

42 IAC 1-5-7 Conflicts of interest; contracts (IC 4-2-6-10.5)

A former IDHS Foundation member contracted with two county LEPCs through his consulting company to write emergency management and response plans while he was serving on the Foundation. SEC found that the former Foundation member technically violated IC 4-2-6-10.5 by failing to adequately disclose the financial interests his consulting company had in the contracts with the county LEPCs; however, SEC acknowledged that the Foundation member verbally disclosed the financial interests to IDHS who failed to properly instruct him to file the disclosure. SEC ultimately found that the former Foundation member complied with IC 4-2-6-10.5(b)(2) by making a full written disclosure of his financial interests in the contract and disposing of it by resigning from the Foundation.

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics pursuant to IC 4-2-6-4(b)(1).

BACKGROUND

A former member of the Indiana Homeland Security Foundation (“Foundation”) is the owner of a consulting company which writes *Comprehensive Emergency Management Plans* and *Hazardous Material Emergency Response Plans* for various counties and Local Emergency Planning Committees (“LEPC”) throughout the state of Indiana.

The Foundation is an entity within the purview of the Indiana Department of Homeland Security (“IDHS”). One of the primary purposes of the Foundation is to fund public safety projects at the local level. Similarly, LEPCs also fall within the purview of the IDHS. LEPCs throughout the state report to the LEPC chairperson and the Indiana Emergency Response Commission (“IERC”), a Commission of the IDHS.

When the former member was first appointed to the Foundation he made, what he believed to be, a full and proper disclosure to the Foundation during a meeting regarding the nature of his consulting company’s business. The verbal disclosure was made in the presence of his fellow Foundation members and the IDHS Ethics Officer. At that time, the former member also indicated that he would abstain from any votes that came before the Foundation from any county with whom he had been previously, currently, or anticipated to engage in business transactions with.

While serving on the Foundation, the consulting company was hired by the Delaware County LEPC to write a *Hazardous Material Emergency Response Plan*. Similarly, the consulting company was hired by the Wabash County LEPC to perform similar work.

On March 17th, 2008, the former member was notified by the Delaware County LEPC Chairman that the County was denied reimbursement for the work performed by the consulting company. The former member received the same notification from the Wabash County LEPC a few days later.

ISSUE

Did the former member violate IC 4-2-6-10.5 when his consulting company contracted with the Delaware and Wabash LEPCs while serving as a special state appointee on the IDHS Foundation?

RELEVANT LAW

IC 4-2-6-10.5

Prohibition against financial interest in contract; exceptions

Sec. 10.5. (a) Subject to subsection (b), a state officer, an employee, or a special state appointee may not knowingly have a financial interest in a contract made by an agency.

(b) The prohibition in subsection (a) does not apply to:

(1) a state officer, an employee, or a special state appointee who does not participate in or have official responsibility for any of the activities of the contracting agency, if:

(A) the contract is made after public notice or, where applicable, through competitive bidding;

(B) the state officer, employee, or special state appointee files with the commission a statement making full disclosure of all related financial interests in the contract;

(C) the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee; and

(D) in the case of a contract for professional services, the appointing authority of the contracting agency makes and files a written certification with the commission that no other state officer, employee, or special state appointee of that agency is available to perform those services as part of the regular duties of the state officer, employee, or special state appointee; or

(2) a state officer, an employee, or a special state appointee who, acting in good faith, learns of an actual or prospective violation of the prohibition in subsection (a), if, not later than thirty (30) days after learning of the actual or prospective violation, the state officer, employee, or special state appointee:

(A) makes a full written disclosure of any financial interests to the contracting agency and the commission; and

(B) terminates or disposes of the financial interest.

ANALYSIS

Pursuant to IC 4-2-6-10.5, a special state appointee may not knowingly have a financial interest in a contract made by an agency unless the statutory exceptions are met. The former member was a special state appointee by virtue of his appointment to the Foundation. Accordingly, the former member was prohibited from having a financial interest in a contract made by a state agency.

For purpose of ethics, LEPCs are entities that are within the purview of the IDHS. In this case, the former member had a financial interest in a contract made by IDHS through the Delaware and Wabash LEPCs. According to the rule, the restriction against having a

financial interest in a contract made by a state agency would not apply if the four conditions set forth in IC 4-2-6-10.5 (b) (1) (A) – (D) were met. While it appears that the contracts awarded to the consulting company were in compliance with subsection (A), the former member failed to fulfill the disclosure requirement set forth in subsection (B) for either contract. The former member did not file with the Commission a statement making full disclosure of all related financial interests in either contract.

Furthermore, IC 4-2-6-10.5 (b) (2) sets forth the appropriate measures that must be followed when a special state appointee who, acting in good faith, learns of an actual or prospective violation of the prohibition in subsection (a). If, not later than thirty (30) days after learning of the actual or prospective violation, a special state appointee must make a full written disclosure of any financial interest to the contracting agency and the commission; and terminate or dispose of the financial interest.

CONCLUSION

The Commission finds that the former member's failure to file a statement making full disclosure of all related financial interests in the contracts between the consulting company and the Delaware and Wabash LEPCs is a technical violation of IC 4-2-6-10.5. In making this finding, however, the Commission acknowledges that the former member made a full verbal disclosure in the presence of the IDHS Ethics Officer regarding the nature of his consulting company. The Commission is of the opinion that IDHS failed to properly instruct the former member regarding the statutory requirement to file a disclosure with the Commission if and when he was to contract with an LEPC. Moreover, the Commission finds that the former member has properly complied with the provisions set forth in IC 4-2-6-10.5 (b)(2) by both making full written disclosure of his related financial interests in the contracts between the consulting company and the Delaware and Wabash LEPC and disposing of his financial interest by resigning from the Foundation.