



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 570

February 25, 2022

ISSUE

Whether the revolving door provision in Government Code section 572.054(b) prohibits a former employee of a regulatory agency who participated in canceling a request for proposal (“RFP”) during her state service from receiving compensation for assisting with a response to a subsequent RFP for the same service or product. (AOR-655)

SUMMARY

Like separate contracts, separate RFPs leading to separate contracts are separate “matters” for purposes of the revolving door provision in Government Code section 572.054(b). However, the conclusion that a specific work activity constitutes “participation in” one matter does not necessarily preclude the conclusion that the same work also constitutes “participation in” another matter. Tex. Ethics Comm’n Op. No. 397 (1998).

When an officer or employee of an agency participates in the decision to cancel or rescind an RFP, and the agency subsequently issues another RFP for the same service or product, the employee may have participated in both the rescinded RFP and the reissued RFP for purposes of section 572.054(b), even if the RFP is not reissued until after the employee’s state service has concluded. Whether the former officer or employee participated in the reissued RFP depends on, among other things, whether the agency reviews or analyzes the former officer’s or employee’s work in connection with reissuing the RFP.

Here, the requestor has asked the Commission to rely on facts that would demonstrate her lack of participation in the subsequent RFP, so this opinion concludes that she is not precluded from working on a response. However, we caution agency officers and employees against using their authority to cancel a procurement for essential state services with an intent to profit from their knowledge of the agency’s inevitable search for a new provider.

FACTS

The requestor seeks an opinion from the Commission on the applicability of Section 572.054(b). She is a former employee of a regulatory agency who, during her state service, had oversight over a program serviced by a private company pursuant to a contract with the agency. The

requestor was also involved in the development and issuance of the agency's requests for proposal ("RFP") soliciting bids to provide those services.

Near the conclusion of her state service, the agency canceled the pending RFP for the renewal of this program over concerns regarding the scoring process. The requestor acknowledges she was involved in the development, issuance, and cancellation of this RFP. Upon the cancellation of the RFP, the requestor recused herself from any discussions about the agency's future procurements and, shortly thereafter, retired from state service.

Ten months after the RFP was canceled—and eight months after the requestor retired—the agency began meeting with interested companies in connection with a forthcoming reissued RFP for the same program. Based in part on the information gained and the feedback received from these meetings, the agency published draft evaluation criteria for the forthcoming RFP. The requestor did not participate in any of these meetings or in drafting the criteria.

The requestor now wishes to accept compensation in connection with helping a private company respond to the reissued RFP.

ANALYSIS

Section 572.054(b) prohibits former state officers and employees of regulatory agencies from receiving any compensation for services rendered on behalf of any person "regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer's or employee's official responsibility." Tex. Gov't Code § 572.054(b). In short, this law prohibits a former state employee from working on a "matter" the former state employee "participated" in as an employee of the state agency.

The Government Code defines "particular matter" as a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding. Tex. Gov't Code § 572.054(h)(2). The Commission has previously opined that the "term 'particular matter' refers to a particular proceeding rather than to a particular subject matter" Similarly, it has opined that former state employees are not prohibited from working in subject areas or for employers with which they became familiar in the course of their state employment. *Id.* (citing Tex. Ethics Comm'n Op. No. 364 (1997)).

The requestor relies primarily on Ethics Advisory Opinion No. ("EAO") 397, which in part states that "[s]eparate contracts are separate 'matters' for purposes of the revolving door provision in Government Code section 572.054(b)." Tex. Ethics Comm'n Op. No. 397 (1998). The requestor asserts that because the Commission has concluded that separate contracts are separate matters, "it logically follows that the separate RFPs leading to those contracts are also separate matters." We agree.

However, EAO 397 is also careful to clarify that "a conclusion that a particular work activity constitutes 'participation in' one matter ... does not necessarily preclude the conclusion that the same activity also constitutes 'participation in' another matter." *Id.* ("In circumstances in which two matters are interdependent pieces of a larger project, an agency employee's 'participation' in one of the matters would also constitute 'participation' in the other matter if the employee's

work on the first matter is being reviewed or analyzed in the second matter.”). Put simply, even though the RFPs constitute separate matters, the requestor may have participated in both.

The facts presented here make for an even closer call than EAO 397. In that opinion, the “separate contracts” were for distinct, albeit related, services. Here, on the other hand, the two RFPs are for the same service or set of services. In fact, the second RFP only exists because the first RFP was rescinded by the agency, and the requestor participated in making that decision.

Nevertheless, the requestor did not participate in the reissued RFP for purposes of section 572.054(b). Not only did she recuse herself from any discussion or development of the reissued RFP, a comparison of the evaluation criteria for the canceled RFP with the proposed criteria for the forthcoming RFP makes clear that the two are significantly different. *Cf.* Tex. Ethics Comm’n Op. No. 397 (1998) (“an agency employee’s ‘participation’ in one of the matters would also constitute ‘participation’ in the other matter if the employee’s work on the first matter is being reviewed or analyzed in the second matter”). Consequently, the requestor may receive compensation in connection with working on a response to the new RFP. However, the Penal Code prohibits the requestor from using any nonpublic information she gained by virtue of her public service to benefit herself or her prospective employer. Tex. Penal Code § 39.08(a).

Furthermore, the Commission takes this opportunity to caution state officers and employees against using their authority as public servants to benefit their prospective careers in the private-sector. The law prohibits, for example, an employee of a regulatory agency from canceling an RFP with the intention of creating for himself a private-sector job with a prospective bidder on a reissued RFP. This kind of self-dealing would also violate the spirit of multiple standards of conduct applicable to all state officers and employees, including 572.051(a)(3) (“A state officer or employee should not ... accept other employment or compensation that could reasonably be expected to impair the officer’s or employee’s independence of judgment in the performance of the officer’s or employee’s official duties”) and 572.051(a)(5) (A state officer or employee should not ... intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer’s or employee’s official powers or performed the officer’s or employee’s official duties in favor of another”).