

2022 State Contracts Seminar

July 13, 2022



WHERE DO I EVEN BEGIN?!



STATE CONTRACTS IN ONE SLIDE



- They must be in writing.
- Selection of the contractor or the grantee must be made in accordance with statute or regulation.
- As required by IC 4-13-2-14.1, they must be approved by:
 - ✓ IOT (if technology is involved)
 - ✓ IDOA
 - ✓ State Budget Agency
 - ✓ Office of the Indiana Attorney General
- They must contain certain provisions.
- They cannot contain certain provisions.
- Everything you generally need to know is found on IDOA's Contract Administration web page:

<https://www.in.gov/idoa/state-purchasing/contract-administration/>



INDIANA DEPARTMENT OF ADMINISTRATION

Commissioner Dr. Rebecca Holwerda

Erin Kellam, Deputy Commissioner Procurement
Tammera Glickman, Deputy General Counsel



Provide service excellence and support to our partner agencies by:

Ensuring **effective** and **efficient management** of state resources

While providing **transparency** and **accountability** to Hoosiers




Our
Mission





Accountability
Ethics
Impartiality
Professionalism
Service
Transparency

Our
Guiding Principles



IDOQA's Duties IC 4-13-1-4



PUBLIC WORKS

Inspect/regulate power, heating, lighting plants owned by state agencies



PROCUREMENT CONTRACTS

Copying, printing, mailing services



FLEET TRAVEL



DCS Ombudsman
IDOC Ombudsman
Code Adam



Property management

Leases
Rent out state property
-
real & personal
Surplus property

Procurement & Contracts

Where do I start?

Procurement Training & Resources

<https://www.in.gov/idoa/procurement/procurement-training/>

Delegation of Purchasing Authority Program (DPAP) Manual

<https://www.in.gov/idoa/procurement/procurement-training/delegation-of-purchasing-authority-program>

Stay informed... sign up for SCM Newsflash updates

SCMNewsflashSubscrip@idoa.IN.gov



Procurement

Can I just purchase whatever my agency needs?

IDOA is the official procurement agent for all executive branch agencies. IC 5-22-4-1

State agencies have delegated procurement authority under specific dollar amounts.

Any amount over agency delegation - IDOA Procurement Division is responsible for the bidding process.



Procurement

Procurement Methods:

<https://www.in.gov/idoa/procurement/how-to-build-a-request-for-proposal-rfp/solicitation-methods/>

- IC 5-22-7 Competitive Bidding
- IC 5-22-7.3 Negotiated Bidding
- IC 5-22-9 Request for Proposals
- IC 5-22-10 Special Purchasing Methods



Request for Proposal (RFP) Process

What is an RFP?

- *Primarily used for contracts above \$75,000*
- *Entire process typically 9-12 months*
- *Most often used for services*
- *Considers cost and quality*
- *Award based on most responsive/best value to the State*
- *Advertised in publications for 2 weeks*
- *“On the street” for 8-12 additional weeks*
- *Evaluation criteria is identified in the RFP*
- *See IC 5-22-9*



Special Purchasing Methods

Special Procurement

Special/Emergency purchasing methods may be used when unique circumstances exist, as provided for by Indiana Code IC 5-22-10, allowing standard practices to be circumvented. The need for this type of purchase must qualify under at least one of the criteria defined in IC 5-22-10, sections 4 to 19, and justification must be provided explaining why this type of purchasing method applies.

- *Request for Special Procurement Form is located within PeopleSoft*
- *eSPR Guide https://www.in.gov/idoa/procurement/files/eSPR_Guide.pdf*
- *Contract term – identify with specificity*
- *Save online form, e-approval chain, and supplemental justification to include in Contract file (Supplemental Documents folder in SCM)*



Special Procurements in PeopleSoft- “eSPR”

Since its inception in 2020, IDOA Procurement has approved 1,621 eSPRs.

The process began in 2020 with 18 eSPRs approved.

908 eSPRs approved in 2021

695 approved this year to date (July 5, 2022).



IDOA's Division of Supplier Diversity (DSD)

IC 4-13-16.5 Governor's Commission on Supplier Diversity

- IDOA's new Deputy Commissioner of DSD, Kesha Rich
- Authority encompasses Indiana Veteran Owned Small Businesses since 2020 (IC 4-13-16.5-1.5)
- Mission is to provide equal opportunity to minority, women, and veteran owned enterprises in the state's procurement and contracting process
- Actively promote, monitor and enforce the standards for certification of minority, women, and veteran business enterprises
- Core functions:
 - Certification
 - Contract Compliance
 - Business Outreach



DSD Goals, effective July 1, 2021

Construction	Goods and Services	Professional Services	Weighted Average Goal
Minority 7%	Minority 8%	Minority 8%	Minority 8%
Women 5%	Women 13%	Women 11%	Women 10%
Veteran 3%	Veteran 3%	Veteran 3%	Veteran 3%

Contractor Compliance

IC 4-13-16.5-8 Contractor notice to minority, women's, and veteran business enterprises

...

- (f) Before beginning work on a contract, a contractor **shall do the following**:
- (1) Notify in writing each minority business, women's business enterprise, and veteran owned small business designated in the contractor's offer that the contractor has been awarded the contract.
 - (2) Give copies of each notification to the state agency that awarded the contract.
- (g) If a contractor fails to comply with subsection (f), the awarding state agency may consider the failure a breach of contract and do any of the following:
- (1) Cancel the contract.
 - (2) Collect from the contractor all funds paid to the contractor under the contract.
 - (3) Exercise any of the state's rights set out in the contract.
 - (4) Use the failure as a basis for finding the contractor not responsible when awarding other contracts.

As added by P.L.228-2007, SEC.6. Amended by P.L.15-2020, SEC.7.



Contractor Compliance

What about Contract Amendments and Change Orders?

25 IAC 5-6-2 Monitoring MBE and WBE participation as subcontractors

...

(b) All contract amendments and change order requests **must include the following:**

- (1) An explanation of how MBEs and WBEs will be used.
- (2) The percentage represented above the current contract amount.

25 IAC 9-4-1 Monitoring IVOSB participation

...

(b) All change orders, amendments, and other modifications to the contract that affect value **must include an explanation of the following:**

- (1) How IVOSB will be utilized.
- (2) Any IVOSB percentage changes to the original contract amount



Templates – where to find them

Contracts

SCM or

IDOA's website

[https://www.in.gov/idoa/
state-
purchasing/contract-
administration/](https://www.in.gov/idoa/state-purchasing/contract-administration/)

Public Works

[https://www.in.gov/idoa/
state-property-and-
facilities/public-
works/](https://www.in.gov/idoa/state-property-and-facilities/public-works/)

Leases

SCM or

Leasing

Form & Manuals

(link at the bottom)

[https://www.in.gov/idoa/
state-property-
and-
facilities/government-
office-space/real-
estate-leasing/](https://www.in.gov/idoa/state-property-and-facilities/government-office-space/real-estate-leasing/)

Fleet & Travel

Fleet information

[https://www.in.gov/id
oa/state-resource-
management/fleet-
services/](https://www.in.gov/idoa/state-resource-management/fleet-services/)

Travel Services

[https://www.in.gov
/idoa/state-
purchasing/travel-
services/](https://www.in.gov/idoa/state-purchasing/travel-services/)

IDOA Review of Contract Documents

IC 4-13-2-14.1(a)(1)

25 IAC 1.1

By the numbers:

Contracts Approved in SCM by IDOA

Legal:

Jan. 1, 2022 thru July 5,

2022: **5,367**

Jan. 1, 2021 thru Dec. 31,

2021: **9,499**

Jan 1, 2020 thru July 5,

2022: **23,914**

The state no longer maintains its former system for tracking paper documents. Therefore, the number of paper contracts, amendments, grants, and leases approved by IDOA is not known.



Document Review at IDOA

Before submitting your document for approvals please ensure:

- The procurement method is well documented and meets IDOA requirements.
(IC 5-22 and 25 IAC 1.1)
- The contractor's duties & deliverables are clearly defined. (25 IAC 1.1-1-16(b))
- The consideration is clear and concise detailing payment per hour/per day/per month, etc. and the total \$\$.
- You are using the TEMPLATES approved by IDOA & OAG.
- All signatures are present.
- The exhibits are properly labeled, referenced in the contract and attached.
- Changes to the boilerplate are clearly identified **in Section 50. State Boilerplate Affirmation Clause.**



What might delay IDOA's review?

#1 Delay- your document is a hard copy/paper contract

#2 Delay- no procurement documentation or insufficient documentation

#3 Delay – no clearances or insufficient documentation of clearances



Where can I find helpful checklists?

“Before you send your contract through the approval process, check it against the following list. If all items are completed, your contract should not encounter any problems during the approval process.”

1. DPAP Manual - page 54
2. Professional Services Contract Manual
 - Contract checklist - page 24
 - Amendment checklist – page 54



Tell me more about Clearances

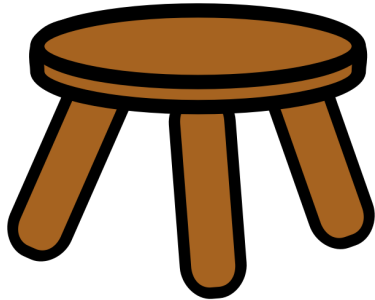
Clearances are required by law, the terms of the Contract/Grant/Lease, and IDOA Policy.

- Department of Workforce Development (DWD)
- Department of Revenue (DOR) IC 4-13-2-14.5
- Secretary of State (SOS) IC 5-22-16-4(a)
- IDOA's list of suspended or debarred vendors
- SAM – federal government's list of suspended or debarred vendors



Contract Drafting

Three Essential Elements of a Contract **Offer – Acceptance – Consideration**



Make sure your contract identifies some form of consideration whether monetary \$ or other.


*state contracts must be in writing
IC 4-13-2-14.2



Can I make changes to the templates?

- Identify those changes clearly in Section 50 (contract) and Section 26 (grant)
- Section heading may reflect “modified” or “revised”

For example: “**28. Insurance [Modified]**”

- Some agencies have identified small changes in **bold** within the clause.
- Consult with your agency legal for risk assessment and risk tolerance. Document agency legal approval within SCM via Supplemental Documents.
- Pre-review by IDOA (please allow 2 weeks for review & comments)
- We  Form Approved contracts, grants, and other agreements.

Speaking of Templates...

Using the Addendum Template for Software as a Service agreements

Section 2. Duties must be clearly defined. Include:

- *the software trade name being purchased*
- *purpose of the software (why/how does your agency use the software)*
- *software support services or maintenance, describe them briefly.*
- *enhancements provided by the Contractor, describe*

Duties- Insufficient detail

eCONTRACT #66666

2. Form Contract/Duties of Contractor. The Contractor shall provide the Services or Products described in the Form Contract.

3. Term. This Contract begins on January 01, 2022 and ends December 31, 2022.



Addendum for SaaS continued

Section 3. Consideration must be clearly defined.

Include an explanation of the payment benchmarks for the deliverables that were identified in the Duties (Section 2)

- How many software licenses will be purchased
- Cost per license
- Maintenance/support services – how much per hour?
Annual cost?

Then, total up all of the elements into the total remuneration amount for the entire term of the contract.

Consideration- Insufficient detail

eContract #66667

3. Term. This Contract begins on January 01, 2022 and ends December 31, 2022

4. Consideration. [Include an explanation of the payment benchmarks for deliverables described in Section 2. Duties of Contractor.] Total consideration for term of this Contract is \$885,734.



Oops, something is missing and the clue in the brackets wasn't deleted.

Real Estate Transactions and Public Works

Does IDOA handle these things, too?

- State real property transactions are governed by IC 4-20.5 and most often administered by IDOA.

**Steve Harless, Deputy Commissioner State Resource Management*

- Public Works are governed by IC 4-13.6 and are generally administered by IDOA.

**Robert Grossman, Director Public Works Division*

These types of transactions are subject to procurement laws and an approval process but are beyond the scope of this presentation.

Resources for Leasing and Public Works

Templates, Policies, and Manuals for these transactions are on IDOA's website and standard templates are in SCM.

Leasing <https://www.in.gov/idoa/state-property-and-facilities/government-office-space/real-estate-leasing/>

Public Works <https://www.in.gov/idoa/state-property-and-facilities/public-works/general-forms-and-manuals/>



Fleet Services



IDOA Fleet Services provides a variety of vehicle services to state agencies.

Fleet Services is divided into two sections: Vehicle Administration and Vehicle Maintenance.

Fleet Services website:

<https://www.in.gov/idoa/state-resource-management/fleet-services/>

**Nancy Morris, Director of Fleet Services*

State vehicles are not self-insured.



*On behalf of Commissioner Holwerda,
thank you for all your hard work
procuring, negotiating, drafting, and managing
state contracts.*



INDIANA ATTORNEY GENERAL'S OFFICE



Bill Anthony, Deputy Attorney General, Assistant Chief Counsel, OAG
Philip Gordon, Deputy Attorney General, Section Chief, OAG

OFFICE OF THE ATTORNEY GENERAL (OAG)

I know what IDOA reviews for – what role does the OAG play in this process?

- The OAG reviews for form and legality: “The attorney general must review for form and legality contracts to which a state agency is a party” and, if the contract “does not meet the requirements of law”, the OAG must disapprove the contract in writing and “assist the agency to remedy defects that are found, if possible.” IC § 4-13-2-14.3
- The OAG has 45 days to review; if the OAG does not respond within 45 days of submission, the contract is deemed approved.
- The OAG is always the last step in the process – it will **always** be approving the final document to which all other parties have agreed.



OAG ROLE DEFINED

4-13-2-14.3 Contracts of state agencies; review by attorney general of form and legality; advice to agency; forms

- (a) Except as provided in subsection (e), **the attorney general must review for form and legality contracts to which a state agency is a party**, unless the contract is not required to be in writing under section 14.2 of this chapter.
- (b) If the attorney general finds that a contract does not meet the **requirements of law**, the attorney general **shall**:
- (1) disapprove the contract;
 - (2) explain in writing to the contracting agency how the contract is legally defective; and
 - (3) assist the agency to remedy defects that are found, if possible.
- (c) If the attorney general finds that the **form of a contract** is inappropriate but that the contract is legal, the attorney general **may** disapprove the contract and shall advise the agency how the form is defective and how the form may be improved.
- (d) The attorney general shall advise the contracting agency as to the form and legality of the contract within **forty-five (45) days** after its submission for review. **If the attorney general does not advise the agency within forty-five (45) days after submission, the contract is considered to be approved.**
- (e) The attorney general may approve contract forms or, by rules adopted under IC 4-22-2, contract types to be used by a state agency and specify the conditions under which the approved forms or types may be used. An agency using a contract form or contract type approved by the attorney general is not required to submit individual contracts using the forms or types for review by the attorney general under this section. Changes in an approved form or type must:
- (1) be approved by the attorney general; and
 - (2) be made in accordance with IC 5-15-5.1-5.
- (f) **The attorney general may delegate to a deputy a power or responsibility given to the attorney general under this section.**



CONTRACT BASICS

What is a Contract?

An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law. Black's Law Dictionary (11th ed. 2019).

What is the importance of a good contract?

When construing the meaning of a contract, our primary task is to determine and effectuate the intent of the parties. First, we must determine whether the language of the contract is ambiguous. The unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts. If the language of the instrument is unambiguous, the parties' intent will be determined from the four corners of the contract. If, on the other hand, a contract is ambiguous, its meaning must be determined by examining extrinsic evidence and its construction is a matter for the factfinder. When interpreting a written contract, we attempt to determine the intent of the parties at the time the contract was made. We do this by examining the language used in the instrument to express their rights and duties. We read the contract as a whole and will attempt to construe the contractual language so as not to render any words, phrases, or terms ineffective or meaningless. We must accept an interpretation of the contract that harmonizes its provisions, rather than one that places the provisions in conflict.

Ryan v. Lawyers Title Ins. Corp., 959 N.E.2d 870, 875 (Ind. Ct. App. 2011) (internal citations omitted)



CONTRACT BASICS – Development Reminders

GOALS IN CONTRACT DRAFTING:

- (1) Be Clear (unambiguous).
- (2) Be Concise (don't get too "wordy")
- (3) Don't agree to prohibited terms.
- (4) Include all necessary boilerplate terms.
- (5) Perform proper risk assessment when negotiating terms.
- (6) When in doubt, contact the IDOA and the OAG.



OAG REVIEW – BEHIND THE SCENES

- The Advisory Section of the OAG is responsible for all matters relating to contracts.
- Jean Marie Leisher manages Advisory's contract process. All SCM contracts route to her first. Jean Marie then assigns them to the Deputy Attorneys General ("DAGs") who review and approve them.
- 11 DAGS review contracts and requests for form approval – in addition to all of their other duties. They strive to have contract approvals done within 10 business days.
- The Advisory Chief Counsel Approves Contracts over \$10M. Certain DAGs have delegations up to \$10M, but most DAGs have delegations up to \$3M.
- All of the OAG reviewers check to make sure that referenced Exhibits are attached, that the term and consideration amounts are consistent, and – in the case of an amendment – that the underlying contract has not already expired.



OAG REVIEW FOR BASIC INFORMATION

- Term – the timeframe
- Consideration – What I get in exchange for a good or service that has been bargained
- Parties – who is signing the contract?
- Signatures – binding the parties to the contract
- Exhibits – clearly labeled and incorporated
- Mandatory clauses included
- Prohibited clauses excluded



OAG REVIEW FOR BASIC INFORMATION – REQUIRED CLAUSES

- Compliance with laws – state and federal
- Ethics IC 4-2-6 *et seq* & IC 4-2-7 *et seq*
- Telephone Privacy (IC 5-22-3-7)
- Electronic Payment (IC 4-13-2-14.8, & -20)
- E-Verify (IC 22-5-1.7-11, -12, & -13)
- Drug-free Workplace (EO 90-05)
- Governing law (IC 34-13-2-3(d))
- Funding Cancellation (IC 5-22-17-5 & FMC 3.3)
- Non-Discrimination (IC 22-9-1-10)
- Non-Collusion



OAG REVIEW FOR BASIC INFORMATION – PROHIBITED CLAUSES

Any provision:

- requiring the State of Indiana to provide insurance
- requiring the State of Indiana to provide indemnity
- providing that the Contract be construed in accordance with laws other than those of the State of Indiana
- providing that suit be brought in any state other than Indiana
- providing for resolution of contract disputes
- requiring the State of Indiana to pay any taxes
- requiring the State of Indiana to pay penalties, liquidated damages, interest or attorney's fees



OAG REVIEW FOR BASIC INFORMATION – PROHIBITED CLAUSES 2

Any provision:

- modifying the applicable Indiana statute of limitations
- relating to the time within which a claim must be made.
- requiring payment of consideration in advance unless authorized by an exception listed in IC § 4-13-2-20
- limiting disclosure of the contract in violation of the Access to Public Records Act, IC § 5-14-3. This is a Public Contract and will be posted on the transparency portal as required by Executive Order 05-07 and IC § 5-14-3.5-2.
- requiring payment in less than 35 days
- providing for automatic renewal – instead, execute an Amendment extending the term if the contract has not expired



FORM APPROVED CONTRACTS/GRANTS

- A form approval is a template form which may be used by an agency for one year from the date of approval.
 - Intended to be used when a contracting state entity anticipates a high number of contracts or grants for the same purpose/services with different contractors or grantees.
- Contracts and grants entered into within the year timeframe using the approved form do not have to be reviewed by the Attorney General for form and legality.
 - This has the added advantage of speeding up the contract approval process and providing the contracting state entity with a consistent legal document that is lawful as to form and content.
- No changes can be made to the approved form other than filling in the template blanks.



FORM APPROVED CONTRACTS/GRANTS

continued

- To seek form approval, you must submit a form approval request form, https://www.in.gov/idoa/files/Form-1028_Form-Approval-Request-Sheet.pdf, along with the draft contract/grant to the Attorney General at contracts@atg.in.gov.
 - The draft contract/grant you are submitting must be submitted in Microsoft Word format.
- Please make sure to include a “Prepared by” statement on the document.
 - This is verification that each form approved contract has actually been reviewed by the agency legal counsel before execution; agency legal counsel ensure the initial and final integrity of the agreement.
 - *This Contract [Grant] was prepared by agency legal counsel [NAME] on [DATE].*
- Any exhibits/attachments referenced in the form should be included and labeled properly; at a minimum, include placeholder pages.



FORM APPROVED CONTRACTS/GRANTS

continued

- Once approved, the agency will receive a letter from the OAG with the template name and form approval number associated with the template that has been approved.
- Contracts that have received form approval will have a statement in placement rather than the regular Attorney General signature block.
- The OAG will send the approval letter via email to the person who requested the form; IDOA will also be provided copies of all form approvals to help monitor the integrity of the process.
- **It is the agency's responsibility to request the form approved template be created in SCM.**
 - For further information, please consult the 2022 Contracts Manual at: https://www.in.gov/idoa/files/2022_Contract_Manual_20220418.pdf.
- PLEASE MAKE SURE TO DESTROY ALL ELECTRONIC COPIES OF OLD FORMS UPON RECEIPT OF FINAL APPROVAL OF THE NEW FORM CONTRACT.
- **REMINDER:** The form is approved as of the date of the approval letter. Approval expires exactly one year from that date. IDOA will not approve a contract document that has been signed by the Contractor after the expiration of the form approval.
- **ADDITIONAL REMINDER:** If you amend an agreement that has previously received form approval with a standard amendment (and not a form approved amendment), you will need to go back and manually select the correct approval path in SCM.



STATE BUDGET AGENCY



John von Arx, Senior Budget Analyst, State Budget Agency

SBA BACKGROUND AND FMC'S

- The State Budget Agency is charged with the duty and responsibility of serving as fiscal analyst, administrative budget officer, fiscal forecaster and fiscal policy advisor to the Governor. By statute, the Governor appoints the State Budget Director and two Deputy Directors
- The Budget Agency facilitates the processes of revenue forecasting and budget development and implementation. The agency is also responsible for evaluating the fiscal and policy impacts of legislative proposals and making this information available to decision makers. Each biennium, the agency compiles fiscal data from state agencies and works with the legislature to develop the State's budget
- More information about the State Budget Agency can be found in Title 4, Article 12, Chapter 1 of the Indiana Code



SBA BACKGROUND AND FMC'S continued

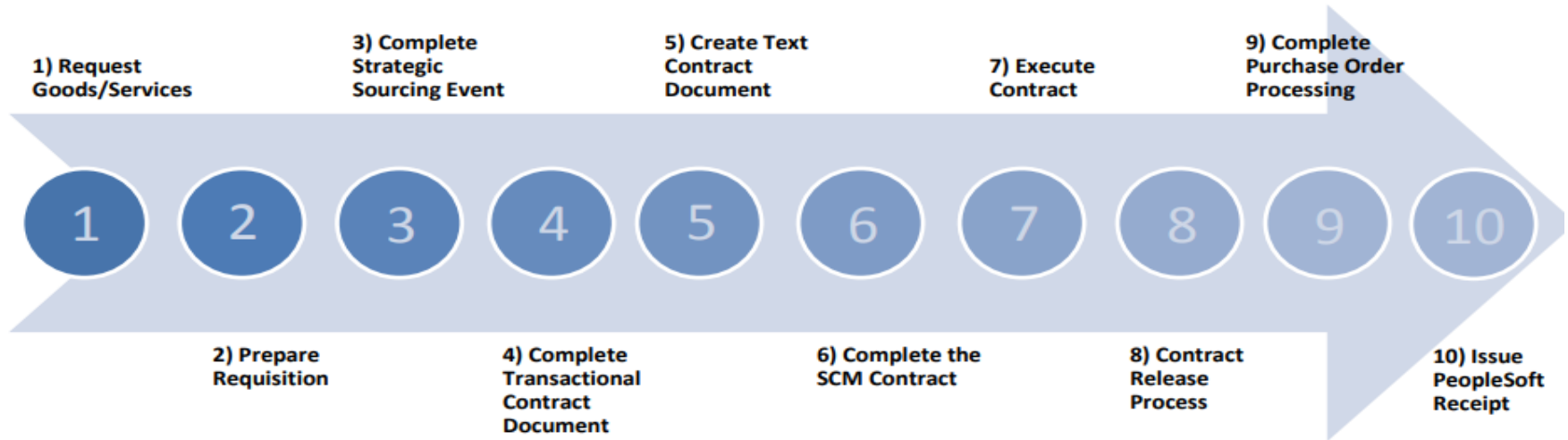
- IC 4-12-1-13 allows the State Budget Agency (SBA) to adopt and enforce financial guidelines for state agencies to follow. The Office of Management and Budget (OMB) has similar authority under IC 4-3-22-4. We refer to this guidance as Financial Management Circulars (FMCs)
- Previously existing FMC's were repealed on December 31, 2021, and the new FMCs went into effect on January 1, 2022
- Primarily applies to only executive branch agencies IC 4-12-1-13(g)
- For today's purposes, we will be discussing the updated contract management FMC's found here - <https://www.in.gov/sba/budget-information/financial-management-circulars>



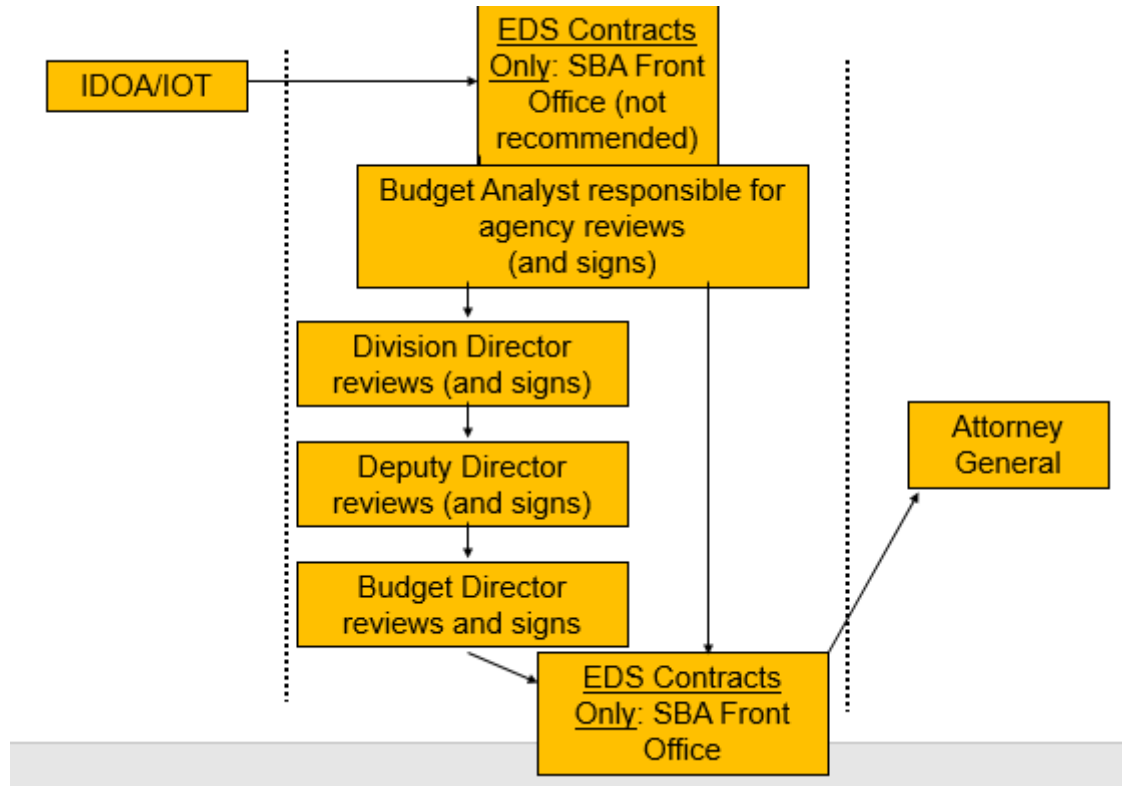
CONTRACT CREATION PROCESS

Financials Procedure Overview

Purchase that does require solicitation and an SCM contract



HOW DOES THE CONTRACT APPROVAL PROCESS WORK AT SBA?



WHAT ARE THE “FISCAL ISSUES” SBA IS LOOKING FOR IN A CONTRACT?

- Financial impact of the contract to the agency
 - Total cost of contract, fiscal year by fiscal year impact, funding sources, etc
 - Impact of contract to the agency’s budget and spending plan, CFO sign off
 - Cost per unit, per hour, per product, etc.
 - SBA will work with agency financial staff or controllers to understand the financial impact of the contract



WHAT ARE THE SPECIFIC CLAUSES SBA REQUIRES IN A CONTRACT?

Funding cancellation

- **FMC 3.3** (January 1, 2022) requires that all contracts contain the following language:

“When the Director of the State Budget Agency makes a written determination that funds are not appropriated or otherwise available to support the continuation of performance of this contract, the contract shall be canceled. A determination by the Director of the State Budget Agency that funds are not appropriated or otherwise available to support the continuation of performance shall be final and conclusive.”

- **IC 5-22-17-5**

Funds not appropriated or not available; cancellation of contract

Sec. 5. (a) When the fiscal body of the governmental body makes a written determination that funds are not appropriated or otherwise available to support continuation of performance of a contract, the contract is considered canceled.

(b) A determination by the fiscal body that funds are not appropriated or otherwise available to support continuation of performance is final and conclusive.

As added by P.L.49-1997, SEC.1.



SPECIFIC KEY CLAUSES

Other key clauses SBA considers

- Termination for convenience (While not mandatory, inclusion of this clause is highly recommended.)
- Out clause (normally with leases)
- Performance measures, outcomes, service levels, penalties
- Consideration and Term (make sure its clear and matches the EDS, other attachments)
- Renewal Options, Payments (35 days in arrears)



HOW CAN I EXPEDITE THE CONTRACT REVIEW PROCESS?

- SBA goal to return contracts within 48 hours of receipt and within 5 days maximum
- Large policy or dollar amount contracts coming through for approval
 - If the agency has a high priority contract coming through, or will be coming through for approval, advanced notice and information is helpful to SBA
 - Working with SBA staff before a major contract, or high priority contract, comes through for approval can cut down on review time in SBA
 - If total consideration is less than \$2,000,000, Budget Analysts should approve these contracts.
 - If total consideration is less than \$10,000,000, Assistant Directors should approve these contracts.
 - If total consideration is \$10,000,000 or greater, the Deputy Budget Director should approve these contracts



HOW IS THE MOU REVIEW PROCESS DIFFERENT FROM THE CONTRACT REVIEW PROCESS?

- A Memorandum of Understanding (MOU) between two state agencies must be reviewed and approved by SBA
- SBA review and approval of MOUs are required by FMC 3.4 (January 1, 2022)
- The same policies concerning approval of contracts by SBA apply to MOUs
- Generally, MOU's between state agencies should only extend as far as the current budget period. For example, July 1, 2021 – 6/30/2023.
- Preference is to journal expenses between agencies



INDIANA ATTORNEY GENERAL'S OFFICE



Bill Anthony, Deputy Attorney General, Assistant Chief Counsel, OAG
Philip Gordon, Deputy Attorney General, Section Chief, OAG

TEMPLATES I

I know from law school what a contract is and what it should contain, but I'd really feel better seeing what some other state contracts look like. Any suggestions?

Uniformity and Consistency are Key to the Success of the State Contracting Process. Well over 10,000 contracts and grants flow through the system each year.

The reviewing agencies CANNOT do their jobs effectively and efficiently without considerable standardization.

The OAG and IDOA have developed templates to be used as the basis for contracts or grants.



TEMPLATES II

Updated templates are automatically loaded into SCM. They can be viewed in Word format on IDOA's contract management website: <http://www.in.gov/idoa/3000.htm>

Standard templates include those for:

- Professional Services
- Grants
- State Educational Institution Contracts
- Amendments
- Addendums
- Outside Counsel Contracts

ALWAYS USE THE CURRENT TEMPLATES!

You may customize a template for use by your agency, but please coordinate with IDOA and OAG.



THE ADDENDUM TEMPLATE

What is the addendum template used for?

- A vendor may present its form contract for the State to sign. This is particularly common in technology contracts.
- The Vendor's form contract always has clauses that are in the Vendor's best interest, not the State's; it likely contains clauses that are not legal in State contracts (*i.e.*, governing law, indemnity, arbitration, payment of fees and costs).

NEVER SIGN THE VENDOR'S FORM CONTRACT, USE THE STATE'S ADDENDUM

- Regardless of what the Vendor's Account Executive says, the Vendor's boilerplate terms are negotiable



MORE ABOUT THE ADDENDUM

What should I be aware of in the addendum?

- It must **always** take precedence over the form contract. The first paragraph provides: *“Any inconsistency, conflict, or ambiguity between this Addendum and the Form Contract shall be resolved by giving precedence and effect to this Addendum.”*
- It has a list of terms and conditions that the State cannot agree to and that the Vendor must agree are deleted from its form contract.
- The Addendum has terms and conditions that are required by law to be in contracts to which the State is a party or in which public funds are spent.
- Always take the time to read the vendor’s form contract; it often has business terms that are important for your client to be aware of.



AMENDMENTS

Our contractor has changed its name and asked that all future payments be made payable to the new name. Is there anything I need to do?

Any time you are modifying a contract to change the amount of consideration, to change the term, to change the scope of work, to change the name of the vendor:

DO AN AMENDMENT AND ROUTE IT THROUGH THE APPROVAL PROCESS.

The current amendment template will also include any mandatory clauses resulting from statutory changes.

An expired contract cannot be amended; a new contract must be done. A contract is deemed expired if the amendment is not signed by the vendor on or before the expiration date.



THE OUTSIDE COUNSEL TEMPLATE

- All agencies **MUST** obtain OAG consent **PRIOR** to entering into an agreement for legal services with a law firm or attorney, with limited exception. When in doubt, please consult the Indiana Code.
- **Statutory Authority for Consent to Hire Outside Counsel:**
 - IC 4-6-5-3 provides that no agency, except as provided by this chapter, shall have the right to name, appoint, employ, or hire any attorney or special or general counsel to represent it or perform any legal service on behalf of such agency and the state without the written consent of the Attorney General.
- An approved request to hire outside counsel will receive a consent letter. That consent letter **MUST** be attached to your outside counsel agreement.
- Any type of amendment to an Outside Counsel Contract requires prior approval from the Attorney General. Requests for amendment must be submitted to the Attorney General. A new consent letter will be issued for each amendment. A contract amendment must be executed following consent and should include the consent letter as an exhibit to the amendment.



OAG REVIEW FOR BASIC INFORMATION – COMMON ERRORS INHIBITING OAG APPROVAL

- Consideration errors – dollar amount errors
- Missing pages
- Term errors
- Failure to incorporate exhibits properly
- Required clauses missing or altered impermissibly (not merely hiding in a different place.)
- Improper “Business Decisions” – failure to perform a risk analysis



OAG FORM AND LEGALITY APPROVAL – CONSIDERATION ERRORS

- Always double check consideration amounts and total remuneration.
- Budgeted amounts in grants and contracts, which is often provided in an exhibit, often fail to match up with the actual consideration and total remuneration amount in the body of the contract.
- Be diligent in reviewing both the dollar amounts entered in the body of the contract and the corresponding exhibits or budgets.
- **When inputting dollar amounts, do not spell it out. Use only numbers to show consideration.**
- For amendments, they often purport to add a specific amount of money to an underlying contract equaling a new total remuneration amount, but the new total does NOT match the underlying contract amount plus the amendment amount. Always double check the math and review prior amendments.



OAG FORM AND LEGALITY APPROVAL – MISSING PAGES OR DOCUMENTS

- Quite frequently, we see contracts that are signed and executed properly but fail to include certain pages or exhibits. Or, in the alternative, the exhibits are not referenced in the agreement but are attached.
- Assure page numbers are included and in the proper order prior to submitting for approvals.



OAG FORM AND LEGALITY APPROVAL – TERM ERRORS

- Failure to reconciled the stated length of term in days/months/years to the corresponding start and end dates.
- Always make sure the term of the agreement aligns with what is actually stated.
- For example, “This Contract shall be effective for a period of one (1) year. It shall commence on April 22, 2022, and shall remain in effect through August 31, 2022.” These two sentences create ambiguity in the contract term **and prevent OAG approval.**



OAG FORM AND LEGALITY APPROVAL – FAILURE TO INCORPORATE EXHIBITS

- Exhibits must be properly labeled, incorporated into the contract, and referenced.
- Simply attaching a document is neither necessary nor sufficient for incorporation. *See Kleen Leen, Inc. v. Mylcraine*, 174 Ind. App. 579, 583, 369 N.E. 2d 638, 640-41 (Ind. Ct. App. 1977).
- Why is this so important? So that it's clear to individuals looking through the contract and series of amendments and exhibits to those amendments that an exhibit hasn't been left out or improperly referenced.
- This includes situations where there is an amendment attached but not incorporated in the language of the contract, or situations where an exhibit is incorporated in the language in the contract and then not attached as part of the submission.
- Clearly marking exhibits tells the reader the exhibit is an actual part of the contract.
- If an exhibit is not properly incorporated, the OAG will request the contract be withdrawn and resubmitted.



OAG FORM AND LEGALITY APPROVAL – REQUIRED CLAUSES MISSING OR ALTERED

- State required contract provisions should not be altered or omitted.
- Vendors should understand **at the beginning of your negotiation** that these are **non-negotiable** and required to be included under Indiana law.



OAG FORM AND LEGALITY APPROVAL – FAILING TO CONDUCT RISK ANALYSIS

- Often, and as discussed previously, agencies will remove provisions that are not technically required by statute or otherwise. Generally, removal is not a form or legality problem for the OAG.
- However, that doesn't mean that agencies have performed the proper risk analysis to justify why removal is appropriate or in the State's best interests. The common response is "this is the way we have always done it" or "the contractor asked for the removal of 'X' clause." Just because a clause can be removed, doesn't mean it should be removed!
- Agencies should be cognizant that while a contract may be approvable, it doesn't mean that the State is protected against unnecessary risk.
- Examples would include higher dollar amount contracts where an agency agreed to remove all insurance requirements. Likely not advisable no matter what the circumstances. **Additionally, limitation of liability clauses are another popular addition to state contracts. Remember, the state cannot accept liability of another and you should review and understand in what ways the contractor is limiting its liability and be mindful of the dollar amount of contracts as well as services being provided.**



OAG FORM AND LEGALITY APPROVAL – FORCE MAJEURE PROVISIONS

- What is a force majeure clause?
 - A force majeure clause aims to excuse a party's performance when performance is prevented by circumstances outside of the party's control. Although this is the general understanding, what ultimately controls is whether there is specific language in the contract that excuses performance because of a *specific* type of event. A recent case on force majeure, *Specialty Foods of Indiana, Inc. v. City of South Bend*, 997 N.E.2d 23 (Ind. Ct. App. 2013), provides helpful guidance on how a court reviewed specific language in a contract to determine whether a force majeure event excuses a party's performance.
- What does the State's boilerplate clause say?
 - In the event that either party is unable to perform any of its obligations under this Contract or to enjoy any of its benefits because of natural disaster or decrees of governmental bodies not the fault of the affected party (hereinafter referred to as a "Force Majeure Event"), the party who has been so affected shall immediately or as soon as is reasonably possible under the circumstances give notice to the other party and shall do everything possible to resume performance. Upon receipt of such notice, all obligations under this Contract shall be immediately suspended. If the period of nonperformance exceeds thirty (30) days from the receipt of notice of the Force Majeure Event, the party whose ability to perform has not been so affected may, by giving written notice, terminate this Contract.
- **REMINDER: For State contracting purposes, a force majeure event is one that is by an "act of God" or caused by a natural disaster. You should never agree to a force majeure clause that is tied to economic considerations/performance or something beyond what is stated in the State's boilerplate clause.**



IN CONCLUSION...

Follow these rules, ask questions when necessary, and the contracting process will go smoothly!



INDIANA OFFICE OF TECHNOLOGY



Jim Ehrenberg, General Counsel

Terri Messer, Contract and Procurement Manager

Part I: Standard Terms & Conditions for the State's IT Contracts *and* What to Do if You Want to Change Them

Preface

**WHY SHOULD YOU LISTEN TO ME
AND TERRI?**

Preface

WHY SHOULD YOU LISTEN TO ME AND TERRI?

Because IOT – just like your agencies – must have its contracts reviewed and approved by IDOA, SBA, and the Attorney General. *In other words*, we’re on of the “approving agencies” – when it comes to IT contracts – but we must have our own contracts approved as well. So we can see things from their perspective as well as yours.

Preface

Q: What is the basic purpose of the State's contract boilerplate templates?

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A: The basic purpose of the templates is to broadly protect the State from any number of unknown potential harms. They contain terms that the “approving agencies” think will do that job in most cases.

Preface

Q: What is the basic purpose of the State’s contract boilerplate templates?

A: The basic purpose of the templates is to broadly protect the State from any number of unknown potential harms. They contain terms that the “approving agencies” think will do that job in most cases.

Q: What are the “approving agencies” really responsible for doing when it comes to reviewing our contracts?

Preface

Q: What is the basic purpose of the State’s contract boilerplate templates?

A: The basic purpose of the templates is to broadly protect the State from any number of unknown potential harms. They contain terms that the “approving agencies” think will do that job in most cases.

Q: What are the “approving agencies” really responsible for doing when it comes to reviewing our contracts?

A: They are responsible for conducting a due-diligence review to make sure that we’re not agreeing to contract terms that don’t protect the State to – *at least* – the minimum degree to which it needs to be protected.

Preface

Q: Why are the “approving agencies” hesitant to approve changes to the State’s standard terms and conditions? What are they afraid of?

Preface

Q: Why are the “approving agencies” hesitant to approve changes to the State’s standard terms and conditions? What are they afraid of?

A: They are hesitant to approve changes – *usually* – because they don’t know very much about the product or service that my agency is buying, what it will do, why we need it, or how it (or the vendor that is selling it) could somehow hard the State.

And their main job, again, is to make sure that the State is protected to – *at least* – the minimum degree to which it needs to be protected. It’s a big responsibility.

Preface

Put yourself in their shoes.

How would you see you and your agency's requests to change or remove some of the standard terms in the State's boilerplate templates if you were them?

Preface

I realized that the “approving agencies” essentially saw IOT like this.



Preface

And this is how they saw our prospective vendors...



Preface

And this is how they saw IOT Legal agreeing to remove certain standard protections in the boilerplate templates...



Preface

This is IDOA reacting to IOT Legal having done that.



Preface

This is SBA reacting.



Preface

This is IDOA discussing the situation with SBA.



Preface

And this is the Attorney General.



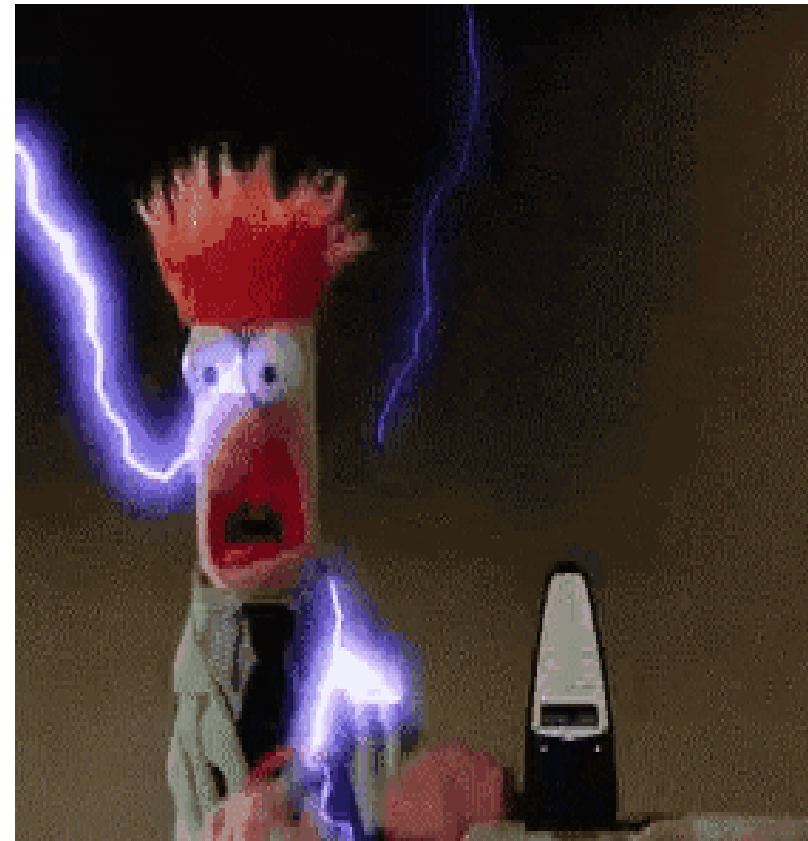
Preface

This is how the IDOA, SBA, and the Attorney General envisioned IOT using the new product for the very first time.



Preface

This is how they envisioned
the new product not working
quite as well as IOT's
vendor suggested it would
work...



Preface

And this is how they envisioned IOT suffering significant harm that would have been avoided if only IOT Legal hadn't agreed to remove the standard protections.



Basic takeaway from Muppet gifs...

We must help the “approving agencies” feel comfortable with our contracts if we want them to approve them.

- The easiest way to do that is to change as little as possible in the State’s boilerplate templates.
- And the easiest way to change as little as possible in the State’s boilerplate templates is to set the table for your vendors early on in your negotiations by making three points on why our templates are necessary and what they do for the State.

Change-as-Little-as-Possible

Point 1

The State depends on its templates because it has limited staff to process hundreds of contracts on an annual basis. The State's templates allow the agencies that are responsible for reviewing and approving our contracts to do their jobs in a reasonable amount of time.

Extra detail for Point 1

- State agencies negotiate the terms of their individual contracts with their vendors. But as many as **four other agencies** – IDOA, SBA, the ATG, and IOT – must “review and approve” the terms that state agencies agree to with their vendors, in principle, to ensure that they protect the State’s interests to at least the minimum degree that is necessary under the circumstances of the deals in question.
- State agencies, collectively, enter into **hundreds and hundreds of contracts** a year. In order to get that many contracts reviewed and approved in a reasonable amount of time, the “approving agencies” have created templates for state agencies to use for their contracts.
- The templates include the standard terms that the approving agencies think are necessary to **broadly protect the State’s interests** in most cases. So asking them to revise or eliminate parts of the standard terms is – as they see it – effectively asking them to lessen the State’s protections.
- The approving agencies can review and approve contracts that include our standard terms relatively quickly because they are **familiar with our terms** and how they protect us.

Change-as-Little-as-Possible

Point 2

The review-and-approval process for our contracts slows down when state agencies (or their vendors) propose changes to the standard terms in the State's templates. This is because it takes time for the approving agencies to consider them.

Extra detail for Point 2

- The approving agencies recognize that changes to the standard terms are sometimes necessary. But their job is **not to simply approve the changes** that state agencies (or their vendors) propose **in rubberstamp fashion** because, again, the standard terms are there to protect the State's best interests.
- When state agencies (or their vendors) propose making changes to the State's standard terms, the review-and-approval process gets slowed down – *sometimes considerably* – because the approving agencies **need to understand more about the deals** in question in order to determine whether the proposed revisions protect the State's best interests to at least the minimum degree necessary. They have to ask us questions to understand what is going on and why we think the change is acceptable and appropriate.
- So while changes are not out of the question, the fastest way to get a deal done is to **change as little as possible** and focus on the terms that are truly significant. Consider whether the change really needs to be made before you propose that we make it.
- Also keep in mind that proposed changes don't always get okayed. Ask yourself if this is something that you are **willing to risk our deal** over?

Change-as-Little-as-Possible

Point 3

We need to help the approving agencies understand the thinking behind our proposed changes to the State's standard terms – AND why our proposed changes are appropriate and acceptable – in order for them to feel comfortable approving our proposed changes.

Extra detail for Point 3

- We will speed up the review-and-approval process if we clearly identify the language that we want to change AND what we want to change it to.
- The approving agencies don't understand what your product is or how my agency will use it like we do. We will improve the chances of our proposed changes being approved by them if we explain why our proposed changes are acceptable and appropriate for the purposes of our contract in terms that will make sense to them.

IOT- Specific Stuff

Two questions you might have about IT Contracts and IOT's review and approval of them:

1. What parts of the State's contract templates is IOT responsible for reviewing and approving?
2. What must you do in order to enable the IOT Security Team to consider and potentially approve changes to the template language?

What we approve: *The “IOT Paragraph”*

27. Information Technology Enterprise Architecture Requirements. If this Contract involves information technology-related products or services, the Contractor agrees that all such products or services are compatible with any of the technology standards found at <https://www.in.gov/iot/2394.htm> that are applicable, including the assistive technology standard. The State may terminate this Contract for default if the terms of this paragraph are breached.

What we approve: The Cloud Terms

“Cloud computing” is the practice of using a network of remote servers hosted on the Internet to store, manage, and process data, rather than a local server or a personal computer.

- IOT must approve all cloud contracts.
- The Cloud Terms are “the default.” That means they are supposed to be used unless there is a good reason for not using them. They will typically be attached to the professional services agreement boilerplate template as an exhibit.
- Changes are permitted. In order to get your proposed changes approved by the IOT Security Team, however, you will need to identify what the change is and why it is appropriate and acceptable for the purposes of your contract so that they can do a due-diligence review of what you have in mind.

Start by considering the section headings. They should help you understand the basic intent of the section and the importance of its language.

1. Data Ownership
2. Data Protection
3. Data Location
4. Notice Regarding Security Incident or Data Breach
5. Responsibilities Regarding Security Breach
6. Notification of Legal Requests
7. Termination and Suspension of Services
8. Background Checks
9. Access to Security Logs and Reports
10. Contract Audit
11. Data Center Audit
12. Change Control and Advance Notice
13. Security
14. Non-Disclosure and Separation of Duties
15. Import and Export of Data
16. Responsibilities and Uptime Guarantee
17. Subcontractor Disclosure
18. Business Continuity and Disaster Recovery
19. Compliance with Accessibility Standards
20. Additional Terms and Conditions Declaration

What you should be prepared to do if you want to make changes to the “IOT Paragraph” or the Cloud Terms...

1. **Describe** the product or service that you are buying – and what it will do for your agency – with sufficient detail (but using simple terms) so that the IOT Security Team will have a basic understanding of what is going on so that it can legitimately consider whether the changes that you have proposed are acceptable and appropriate under the circumstances.
2. Clearly **identify** the changes that you propose to make. *(IOT prefers redlines made to Word versions of the State’s templates.)*
3. **Explain** why your agency thinks your proposed changes are acceptable and appropriate under the circumstances. *(IOT prefers marginal comments inserted directly into Word versions of the State’s templates.)*
4. **Acknowledge** that your agency is responsible for any harm that comes to the State which would have been prevented if your proposed changes hadn’t been made.

Part II: IOT's Role in the IT Contract Review-and-Approval Process: *Perception v. Reality*

Special Procurement Requests

Perception

My Special Procurement Requests (SPRs) for IT contracts containing **cloud services** are complete as long as the right IOT boxes at the end of the SPR are checked.

Special Procurement Requests

Perception

- My Special Procurement Requests (SPRs) for IT contracts containing **cloud services** are complete as long as the right IOT boxes at the end of the SPR are checked.

Reality

- Attaching a copy of the **IOT security questionnaire** will speed IOT's SPR review.
- The questionnaire is available by request to contracts@iot.IN.gov.

Types of Approvals

Perception

- If someone at IOT has approved some aspect of my IT purchase, I can expect approval of the accompanying contract.

Types of Approvals

Perception

- If someone at IOT has approved some aspect of my IT purchase, I can expect approval of the accompanying contract.

Reality

- Operational purchase approval, SPR approval, Archer approval, and any other relevant IOT approvals should be obtained as applicable, **but they don't stand in the place of IOT contract approval.**

IOT's Review Jurisdiction

Perception

- IOT reviews every IT contract, including every EULA, every SOW, and every other exhibit during the review and approval process, ensuring our contract has the best legal and operational position possible.

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Perception

- IOT reviews every IT contract, including every EULA, every SOW, and every other exhibit during the review and approval process, ensuring our contract has the best legal and operational position possible.

Reality

- IOT selectively reviews IT contracts based on many factors. We rely on agency contract departments, IT staff, and legal counsel to negotiate the terms that suit each deal best.

Cloud Services & Amendments

Perception

- If a contract containing cloud services has been in place without issues for a long time, I don't need to add IOT's cloud terms when I amend the contract.

OR

- Since my existing on-prem services contract was approved by IOT, I don't need to include IOT cloud terms when I amend it to migrate services to the cloud.

Cloud Services & Amendments

Perception

- If a contract containing cloud services has been in place without issues for a long time, I don't need to add IOT's cloud terms when I amend the contract.

OR

- Since my existing on-prem services contract was approved by IOT, I don't need to include IOT cloud terms when I amend it to migrate services to the cloud.

Reality

All existing contracts containing **cloud services** but not **IOT cloud terms** should be amended to add IOT cloud terms. The same is true for existing contracts being amended to **add** cloud services.

Steps for Success

New email requests to modify or delete the IOT paragraph or to modify, waive, or replace the IOT cloud terms should be sent to ContractExceptions@iot.IN.gov.

Steps for successful IOT contract review and approval

1. Do I want to modify or delete the IOT paragraph? If so:
Have I engaged IOT via ContractExceptions@iot.in.gov?

Steps for successful IOT contract review and approval

1. Do I want to modify or delete the IOT paragraph? If so:

Have I engaged IOT via ContractExceptions@iot.in.gov?

2. Does my contract include cloud services? If so:

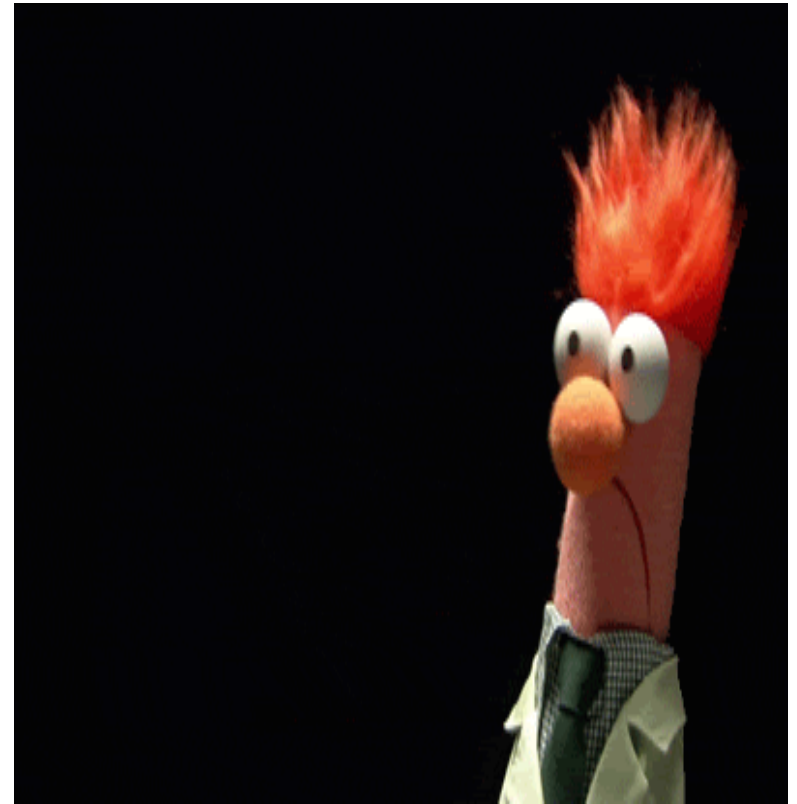
Have I included the **IOT cloud terms**?

Have I asked the vendor to complete **IOT's security questionnaire** for cloud services?

Steps for successful IOT contract review and approval

1. Do I want to modify or delete the IOT paragraph? If so:
Have I engaged IOT via ContractExceptions@iot.in.gov?
2. Does my contract include cloud services? If so:
Have I included the **IOT cloud terms**?
Have I asked the vendor to complete **IOT's security questionnaire** for cloud services?
3. If I want to modify the IOT cloud terms, elect not to use them at all, or substitute a vendor's cloud terms instead:
Have I engaged IOT via ContractExceptions@iot.in.gov?

Thank you for helping us help you!



ETHICS IN STATE CONTRACTING



Sean Gorman, Doreen Clark and Mark Mader, Indiana Office of Inspector General
Tammera Glickman, Indiana Department of Administration

Today's Agenda

1. Overview of OIG and the Code of Ethics
2. For Attorneys, Professional Responsibility
3. Specific Ethics Rules that May Involve Contracts
4. IDOA Guidance on Lobbying Activities



Office of Inspector General Duties:

1. Establish the Code of Ethics
2. Educate/Advise
3. Investigate
4. Adjudicate



ADVICE:

1. Informal Advisory Opinions
2. Formal Advisory Opinions



OIG and Code of Ethics

JURISDICTION:

State Government

Executive

Officers

Employees

Special State Appointees

People with business relationship



For the Attorneys:

Be mindful of the Rules of Professional Conduct!

In particular, See Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

OIG does not have Jurisdiction to provide guidance on this or other ethical obligations for attorneys under the Rules of Professional Conduct

BUT the Supreme Court Disciplinary Commission can offer informal guidance on the application of the rules to a set of circumstances in much the same way that OIG does for the State Code of Ethics.
<https://www.in.gov/courts/discipline/guidance/>



THE CODE OF ETHICS:

Indiana Code § 4-2-6-1 to 17

42 IAC § 1-1-1 to 1-11-1



THE CODE OF ETHICS:

Gifts

Bribery

Donor Restrictions

Benefitting from
Confidential Information

Honoraria

Divulging Confidential
Information

Political Activity

Use of State Property

Moonlighting

Ghost Employment

Conflicts of Interests;
Decisions and Voting

Post-Employment

Conflicts of Interests;
Contracts

Nepotism

Additional Compensation



GIFTS:

TO WHOM

- You, your spouse, and your child (unemancipated)

WHAT

- Gift, favor, service, entertainment, food/drink, travel expenses, registration fees

FROM WHOM

- Person with a business relationship with your agency



GIFTS:

EXCEPTIONS

- Memento/souvenir of nominal value
- Relative or ongoing social relationship

WAIVERS

- Agency's appointing authority can waive rule
- Must be consistent with public interest



GIFTS RULE EXAMPLES:

Your Agency regularly purchases registrations from a CLE provider for CLE courses for agency staff. One of your staff attorneys is invited to present a CLE session and receives a free registration for the entire session of CLE offerings.



GIFT RULE EXAMPLES:

Your Agency contracts with a drug testing lab, and you are at a conference where the lab is exhibiting as a vendor. Several of you go out for dinner and drinks at the end of the day and the lab rep picks up the check.



-Contracts-

- The Conflicts of interests Related to Contracts Rule is outlined in IC § 4-2-6-10.5.
- Reads that “*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”.



-Contracts- Exceptions:

A state employee **may** have a financial interest in a contract made by a state agency so long as the employee:

- (1) Does not participate in or have official contracting responsibility for the contracting agency.
- AND**
- (2) Files a written disclosure form with our office **PRIOR** to the execution of the contract with the agency.

*Unless the state employee files a written disclosure form with the OIG **prior** to the contract between the state agency and vendor, the exception to the rule will not be met and having a financial interest in a state contract will be in violation of the rule.



-Contracts- Criminal Conflicts of Interests:

- Criminal conflicts of Interests statute can be found in IC § 35-44.1-1-4
- The criminal statute prohibits certain public servants from having a pecuniary interest in or deriving a profit from a contract with the public servant's agency.
- Level 6 Felony



-Contracts- Test your Knowledge!

Sarah works at the Indiana Department of Transportation (INDOT) as an Electronic Technician II. In her role as Electronic Technician II, Sarah oversees maintenance of traffic signals and supervises traffic signal maintenance contracts within various counties across Indiana. Sarah owns her own side business in which she writes computer software applications and sells them to various companies. Sarah has developed a software that would help improve traffic signal development and potentially benefit INDOT. Sarah would like to form a contract with INDOT in which she sell this software to the agency.



Code of Ethics - Violations

Potential sanctions!





Post-employment

Cooling Off Requirement

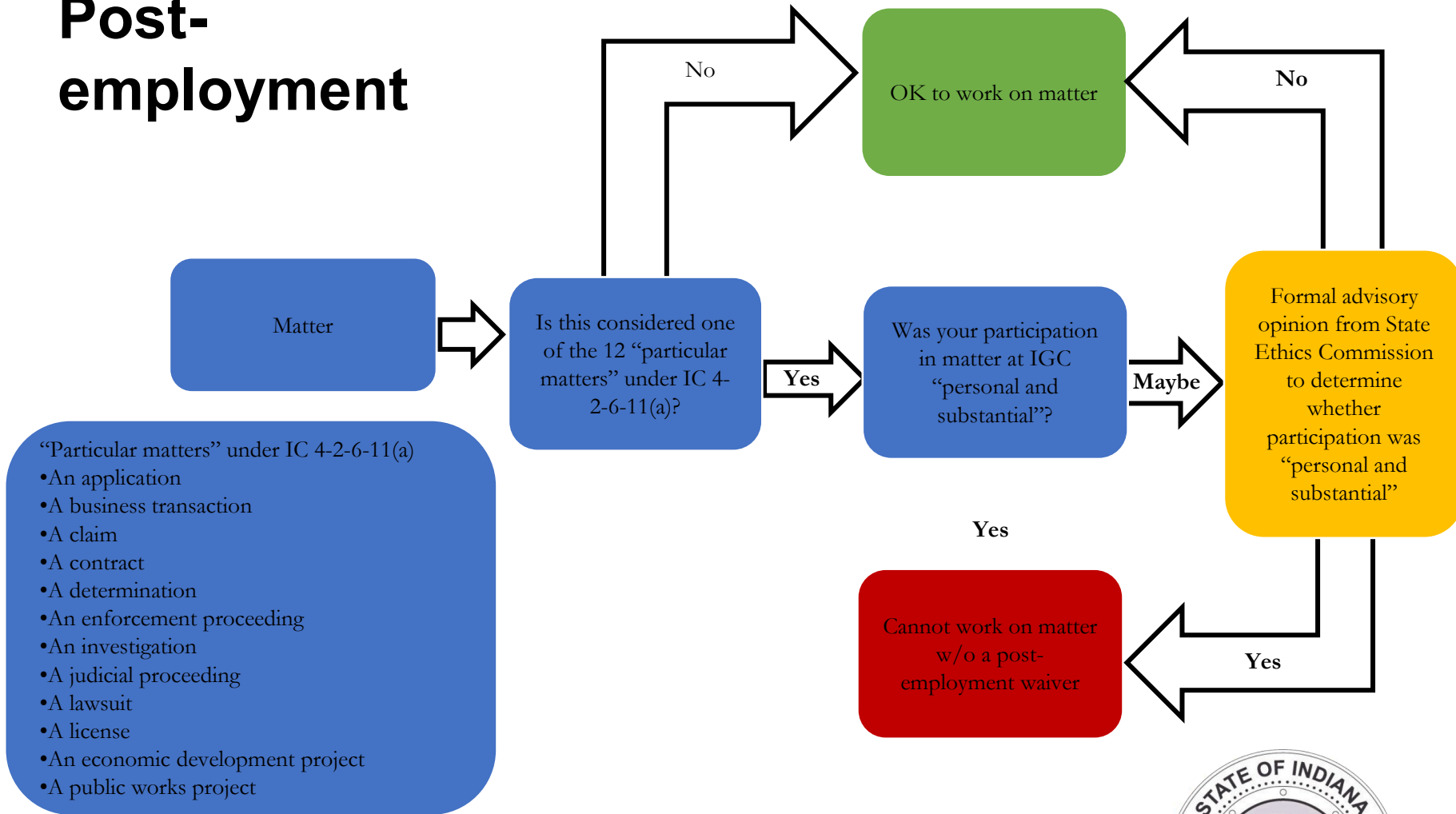
- “Revolving door” – IC 4-2-6-11(b)
- Lobbying
- Negotiation/administration of state contract
- Regulatory/licensing decisions
- 365 days

Particular Matter Restriction

- 12 “particular matters” - IC 4-2-6-11(a)
- Prohibits former employees from working on opposing side of matters they worked on for State
- “Personal and substantial” participation
- Life of matter (not limited to one year)



Post-employment



Post-employment:

Post-employment cooling off requirement and Particular Matter Restrictions *can* be waived



CONFLICTS OF INTERESTS:

Decisions/Votes

- Can't participate in decisions/votes under certain circumstances



CONTACT US:

INDIANA OFFICE OF INSPECTOR GENERAL

www.in.gov.ig

(317)232-3850

info@ig.in.gov



EXECUTIVE BRANCH LOBBYING

Commissioner Rebecca Holwerda



Transparency

Governor Joseph E. Kernan
signed Executive Order 04-11
on April 27, 2004.

STATE OF INDIANA
EXECUTIVE DEPARTMENT
INDIANAPOLIS

EXECUTIVE ORDER: 04-11

**FOR: REGISTRATION OF EXECUTIVE BRANCH LOBBYISTS
TO ALL WHOM THESE PRESENTS MAY COME, GREETINGS:**

WHEREAS, many individuals and businesses seek to influence the decisions of the Executive Branch of government relating to policies, procurement, and other business;

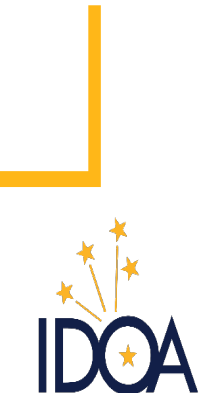
WHEREAS, the Executive Branch decisions that these individuals and businesses seek to influence involve the expenditure of billions of taxpayers' dollars and the operations of all aspects of government;

WHEREASand

WHEREAS, the General Assembly already has undertaken a similar process to register persons who lobby the General Assembly by establishing the Lobby Registration Commission and procedures for lobbyists to register and report their activities and expenditures.

NOW, THEREFORE, I, JOSEPH E. KERNAN, by virtue of the authority vested in me as Governor of the State of Indiana, do hereby order that:

...



Transparency

In 2005,
the Indiana Department of
Administration (IDOA)
promulgated rules for Executive
Branch Lobbyists,
effective Jan. 1, 2006.

In 2006,
the General Assembly passed
Public Law 89-2006, Sec. 15,
requiring registration and
reporting of Executive Branch
Lobbyists.

25 Indiana Administrative Code Article 6. Executive Branch Lobbyists

- Rule 1. Definitions
- Rule 2. Registration Requirements
- Rule 3. Duties of the Commissioner
- Rule 4. Prohibitions
- Rule 5. Enforcement
- Rule 6. Severability

Indiana Code § 4-2-8 Registration and Reporting of Executive Branch Lobbyists



The numbers

For 2021

- 90 registered executive branch lobbyists
- \$1,010,465.59 in compensation

For 2022 to date

- 74 registered executive branch lobbyists
- \$89,447.66 in compensation to date



Who is an Executive Branch Lobbyist?

“...any individual who is employed and receives payment, or who contracts for financial consideration, exceeding one thousand dollars (\$1,000) in any registration year, for the purpose of engaging in executive branch lobbying activity.” 25 IAC 6-1-1(8)

** A registration year is a calendar year (January – December). See 25 IAC 6-2-1



Who is NOT an Executive Branch Lobbyist?

See 25 IAC 6-1-1(8)(A) through (F)

Some examples:

- An attorney representing a client in a proceeding conducted under IC 4-21.5 (AOPA)
- Media
- Communications for the sole purpose of gathering information relating to a bid, procurement, or public work per statute

Why should I care about executive branch lobbying?



- 1- Most of you are members of the Executive Branch.
- 2- You and your executive team may be subject to lobbying efforts.
- 3- Executive branch lobbyists are prohibited from serving on executive branch boards, commissions, authorities or task forces **unless** the board, commission, authority or task force is an advisory body and not a policy making body. IC 4-2-6-11.5.

4- Post employment restrictions apply to you when you leave state employment (365 day cooling off period- no lobbying). IC 4-2-6-11(b)(1).

You can help with transparency & compliance

- Is the meeting “executive branch lobbying activity”?
- Is the person properly registered? (check the database)
- Know your agency boards & commissions
- Leave the EBL brochures at your agency front desk.
- Send inquires to Director of Executive Branch Lobbying
- Understand where to look for more information.

<https://secure.in.gov/idoa/lobbyistreg/Search.aspx>

eb1@idoa.IN.gov

<https://www.in.gov/idoa/state-purchasing/executive-branch-lobbying/>





What is “executive branch lobbying activity”?

“action or communication made to delay, oppose, promote, or otherwise influence the outcome of an executive branch action.” 25 IAC 6-1-1(7)

“Executive branch action” is defined at 25 IAC 6-1-1(6).

The Process



Step 1. Registration

1. Start at IDOA's Homepage

<https://www.in.gov/idoa/>

I Want to:

"Register as an Executive Branch Lobbyist" link in lower left of the Homepage

The link will take you to the Executive Branch Lobbying (EBL) webpage.

<https://www.in.gov/idoa/state-purchasing/executive-branch-lobbying/>

2. Create an Account

From the EBL page, click the Register/Sign In link. Pay the \$50 registration fee.

Third Party Delegates are permitted and must be approved by the lobbyist before updating the account.

3. Update as required

Within 15 days of executive branch lobbying activity. When the lobbyist's employment changes.

Don't close the account until executive branch lobbying activity has concluded for the calendar year.

Step 3: Updates to the account

“If a material change occurs in any of the information contained in a registration statement, an appropriate amendment shall be filed with the department within fifteen (15) days after the change.” 25 IAC 6-2-3(a)

Some examples:

- New lobbying contact with a member of the executive branch
- Change in compensation
- New client (real party in interest)
- New employer



Step 4: File Annual Report

“In addition to filing an initial registration statement under section 1 of this rule, starting in 2007, an executive branch lobbyist shall file with the department, not later than January 15, a signed annual report on a form approved by the commissioner...” 25 IAC 6-2-2

- DUE by January 15th of the following year

EXAMPLE: 2022 registration requires an annual report closing the account by January 15, 202.

- REGISTRATION DOES NOT ROLL OVER TO NEXT YEAR.



Compliance

Under Oath

Registration and annual report must be filed under oath
IC 4-2-8-3

Accurate information

Filing Fees

\$50 registration fee.

\$50 annual report fee

Enforcement

IDOA Commissioner
25 IAC 6-5-1

Referral to Inspector General
IC 4-2-8-5(a)

Enforcement

■ 25 IAC 6-5-1 Enforcement Authority

Sec. 1. (a) The commissioner shall take all steps allowed by applicable law to enforce this article.

(b) The office of the inspector general shall receive complaints concerning unlawful executive branch lobbying activity, violations of the executive branch lobbying rules, or violations of state ethics rules committed by executive branch lobbyists.

(c) Complaints alleging unlawful executive branch lobbying activity, violations of the executive branch lobbying rules, or violations of state ethics rules may be filed with the office of the inspector general by:

(1) the department;

(2) any appointing authority of an agency; or

(3) any person



Penalties & Sanctions from SEC

IC 4-2-6-12 Violations; penalties; sanctions

Sec. 12. If the commission finds a violation of this chapter, [IC 4-2-7](#), or [IC 4-2-8](#), or a rule adopted under this chapter [IC 4-2-7](#), or [IC 4-2-8](#), in a proceeding under section 4 of this chapter, the commission may take any of the following actions:

...

- (10) Revoke the registration of a person registered as a lobbyist under [IC 4-2-8](#).
- (11) Bar a person from future lobbying activity with a state officer or agency.



Resources

IDOA's website for Executive Branch Lobbying

<https://www.in.gov/idoa/state-purchasing/executive-branch-lobbying/>

Executive Branch Lobbying Manual

https://www.in.gov/idoa/files/EBLR_Manual_090911_.pdf

IC 4-2-8 <http://iga.in.gov/legislative/laws/2021/ic/titles/004/#4-2-8>

25 IAC 6 <http://iac.iga.in.gov/iac//T00250/A00060.PDF>



Executive Branch Lobbying

Executive Director

Tammera J. Glickman

Indiana Department of Administration

TGlickman@idoa.IN.gov

317.234.8851



AGENCY CONTACT INFORMATION

GENERAL QUESTIONS RELATING TO THE PRESENTATIONS: contracts@atg.in.gov

AGENCY INQUIRIES MOVING FORWARD SHOULD BE DIRECTED TO:

DOA: tglickman@idoa.in.gov or contracts@idoa.in.gov

OAG: contracts@atg.in.gov

SBA: OIEgunyomi@sba.IN.gov

IOT: jehrenberg@iot.in.gov or tmesser@iot.in.gov

OIG: info@ig.in.gov

