

**42 IAC 1-5-7 Prohibition against financial interest in contract; exceptions (IC 4-2-6-10.5)**

IDHS sought advice to determine whether the “public notice” requirement in IC 4-2-6-10.5(b)(1)(A) for contracts and grants awarded to LEPC members who qualify for the exception to the prohibition against having a financial interest in a contract with a state agency could be satisfied by publishing notices of the contacts and grants on the IDHS website. IDHS had been providing such notice by following the notice of publication requirements set forth in IC 5-3-2-1(j), including publishing notices in the Indianapolis Star. SEC opined that IDHS should continue to follow the notice of publication requirements in IC 5-3-1-2(j).

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The Indiana State Ethics Commission (“Commission”) issues the following advisory opinion concerning the State Code of Ethics (“Code”) 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 is the Ethics Officer for the Indiana Department of Homeland Security (“IDHS”). He requests an advisory opinion from the Commission addressing the public notice requirements for agency grants. The IDHS enters into hundreds of grants or subgrants each year, dealing with such things as disaster response or recovery exercises, public safety training, planning, the reimbursement of local emergency management official salaries, and school safety projects. These agency contracts are subject to the conflict of interest provisions set forth in the Code under 42 IAC 1-5-7 (IC 4-2-6-10.5).

Because of the high likelihood that a state employee or special state appointee, particularly members of Local Emergency Planning Committees (“LEPCs”), might ultimately have a financial interest in one of these contracts, IDHS public notices all of these agreements as a dedicated step in the grant process. This enables those state employees or special state appointees to then satisfy the remaining requirements for the exception to the conflict of interest provisions. This deliberate, blanket public notice for these types of grants is a result of the Commission’s Advisory Opinion No. [09-I-13](#). In that opinion, the Commission recommended the IDHS take appropriate action when awarding contracts/grants to ensure that individuals such as LEPC members who qualify for the exception to the prohibition against having a financial interest in a contract made by a state agency can be in compliance with the requirements in IC 4-2-6-10.5(b)(1)(A); specifically that the contract/grant in question is made after public notice, or where applicable, through competitive bidding.

The IDHS seeks clarification from the Commission regarding the specific steps that must be taken by the agency to satisfy the “public notice” requirement of the conflict of interest provisions. Since the issuance of Advisory Opinion No. [09-I-13](#), IDHS has adopted the requirements of IC 5-3-1-2, which provides the public notice requirements for certain public governmental events, such as hearings, meetings, elections, and the sale of items such as bonds.

Specifically, the requirements in IC 5-3-1-2(j) provide that “[i]f the event is anything else, notice shall be published two (2) times, at least one (1) week apart, with the second publication made at

least three (3) days before the event.” IDHS has therefore published the relevant contracts in the Indianapolis Star (“Star”) in accordance with this statute’s timeline.

However, the IDHS finds this process problematic. Specifically, IC 5-3-1-2 “applies only when notice of an event is required to be given by a publication in accordance with [IC 5-3-1-2].” IC 5-3-1-2(a). Nothing in IC 4-2-6-10.5 appears to require public notice of contracts in accordance with IC 5-3-1, so the IDHS believes it is at best a standard adopted by analogy.

The IDHS also finds the current process to be inefficient, both in terms of cost to the agency and delay in the grant process. Public notice in the Star costs the agency up to Two Thousand Dollars (\$2,000) per year in publication costs. In addition, publishing in accordance with the current timeline adds several weeks to the grant approval process in submission to the Star, publication, and receiving proof of publication. More importantly, the IDHS highlights the fact that these grants are issued state-wide. If the intent of the exception in IC 4-2-6-10.5(b) to the conflict of interest provisions in IC 4-2-6-10.5 (a) is to truly provide public notice of a state agency grant, the IDHS argues that it seems unlikely that the publication in a print newspaper that is published and read in only one city in the State would accomplish that goal.

The IDHS therefore proposes an alternative process, and requests approval from the Commission to post notice of these grants on the IDHS website instead of publishing them in the Star. Additionally, if this form of public notice satisfies the Code requirements, IDHS requests guidance on how soon, prior to the full execution of the grant, the notification should be posted.

The IDHS believes posting notice of these grants on its website would resolve the issues currently facing the public notice process. Costs for posting the grants to the IDHS website would be absorbed within the duties of IDHS’ current web managers. The postings could be made quickly as part of the grants approval process, left online through the duration of the grant program, and then archived after the performance period. And those persons who would be most interested in the public notice – primarily local officials and emergency managers – would have easy access to the public notice no matter where in Indiana they lived, and through a website they are already familiar with and using regularly.

### **ISSUE**

Would posting contract/grant information on the IDHS website satisfy the public notice requirement for such contracts/grants set forth in IC 4-2-6-10.5(b)(1)(A)?

### **RELEVANT LAW**

#### **IC 4-2-6-10.5 (42 IAC 1-5-7) 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.

#### **IC 4-2-6-1 Definitions**

Sec. 1. (a) As used in this chapter, and unless the context clearly denotes otherwise:

...

(10) "Financial interest" means an interest:

(A) in a purchase, sale, lease, contract, option, or other transaction between an agency and any person; or

(B) involving property or services.

The term includes an interest arising from employment or prospective employment for which negotiations have begun. The term does not include an interest of a state officer or employee in the common stock of a corporation unless the combined holdings in the corporation of the state officer or the employee, that individual's spouse, and that individual's unemancipated children are more than one percent (1%) of the outstanding shares of the common stock of the corporation. The term does not include an interest that is not greater than the interest of the general public or any state officer or any state employee.

#### **ANALYSIS**

Pursuant to IC 4-2-6-10.5 (42 IAC 1-5-7), a state employee, officer, or special state appointee may not knowingly have a financial interest in a contract made by an agency. This prohibition however, does not apply to an employee, state officer, or special state appointee who does not participate in or have official responsibility for any of the activities of the contracting agency, provided certain statutory criteria are met. The term "official responsibility" has been interpreted by the Commission to include contracting responsibilities.

To the extent that a state employee, state officer, or special state appointee does not participate in or have official contracting responsibilities for his or her agency, he or she would be permitted to have a financial interest in a contract made by a state agency if the individual complies with the criteria set forth in IC 4-2-6-10.5(b)(1)(A)-(D), including that the contract is made after public notice or through competitive bidding. There is no definition of "public notice" within IC 4-2-6.

In this case, the IDHS currently meets the public notice requirement in IC 4-2-6-10.5(b)(1)(A), when applicable to a state employee, state officer, or special state appointee by following the publication of notice requirements in IC 5-3-1-2(j). This statute requires that notices of public hearings and other events be published in a newspaper. Specifically, subsection (j) requires that “[i]f the event is anything else, notice shall be published two (2) times, at least one (1) week apart, with the second publication made at least three (3) days before the event.”

The IDHS seeks approval from the Commission to instead fulfill the public notice requirement in IC 4-2-6-10.5(b)(1)(A) by posting notice of IDHS grants or contracts on the agency’s website. The IDHS believes that providing notice in this manner is not only more efficient and cost-effective than publishing such notice in a newspaper with limited distribution, but will also provide notice to a more appropriate, and likely wider, audience.

The Commission found that posting notice of IDHS grants or contracts on the agency’s website does not satisfy the public notice requirement set forth in IC 4-2-6-10.5(b)(1)(A). Specifically, while there is no definition for “public notice” within the Code, the Commission determined that this requirement is satisfied by following the requirements set forth in IC 5-3-1-2(j).

Consequently, the Commission finds that IDHS should continue to follow the publication of notice requirements in IC 5-3-1-2(j) and provide notice of the IDHS grants by publishing notice in the Indianapolis Star as required under this subsection to meet the requirements in IC 4-2-6-10.5(b)(1)(A)

### **CONCLUSION**

The Commission determined that posting notice of IDHS grants or contracts on the agency’s website does not satisfy the public notice requirement set forth in IC 4-2-6-10.5(b)(1)(A). Accordingly, the Commission advised that the IDHS should continue to meet the public notice requirements in IC 4-2-6-10.5(b)(1)(A) by following the publication of notice requirements in IC 5-3-1-2(j).