

42 IAC 1-5-6 Conflicts of interest; decisions and voting (IC 4-2-6-9)

The Deputy Commissioner of Capital Program Management for INDOT approves the final selection of all consultant contracts and signs this final approval on behalf of the Commissioner of INDOT. The Deputy Commissioner was approached by a third party regarding employment with a consulting firm that has contracts with INDOT. SEC found that employment negotiations had commenced and that the screening procedure proposed by INDOT, whereby the Deputy Commissioner was screened from all matters related to the firm, was appropriate to avoid any potential conflicts of interest.

July 2014

No. 14-I-11

The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) pursuant to I.C. 4-2-6-4(b)(1). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

BACKGROUND

A state employee is the Deputy Commissioner of Capital Program Management for the Indiana Department of Transportation (“INDOT”). The Deputy Commissioner has recently become aware of a potential employment opportunity at an engineering and construction consulting firm that INDOT does business with regularly. He was approached by a third party in early June 2014 inquiring whether he would be interested in a position at the consulting firm. He anticipates beginning employment discussions with the consulting firm and accordingly notified INDOT’s Commissioner, about his intentions on June 16, 2014.

The Deputy Commissioner began his employment with INDOT in 2005. Since that time, the Deputy Commissioner has served in a few capacities including Director of the Vincennes District and Deputy Commissioner of Major Programs. He has served in his current capacity since January 2013. In his position as Deputy Commissioner of Capital Program Management he is responsible for supervising all capital project managers, the construction management and inspection staff as well as all utility and railroad coordination staff and activities. As of February 2013, one of his job duties is to approve the final selection of all consultant selection contracts and sign the final approval of the ultimate award to INDOT’s consultants on behalf of the Commissioner of INDOT. He has not considered or approved the award of any contracts to the consulting firm since acquiring this new duty. Furthermore, the Deputy Commissioner has not worked directly with the consulting firm.

Based on his job duties with INDOT, there is the potential that issues may arise regarding INDOT and the consulting firm. INDOT proposes the implementation of the following screening procedure to avoid any potential conflict of interest should the consulting firm be identified as a potential consultant or any other issues in which he, by virtue of his employment negotiations with the consulting firm, or the consulting firm would have a financial interest:

1. Any matter in which the consulting firm is identified as a potential consultant or any other issue involving the consulting firm will be immediately referred to the

Commissioner for review and signature. The INDOT's Ethics Officer, will be copied on these matters;

2. The Commissioner will be solely responsible for handling any issue(s) including any communications and necessary decision making associated with the issue(s) and potential reassignment; and
3. The Ethics Officer will continue to monitor the process to ensure the integrity of the screening procedure.

ISSUES

1. Have employment negotiations commenced between the Deputy Commissioner and the consulting firm?
2. Would a conflict of interest arise for the Deputy Commissioner if he participates in decision(s) and/or vote(s) in which the consulting firm and/or he would have a financial interest when and if employment negotiations have commenced with the consulting firm?

RELEVANT LAW

I.C. 4-2-6-9

Conflict of economic interests

Sec. 9. (a) A state officer, an employee, or a special state appointee may not participate in any decision or vote if the state officer, employee, or special state appointee has knowledge that any of the following has a financial interest in the outcome of the matter:

- (1) The state officer, employee, or special state appointee.
- (2) A member of the immediate family of the state officer, employee, or special state appointee.
- (3) A business organization in which the state officer, employee, or special state appointee is serving as an officer, a director, a trustee, a partner, or an employee.
- (4) Any person or organization with whom the state officer, employee, or special state appointee is negotiating or has an arrangement concerning prospective employment.

(b) A state officer, an employee, or a special state appointee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. The commission shall:

- (1) with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state officer, employee, or special state appointee seeking an advisory opinion from involvement in the matter; or
- (2) make a written determination that the interest is not so substantial that the commission considers it likely to affect the integrity of the services that the state expects from the state officer, employee, or special state appointee.

(c) A written determination under subsection (b)(2) constitutes conclusive proof that it is not a violation for the state officer, employee, or special state appointee who sought an advisory opinion under this section to participate in the particular matter. A written determination under subsection (b)(2) shall be filed with the appointing authority.

ANALYSIS

I.C. 4-2-6-9 (a)(1) prohibits the Deputy Commissioner from participating in any decision or vote if he has a financial interest in the outcome of the matter. Similarly, I.C. 4-2-6-9(a)(4) prohibits the Deputy Commissioner from participating in any decision or vote in which a person or organization with whom he is negotiating or has an arrangement concerning prospective employment has a financial interest in the outcome of the matter. The definition of financial interest in I.C. 4-2-6-1(a)(11) includes, “an interest arising from employment or prospective employment for which negotiations have begun.”

In Advisory Opinion 10-I-7, the Commission determined that employment negotiations commence once an employer contacts a state employee to discuss potential employment. While he indicates that he plans to engage in “active” negotiations with the consulting firm the first week of July, it appears that employment negotiations have already commenced. Specifically, the Deputy Commissioner indicates that he was contacted by a third party on June 16, 2014. To the extent that a back and forth has commenced since then, it appears that employment negotiations have commenced. Accordingly, a conflict of interest would arise for the Deputy Commissioner if he participates in a decision or vote in which either he, by virtue of his employment negotiations with the consulting firm, or the consulting firm would have a financial interest.

I.C. 4-2-6-9(b) provides that a state employee who identifies a potential conflict of interest shall notify the person's appointing authority and seek an advisory opinion from the Commission by filing a written description detailing the nature and circumstances of the particular matter and making full disclosure of any related financial interest in the matter. In this case, the Deputy Commissioner requested an advisory opinion from the Commission as provided in the rule and has disclosed the potential conflict to his appointing authority.

I.C. 4-2-6-9(b)(1) further provides that when a potential conflict of interest arises, the Commission may, with the approval of the appointing authority, assign the particular matter to another person and implement all necessary procedures to screen the state employee seeking an advisory opinion from involvement in the matter. In this case, INDOT proposes the implementation of the following screening procedure:

1. Any matter in which the consulting firm is identified as a potential consultant or any other issue involving the consulting firm will be immediately referred to the Commissioner for review and signature. The INDOT's Ethics Officer will be copied on these matters;
2. The Commissioner will be solely responsible for handling any issue(s) including any communications and necessary decision making associated with the issue(s) and potential reassignment; and
3. The Ethics Officer will continue to monitor the process to ensure the integrity of the screening procedure.

While it appears that the proposed procedure would prevent the Deputy Commissioner's participation or vote in matters related directly with the consulting firm, it must be emphasized that he should be screened from any decision or vote in which he or the consulting firm would have a financial interest regardless of whether it involves him or the firm directly. In addition, the screen must remain in place until the employment negotiations conclude or for the remainder of the Deputy Commissioner's employment until his departure if a job offer is extended and accepted.

CONCLUSION

The Commission finds that a potential conflict of interest would arise for the Deputy Commissioner under I.C. 4-2-6-9 if he participates in any decision or vote in which either he or the consulting firm would have a financial interest in the outcome of the matter because employment negotiations have commenced. Moreover, it is the Commission's opinion that the screening mechanism proposed by INDOT is appropriate. The Commission, however, emphasizes that this opinion is narrowly tailored to address potential conflicts of interests; it is not intended to provide approval for any post-employment opportunities that may arise for the Deputy Commissioner.