

TEXAS TRANSPORTATION COMMISSION

VARIOUS Counties

MINUTE ORDER

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Title 43, Texas Administrative Code, Section 27.8 prescribes ethical standards of conduct applicable to private entities, including consultants and subconsultants, participating in the comprehensive development agreement (CDA) program of the Texas Department of Transportation (department).

Section 27.8(c)(8) provides that a consultant actively engaged and performing procurement services to the department with respect to a CDA project may be a proposer or participate as an equity owner, team member, consultant, or subconsultant of or to a proposer for another CDA project, or may have a financial interest in any of the foregoing entities with respect to another CDA project, provided the consultant submits a request for a written determination under 43 TAC §27.8(c)(9) that establishes to the satisfaction of the Texas Transportation Commission (commission) that such participation or interest would not constitute a conflict of interest or create the appearance of a conflict of interest, and the consultant institutes ethical walls or other safeguards required by the department.

Pursuant to Section 27.8(c)(9), in determining whether a conflict of interest exists or whether to approve an exception to the applicability of Section 27.8(c) (conflict of interest rules) to services performed by a consultant or subconsultant, the commission shall consider the recommendation of the executive director of the department and:

- (1) the extent to which the firm obtained access to or the ability to gain knowledge of confidential or sensitive information, procedures, policies, and processes concerning the CDA program or a particular project or procurement that could provide an unfair competitive advantage with respect to the procurement or project at issue;
- (2) the type of consulting services at issue;
- (3) the particular circumstances of each procurement;
- (4) the specialized expertise needed by the department and proposers to implement the procurement;
- (5) the past, current, or future working relationship between the consultant and the department;
- (6) the period of time between the potential conflict situation and the project at issue; and
- (7) the potential impact on the procurement and project at issue, including competition.

On November 22, 2011, IDC Inc. (IDC) submitted a request to the executive director for a determination in accordance with Section 27.8(c)(9) that a conflict of interest does not exist between IDC's procurement services and IDC's potential participation on a CDA developer team for the I-35E, Grand Parkway, SH 249, and SH 288 CDA projects. IDC is currently under contract, as a subconsultant to URS Corporation, to perform procurement services for the SH 183 CDA project in Dallas County.

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As an Historically Underutilized Business (HUB) subconsultant, IDC has provided preliminary engineering services for the SH183 project in Dallas County.

In its request letter, IDC states that it has not had access to any confidential information. URS provided IDC with a stick diagram which identified project termini, from which IDC is preparing a schematic and cost estimate for the SH 183 project.

IDC states that the firm's staff has not participated in any meetings or conference calls during which sensitive information has been discussed. According to URS' letter to TxDOT, dated August 12, 2011, URS maintains security and control over confidential information and documents through a firewall which extends to subconsultants on their procurement team. According to URS, "Subconsultants are retained to carry out the obligations of their contracts, such as gather information or conduct research. They are not included in TxDOT deliberations or decision making."

Most of the criteria in Section 27.8(c)(9) are considered when determining whether to grant an exception to the applicability of the conflict of interest rules to the services in question. The criterion of concern in the issuance of a determination in response to IDC's request is the extent to which the firm obtained access to or the ability to gain knowledge of confidential or sensitive information, procedures, policies, and processes concerning the comprehensive development agreement program or a particular project or procurement that could provide an unfair competitive advantage with respect to the procurement or project at issue.

A consultant providing procurement services may be privy to discussions concerning sensitive or confidential information, including strategies for structuring the procurement, evaluation criteria and points to be assigned to each evaluation criterion, and what is important to evaluators, that other proposers will not be aware of. Moreover, those consultants may participate in internal discussions the department has concerning issues that come up at one-on-one meetings with proposers during industry review of the draft request for proposals for a CDA project. Those issues typically are not project specific. A consultant providing procurement services will be aware of the department's sensitivities on those issues and how far the department will be willing to go to compromise on those issues. This understanding of the department's procurement and negotiation strategy can be used to the advantage of the consultant and the proposer who uses their consulting services.

In addition, discussions during one-on-one meetings may involve the confidential business strategy of a proposer that is the competitor of the consultant on a different project. Additionally, the department, historically and currently, conducts CDA procurements for multiple projects at the same time. A procurement engineer on a project is tasked to review the confidential alternative technical concepts submitted by proposers for that project. The proposers submitting the alternative technical concepts are potential competitors to the procurement engineer's proposer. Given the schedule for CDA procurements, it is possible that consultants may be reviewing the alternative technical concepts of their competitors at the same time that they are developing their own alternative technical concepts for a different project.

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Department staff has indicated that IDC has not been privy to current sensitive information that could be carried forward and valuable in future CDAs. IDC has not been involved with the planning of strategy sessions for the current candidate CDA projects, and IDC's involvement in past efforts is not directly applicable to the current philosophy in developing CDA procurement strategies. In addition, IDC's involvement in past efforts resulted in documents that are now public and available to all prospective bidders. Any sensitive information or knowledge IDC may have gained during those activities is either public or no longer current and relevant to future project discussions.

Based on the information provided by IDC and department staff, IDC has not obtained access to or gained knowledge of confidential or sensitive information, procedures, policies, and processes concerning the CDA program or a particular project or procurement that could provide an unfair competitive advantage with respect to the future procurements and projects IDC is seeking to participate as a member of a proposer or developer team, either through never having obtained access to such information, or because the information is no longer sensitive or confidential because it is publicly available or no longer relevant to future project procurements.

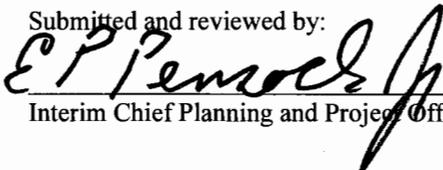
In accordance with the requirements of Section 27.8(c)(9), the executive director has recommended that the commission determine that IDC's participation on a proposer team with respect to the Grand Parkway, SH 249, SH 288 and I-35E projects would not constitute a conflict of interest or create the appearance of a conflict of interest. There is insufficient information supporting a conclusion that a conflict of interest exists, or that there is the appearance of a conflict of interest.

Section 27.8(c)(12) provides that in instances where there is a written determination under Section 27.8(c)(9) that a conflict of interest does not exist, or an exception to the application of the conflict of interest rules is granted, the department may still, in its discretion, restrict the scope of services the consultant or subconsultant may be eligible to perform for the department in order to further the intent and goals of the conflict of interest rules.

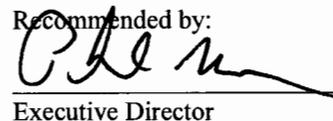
IT IS THEREFORE DETERMINED by the commission, in consideration of the foregoing facts and the recommendation of the executive director, and pursuant to the requirements of 43 TAC §27.8(c)(8) and (9), that IDC's participation as an equity owner, team member, consultant, or subconsultant of or to a proposer for the Grand Parkway, SH 249, SH 288 and I-35E projects, would not constitute a conflict of interest or create the appearance of a conflict of interest.

IT IS FURTHER ORDERED that the department review IDC's scope of services under their subconsultant procurement engineering contract and restrict that scope as necessary to ensure that neither a conflict of interest nor the appearance of a conflict of interest is created in the future as a result of IDC's participation as part of a proposer team.

Submitted and reviewed by:

  
Interim Chief Planning and Project Officer

Recommended by:

  
Executive Director

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Minute Number      Date Passed