

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose 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 proposed 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 proposed for adoption and are authorized for publication in the *Texas Register* for the purpose of receiving public comments.

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

112689 MAY 26 11

Minute Number

Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §27.8, concerning Conflict of Interest and Ethics
4 Policies.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

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

13

14 The commission previously adopted §27.8 to prescribe conflict of
15 interest provisions and communications restrictions in order to
16 provide a fair and unbiased comprehensive development agreement
17 procurement process and to ensure high standards of ethics and
18 fairness in the administration of the comprehensive development
19 agreement program. Changes to §27.8 are necessary in order to
20 reduce impacts on competition by ensuring there are a sufficient
21 number of qualified firms available to participate as part of
22 proposer teams, while protecting the integrity and fairness of
23 the comprehensive development agreement program and all
24 procurements carried out by the department as part of the
25 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 executive director
9 of the department determines that the performance of services by
10 a consulting firm raises a conflict of interest, the resulting
11 prohibition or restriction on that firm as provided in that
12 subsection continues until the date the performance of services
13 ends and all work product prepared by the entity and other
14 information and data provided to the entity in the performance
15 of services 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 executive director of the department may determine a conflict of
20 interest does not exist under §27.8(c)(9), relating to a
21 consultant that has completed its services. The change would
22 allow additional private entities, under the circumstances
23 described in §27.8(c)(3), to participate in procurements as part
24 of a proposer team. Individual employees of a consultant or
25 subconsultant who performed the services that create a conflict

1 of interest may continue to be subject to a restriction or
2 prohibition.

3

4 FISCAL NOTE

5 James Bass, Chief Financial Officer, has determined that for
6 each of the first five years the amendments as proposed are in
7 effect, there will be no fiscal implications for state or local
8 governments as a result of enforcing or administering the
9 amendments.

10

11 Mark Tomlinson, Director, Texas Turnpike Authority Division, has
12 certified that there will be no significant impact on local
13 economies or overall employment as a result of enforcing or
14 administering the amendments.

15

16 PUBLIC BENEFIT AND COST

17 Mr. Tomlinson has also determined that for each year of the
18 first five years in which the sections are in effect, the public
19 benefit anticipated as a result of enforcing or administering
20 the amendments will be to reduce impacts on competition by
21 ensuring there are a sufficient number of qualified firms
22 available to participate as part of proposer teams, while
23 protecting the integrity and fairness of the comprehensive
24 development agreement program and all procurements carried out
25 by the department as part of the program. There are no

1 anticipated economic costs for persons required to comply with
2 the sections as proposed. There will be no adverse economic
3 effect on small businesses.

4

5 SUBMITTAL OF COMMENTS

6 Written comments on the proposed amendments to §27.8 may be
7 submitted to Mark Tomlinson, Director, Texas Turnpike Authority
8 Division, Texas Department of Transportation, 125 East 11th
9 Street, Austin, Texas 78701-2483. The deadline for receipt of
10 comments is 5:00 p.m. on July 11, 2011.

11

12 STATUTORY AUTHORITY

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

22

23 CROSS REFERENCE TO STATUTE

24 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
3 the executive director determines that the performance of
4 services by a consultant or subconsultant raises a conflict of
5 interest, the resulting prohibition or restriction provided in
6 this subsection continues:

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

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

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

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

21 (4) Application to new firm. If a conflict of interest
22 is determined to apply to an individual pursuant to paragraph
23 (3)(B) of this subsection, the conflict of interest and

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

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

15 (6) General conflict of interest standards. Except as
16 provided in paragraph (7) of this subsection, no consultant
17 providing consultant services to the department with respect to
18 a comprehensive development agreement project may be a proposer
19 or participate as an equity owner, team member, consultant, or
20 subconsultant of or to a proposer for that project, or have a
21 financial interest in any of the foregoing entities with respect
22 to that project. Except as provided in paragraphs (8) and (9)
23 of this subsection, a consultant performing consultant services

1 for a comprehensive development agreement project will not be
2 prohibited from participating on a different comprehensive
3 development agreement project as a proposer or participating as
4 an equity owner, team member, consultant, or subconsultant of or
5 to a proposer for the different project, or having a financial
6 interest in any of the foregoing entities with respect to the
7 different project.

8 (7) Providing services for the same project. A
9 consultant that is actively providing preliminary engineering
10 and architectural services to the department with respect to a
11 comprehensive development agreement project, or that performed
12 and completed environmental or traffic and revenue services for
13 a comprehensive development agreement project, may be a proposer
14 or 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 the executive director issues
18 a written determination under paragraph (10) of this subsection
19 that:

20 (A) the consultant will not, or in the case of the
21 previous performance of consultant services did not, have access
22 to or obtain knowledge of confidential or sensitive information,
23 procedures, policies and processes that could provide an unfair

1 competitive advantage with respect to the procurement for that
2 project;

3 (B) the data and information provided to the consultant
4 in the performance of the consultant services is either
5 irrelevant to the procurement for that project or is available
6 on an equal and timely basis to all proposers;

7 (C) the work products from the consultant incorporated
8 into or relevant to the procurement for that project are
9 generally available on an equal and timely basis to all
10 proposers;

11 (D) with respect to environmental services, a record of
12 decision or finding of no significant impact has been issued for
13 the project; and

14 (E) with respect to traffic and revenue services, there
15 will be no impact on the project's plan of finance, including
16 the ability to obtain and close funding and potential sources of
17 funding.

18 (8) Procurement and financial services. A consultant
19 actively engaged and performing procurement services or
20 financial services with respect to a comprehensive development
21 agreement project may not be a proposer or participate as an
22 equity owner, team member, consultant, or subconsultant of or to
23 a proposer for that project or any other comprehensive

1 development agreement project, or have a financial interest in
2 any of the foregoing entities with respect to any comprehensive
3 development agreement project.

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

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

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

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

8 (12) Participation on proposer or developer team. A
9 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 (13) Restriction of services and conditions to approvals
20 and exceptions. In instances where the executive director has
21 issued a written determination under paragraph (10) of this
22 subsection that a conflict of interest does not exist
23 (including, in particular, where the conditions prescribed in

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 (1) subcontractors that are shared between two or more
21 proposer teams may communicate with members of each of those
22 teams so long as those proposers establish a protocol to ensure
23 that the subcontractor will not act as a conduit of information

1 between the teams; and

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