



WAIVERS

- Agency's appointing authority can waive rule
- Must be consistent with public interest



Conflicts of Interests Contracts: IC 4-2-6-10.5

What the Code States

A state employee may not *knowingly* have a financial interest in a contract made by any state agency.



How the Code defines a Financial Interest

An *interest* in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or involving property or services.



Conflicts of Interests Contracts: IC 4-2-6-10.5

Exception:

An employee *may* have a financial interest in a contract made by a state agency so long as the employee:

(1)

Does not *participate in* or *have official contracting responsibility* for the contracting agency.

(2)

Files a written disclosure form with our office ***PRIOR*** to the execution of the contract with the agency.



Example

Scenario:

- You work for BMV, and you are seeking a second job to supplement your income.
- You have been offered employment as a caseworker for ABC Health.
- ABC Health has a contract with FSSA, which was established prior to your state employment.
- ABC Health will be paying your salary using funds from the FSSA contract.

Analysis:

- **Recommended Steps**
 - Search the Indiana Transparency Portal for a state contract.
 - If a contract exists, and more guidance is needed,
 - Discuss the matter with your agency's ethics officer
 - Ask for an Informal Advisory Opinion
- **Conclusion**
 - You do not have contracting authority with FSSA (you work for BMV).
 - But because ABC Health is paying you with state funds & the contract was already established, **you cannot accept any compensation from ABC Health that is derived from an agency contract.**



Indiana Transparency Portal



The Indiana Transparency Portal provides a searchable database for most professional services contracts in which the state is currently a party. The Indiana Department of Administration (IDO) maintains all active state contracts for publication.

<p>PUBLIC SEARCH OF STATE CONTRACTS</p>  <p>Search all of state contracts.</p>	<p>BUY INDIANA SEARCH</p>  <p>Search state contracts with Indiana businesses.</p>	<p>SEARCH STATE CERTIFIED BUSINESS</p>  <p>Search for businesses certified with the State of Indiana.</p> <p>Certified Minority & Women Businesses (MBE & WBE)</p>	<p>DOING BUSINESS WITH THE INDIANA DEPARTMENT OF TRANSPORTATION (INDOT)</p>  <p>INDOT provides consultants and contractors with information needed to research, review, bid upon, coordinate, manage and complete INDOT transportation construction projects.</p>	<p>QUANTITY PURCHASE AGREEMENTS (QPA'S)</p>  <p>QPAs are contracts negotiated for bulk pricing with a vendor to benefit all state agencies. QPAs are awarded through a competitive bid process.</p>
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Conflicts of Interests; Decisions & Votes: IC 4-2-6-9

What the Code States:

- You cannot participate in any decision or vote, or matter related to that decision or vote
- IF you have knowledge that various persons may have a financial interest in the outcome of the matter



Conflicts of Interests; Decisions & Votes: IC 4-2-6-9

Whose financial interest triggers the prohibition?

The State Employee



An Immediate Family Member



Business Org that the State Employee is serving
as an officer, director, member, trustee, partner
or employee



An organization with whom the state employee
is negotiating or has an arrangement concerning
prospective employment



Conflicts of Interests; Decisions & Votes: IC 4-2-6-9

- A state employee must:
Notify the agency's authority and ethics officer in writing to either
 1. *Seek a formal advisory opinion from the Commission***OR...**



Conflicts of Interests; Decisions & Votes: IC 4-2-6-9

2. *File a written disclosure with our office.*

What is required of the Written Disclosure?

- Details the conflict of interests
- Describes and affirms the implementation of the screen established by the ethics officer
- Signed by the state employee and the agency's ethics officer
- Filed no later than seven days after the conduct that gives rise to the conflict



The screenshot shows the 'Indiana Office of Inspector General' website. The main heading is 'Filings'. Below it are links for 'About Disclosures' and 'About Waivers'. A 'File' section is expanded, showing a list of filing categories: 'Financial Disclosure Statements', 'Conflicts of Interest - Decisions & Votes', 'Conflicts of Interest - Contracts', 'Gift Waiver', and 'Post-Employment Waiver'. A search bar is located at the bottom of the list.



Criminal Conflicts of Interests: IC 35-44.1-1-4

- Prohibits certain public servants from having
 - a pecuniary interest in or
 - deriving a profitfrom a contract with the public servant's agency.
- **Example:** An INDOT employee who has a side job of developing software for various companies and decides to contract with his own agency (INDOT) to sell his own software the agency.

Level 6 Felony

The Indiana sentencing guidelines, which can be found in Indiana Code chapters 35-50-2, state that the range of punishment for a Level 6 felony in Indiana is **between 6 months and 2.5 years in prison, and a fine of up to \$10,000.**



Post-Employment

Cooling Off Requirement



- “Revolving door” – IC 4-2-6-11(b)
- Lobbying
- Negotiation/administration of state contract
- Regulatory/licensing decisions
- 365 days

Particular Matter Restriction



- 12 “particular matters” – IC 4-2-6-11(a)
- Prohibits former employees from working on opposing side of matters they worked on for State
- “Personal and substantial” participation
- Life of matter (not limited to one year)



Post-Employment; Cooling Off Period: IC 4-2-6-11(b)

For 1 year after leaving state employment, you CANNOT:

1. Serve as a lobbyist.



Post-Employment; Cooling Off Period: IC 4-2-6-11(b)

For 1 year after leaving state employment, you CANNOT:

2. Work for an employer if you negotiated or administered a contract with the employer **AND** you had discretionary decision-making affecting the negotiation or administration of the contract.



Post-Employment; Cooling Off Period: IC 4-2-6-11(b)

For 1 year after leaving state employment, you CANNOT:

3. Work for an employer if you made a regulatory or licensing decision that directly applied to the employer.



Types of Particular Matters

IC 4-2-6-11(c)

1. Application
2. Business transaction
3. Claim
4. Economic development project
5. Contract
6. Determination
7. Enforcement proceeding
8. Investigation
9. Judicial proceeding
10. Lawsuit
11. License
12. Public works project



Post Employer Waiver: IC 4-2-6-11(g)

Appointing Authority may waive Cooling Off and Particular Matter Restrictions

- (1) Signed by both appointing authority and ethics officer.
- (2) Must include:
 - a. Whether employee's job duties involved substantial decision making.
 - b. Nature of duties for prospective employer.
 - c. Substantial contact with former agency.
 - d. Consistent with public interest.
 - e. Employee hardship if denied.
- (3) Filed and presented to SEC by appointing authority.
- (4) Must be obtained before beginning new employment.



Ethics Violations; penalties; sanctions

IC 4-2-6-12

1. Civil Penalty 3X Value of benefit
2. Cancel contract
3. Bar from entering contract
4. Restitution or disgorgement
5. Reprimand, suspend or terminate
6. Bar future state employment
7. Recommend impeachment
8. Revoke license or permit
9. Bar from obtaining license or permit
10. Revoke lobbyist registration
11. Bar future lobbying activity



Front Page News

WTHR 13 News Weather Sports VERIFY **An unknown error has occurred**

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State ethics commission rules former DHS executive violated nepotism rules

A former state financial officer who claims she was wrongfully fired lost her appeal on ethics violations Thursday.

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NEWS

Former top BMW official fined \$500 for ethics violation

Tony Cook IndyStar

Published 6:31 p.m. ET June 9, 2016 | Updated 8:39 p.m. ET June 9, 2016

Indiana CAPITAL CHRONICLE

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[GOVERNMENT & POLITICS](#)

IN BRIEF

Woman fined, barred from state employment

BY: **STAFF REPORTS** - DECEMBER 9, 2022 1:00 PM



STATEIMPACT

A reporting project of WFIU & WTIU, with support from IPBS

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State Ethics Commission Accepts Bennett's Settlement

JULY 10, 2014 | 3:56 PM
BY CLAIRE MCINERNY

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For the Attorneys

Be mindful of the Rules of Professional Conduct!

- See Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees
- The Supreme Court Disciplinary Commission can offer informal guidance on the application of the rules to a set of circumstances in much the same way that OIG does for the State Code of Ethics. <https://www.in.gov/courts/discipline/guidance/>
- March 2023: Supreme Court Disciplinary Commission Opinion # 1 – 2 3: Detecting and Navigating Imputed Conflicts of Interests of Current and Former Government Officials, Lawyers, and Employees - <https://www.in.gov/courts/discipline/files/dc-opn-1-23.pdf>
- OIG does not have jurisdiction to provide guidance on this or other ethical obligations for attorneys under the Rules of Professional Conduct



QUIZ



Example #1

A contractor at your agency has offered you a free registration for a conference. Can you accept the free registration?

A. Yes – It is work related, so feel free to accept and enjoy!

B. Yes – You did not sign the contract, so go ahead and accept.

C. No – your agency has a business relationship with the contractor, so unless an exception applies or you get a waiver, you cannot accept.

D. No – you can never accept free registration to a conference.



Example #2

You win a door prize in a drawing at a work conference. Can you accept it?

A. Yes – it was a random drawing; of course, you can accept it.

B. No – you can never accept a door prize.

C. It depends on whether you were allowed to attend the conference.

D. It depends on whether the donor has a business relationship with your agency or if an exception applies or you get a waiver.



Example #3

Can you take an outside job with a non-profit organization that has a grant with another state agency?

A. Yes – you do not work for the granting agency, so no restrictions apply.

B. Yes – if the compensation for your outside job does not come from a state contract or grant.

C. Yes – if you receive compensation from state funds, but you file a disclosure statement before execution of the contract.

D. Both B and C.



Example #4

You leave state government and accept a job to lobby the IN and OH legislatures. Can you do so immediately upon leaving the State?

A. Yes – the cooling-off restriction only applies to executive branch lobbying (not legislative).

B. Yes – you can lobby anyone you want after leaving state employment.

C. No – you cannot engage in any type of lobbying after leaving state employment.

D. It depends on who your employer is.



Example #5

In your state role, you make general policy decisions that apply to a regulated industry (but never to a specific entity). Can you immediately work for a specific regulated entity upon leaving the State?

A. Yes – the post-employment rule does not prohibit working for regulated entities.

B. Yes – if you only made decisions of general applicability, you can work for a regulated entity.

C. No – your decisions involved the industry; therefore, you are out of luck.

D. No – unless you get a waiver from your appointing authority.



Example #6

You have a question regarding whether the Code of Ethics would allow you to accept job you are considering. What should you do?

A. Take the job – no one is watching.

B. Take the job – there are no real penalties for violating the Code of Ethics.

C. Ask for advice – from your ethics officer, the OIG, or State Ethics Commission.

D. Stress about it for days and lose sleep over it.



CONTACT US:



- Indiana Office of Inspector General
- www.in.gov.ig
- (317) 232-3850
- info@ig.in.gov

