

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

A FSSA Employee sought advice regarding acceptance of a contest prize awarded by an FSSA grantee. SEC determined that the employee cannot accept the cash prize per the prohibition against having a financial interest in a state contract.

February 13, 2020  
2020-FAO-003

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**

The Managing Attorney and Ethics Officer (Ethics Officer) for the Indiana Family and Social Services Administration (FSSA). She is requesting a Formal Advisory Opinion on behalf of an FSSA employee (Employee), regarding acceptance of a contest prize awarded by an FSSA grantee.

The Employee is the Regulatory and Compliance Director and Adult Protective Services (APS) Director for FSSA's Division of Aging. Her duties include overseeing the APS state program and ensuring division-wide compliance with federal and state legislation, rules and guidance. The Employee does not have any contracting authority for FSSA.

In September 2019, the Employee entered into the Infant and Toddler Access Challenge (Challenge), a public contest sponsored by Early Learning Indiana (ELI) that called for individuals to submit their ideas for improving Indiana's infant and toddler care shortage. She entered the Challenge because of her personal interest in the issue as a new mother. She did so on her own time using her own resources. The Employee did not identify herself as a state employee when she entered the Challenge. She admits that some of her ideas were shaped by her work experience at the Division of Aging; however, the idea that she submitted for the Challenge was not based on confidential information. She submitted a suggestion that daycare providers could consider locations in assisted living or retirement communities because these communities might find co-locating to be a selling point for potential residents, and the daycare providers could have a built in potential workforce.

ELI is a child care provider that operates nine child care centers licensed and regulated by the FSSA Division of Family Resources, Bureau of Child Care (Bureau). Additionally, ELI currently has a total of 10 active agreements with FSSA. The Challenge was supported by a grant awarded to ELI. This grant is contract number 29002, a Preschool Development Grant, which is funded by the Bureau. Under this grant agreement, ELI oversees the Service Deliverable Area Agencies and provides training and technical support. Additionally, ELI provides support for community outreach and the Paths to Quality Program under the grant.

ELI was not aware that the Employee was a FSSA employee until after they notified her that she had won a \$5,000 cash prize for her entry into the Challenge. The Employee learned that she

won one of the contest Challenge prizes on November 18, 2019. To date, the Employee has not accepted the prize nor has she completed any of the forms ELI requested that she sign to claim her prize. The Employee notified the Ethics Officer of the award on December 2, 2019. After discussing the potential conflict of interests and seeking an informal advisory opinion, the Employee decided to request a formal advisory opinion to determine whether she could keep the prize if she obtained a gift waiver.

As a condition of receiving the \$5,000 cash prize, the Employee would be required to execute an Infant and Toddler Access Challenge- Preschool Development Grant – Recipient Agreement (“Agreement”). The Agreement would require her to relinquish all of her rights to the idea she submitted to ELI and the State of Indiana. Additionally, she would be required to provide copies of all documents, assets and other documented intellectual property prior to the awarding of the cash prize. She would also be required to agree to participate in a discovery session, not to exceed one hour.

The Employee was one of five winners selected. According to the Director of Capacity Building at ELI (Director), a team of five ELI staff members evaluated the Challenge submissions. Per the Director, after the staff completed their evaluations, they submitted their recommendations to ELI leadership, who approved the awards. Neither FSSA nor the Employee were involved in or consulted regarding the evaluation of the Challenge submissions or awarding of the prizes.

The Employee knows that she is required to comply with the ethics laws regarding confidentiality and that she is prohibited from divulging confidential information if she is permitted to enter into an agreement with ELI and accept the prize.

### **ISSUE**

Would the Employee be permitted to keep the prize money awarded by ELI under the Code of Ethics?

### **RELEVANT LAW**

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

#### **Prohibition against financial interest in contract; exceptions; disclosure statement; penalty for failure to file statement**

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 a state officer, an employee, or a special state appointee who:

- (1) does not participate in or have contracting responsibility for the contracting agency;
- and

- (2) files a written statement with the inspector general before the state officer, employee, or special state appointee executes the contract with the state agency.
- (c) A statement filed under subsection (b)(2) must include the following for each contract:
- (1) An affirmation that the state officer, employee, or special state appointee does not participate in or have contracting responsibility for the contracting agency.
  - (2) An affirmation that the contract:
    - (A) was made after public notice and, if applicable, through competitive bidding; or
    - (B) was not subject to notice and bidding requirements and the basis for that conclusion.
  - (3) A statement making full disclosure of all related financial interests in the contract.
  - (4) A statement indicating that the contract can be performed without compromising the performance of the official duties and responsibilities of the state officer, employee, or special state appointee.
  - (5) In the case of a contract for professional services, an affirmation by the appointing authority of the contracting agency 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. A state officer, employee, or special state appointee may file an amended statement upon discovery of additional information required to be reported.
- (d) A state officer, employee, or special state appointee who:
- (1) fails to file a statement required by rule or this section; or
  - (2) files a deficient statement; before the contract start date is, upon a majority vote of the commission, subject to a civil penalty of not more than ten dollars (\$10) for each day the statement remains delinquent or deficient. The maximum penalty under this subsection is one thousand dollars (\$1,000).

### ANALYSIS

Pursuant to IC 4-2-6-10.5, a state employee may not knowingly have a financial interest in a contract made by any state agency. The Code defines “financial interest” to include an interest arising from employment. The Commission has interpreted this rule to apply when a state employee derives compensation from a contract between a state agency and a third party. The Code defines “compensation” as “any money, thing of value or financial benefit conferred on, or received by, any person in return for services rendered or for services to be rendered.” This prohibition however does not apply to an employee that (1) does not participate in or have official contracting responsibility for the contracting agency and (2) files a disclosure form with the OIG *prior* to the contract’s execution.

The Bureau licenses and regulates ELI, and ELI was awarded FSSA’s Preschool Development Grant. ELI used FSSA’s Preschool Development Grant to fund the Challenge prize.

The Commission finds that the Challenge prize is compensation derived from the grant/contract between FSSA and ELI, and IC 4-2-6-10.5 would prohibit the Employee from receiving the Challenge prize as compensation derived from the grant/contract between FSSA and ELI unless she (1) does not participate in or have contracting responsibilities for the contracting agency (FSSA); and (2) files a written disclosure with the OIG before the grant/contract is executed.

Based on the information provided, the Employee does not have any contracting authority for FSSA and she was not involved in any way with FSSA's award of the grant to ELI because it was done through another Division of FSSA and not the Division of Aging, where she is employed. As a result, she would be able to meet the requirements of subsection (1) of the exception to IC 4-2-6-10.5 because she does not participate in or have contracting responsibilities for FSSA; however, she would be unable to meet the requirements of subsection (2) of the exception to IC 4-2-6-10.5 because it requires her to file a written disclosure form with the OIG before the grant/contract is executed between the third party and the state agency and this grant/contract has already been executed.

Accordingly, the Commission finds the Employee would have a financial interest in a state contract if she accepted the prize; such a financial interest is prohibited.

### **CONCLUSION**

The Commission congratulates the Employee for winning the Challenge but has determined that she cannot accept the cash prize per the prohibition against having a financial interest in a state contract found in IC 4-2-6-10.5.