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 August 12, 2011, URS Corporation (URS) 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 URS' procurement services and URS' potential participation on a CDA developer team for the Grand Parkway and I-35E projects. URS is currently performing procurement services for the SH 183 CDA project in Dallas County.

In its request letter, URS states that there are limited instances where URS employees could gain confidential knowledge during a procurement that could provide an unfair competitive advantage, and in those instances where information not generally known by the public is presented to URS staff, URS has maintained ethical walls segregating procurement personnel from involvement with personnel associated with URS' CDA or design-build efforts.

URS states that the firm's first project development assignment under the procurement services contract is the current one relating to the SH 183 project. URS further states that TxDOT has implemented protocols to limit the sensitive information available to the procurement engineer by excluding staff from the financial and other committees engaged in the CDA selection process. URS also notes that all URS employees working on the SH 183 procurement have signed a confidentiality agreement and are subject to other firewalls prohibiting the sharing of confidential information with any person who does not have a need to know the information and who has not signed a confidentiality agreement.

URS states that the firm provides procurement services that are highly specialized and address areas of risk analysis, projections of anticipated municipal growth, value engineering and other project specific technical services, including reviewing CDA technical requirements that are publicly available. URS states that the exclusion of URS from participating on a developer team for CDA projects where it has not provided procurement services will result in the loss of expertise and decreased competition.

In its August 19, 2011, response to the department's request for additional information, URS states that URS staff has not participated in any meetings or conference calls in which sensitive information regarding the Grand Parkway and I-35E projects has been discussed or had access to sensitive information. URS states the firm did not participate because of a joint decision by the department and URS to limit the URS team's potential conflict of interest. URS further states that URS team members have not participated in discussions regarding business strategy and ideas of potential competitors for any CDA procurement.

URS states that URS has not been included in past meetings of legal and financial subcommittees for upcoming procurements, nor will they attend future meetings. The firm will be engaged in specific tasks that may be supplied to these subcommittees, and which involve technical aspects of analysis.

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 URS' 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 proposer the procurement engineer is a part of. 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.

Department staff has indicated that URS has not been privy to current sensitive information that could be carried forward and valuable in future CDAs. URS has not been involved with the planning of strategy sessions for the current candidate CDA projects, and URS' involvement in past efforts is not directly applicable to the current philosophy in developing CDA procurement strategies. In addition, URS' involvement in past efforts resulted in documents that are now public and available to all prospective bidders. Any sensitive information or knowledge URS 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 URS and department staff, URS 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 URS 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 URS' participation on a proposer team with respect to the Grand Parkway 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 URS' participation as an equity owner, team member, consultant, or subconsultant of or to a proposer for the Grand Parkway 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 the ethical walls that have been or are proposed to be implemented by URS, and existing confidentiality agreements signed by URS staff, and require URS to implement any additional safeguards deemed 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 URS' participation as part of a proposer team.

IT IS FURTHER ORDERED that the department review URS' scope of services under their 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 URS' participation as part of a proposer team.

Submitted and reviewed by:

Interim Director, Texas Turnpike Authority Division

Recommended by:

Interim Executive Director

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Minute Number

Date Passed