

ADVISORY OPINION

APPROVAL DATE: May 15, 1998

NUMBER: 98-07

STATUS: **Current**

REVIEWED ON: March 2, 2016

NEXT REVIEW: March 2021

REFERENCES: RCW 42.52.020RCW 42.52.030,
RCW 42.52.040, RCW 42.52.120, RCW 42.52.160,
WAC 292-110-010.

SUMMARY OF CHANGES: Updated format only.

Outside Employment/Subcontracting

QUESTIONS

1. May a state employee work as a subcontractor to a state subcontractor on projects for his or her state agency?
2. May a state employee work as a subcontractor to a state subcontractor on unrelated projects?
3. May a state employee also work as an employee of a state subcontractor?

ANSWERS

1. Yes, depending on the facts surrounding the subcontracting relationship. Provided that the state employee meets the conditions for outside employment under RCW 42.52.120, and did not use his or her state position to influence the selection of a subcontractor, a state employee may work as a subcontractor to his or her state agency.

In circumstances where a subcontract is obtained subsequent to an agreement between a state agency and a contractor, a state officer or state employee who is employed as a subcontractor to the contractor does not require Executive Ethics Board approval for the subcontract. However, if a state officer or state employee obtains a subcontract prior to the award of a contract, and the contractor uses the subcontractor's name or otherwise identifies a state officer or state employee as a subcontractor, the proposed subcontract would fall under RCW 42.52.120(2).

2. Yes, provided the conditions for outside employment are met under RCW 42.52.120(1). A state employee is not prevented from working as a subcontractor to a contractor that does business with the employee's state agency on non-agency projects provided that the conditions for outside employment under RCW 42.52.120(1) are met.

3. Yes, as long as the state employee does not have a conflict of interest under any specific provision of RCW 42.52. There is no provision in RCW 42.52 that prohibits a state employee from working as an employee of a state contractor. Such employment, however, may be limited by provisions that establish ethical guidelines for acceptable outside employment including, but not limited to, RCW 42.52.020, Activities incompatible with official duties; RCW 42.52.030, Financial interests in transactions; RCW 42.52.040, Assisting in transactions; and, RCW 42.52.120, Compensation for outside activities; and, any applicable agency policy.

ANALYSIS

Washington State University's central computer control and monitoring system uses a standardized technology provided by a sole source subcontractor. Although the subcontractor's employees do part of the installation work during capital projects, others may also be hired to perform specific installations. One of those hired by the subcontractor has been a control technician who works for Facilities Operations at Washington State University. The technician's primary duties are to install, maintain, and replace control systems for the state agency. These duties are not regulatory in nature.

Because the control technician is performing substantially similar work as both a state employee and a subcontractor, concern has been expressed that the similarity of the work itself may create a conflict of interest under the state's ethics law. A related concern is that the control technician could be assigned to perform state work in a facility where he also works as a subcontractor, thus providing him with an opportunity to use state time and resources to perform his subcontracting work. Based on these concerns, the agency has requested an interpretation of whether outside work as a subcontractor necessarily violates one or more provisions of RCW 42.52.

Outside employment is regulated under RCW 42.52.120. If a state officer or state employee intends to engage in outside employment, and is not seeking a contract or grant with a state agency, the conditions under RCW 42.52.120(1) apply. This subsection provides that a state officer or state employee may not receive any thing of economic value under any contract or grant outside of his or her official duties unless each of the following conditions are met:

- (a) The contract or grant is bona fide and actually performed;
- (b) The performance or administration of the contract or grant is not within the course of the officer's or employee's official duties, or is not under the officer's or employee's official supervision;
- (c) The performance of the contract or grant is not prohibited by RCW 42.52.040 or by applicable laws or rules governing outside employment for the officer or employee;
- (d) The contract or grant is neither performed for nor compensated by any person from whom such officer or employee would be prohibited by RCW 42.52.150(4) from receiving a gift;
- (e) The contract or grant is not one expressly created or authorized by the officer or employee in his or her official capacity.

Under RCW 42.52.010(6) a contract includes an employment contract.

In this case, the state employee is not a regulatory employee, and does not participate in the acquisition of goods and services. All capital construction contracts are negotiated and administered through Facilities Development, a separate department at Washington State University. This department is also responsible for overseeing quality control and contract compliance. There is also no direct contractual relationship between the subcontractor that employs the control technician and Facilities Operations. The subcontractor is responsible to a mechanical contractor, who in turn is responsible to a general contractor. The general contractor is directly responsible to Facilities Development.

In circumstances where a subcontract is obtained subsequent to an agreement between a state agency and a contractor, a state officer or state employee who is employed as a subcontractor to the contractor does not require Executive Ethics Board approval for the subcontract. However, if a state officer or state employee obtains a subcontract prior to the award of a contract, and the contractor uses the subcontractor's name or otherwise identifies a state officer or state employee as a subcontractor, the proposed subcontract would fall under RCW 42.52.120(2). In this case, however, the attenuated relationship between the subcontractor and the employee's agency, the absence of regulatory responsibilities, and the employee's compliance with RCW 42.52.120(1), creates a subcontracting situation that would not violate the state's ethics law. Such employment must also comply with the restrictions on use of state resources for personal benefit or the benefit of other persons under RCW 42.52.160(1) and WAC 292-110-010.

In Advisory Opinion 97-03 the Board advised that a state officer or employee of a regulatory agency could not conduct an outside business or accept outside employment in an area that the state officer or employee regulated. This prohibition notwithstanding, the Board agreed that state officers or employees may accept employment if the employment is unrelated to official duties and the officer or employee did not participate in the regulation of the employer.

Although the state employee in this instance is not engaged in regulation, a similar analysis applies. Because work as a subcontractor to a state subcontractor on non-agency projects is unrelated to the control technician's official duties for the state agency, the control technician can perform this type of work for the state subcontractor without violating RCW 42.52.

There is no provision in RCW 42.52 that prohibits a state employee from working as an employee of a state subcontractor. Such employment, however, may be limited by provisions that establish ethical guidelines for acceptable outside employment including, but not limited to, RCW 42.52.020, Activities incompatible with official duties; RCW 42.52.030, Financial interests in transactions; RCW 42.52.040, Assisting in transactions; and, RCW 42.52.120, Compensation for outside activities; and, any applicable agency policy. Such determinations depend on the context of the outside employment relationship and the official duties of the state officer or state employee.

In this particular case, the analysis would not change, provided that the outside employment could be performed without the use of state time or resources under RCW 42.52.160(1).