

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

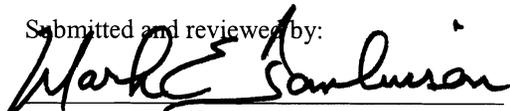
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §27.8, relating to Conflict of Interest and Ethics Policies, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth verbatim in this minute order, except that they are subject to technical corrections and revisions, approved by the General Counsel, necessary for compliance with state or federal law or for acceptance by the Secretary of State for filing and publication in the *Texas Register*.

IT IS THEREFORE ORDERED by the commission that the amendments to §27.8 are adopted and are authorized for filing with the Office of the Secretary of State.

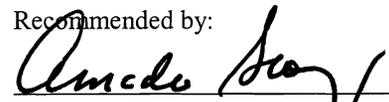
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



Director, Texas Turnpike  
Authority Division

Recommended by:



Executive Director

**112749 JUL 28 11**

Minute  
Number

Date  
Passed

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1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts  
3 amendments to §27.8, concerning Conflict of Interest and Ethics  
4 Policies. The amendments to §27.8 are adopted with changes to  
5 the proposed text as published in the June 13, 2011 issue of the  
6 *Texas Register* (36 TexReg 3589).

7

8 EXPLANATION OF ADOPTED AMENDMENTS

9 Under Transportation Code, §223.209, the Texas Transportation  
10 Commission (commission) is required to adopt rules, procedures,  
11 and guidelines governing selection of a developer for a  
12 comprehensive development agreement (CDA) and negotiations to  
13 promote fairness, obtain private participants in projects, and  
14 promote confidence among those participants.

15

16 The commission previously adopted §27.8 to prescribe conflict of  
17 interest provisions and communications restrictions in order to  
18 provide a fair and unbiased CDA procurement process and to  
19 ensure high standards of ethics and fairness in the  
20 administration of the CDA program. Changes to §27.8 are  
21 necessary in order to reduce impacts on competition by ensuring  
22 there are a sufficient number of qualified firms available to  
23 participate as part of proposer teams, while protecting the  
24 integrity and fairness of the CDA program and all procurements  
25 carried out by the department as part of the program.

1  
2 Amendments to §27.8(c)(2) clarify that all provisions in that  
3 subsection that apply to a consultant or subconsultant also  
4 apply to individual employees of a consultant or subconsultant  
5 who participated in the performance of services for the  
6 department.

7  
8 Amendments to §27.8(c)(3) provide that if the department  
9 determines that the performance of services by a consulting firm  
10 raises a conflict of interest, the resulting prohibition or  
11 restriction on that firm as provided in that subsection  
12 continues until the date the performance of services ends and  
13 all work product prepared by the entity and other information  
14 and data provided to the entity in the performance of services  
15 is publicly available.

16  
17 The change in the period in which a conflict of interest applies  
18 is generally consistent with the circumstances in which the  
19 department may determine a conflict of interest does not exist  
20 with respect to certain consultant services under §27.8(c),  
21 where the executive director or commission, as appropriate, will  
22 consider the extent to which a firm has access to information  
23 that could provide a competitive advantage, and whether that  
24 information is made available on an equal and timely basis to  
25 all proposers for a project. The change will allow additional

1 private entities, under the circumstances described in  
2 §27.8(c)(3), to participate in procurements as part of a  
3 proposer team. Individual employees of a consultant or  
4 subconsultant who performed the services that create a conflict  
5 of interest may continue to be subject to a restriction or  
6 prohibition.

7  
8 Amendments to §27.8(c)(6) make conforming changes to paragraph  
9 (6) in connection with the deletion of §27.8(c)(9).

10  
11 Amendments to §27.8(c)(7) authorize a consultant that is  
12 actively providing preliminary engineering and architectural  
13 services to the department for a CDA project to be a proposer or  
14 to participate as an equity owner, team member, consultant, or  
15 subconsultant of or to a proposer for the same project, or have  
16 a financial interest in any of the foregoing entities with  
17 respect to that project, provided all work product prepared by  
18 the consultant and other information and data provided to the  
19 consultant in the performance of services is made available to  
20 all proposers prior to the issuance of the request for proposals  
21 for that project. This change will provide more certainty to  
22 consultants providing those services and to developers forming  
23 proposer teams that the consultant will be able to participate  
24 on a proposer team under the conditions described in this  
25 paragraph.

1  
2 Amendments to §27.8(c)(8) authorize a consultant that is  
3 actively engaged and performing procurement services or  
4 financial services with respect to a CDA project to be a  
5 proposer or to participate as an equity owner, team member,  
6 consultant, or subconsultant of or to a proposer for a CDA  
7 project other than the project for which the consultant is  
8 providing procurement or financial services, or to have a  
9 financial interest in any of the foregoing entities with respect  
10 to a different CDA project, provided the consultant submits a  
11 request for a written determination under §27.8(c)(9) that  
12 establishes to the Commission's satisfaction that such  
13 participation or interest would not constitute a conflict of  
14 interest or create the appearance of a conflict of interest, and  
15 the consultant institutes ethical walls or other safeguards  
16 required by the department. This change allows a consultant,  
17 under certain conditions and safeguards necessary to provide a  
18 fair and unbiased CDA procurement process, to concurrently  
19 provide procurement and financial services to the department and  
20 participate on a CDA proposer team.

21  
22 The amendments delete §27.8(c)(9). Provisions applicable to  
23 consultants participating as a proposer or as an equity owner,  
24 team member, consultant, or subconsultant of or to a proposer  
25 are covered in §27.8(c)(6) and (8).

1  
2 Amendments to §27.8(c)(13) make conforming changes to this  
3 paragraph in connection with the deletion of §27.8(c)(9).

4  
5 COMMENTS

6 Comments were received from Glenn Gregory, Vice President, The  
7 HNTB Companies (HNTB), Raoul Portillo, Vice President, Jacobs  
8 Engineering Group, Inc. (Jacobs), Philip Yerby, Vice President,  
9 CH2M Hill, and David Weeks, P.E., URS Corporation (URS).

10  
11 Comment:  
12 HNTB states they do not take exception to any of the proposed  
13 amendments, but have concerns that the proposed amendments do  
14 not remove an unnecessary prohibition on consultants performing  
15 procurement services or financial services with respect to a CDA  
16 project from participating as an equity owner, team member,  
17 consultant, or subconsultant of or to a proposer for another CDA  
18 project. While they agree a prohibition makes sense for  
19 services on the same CDA project, they do not believe that  
20 extending the prohibition to unrelated CDA projects provides  
21 additional protection for the State of Texas.

22  
23 HNTB states that concerns that a consultant would gain an unfair  
24 advantage on all CDA projects by virtue of working on a single  
25 CDA procurement are no longer valid, as the department's policy

1 objectives and selection process are well understood by all  
2 interested parties. Procurement documents have been nearly  
3 identical, and consultants participating in CDA procurements  
4 possess a detailed understanding of the department's policies,  
5 evaluation methodology, and approach to CDA financial and  
6 business terms. A consultant performing procurement activities  
7 in one location does not gain an unfair advantage on proposals  
8 for CDA projects regardless of location. Project specific  
9 issues and challenges will vary from project to project.

10

11 HNTB states that the proposed amendments restrict open  
12 competition for CDA procurements by unnecessarily restricting  
13 the pool of qualified proposers. The department would receive  
14 more competitive proposals if consultants prohibited from  
15 joining proposer teams were allowed to do so. Consultants with  
16 design-build and CDA experience will be reluctant to respond to  
17 requests for proposals to provide procurement services due to  
18 the uncertainty imposed on working on other CDA projects in the  
19 state. Requests to the executive director for case-by-case  
20 exceptions under the current rule increase opportunities for the  
21 appearance of arbitrary treatment of consultants, and fail to  
22 provide consultants with the certainty needed to assess conflict  
23 of interest risks associated with a particular CDA when proposer  
24 teams begin forming.

25

1 HNTB proposes that §27.8(c)(8) be amended by deleting the phrase  
2 "or any other comprehensive development agreement project", and  
3 that §27.8(c)(9) be deleted in its entirety.

4

5 Response:

6 The department has made the requested changes, but has amended  
7 §27.8(c)(8) to prescribe conditions on a consultant providing  
8 procurement or financial services to the department being a  
9 proposer or participating as an equity owner, team member,  
10 consultant, or subconsultant of or to a proposer for a  
11 comprehensive development agreement project other than the  
12 project for which the consultant is providing those services.

13

14 The commission and the department believe that conditions on a  
15 consultant's participation as an equity owner, team member,  
16 consultant, or subconsultant of or to a proposer for a CDA  
17 project that is not the project for which the consultant is  
18 providing procurement or financial services are necessary in  
19 order to protect the integrity and fairness of the CDA program  
20 and all procurements carried out by the department as part of  
21 the program, to avoid circumstances where certain consultants or  
22 CDA proposers obtain, or have the appearance of obtaining, an  
23 unfair competitive advantage as a result of work performed for  
24 the department, and to protect the department's interests and  
25 confidential and sensitive information.

1  
2 One of the primary purposes of the conditions in §27.8(c)(8) is  
3 to prevent "insider" knowledge during procurements that could  
4 create a potential unfair advantage for a proposer or a  
5 potential disadvantage for the department. While the department  
6 has used similar procurement documents for each CDA project,  
7 consultants participating in CDA procurements have worked on  
8 revisions to the procurement documents that will be used on all  
9 projects. In addition, "inside information" that could provide  
10 a competitive advantage for a proposer or disadvantage for the  
11 department is information that is not included in the  
12 procurement documents. This includes negotiation strategies and  
13 approach to business terms in changing financial markets. All  
14 consultants participating in CDA procurements will not possess a  
15 full understanding of the department's policies, evaluation  
16 methodology, and approach to CDA financial and business terms.  
17  
18 For example, a consultant providing procurement or financial  
19 services will be privy to discussions concerning evaluation  
20 criteria and points to be assigned to each evaluation criterion,  
21 and what is important to evaluators, that other proposers will  
22 not be aware of. Moreover, those consultants participate in  
23 internal discussions the department has concerning issues that  
24 come up at one-on-one meetings with proposers during industry  
25 review of the draft request for proposals for a CDA project.

1 Those issues typically are not project specific. A consultant  
2 providing procurement or financial services will be aware of the  
3 department's sensitivities on those issues and how far the  
4 department will be willing to go to compromise on those issues.  
5 This understanding of the department's negotiation strategy can  
6 be used to the advantage of the consultant and the proposer the  
7 consultant is a part of. In addition, discussions during one on  
8 one meetings may involve the confidential business strategy of a  
9 proposer that is the competitor of the consultant on a different  
10 project. Additionally, the department, historically and  
11 currently, conducts CDA procurements for multiple projects at  
12 the same time. A procurement engineer on a project is tasked to  
13 review the confidential alternative technical concepts submitted  
14 by proposers for that project. The proposers submitting the  
15 alternative technical concepts are potential competitors to the  
16 proposer the procurement engineer is a part of. Given the  
17 schedule for CDA procurements, it is possible that consultants  
18 may be reviewing the alternative technical concepts of their  
19 competitors at the same time that they are developing their own  
20 alternative technical concepts for a different project.

21  
22 The department has been able to attract a substantial number of  
23 competitive proposals on past CDA projects that were procured  
24 under the existing rules. Each procurement has been very  
25 competitive. The commission and the department believe that

1 allowing consultants providing procurement and financial  
2 services to participate on proposer teams for other projects  
3 without appropriate safeguards will result in the perception of  
4 a conflict of interest and unfair competitive advantage that  
5 itself will reduce competition in CDA procurements, could lead  
6 to bid protests and bring into question the integrity of the CDA  
7 program. The impact on competition because of the perception  
8 that the procurement is unfair is believed to outweigh any  
9 possible reduction in the number of competitive CDA proposals or  
10 proposals for procurement engineering services that might be  
11 received if consultants prohibited from joining proposer teams  
12 were allowed to do so.

13  
14 The amendments to §27.8(c)(8) will provide a mechanism for  
15 consultants providing procurement and financial services to  
16 participate on a proposer team for a project other than the  
17 project the consultant is providing those services. The  
18 amendments will provide more certainty to consultants providing  
19 those services that the consultant can participate on a proposer  
20 team under the conditions described in that paragraph. Requests  
21 for case-by-case exceptions under the current rules are reviewed  
22 using the criteria prescribed in §27.8(c)(10) (renumbered by  
23 this rule as §27.8(c)(9)), which should prevent the arbitrary  
24 treatment of consultants. Additionally, that paragraph has been  
25 changed to provide that, with regard to a consultant actively

1 engaged and performing procurement services with respect to a  
2 comprehensive development agreement, the commission rather than  
3 the executive director will make the determination of whether a  
4 conflict of interest exists or whether to approve an exception  
5 to the applicability of the conflict of interest provisions.  
6 Having the determination made by the commission at a public  
7 meeting will provide additional protection against the  
8 perception of arbitrary treatment of consultants. Associated  
9 changes have been made to other provisions of §27.8 to reflect  
10 that change made to renumbered §27.8(c)(9).

11

12 Comment:

13 Jacobs states they support the proposed changes to §27.8, but  
14 offer a change for consideration by the commission that would  
15 enable increased competition on future CDAs and would benefit  
16 the department by broadening the availability of firms to  
17 participate in the expanded CDA program authorized by the 82nd  
18 Legislature. Jacobs proposes that §27.8(c)(8) be amended by  
19 deleting the phrase "or any other comprehensive development  
20 agreement project".

21

22 Response:

23 The department has made the requested change, but has amended  
24 §27.8(c)(8) to prescribe conditions on a consultant providing  
25 procurement or financial services to the department being a

1 proposer or participating as an equity owner, team member,  
2 consultant, or subconsultant of or to a proposer for a  
3 comprehensive development agreement project other than the  
4 project for which the consultant is providing those services.

5

6 Comment:

7 CH2M Hill states that the proposed amendments to §27.8(c)(8)  
8 will not accomplish the commission's objective to ensure a  
9 sufficient number of qualified firms are available to  
10 participate as part of proposer teams. CH2M Hill requests that  
11 §27.8(c)(8) be amended so that the limitation in that paragraph  
12 only applies to those projects the consultant worked on as the  
13 procurement engineer.

14

15 CH2M Hill states that under the current proposal, the department  
16 will eliminate valuable experience from Texas engineering and  
17 construction firms that are available to provide services for  
18 CDA programs and serve on developer teams, reducing the  
19 available experienced talent and resource capacity. The  
20 department needs this resource capacity to provide strong  
21 competition, competitive pricing, and on-time project delivery  
22 for projects identified in SB 1420. The department will  
23 eliminate valuable experience from Texas engineering firms to  
24 provide services as procurement engineers. The proposed  
25 conflict of interest policy is substantially more restrictive

1 than those used in other states and countries where procurement  
2 engineers are restricted from serving on developer teams for  
3 those projects where the firm provided procurement consulting.  
4 The proposed amendments increase and change the restrictions on  
5 existing contracts, which precluded work under contracts related  
6 to the specific projects managed under the procurement  
7 engineering contract.

8

9 Response:

10 The department has made the requested change, but has amended  
11 §27.8(c)(8) to prescribe conditions on a consultant providing  
12 procurement or financial services to the department being a  
13 proposer or participating as an equity owner, team member,  
14 consultant, or subconsultant of or to a proposer for a  
15 comprehensive development agreement project other than the  
16 project for which the consultant is providing those services.

17

18 The department has been able to attract a substantial number of  
19 competitive proposals on past CDA projects that were procured  
20 under the existing rules. Each procurement has been very  
21 competitive. The commission and the department believe that  
22 allowing consultants providing procurement and financial  
23 services to participate on proposer teams for other projects  
24 without appropriate safeguards will result in the perception of  
25 a conflict of interest and unfair competitive advantage that

1 itself will reduce competition in CDA procurements and bring  
2 into question the integrity of the CDA program. The impact on  
3 competition because of the perception that the procurement is  
4 unfair is believed to outweigh any possible reduction in the  
5 number of competitive CDA proposals or proposals for procurement  
6 engineering services that might be received if consultants  
7 prohibited from joining proposer teams were allowed to do so.

8

9 While the conflict of interest policies in §27.8 may be more  
10 restrictive than those used in certain other jurisdictions where  
11 procurement engineers are restricted from serving on developer  
12 teams for those projects where the firm provided procurement  
13 consulting, the policies are not as restrictive as those used in  
14 some other jurisdictions. Moreover, the commission and the  
15 department are not aware of another jurisdiction with a public  
16 private partnership (PPP) program as large as that of the  
17 department. The department, historically and currently,  
18 conducts CDA procurements for multiple projects at the same  
19 time. As a result, the conflict of interest policies in §27.8  
20 will necessarily differ from those in other jurisdictions whose  
21 PPP program is smaller in size than that of the department.  
22 Certain other states that have had concurrent PPP procurements  
23 have adopted conflict of interest policies that restrict  
24 procurement engineers for one project from serving on developer  
25 teams for other projects.

1  
2 The restrictions in §27.8 apply even if those restrictions  
3 differ from those in existing procurement engineering contracts.  
4 Those contracts only concern the project for which those  
5 services are being provided, not other projects. Moreover, the  
6 department could not legally agree to a provision inconsistent  
7 with those rules.

8  
9 Comment:

10 URS noted with concern that §27.8(c)(8) excludes consultants  
11 engaged in performing procurement services from participating in  
12 a CDA for that project or any other project. URS recognizes  
13 that a project-specific conflict of interest requirement is  
14 appropriate, but states that the level of conflict of interest  
15 defined in the rules does not exist in other states, which allow  
16 consultants to work on both sides with appropriate safeguards.  
17 There is no proprietary information that would become available  
18 to a firm working on the procurement side, other than the  
19 project specific information which is already managed  
20 effectively through confidentiality agreements. URS would be  
21 pleased to work under individual confidentiality agreements and  
22 with appropriate firewalls established between the procurement  
23 engineering and other delivery teams.

24  
25 Response:

1 The primary purpose of the conditions in §27.8(c)(8) is to  
2 prevent "insider" knowledge during procurements that could  
3 create a potential advantage for a proposer or a potential  
4 disadvantage for the department. While the department has used  
5 similar procurement documents for each CDA project, the "inside  
6 information" that could provide a competitive advantage for a  
7 proposer or disadvantage for the department is information that  
8 is not included in the procurement documents. All consultants  
9 participating in CDA procurements will not possess a full  
10 understanding of the department's policies, evaluation  
11 methodology, and approach to CDA financial and business terms.  
12 There is sensitive information that is only available to firms  
13 working as procurement engineers, and which could provide a  
14 competitive advantage for a proposer or disadvantage for the  
15 department if disclosed. Because of the sensitivity of this  
16 information, the commission and the department are not  
17 comfortable relying solely on confidentiality agreements.

18

19 While the conflict of interest policies in §27.8 may be more  
20 restrictive than those used in certain other jurisdictions where  
21 procurement engineers are restricted from serving on developer  
22 teams for those projects where the firm provided procurement  
23 consulting, the policies are not as restrictive as those used in  
24 some other jurisdictions. Moreover, the commission and the  
25 department are not aware of another jurisdiction with a PPP

1 program as large as that of the department. The department,  
2 historically and currently, conducts CDA procurements for  
3 multiple projects at the same time. As a result, the conflict  
4 of interest policies in §27.8 would necessarily differ from  
5 those in other jurisdictions whose PPP program is smaller in  
6 size than that of the department. Certain other states that  
7 have had concurrent PPP procurements have adopted conflict of  
8 interest policies that restrict procurement engineers for one  
9 project from serving on developer teams for other projects.

10

11 STATUTORY AUTHORITY

12 The amendments are adopted under Transportation Code, §201.101,  
13 which provides the commission with the authority to establish  
14 rules for the conduct of the work of the department, and more  
15 specifically, Transportation Code, §223.209, which requires the  
16 commission to adopt rules, procedures, and guidelines governing  
17 selection of a developer for a comprehensive development  
18 agreement and negotiations to promote fairness, obtain private  
19 participants in projects, and promote confidence among those  
20 participants.

21

22 CROSS REFERENCE TO STATUTE

23 Transportation Code, Chapter 223.

1 SUBCHAPTER A. COMPREHENSIVE DEVELOPMENT AGREEMENTS

2 §27.8. Conflict of Interest and Ethics Policies.

3 (a) Purpose. This section prescribes ethical standards of  
4 conduct applicable to private entities, including consultants  
5 and subconsultants, participating in the department's  
6 comprehensive development agreement program. A private entity's  
7 failure to comply with these standards of conduct may result in  
8 the private entity's preclusion from participation in a project  
9 or sanctions being imposed under §27.9 of this subchapter  
10 (relating to Sanctions).

11 (b) Gifts and benefits. A proposer, developer, consultant,  
12 or subconsultant participating in the comprehensive development  
13 agreement program, or an affiliate of any of those entities, may  
14 not offer, give, or agree to give a gift or benefit to a member  
15 of the commission or to a department employee whose work for the  
16 department includes the performance of procurement services  
17 relating to a project under this subchapter, or who participates  
18 in the administration of a comprehensive development agreement.  
19 Notwithstanding this prohibition, a consultant or subconsultant  
20 (unless a member of a proposer or developer team, if authorized  
21 under subsection (c) of this section) may:

22 (1) pay for an ordinary business lunch; and

23 (2) offer, give, or agree to give a token item that does

1 not exceed an estimated value of \$25 (excluding cash, checks,  
2 stocks, bonds, or similar items), where the item is distributed  
3 generally as a normal means of advertising.

4 (c) Conflicts of interest.

5 (1) Purpose. This subsection prescribes department  
6 policy on conflicts of interest relating to consultants and  
7 subconsultants participating in the comprehensive development  
8 agreement program, and thereby:

9 (A) protects the integrity and fairness of the program  
10 and all procurements carried out by the department as part of  
11 the program;

12 (B) avoids circumstances where a consultant, proposer,  
13 or developer obtains, or appears to obtain, an unfair  
14 competitive advantage as a result of work performed by a  
15 consultant or subconsultant;

16 (C) provides guidance to private entities so they may  
17 assess, and make informed business decisions concerning their  
18 participation in the program; and

19 (D) protects the department's interests and  
20 confidential and sensitive project-specific and programmatic  
21 information.

22 (2) Applicability. This subsection applies to all  
23 comprehensive development agreement projects undertaken by the

1 department. This subsection applies to consultants and  
2 subconsultants, and to individual employees of consultants and  
3 subconsultants who participated in the performance of services  
4 for the department. A reference in this subsection to a  
5 consultant or subconsultant also means individual employees of a  
6 consultant or subconsultant who participated in the performance  
7 of services for the department. To the extent that the  
8 department has previously consented in writing to a consultant's  
9 or subconsultant's performance of services that are in conflict  
10 with this subsection, participation on a proposer team as an  
11 equity owner or team member, acting as a consultant or  
12 subconsultant to a proposer, or having a financial interest in a  
13 proposer or an equity owner or team member of a proposer, this  
14 subsection does not modify or alter the prior consent. The  
15 foregoing does not prevent, however, the application of this  
16 subsection to the consultant or subconsultant for other  
17 projects, including taking into account the performance of  
18 services on the project for which consent was obtained. This  
19 subsection may by extension prohibit or restrict the ability of  
20 a proposer to have a consultant or subconsultant participate on  
21 the proposer team as an equity owner or team member, act as a  
22 consultant or subconsultant to the proposer, or have a financial  
23 interest in the proposer or an equity owner or team member of

1 the proposer.

2 (3) Period in which a conflict of interest applies. If a  
3 determination is made under this subsection [~~the executive~~  
4 ~~director determines~~] that the performance of services by a  
5 consultant or subconsultant raises a conflict of interest, the  
6 resulting prohibition or restriction provided in this subsection  
7 continues:

8 (A) for the private entity until [~~one year after~~] the  
9 date the performance of services ends and all work product  
10 prepared by the entity and other information and data provided  
11 to the entity in the performance of services is publicly  
12 available; and

13 (B) for an individual that is an employee of or was  
14 employed by the consultant or subconsultant and who participated  
15 in the performance of services for the department:

16 (i) until five years after the date the performance  
17 of services ends for those projects for which the individual was  
18 materially involved in providing services to the department; and

19 (ii) until one year from the date the performance of  
20 services ends for projects for which the individual was not  
21 materially involved in providing services to the department.

22 (4) Application to new firm. If a conflict of interest  
23 is determined to apply to an individual pursuant to paragraph

1 (3)(B) of this subsection, the conflict of interest and  
2 prohibition with respect to the individual will not apply to the  
3 individual's new place of employment. If the new employer is  
4 otherwise eligible to perform consultant services, the new  
5 employer will remain eligible despite the employment of the  
6 individual. This paragraph does not apply to an individual  
7 employed by an affiliate of its previous employer, and the  
8 conflict of interest and prohibition with respect to the  
9 individual will apply to such affiliate.

10 (5) Federal requirements. For federal-aid projects, the  
11 department must comply with the Federal Highway Administration's  
12 organizational conflict of interest regulations (found in 23 CFR  
13 §636.116). The requirements of this subsection do not limit,  
14 modify, or otherwise alter the effect of those regulations, and  
15 will be applied consistent with those regulations.

16 (6) General conflict of interest standards. Except as  
17 provided in paragraph (7) of this subsection, no consultant  
18 providing consultant services to the department with respect to  
19 a comprehensive development agreement project may be a proposer  
20 or participate as an equity owner, team member, consultant, or  
21 subconsultant of or to a proposer for that project, or have a  
22 financial interest in any of the foregoing entities with respect  
23 to that project. Except as provided in paragraph [~~paragraphs~~]

1 (8) [~~and (9)~~] of this subsection, a consultant performing  
2 consultant services for a comprehensive development agreement  
3 project will not be prohibited from participating on a different  
4 comprehensive development agreement project as a proposer or  
5 participating as an equity owner, team member, consultant, or  
6 subconsultant of or to a proposer for the different project, or  
7 having a financial interest in any of the foregoing entities  
8 with respect to the different project.

9 (7) Providing services for the same project. A  
10 consultant that is actively providing preliminary engineering  
11 and architectural services to the department with respect to a  
12 comprehensive development agreement project, or that performed  
13 and completed environmental or traffic and revenue services for  
14 a comprehensive development agreement project, may be a proposer  
15 or participate as an equity owner, team member, consultant, or  
16 subconsultant of or to a proposer for the same project, or have  
17 a financial interest in any of the foregoing entities with  
18 respect to that project, provided:

19 (A) with respect to a consultant providing preliminary  
20 engineering and architectural services, all work product  
21 prepared by the consultant and other information and data  
22 provided to the consultant in the performance of services is  
23 made available to all proposers prior to the issuance of the

1 request for proposals for that project; or

2 (B) the executive director issues a written  
3 determination under paragraph (9) [~~(10)~~] of this subsection  
4 that:

5 (i) [~~(A)~~] the consultant will not, or in the case of  
6 the previous performance of consultant services did not, have  
7 access to or obtain knowledge of confidential or sensitive  
8 information, procedures, policies and processes that could  
9 provide an unfair competitive advantage with respect to the  
10 procurement for that project;

11 (ii) [~~(B)~~] the data and information provided to the  
12 consultant in the performance of the consultant services is  
13 either irrelevant to the procurement for that project or is  
14 available on an equal and timely basis to all proposers;

15 (iii) [~~(C)~~] the work products from the consultant  
16 incorporated into or relevant to the procurement for that  
17 project are generally available on an equal and timely basis to  
18 all proposers;

19 (iv) [~~(D)~~] with respect to environmental services, a  
20 record of decision or finding of no significant impact has been  
21 issued for the project; and

22 (v) [~~(E)~~] with respect to traffic and revenue  
23 services, there will be no impact on the project's plan of

1 finance, including the ability to obtain and close funding and  
2 potential sources of funding.

3 (8) Procurement and financial services. A consultant  
4 actively engaged and performing procurement services or  
5 financial services with respect to a comprehensive development  
6 agreement project may not be a proposer or participate as an  
7 equity owner, team member, consultant, or subconsultant of or to  
8 a proposer for that project [~~or any other comprehensive~~  
9 ~~development agreement project~~], or have a financial interest in  
10 any of the foregoing entities with respect to that [~~any~~  
11 ~~comprehensive development agreement~~] project. A consultant  
12 actively engaged and performing procurement services or  
13 financial services with respect to a comprehensive development  
14 agreement project may be a proposer or participate as an equity  
15 owner, team member, consultant, or subconsultant of or to a  
16 proposer for another comprehensive development agreement  
17 project, or may have a financial interest in any of the  
18 foregoing entities with respect to another comprehensive  
19 development agreement project, provided the consultant submits a  
20 request for a written determination under paragraph (9) of this  
21 subsection that establishes to the commission's satisfaction  
22 that such participation or interest would not constitute a  
23 conflict of interest or create the appearance of a conflict of

1 interest, and the consultant institutes ethical walls or other  
2 safeguards required by the department.

3  ~~[(9) Completed services. A consultant that performed~~  
4  ~~consultant services for a comprehensive development agreement~~  
5  ~~project and completed the services may be a proposer or~~  
6  ~~participate as an equity owner, team member, subconsultant or~~  
7  ~~consultant of or to a proposer on a different comprehensive~~  
8  ~~development agreement project, or have a financial interest in~~  
9  ~~any of the foregoing entities with respect to a different~~  
10  ~~project, provided that the executive director issues a written~~  
11  ~~determination under paragraph (10) of this subsection that the~~  
12  ~~conditions in paragraph (7)(A) (C) of this subsection have been~~  
13  ~~met.]~~

14 (9) [~~(10)~~] Requests for determinations or exceptions. A  
15 consultant, proposer, or developer may submit a request to the  
16 executive director for a determination whether participation in  
17 a comprehensive development agreement project or the performance  
18 of particular services with respect to a comprehensive  
19 development agreement project would constitute a conflict of  
20 interest, or to request approval of an exception to the  
21 applicability of this subsection to those services. A request  
22 for approval of an exception may be made if a consultant,  
23 proposer, or developer desires to appeal a previous

1 determination [~~by the executive director~~] that a conflict of  
2 interest exists. The executive director will forward a request  
3 to the department's Office of General Counsel for analysis and  
4 recommendation prior to issuing a decision. In determining  
5 whether a conflict of interest exists, or whether to approve an  
6 exception, the commission or executive director, as appropriate,  
7 shall consider the executive director's recommendation and:

8 (A) the extent to which the firm or individual employee  
9 obtained access to or the ability to gain knowledge of  
10 confidential or sensitive information, procedures, policies, and  
11 processes concerning the comprehensive development agreement  
12 program or a particular project or procurement that could  
13 provide an unfair competitive advantage with respect to the  
14 procurement or project at issue;

15 (B) the type of consulting services at issue;

16 (C) the particular circumstances of each procurement;

17 (D) the specialized expertise needed by the department  
18 and proposers to implement the procurement;

19 (E) the past, current, or future working relationship  
20 between the consultant and the department;

21 (F) the period of time between the potential conflict  
22 situation and the project at issue; and

23 (G) the potential impact on the procurement and project

1 at issue, including competition.

2 (10) [~~(11)~~] Multiple services. If a consultant is  
3 providing more than one category of consultant services to the  
4 department and there are differences in the standards,  
5 restrictions, and limitations applicable to those categories,  
6 the standards, restrictions, and limitations applicable to a  
7 category that are more stringent will be applied.

8 (11) [~~(12)~~] Participation on proposer or developer team.  
9 A consultant participating with respect to a comprehensive  
10 development agreement project as a proposer or developer, or as  
11 an equity owner, team member, consultant, or subconsultant of or  
12 to a proposer or developer, or having a financial interest in  
13 any of the foregoing entities, is eligible to provide consultant  
14 services (other than procurement services) to the department for  
15 another comprehensive development agreement project, provided  
16 that, once the consultant is retained to perform consultant  
17 services for the department, the restrictions in this subsection  
18 shall apply.

19 (12) [~~(13)~~] Restriction of services and conditions to  
20 approvals and exceptions. In instances where [~~the executive~~  
21 ~~director has issued~~] a written determination under paragraph (9)  
22 [~~(10)~~] of this subsection that a conflict of interest does not  
23 exist (including, in particular, where the conditions prescribed

1 in paragraph [~~paragraphs~~] (7) [~~and (9)~~] of this subsection has  
2 [~~have~~] been met), or grants an exception to the application of  
3 this subsection under paragraph (9) [~~(10)~~], the department may  
4 still, in its discretion:

5 (A) restrict the scope of services the consultant or  
6 subconsultant may be eligible to perform for the department in  
7 order to further the intent and goals of this subsection; and

8 (B) condition an approval, determination, or exception  
9 as the commission or executive director determines appropriate  
10 to further the intent and goals of this subsection, including by  
11 requiring the consultant, subconsultant, proposer, or developer  
12 to execute confidentiality agreements, institute ethical walls,  
13 or segregate certain personnel from participation in a project  
14 or the performance of consultant services.

15 (13) [~~(14)~~] Provisions are nonexclusive. The provisions  
16 in this subsection do not address every situation that may arise  
17 in the context of the department's comprehensive development  
18 agreement program nor require a particular decision or  
19 determination [~~by the executive director~~] when faced with facts  
20 similar to those described in this subsection. The department  
21 retains the ultimate and sole discretion to determine on a case-  
22 by-case basis whether a conflict of interest exists and what  
23 actions may be appropriate to avoid, neutralize, or mitigate any

1 actual or potential conflict, or the appearance of any conflict.  
2 The provisions of this subsection shall not be construed to  
3 preclude or condone any conduct with regard to projects other  
4 than projects under a comprehensive development agreement. The  
5 department will continue to evaluate other projects based on its  
6 traditional conflict of interest standards.

7 (d) Rules of contact. In order to provide a fair and  
8 unbiased procurement process, a request for qualifications,  
9 request for proposals, or request for competing proposals and  
10 qualifications will contain rules of contact regulating  
11 communications between proposers or any of its team members and  
12 the commission, the department, and third parties involved in  
13 the procurement. Communication includes face-to-face,  
14 telephone, facsimile, electronic-mail (e-mail), or formal  
15 written communication. The rules of contact become effective  
16 upon the issuance of the request for qualifications, request for  
17 proposals, or request for competing proposals and  
18 qualifications. The rules of contact will include provisions:

19 (1) prohibiting a proposer or any of its team members  
20 from communicating with another proposer or its team members  
21 with regard to the project, request for qualifications, request  
22 for proposals, or request for competing proposals and  
23 qualifications, or either team's qualifications submittal or

1 proposal;

2 (2) requiring each proposer to designate one or more  
3 representatives responsible for contact with the department, and  
4 requiring the proposer to correspond with the department  
5 regarding the project, request for qualifications, request for  
6 proposals, or request for competing proposals and qualifications  
7 only through the department's authorized representatives and the  
8 proposer's designated representatives;

9 (3) prohibiting any ex parte communication regarding the  
10 project, request for qualifications, request for proposals, or  
11 request for competing proposals and qualifications or the  
12 procurement with any member of the commission or with any  
13 department staff, advisors, contractors, or consultants involved  
14 in the procurement until the earliest of the execution and  
15 delivery of the comprehensive development agreement, the  
16 rejection of all qualifications submittals or proposals by the  
17 department, or the cancellation of the procurement;

18 (4) permitting communications in exceptional  
19 circumstances and designating department personnel authorized to  
20 approve such communications, and providing that the restrictions  
21 on communications shall not preclude or restrict communications  
22 with regard to matters unrelated to the request for  
23 qualifications, request for proposals, or request for competing

1 proposals and qualifications, or participation in public  
2 meetings of the commission or any public or proposer workshop  
3 related to the project, request for qualifications, request for  
4 proposals, or request for competing proposals and  
5 qualifications;

6 (5) designating a department employee not involved in the  
7 procurement to act as an ombudsman who is authorized to receive  
8 confidential communications (including questions, comments, or  
9 complaints regarding the procurement) and who, after removing,  
10 to the extent practicable, any information identifying the  
11 proposer, forwards the communications to the employees  
12 designated as the department's authorized representatives; and

13 (6) authorizing the executive director to disqualify a  
14 proposer from the procurement and participation in the project  
15 at issue or to impose another sanction under §27.9 of this  
16 subchapter if it is determined that a proposer has engaged in  
17 any improper communications in violation of the rules of  
18 contact.

19 (e) Exceptions to rules of contact. Notwithstanding  
20 subsection (d)(1) of this section:

21 (1) subcontractors that are shared between two or more  
22 proposer teams may communicate with members of each of those  
23 teams so long as those proposers establish a protocol to ensure

1 that the subcontractor will not act as a conduit of information  
2 between the teams; and

3 (2) the prohibition provided by that subsection does not  
4 apply to public discussions regarding the project, request for  
5 qualifications, request for proposals, or request for competing  
6 proposals and qualifications at any department sponsored  
7 informational meetings.