

**42 IAC 1-5-14 Postemployment restrictions (IC 4-2-6-11)**

An IDOE Assessment Specialist was offered employment with an IDOE subcontractor with whom she neither negotiated or administered a contract, nor for whom did she make any regulatory or licensing decisions; however, she did interact extensively with the subcontractor on the underlying contract with the agency. IDOE sought clarification on whether the particular matter prohibition of the rule on Postemployment restrictions applied to the “project” phase of a contract or whether it referred exclusively to contract negotiations. SEC concluded the “revolving door” restriction of the Postemployment rule would not prohibit the Specialist from accepting employment with the subcontractor immediately upon leaving state employment. Regarding the particular matter provision, though, SEC found the term “contract” encompasses all phases of a contract, and the Specialist would therefore be prohibited from representing or assisting the subcontractor on any contract work with IDOE in which she personally and substantially participated as a state employee.

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

**BACKGROUND**

A state employee is an Assessment Specialist in the Indiana Department of Education’s (“IDOE”) Office of Student Assessment. The state employee has been offered a position with an IDOE subcontractor.

The state employee is the Program Lead for the Diagnostic Assessment Tools grant. She supports the implementation of diagnostic tools and is the point of contact for Acuity, the vendor. The state employee works with Acuity’s Indiana Senior Customer Relationship Manager to oversee and support the implementation of Acuity’s diagnostic tools for grant participants. Supporting the implementation of these diagnostic tools requires fielding calls and emails from voluntary grant participants and providing guidance if policy related. If otherwise related, communications are forwarded to the vendor to review and assist. The state employee did not negotiate the contracts for Acuity.

With regard to the Minority and Women’s Business Enterprise (“M/WBE”) certification, once a vendor contract is completed vendors are required to spend a certain percentage of contract money through an M/WBE group. This allocation is required by I.C. 4-13-16.5. The vendor, Acuity in this case, was responsible for determining the scope of work and then selected an M/WBE group from Indiana’s official and approved list. Acuity elected to work with the subcontractor, an M/WBE since the inception of the Diagnostic Assessment Grant Program, which was first administered in 2008.

The state employee’s responsibilities also include working with another contractor of the State. The other contractor has delegated some contract responsibilities to the subcontractor and in doing so has met the M/WBE requirements. It is the other contractor’s personnel that work with the subcontractor under the contract. The state employee has not worked directly with the subcontractor in any capacity.

The employment offer with the subcontractor is as a customer relationship manager (“CRM”) on the Indiana Project. The CRM engages Acuity customers at all levels which includes the corporation level, schools, and classrooms. Furthermore, the CRM fosters a collaborative relationship to help educators achieve their academic goals and vision. Specifically, the CRM is responsible for capturing and recording the customer experience; providing account support for new schools; investigating and researching issues and routing those matters internally in order to provide support; sharing best practice, resources, and recommending a course of action or plan based on customer needs, challenges, and goals; demonstrating Acuity’s capabilities as a holistic and innovative solution for customer needs for performance data and its impact on instruction; and finally delivering product training via WebEx or onsite.

On June 19, 2012, the IDOE’s ethics officer requested an Informal Advisory Opinion (“IAO”) from the Office of Inspector General (“OIG”) regarding the applicability of the Post-Employment rule to the state employee’s intended employment opportunity. The OIG issued an IAO on June 21, 2012, indicating that the one-year cooling off restriction would not apply to the state employee’s intended employment at the subcontractor. Regarding particular matters, the IAO indicated that the contracts between the IDOE and Acuity and the other contractor would qualify as particular matters and the state employee would be prohibited from representing or assisting any of the vendors, including the subcontractor, on those contracts because she personally and substantially participated in those matters with the IDOE. Specifically, while she did not negotiate the actual contract, the IDOE disclosed that the state employee had been personally and substantially involved in the “project phase” of the contracts and that her duties and responsibilities were triggered after the contracts were executed.

### ISSUE

What post-employment restrictions under I.C. 4-2-6-11, if any, is the state employee subject to? Are the contracts between the IDOE and Acuity and the other contractor particular matters? If so, would the state employee be prohibited from representing or assisting the subcontractor or any other person on those matters?

### RELEVANT LAW

#### **I.C. 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**

#### **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.

**I.C. 4-2-6-11 (42 IAC 1-5-14)**

**One year restriction on certain employment or representation; advisory opinion; exceptions**

Sec. 11. (a) As used in this section, "particular matter" means:

- (1) an application;
- (2) a business transaction;
- (3) a claim;
- (4) a contract;
- (5) a determination;
- (6) an enforcement proceeding;
- (7) an investigation;
- (8) a judicial proceeding;
- (9) a lawsuit;
- (10) a license;
- (11) an economic development project; or
- (12) a public works project.

The term does not include the proposal or consideration of a legislative matter or the proposal, consideration, adoption, or implementation of a rule or an administrative policy or practice of general application.

(b) This subsection applies only to a person who served as a state officer, employee, or special state appointee after January 10, 2005. A former state officer, employee, or special state appointee may not accept employment or receive compensation:

- (1) as a lobbyist;

- (2) from an employer if the former state officer, employee, or special state appointee was:
- (A) engaged in the negotiation or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and
  - (B) in a position to make a discretionary decision affecting the:
    - (i) outcome of the negotiation; or
    - (ii) nature of the administration; or
- (3) from an employer if the former state officer, employee, or special state appointee made a regulatory or licensing decision that directly applied to the employer or to a parent or subsidiary of the employer;
- before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.
- (c) A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.
- (d) A former state officer, employee, or special state appointee may not accept employment or compensation from an employer if the circumstances surrounding the employment or compensation would lead a reasonable person to believe that:
- (1) employment; or
  - (2) compensation;
- is given or had been offered for the purpose of influencing the former state officer, employee, or special state appointee in the performance of his or her duties or responsibilities while a state officer, an employee, or a special state appointee.
- (e) A written advisory opinion issued by the commission certifying that:
- (1) employment of;
  - (2) representation by; or
  - (3) assistance from;
- the former state officer, employee, or special state appointee does not violate this section is conclusive proof that a former state officer, employee, or special state appointee is not in violation of this section.
- (f) Subsection (b) does not apply to a special state appointee who serves only as a member of an advisory body.
- (g) An employee's or a special state appointee's state officer or appointing authority may waive application of subsection (b) or (c) in individual cases when consistent with the public interest. Waivers must be in writing and filed with the commission. The inspector general may adopt rules under I.C. 4-22-2 to establish criteria for post employment waivers.

### ANALYSIS

The state employee's intended employment with the subcontractor invokes consideration of the provisions of the Code of Ethics pertaining to confidential information, conflicts of interest, and post-employment. The application of each provision to the state employee's intended employment is analyzed below.

*A. Confidential Information*

I.C. 4-2-6-6 prohibits the state employee 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. In this case, the information provided does not appear to suggest that the subcontractor's employment offer was a result of material information of a confidential nature. Accordingly, the Commission finds that the state employee's intended employment would not be in violation of this rule.

*B. Conflicts of Interest*

I.C. 4-2-6-9 prohibits the state employee from participating in any decision or vote if she has knowledge that various persons may have a "financial interest" in the outcome of the matter, including a potential employer. In this case, the state employee appears to have an arrangement for prospective employment with the subcontractor. To the extent that the state employee abstains from participation in any decision or vote in which the subcontractor has a financial interest in the outcome of the matter for the remainder of her state employment, it is the opinion of the Commission that the state employee would not be in violation of I.C. 4-2-6-9.

*C. Post-Employment*

I.C. 4-2-6-11 consists of two separate limitations: a "cooling off" period and a particular matter restriction. The first prohibition commonly referred to as the cooling off period, would prevent the state employee from accepting employment for 365 days from the date that she leaves state government under various circumstances. As the IAO issued by the OIG indicates, the one-year cooling off restriction would not apply to the state employee.

First, the state employee is prohibited from accepting employment as a lobbyist for the entirety of the cooling off period. Per I.C. 4-2-6-1(b) and I.C. 4-2-7-1(5), this restriction applies to lobbying of the executive branch only. Based on the job duties of a CRM, it does not appear that the state employee would be engaged in lobbying. Accordingly, so long as the state employee does not lobby the executive branch for one year from the last date of state employment, she would not be in violation of this restriction.

Second, the state employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer with whom 1) she engaged in the negotiation or administration of a contract on behalf of a state agency and 2) was in a position to make a discretionary decision affecting the outcome of the negotiation or nature of the administration of the contract. As the Program Lead of the Diagnostic Assessment Tools grant, the state employee was involved in the contract with Acuity. Acuity in turn had a contract with the prospective employer, the subcontractor, to complete some of the work under the original contract. While the state employee was involved with the IDOE's contract with Acuity, she never negotiated or administered a contract between the IDOE and the subcontractor. Similarly, despite the fact that the subcontractor is a subcontractor to another contractor for their contract with the IDOE, the state employee never negotiated or administered a contract with the subcontractor.

As a result, she would not be prohibited from accepting employment with the subcontractor immediately upon leaving state employment due to her involvement in either of these contracts/grants.

Third, the state employee is prohibited from accepting employment for 365 days from the last day of her state employment from an employer for whom she made a regulatory or licensing decision that directly applied to the employer or its parent or subsidiary. The state employee never made a regulatory or licensing decision that affected the subcontractor or any of its subsidiaries. Accordingly, this provision would not restrict the state employee from immediately accepting employment with the subcontractor.

Fourth, the state employee is prohibited from accepting employment from an employer if the circumstances surrounding the hire suggest the employer's purpose is to influence her in her official capacity as a state employee. The information presented to the Commission does not suggest that the subcontractor's offer of employment was extended to the state employee in an attempt to influence her in her capacity as a state employee. Accordingly, this restriction would not appear to apply to the state employee's intended employment with the subcontractor.

Finally, the state employee is subject to the post-employment rule's "particular matter" prohibition in her intended employment with the subcontractor. This restriction prevents her from working on any of the following twelve matters if she personally and substantially participated in the matter as a state employee: 1) an application, 2) a business transaction, 3) a claim, 4) a contract, 5) a determination, 6) an enforcement proceeding, 7) an investigation, 8) a judicial proceeding, 9) a lawsuit, 10) a license, 11) an economic development project, or 12) a public works project. The particular matter restriction is not limited to 365 days but instead extends for the entire life of the matter at issue, which may be indefinite and applies even if the matter arises at a later date in the course of her postemployment.

The contracts between the IDOE and Acuity and the other contractor, and thus the subcontractor, as the subcontractor on these contracts, would qualify as particular matters under the provision. Contracts are particular matters identified specifically in I.C. 4-2-6-11(a)(4). As a result, to the extent the state employee personally and substantially participated in those matters with IDOE, she would be prohibited from representing or assisting any of the vendors, including the subcontractor, on those contracts. In this case, the IDOE's ethics officer indicates that the state employee was personally and substantially involved in the "project phase" of the contracts and that her duties and responsibilities were triggered after the contracts were executed, however, she had no involvement in the negotiation of the contracts. While the IDOE makes a distinction between the negotiation of a contract and the "project phase" or execution phase of the contract, the Commission finds that there is no distinction among the negotiation, execution, or delivery or "project phase" of a contract. It is the opinion of the Commission that personal and substantial involvement at any point in a contract, whether it is during the negotiation or the execution phase, would subject an employee to the particular matter restriction. Accordingly, the Commission finds that because the state

employee personally and substantially participated in the Acuity and the other contractor contracts during her employment with the IDOE, she is prohibited from representing or assisting any person, including the subcontractor, on these contracts upon leaving state employment. Having found that the restriction applies, the Commission notes that the agency's appointing authority may waive the application of this rule.

## **CONCLUSION**

The Commission finds that the state employee may accept employment with the subcontractor immediately upon leaving state employment. The Commission further finds that there is no distinction among the negotiation, execution, or delivery or “project phase” of a contract. Accordingly, the state employee is prohibited from representing or assisting any person, including the subcontractor, in any capacity on the Acuity and the other contractor’s contracts she personally and substantially participated in during her employment with the IDOE absent receiving a waiver from her agency appointing authority.