INDIANA
WORKFORCE
DEVELOPMENT
AND ITS WorkOne CENTERS

TO: Indiana's Workforce Investment System

FROM: Jeffrey M. Gill
General Counsel

DATE: May 16, 2012

SUBJECT: DWD Policy 2011-16
WIA Subrecipients, Vendors, and Agents

Purpose
To provide guidance to a Workforce Investment Board (WIB) when acting in the capacity of a Subrecipient or service provider of Workforce Investment Act (WIA) funds on how to categorize temporary workers that it may utilize in fulfilling the responsibilities of a service provider.

Rescissions
None

Applicability
In circumstances where a WIB, as the Subrecipient for federal WIA funds, agrees to take on additional responsibilities and also becomes the Subrecipient service provider of those funds and thereby, assumes all of the duties and responsibilities of the Subrecipient of a federal award; this policy will provide guidance with respect to the categorization of temporary workers hired by the WIB to carry out those duties and responsibilities.

Background
WIBs are generally Subrecipients of federal WIA grant awards. In some cases, a WIB has hired staff that can deliver services to clients such that there is no need for a Subrecipient service provider to perform those duties. In these cases, the WIBs themselves may become the Subrecipient service provider. WIBs who are also service providers generally have the authority to hire full-time staff to perform the duties associated with the service provider. Due to uncertainties inherent in the economy and the volatile nature of WIA funding levels resulting therefrom; WIBs which are also service providers have resorted to hiring temporary workers from professional staffing companies in order to lower costs associated with hiring and laying-off full-time employees.

The question has arisen as to whether these temporary workers should be considered Vendors (as they are technically employees of the professional staffing company) rather than Subrecipients under WIA requirements. The One-Stop Comprehensive Financial Management Technical

Assistance Guide issued by the U.S. Department of Labor (DOL) Employment and Training Administration (ETA) in July of 2002, states the following:

The applicability of the Workforce Investment Act (WIA), its regulations, and other program regulations, including the Office of Management and Budget (OMB) circulars, is limited to recipients and subrecipients funded by those programs. Thus, the distinction between subrecipients and vendors becomes critical to the program. Payments received by a vendor for goods or services are not considered to be Federal awards. To aid recipients/grantees and subrecipients/subgrantees in making the proper distinctions, the following guidance is provided. The descriptions have been drawn from 29 CFR 99.210.

Applicable Regulations

29 C.F.R. § 660.300 What definitions apply to the regulations for workforce investment systems under title I of WIA?
Subrecipient means an entity to which a subgrant is awarded and which is accountable to the recipient (or higher tier subrecipient) for the use of the funds provided. DOL's audit requirements for States, local governments, and non-profit organizations provides guidance on distinguishing between a subrecipient and a vendor at 29 CFR 99.210.

Vendor means an entity responsible for providing generally required goods or services to be used in the WIA program. These goods or services may be for the recipient's or subrecipient's own use or for the use of participants in the program. DOL's audit requirements for States, local governments, and non-profit organizations provides guidance on distinguishing between a subrecipient and a vendor at 29 CFR 99.210.

29 C.F.R. § 99.210 Subrecipient and vendor determinations.
(a) *General.* An auditee may be a recipient, a subrecipient, and a vendor. Federal awards expended as a recipient or a subrecipient would be subject to audit under this part. The payments received for goods or services provided as a vendor would not be considered Federal awards. The guidance in paragraphs (b) and (c) of this section should be considered in determining whether payments constitute a Federal award or a payment for goods and services.

(b) *Federal award.* Characteristics indicative of a Federal award received by a subrecipient are when the organization:

(1) Determines who is eligible to receive what Federal financial assistance;
(2) Has its performance measured against whether the objectives of the Federal program are met;
(3) Has responsibility for programmatic decision making;
(4) Has responsibility for adherence to applicable Federal program compliance requirements; and
(5) Uses the Federal funds to carry out a program of the organization as compared to providing goods or services for a program of the pass-through entity.

(c) *Payment for goods and services.* Characteristics indicative of a payment for goods and services received by a vendor are when the organization:

(1) Provides the goods and services within normal business operations;
(2) Provides similar goods or services to many different purchasers;
(3) Operates in a competitive environment;
(4) Provides goods or services that are ancillary to the operation of the Federal program; and
(5) Is not subject to compliance requirements of the Federal program.

(d) *Use of judgment in making determination.* There may be unusual circumstances or exceptions to the listed characteristics. In making the determination of whether a subrecipient or vendor relationship exists, the substance of the relationship is more important than the form of the agreement. It is not expected that all of the characteristics will be present and judgment should be used in determining whether an entity is a subrecipient or vendor

Common Law Principals of Agency Relationships
Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. *Restatement (Third) of Agency* §1.01.

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act. *Restatement (Third) of Agency* § 2.01.

An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the principal's manifestations and objectives when the agent determines how to act. *Restatement (Third) of Agency* § 2.02(1).

Content
In accordance with the judgment conferred by 29 C.F.R. § 99.210 (d) and common law principals of agency relationships, a WIB that becomes a service provider/Subrecipient of federal WIA funds and assumes the duties attendant thereto may manifest the necessary assent required to ensure that any temporary workers utilized from professional staffing companies would be considered agents of the WIB. In so classifying the temporary workers, a WIB would be able to clarify the classification of those resources so as to remove the inference that said individual temporary workers would be considered Vendors under 29 C.F.R. § 660.300 and 29 C.F.R. § 99.210.

The professional staffing company itself would be considered a Vendor. Payments made by the WIB to the professional staffing company, would not be considered Federal awards; however the temporary staff that are utilized by the WIB will act as agents of the Subrecipient (the WIB) such that there would be no distinction between a regular full time employee of the WIB and a temporary worker. In this scenario, temporary workers for the WIB would be able to carry out

all of the duties and responsibilities of the WIB as a service provider without abrogating the required distinction between Subrecipient and Vendor.

In order to sufficiently manifest such assent, a WIB would be required to include, in its contract with a professional staffing company, a clause explicitly declaring the intent of the WIB to grant such power and authority to the temporary workers. This clause would also be required to define the scope of the agent's actual authority and provide for the effective notification to the individual agents of the scope of their authority and of any relevant duties owed by the WIB to third parties for whom an agent would be responsible.

Additionally, a WIB would be prohibited from including any clauses in its contract with a professional staffing company that would impose federal compliance objectives, performance metrics or guidelines regarding programmatic decision making by the professional staffing company. A professional staffing company cannot be considered a vendor if any portion of payment from the WIB is conditioned by meeting or failing to meet federal performance outcomes, the accuracy of eligibility determinations or other federal program requirements.

Effective Date
Immediately

End Date
Upon rescission

Ownership
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Action
Workforce Investment Boards should follow this guidance when determining the proper classification of temporary worker or staffing service employees that it utilizes to fulfill the responsibility of a service provider.