



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 578

September 29, 2022

ISSUES

Whether a government employee's direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation under Section 572.069 of the Government Code.

Whether Section 572.069 of the Government Code prohibits a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during his state service. (AOR-668.)

SUMMARY

Direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation.

Affiliates are different persons for purposes of Chapter 572 of the Government Code. Therefore, Section 572.069 of the Government Code does not prohibit a former employee of a state agency from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the employee participated during his state service.

FACTS

The requestor is currently employed with the Employees Retirement System of Texas (ERS) as an investment advisor. The requestor developed two portfolios of investments for ERS that ERS now plans to open to outside investment through partnership with an outside mutual fund company. ERS and the mutual fund company would share profits from the fund. The mutual fund company selected by ERS would then independently contract with affiliated registered investment advisers or registered investment sub-advisors to help make decisions about which securities to include in the mutual fund's portfolio.

The requestor is not responsible for the ultimate decision to choose a mutual fund company as a partner, the final terms of a deal, and whether and at what level to fund the mutual fund. However, the requestor has directly communicated with mutual fund companies regarding the terms of a potential agreement with ERS. The requestor has relayed information to mutual fund

companies about the terms ERS would like and reported back to ERS decision makers with what the mutual companies would agree to.

The requestor asks whether section 572.069 of the Texas Government Code would prohibit him from accepting prospective employment with the mutual fund company that contracts with ERS to run the mutual fund, or an affiliate company of the mutual fund company.

The requestor states that if unable to work for the mutual fund company, his prospective employment would be as a registered investment adviser or registered investment sub-advisor for a separate company hired by the mutual fund company. The prospective employer would be organized as distinct and separate company from the mutual fund company with a separate tax identification number.

ANALYSIS

Section 572.069 prohibits former state officers and employees who participated on behalf of a state agency in a procurement or contract negotiation from accepting employment from any person involved in that procurement or contract negotiation for two years after the contract is signed or the procurement is terminated or withdrawn. Tex. Gov't Code § 572.069.

The requestor developed the portfolios that would form the base of the mutual fund offered under a partnership with a mutual fund company. He also communicated directly with mutual fund companies about the terms ERS seeks for the partnership and the terms the mutual fund companies would require. We think it is clear the requestor has participated in a procurement or contract negotiation on behalf of ERS with the mutual fund companies the requestor has discussed potential contractual terms. As a consequence, the requestor may not accept employment from a mutual fund company in which he engaged in contract negotiations before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn. *Id.*

The requestor asks whether he may accept employment with an affiliate company to a mutual company with which he engaged in contract negotiations. The answer to that question turns on whether the affiliate of the mutual fund company is a distinct “person,” for purposes of section 572.069.

Chapter 572 of the Government Code defines “person” as “an individual or business entity” and defines “business entity” as “any entity recognized by law through which business for profit is conducted, including a sole proprietorship, partnership, firm, corporation, holding company, joint stock company, receivership, or trust.” Tex. Gov't Code §§ 572.002(2), 572.002(7).

In Tex. Ethics. Comm'n Op. No. 572 (2022), we held that “the law does not prohibit an individual from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the requestor participated during her state service.” We relied on the definition of “affiliate” in state law to determine that two affiliates are distinct persons for purposes of Chapter 572 of the Government Code. *Id.* (citing Tex. Bus. Org. Code § 1.002(1)).

Here, the definition of an affiliate company to a mutual fund company compels the same conclusion. The request states that the mutual fund company would contract with an investment advisor or sub-advisor to manage the fund's securities portfolio. The advisors or sub-advisors are considered "affiliated persons" to the mutual fund company. The Investment Company Act of 1940, which regulates the organization of companies, including mutual funds, defines an "affiliated company" as an "affiliated person." 15 U.S.C § 80a-2(a)(2). An "'affiliated person' of another person means," in part "any person directly or indirectly owning, controlling or holding with power to vote, 5 per centum or more of the outstanding securities of such other person." 15 U.S.C § 80a-2(a)(3).

In other words, by definition, an affiliate company to a mutual fund company is a distinct person from the mutual fund company. Regardless of the federal definition, the requestor stated that the advisor or sub-advisor would be organized as a distinct and separate company from the mutual fund company with a separate tax identification number indicating the affiliate is a separate person. We assume those facts to be true.

The affiliate of the mutual fund company is a separate person from the mutual fund company, and the requestor has not participated in procurement or contract negotiation with the affiliate of the mutual fund company. Therefore, we must conclude Section 572.069 does not prohibit an individual from accepting employment from an affiliate of a person that was involved in procurements or contract negotiations in which the requestor participated during his state service.

Consequently, the requestor may accept the prospective employment with affiliates of the mutual fund company selected by ERS.