

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

An IDOA Director submitted an application for employment to an entity that had a pending solicitation at IDOA. The Director learned of the pending solicitation after the entity responded to the Director's application. The Director then sought advice to ensure compliance with IC 4-2-6-9(b) and IDOA submitted a proposed screening mechanism to the SEC for approval. SEC found that a potential conflict of interest could arise for the Director if he participates in decisions(s) and/or vote(s) related to the entity that has a pending solicitation at IDOA since he has begun negotiating with that entity for prospective employment. Moreover, SEC determined that the screening mechanism proposed by IDOA was appropriate and must remain in place for the remainder of the Director's employment with the State or until employment negotiations with the entity cease.

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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). The following opinion is based exclusively on sworn testimony and documents presented by the requestor.

#### **BACKGROUND**

A state employee serves as the Director of Strategic Sourcing at the Indiana Department of Administration ("IDOA"). As the Director of Strategic Sourcing, the Director's responsibilities include the hiring, training, management, and oversight of staff as well as the functions of strategic sourcing. He manages all sourcing activity for the Procurement Division at IDOA, including requests for procurements, bids, reverse auctions, negotiated bids, and coordinated sourcing events.

The Director oversees a team of staff members who assist various state agencies in the development and administration of solicitations that are above agencies' respective delegation amounts. These solicitations use requests for procurement ("RFP"), which have two scoring components: subjective and objective. The purchasing agency is responsible for scoring the subjective components and IDOA scores the objective components, pursuant to the process published in the solicitation documents. IDOA adds the scores together to generate a total score, and the highest total score is awarded the solicitation and given an opportunity to participate in contract negotiations with the purchasing agency. Thus, the purchasing agency is the decision maker on the solicitation, and IDOA serves as the facilitator for the solicitation process.

The Director submitted an application for employment on November 6, 2014, to an entity that had a pending solicitation at IDOA, RFP 15-001. This entity contacted the Director regarding his application on November 11, 2014, and he responded on that same date. When the Director submitted his application to the entity, he was not aware of its pending solicitation at IDOA.

Once the Director learned of the pending solicitation from the entity, he immediately informed the account manager handling the RFP that he was no longer to be contacted, and he also informed IDOA's Ethics Officer of the potential employment opportunity and the pending solicitation. This was done out of an abundance of caution because the account manager on this RFP reports directly to the Deputy Commissioner of Procurement, not to the Director. Due to

this reporting structure, the Director has no responsibilities with respect to this particular solicitation. However, the Director requested that he be screened from any communications. At this time, the solicitation has not been awarded and is still under review by the purchasing agency and IDOA.

The Director sought informal post-employment advice regarding this potential employment opportunity and is now submitting a proposed screening mechanism for the Commission's review and approval. To comply with the provisions of IC 4-2-6-9(b), the Director and IDOA have implemented the following screening procedures:

- 1) The Director shall have no direct or indirect involvement in reviewing any documentation or information submitted by the entity to IDOA, and he has been entirely removed from RFP 15-001.
- 2) While such decision-making responsibilities are outside the scope of the Director's employment and while he does not supervise the IDOA account manager facilitating the solicitation, the Director shall have no direct or indirect involvement in any decision-making process on an application or information submitted by the entity to IDOA.
- 3) If IDOA awards a contract to the entity for which IDOA will manage (currently, there are none pending since RFP 15-001 is a solicitation for a separate agency), the Director will have no involvement regarding the monitoring of the entity as a vendor as such responsibilities are outside the scope of his employment.
- 4) Any decisions regarding a matter involving the entity shall be referred to and resolved by the IDOA's Deputy Commissioner of Procurement, or her designee.
- 5) Any communications issued by IDOA in response to an inquiry or communication from the entity shall be assigned to Deputy Commissioner of Procurement, or her designee.
- 6) The Deputy Commissioner of Procurement shall inform the General Counsel and Ethics Officer of any matter regarding the entity and shall log the involvement, discussion, and resolution.
- 7) The Ethics Officer shall monitor the Director's involvement in any matter involving the entity to ensure that the screening procedures are followed.
- 8) This screen shall continue for as long as the Director serves IDOA or as long as employment negotiations are pending with the entity, whichever ceases to occur first.

### **ISSUE**

What rules in the Code of Ethics apply to the Director's prospective employment opportunity with the entity that has pending a solicitation to RFP 15-001 at IDOA?

## RELEVANT LAW

### **IC 4-2-6-6**

#### **Present or former state officers, employees, and special state appointees; compensation resulting from confidential information**

Sec. 6. No state officer or employee, former state officer or employee, special state appointee, or former special state appointee shall accept any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature.

### **IC 4-2-6-9 (42 IAC 1-5-6)**

#### **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

### *A. Confidential Information*

IC 4-2-6-6 prohibits the Director from accepting any compensation from any employment, transaction, or investment which was entered into or made as a result of material information of a confidential nature. Based on the information provided, it does not appear that this employment negotiation resulted from information of a confidential nature. Accordingly, the Director would

not violate IC 4-2-6-6 by continuing to negotiate employment or accepting the prospective opportunity with this entity.

*B. Conflicts of Interest*

IC 4-2-6-9 prohibits the Director from participating in any decision or vote if he has knowledge that various persons may have a “financial interest” in the outcome of the matter, including himself or any person or organization with whom he is negotiating or has an arrangement concerning prospective employment. In Advisory Opinion 10-I-7 the Commission determined that employment negotiations commence once an employer contacts a state employee to discuss potential employment.

In this case, the Director has been contacted by the entity in response to his application to discuss potential employment. As a result of this contact, the Director and the IDOA Ethics Officer implemented a screen to ensure the Director complied with IC 4-2-6-9(b) whereby he would be screened from the entity in the following manner:

- 1) The Director shall have no direct or indirect involvement in reviewing any documentation or information submitted by the entity to IDOA, and has been entirely removed from RFP 15-001.
- 2) While such decision-making responsibilities are outside the scope of the Director’s employment and while he does not supervise the IDOA account manager facilitating the solicitation, the Director shall have no direct or indirect involvement in any decision-making process on an application or information submitted by the entity to IDOA.
- 3) If IDOA awards a contract to the entity for which IDOA will manage (currently, there are none pending since RFP 15-001 is a solicitation for a separate agency), the Director will have no involvement regarding the monitoring of the entity as a vendor as such responsibilities are outside the scope of the Director’s employment.
- 4) Any decisions regarding a matter involving the entity shall be referred to and resolved by the IDOA’s Deputy Commissioner of Procurement, or her designee.
- 5) Any communications issued by IDOA in response to an inquiry or communication from the entity shall be assigned to Deputy Commissioner of Procurement, or her designee.
- 6) The Deputy Commissioner of Procurement shall inform the General Counsel and Ethics Officer of any matter regarding the entity and shall log the involvement, discussion and resolution.
- 7) The Ethics Officer shall monitor the Director’s involvement in any matter involving the entity to ensure that the screening procedures are followed.
- 8) This screen shall continue for as long as the Director serves IDOA or as long as employment negotiations are pending with the entity, whichever ceases to occur first.

To the extent that the Commission is satisfied with the proposed screening procedures, the Director must ensure he complies with the terms of this screen and abstain from participating in any decisions or votes for the remainder of his employment with IDOA involving the entity to avoid violating IC 4-2-6-9 as he negotiates for employment with them.

### **CONCLUSION**

The Commission finds that a potential conflict of interest could arise for the Director if he participates in decisions(s) and/or vote(s) related to the entity that has a pending solicitation at IDOA since he has begun negotiating with that entity for prospective employment. Moreover, it is the opinion of the Commission that the screening mechanism proposed by IDOA is appropriate and must remain in place for the remainder of the Director's employment with the State or until employment negotiations with the entity cease.