

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

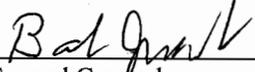
The Texas Transportation Commission (commission) finds it necessary to adopt amendments to §10.6, Conflict of Interest, and §10.102, Grounds for Sanctions, both relating to Ethical Conduct by Entities Doing Business with the Department to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted amendments, attached to this minute order as Exhibits A - C, 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 §10.6 and §10.102 are adopted and are authorized for filing with the Office of the Secretary of State.

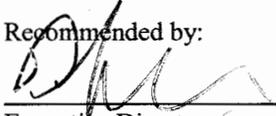
The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:



General Counsel

Recommended by:



Executive Director

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Minute Date
Number Passed

1 solicit business or influence a decision on behalf of the
2 current employer. Subsection (b)(2) prohibits all former
3 employees whose last salary was at or above the level of the
4 state's Salary Group A17 from working for a business entity on
5 any matter that they worked on while employed by the department.
6 Subsection (b)(2) is similar to the prohibition in Government
7 Code, §572.054(b), which is subject to statutory interpretation
8 by the Texas Ethics Commission. The department will follow the
9 Texas Ethics Commission's opinions related to that statutory
10 provision in making its determinations under subsection (b)(3).
11 Subsection (e) provides a method for a former employee or entity
12 that is subject to subsection (b) to ask for a determination of
13 whether a conflict of interest would exist in a specified
14 situation. The department will respond in writing to a proper
15 request. Subsection (f) makes subsection (b)(1) applicable only
16 to employees who leave the department on or after the effective
17 date of these rules.

18
19 Appeals would be handled through existing appeals processes. A
20 disqualification could be appealed by the filing of a protest,
21 denial of payment could be appealed by the filing of a contract
22 claim, and regular sanctions will be handled through the
23 sanction appeal process.

24
25 The amendments to §10.6 are needed in order to provide a fair

1 and unbiased contracting system and to ensure high standards of
2 ethics and fairness in the administration of the department's
3 programs.

4

5 Amendments to §10.102 allow the department to impose non-
6 sanction consequences for entities whose employees violate the
7 new provisions of §10.6 under a contract with the department.

8 In addition to possible sanctions, the department may disqualify
9 an entity from participating in the contract or it may refuse to
10 pay the entity for any work performed by the former employee
11 under the contract. This amendment is intended to deter
12 violations of the revolving door restrictions and to provide the
13 department with an appropriate remedy should a violation occur.
14 Having a former department employee on staff does not, in
15 itself, constitute a violation of these rules and will not
16 automatically disqualify an entity from any contract or payment.
17 The department will not disqualify an entity or refuse payment
18 if the entity was properly acting in reliance on a written
19 determination issued by the department under §10.6(e).

20

21 COMMENTS

22 Comments on the proposed amendments were received from the
23 American Council of Engineering Companies of Texas (ACEC) and
24 from an individual.

25

1 Comment: One commenter recommended that the words "at or" be
2 deleted from §10.6(c)(1) because it would, in some instances,
3 subject district engineers, division directors, office
4 directors, and region directors to the same restrictions as
5 members of the Administration.

6
7 Response: The department agrees that all positions at or above
8 the level of district engineer, division director, office
9 director, and region director should be subject to the same
10 restrictions. Subsection 10.6(b)(1) has been revised to apply a
11 one-year ban on certain contacts with the department to all
12 former employees at or above the level of district engineer,
13 division director, office director, or region director.

14
15 Comment: One individual commented that these post-employment
16 restrictions might discourage qualified professionals from
17 accepting upper-level positions at the department.

18
19 Response: The department disagrees with this comment. The
20 revolving door restrictions merely restate current law, and the
21 time restriction on influencing the department does not prevent
22 former employees from accepting private-sector employment, it
23 bars only certain limited actions that could be detrimental to
24 the public trust.

25

1 Comment: ACEC and one other commenter recommended that the
2 changes be made to apply only to employees who separate from the
3 agency after the effective date of the changes.

4

5 Response: The department agrees with this comment with regard to
6 the one-year ban and has added 10.6(f) to make the ban
7 applicable only to individuals who leave the department on or
8 after the effective date of the rule. The department declines
9 to add a grandfather clause for the general revolving door
10 restrictions because those restrictions are not different than
11 currently applicable state law.

12

13 Comment: ACEC commented that the department should not expand
14 its rules beyond the law.

15

16 Response: The department disagrees with this comment. Any
17 behavior that might reasonably give rise to a perception that
18 favoritism plays a part in the award of department contracts is
19 harmful to the integrity of the department's contracting system
20 and serves to discourage qualified providers from participating.
21 The rule's modest expansion of the provisions of the revolving
22 door statutes to the higher-level administrative positions will
23 address those concerns and will reinforce the department's
24 commitment to integrity and ethical behavior.

25

1 Comment: ACEC commented that there is no basis for
2 distinguishing between for-profit entities and government and
3 nonprofit entities.

4
5 Response: The department distinguishes between for-profit
6 entities and government and nonprofit entities because the
7 legislature has done the same in the revolving door statute.
8 (See the definitions of "person" and "business entity" in
9 Government Code, §572.002(7) and (2), respectively.) A major
10 purpose of revolving door laws is to preserve current government
11 employees from being influenced, consciously or unconsciously,
12 by the prospect of potential lucrative employment when making
13 decisions that affect private entities. Entities that are not
14 driven by profit motives would not have the same incentive to
15 make employment offers to former department employees.

16
17 Comment: ACEC questioned whether the department is a regulatory
18 agency under the revolving door statute and commented that the
19 wording in §10.6(b)(3) conflicts with the revolving door
20 statute.

21
22 Response: The department is a regulatory agency. The revolving
23 door statute defines "regulatory agency" as any statewide
24 executive agency having the power to adopt rules (Government
25 Code, §572.002(8) and §572.004). The language in the rule

1 closely tracks the language in the revolving door statute, and
2 the department will follow the Texas Ethics Commission's
3 opinions related to that statutory provision in making
4 determinations under subsection (b)(3).

5

6 Comment: ACEC commented that the revolving door prohibitions
7 should not be lifetime.

8

9 Response: The rule merely restates the lifetime prohibition
10 found in the revolving door statute.

11

12 Additional change:

13 The department, in its discretion rather than in response to
14 comments, determined that a change to the proposed rules is
15 necessary to provide more certainty for persons affected by the
16 rules. The change adds new subsection (e) to §10.6 which
17 provides a method for a former department employee or entity
18 that is subject to the rules to ask for a written determination
19 of whether a conflict of interest would exist in a specified
20 situation. The department will promptly respond to a written
21 request that contains a concise explanation of the relevant
22 facts of the situation. An accompanying change added in
23 §10.102(b) prohibits the department from imposing sanctions on
24 an entity on the basis of the entity violating the revolving
25 door rules in a particular situation if the entity properly

1 acted in reliance on a written determination of the department
2 provided under §10.6(e).

3

4 STATUTORY AUTHORITY

5 The amendments are adopted under Transportation Code, §201.101,
6 which provides the commission with the authority to establish
7 rules for the conduct of the work of the department.

8

9 CROSS REFERENCE TO STATUTE

10 Government Code, Section 572.054.

1 SUBCHAPTER A. GENERAL PROVISIONS

2 §10.6. Conflict of Interest.

3 (a) For the purposes of this chapter, a conflict of
4 interest is a circumstance arising out of existing or past
5 activities, business interests, contractual relationships, or
6 organizational structure of an entity, or a familial or domestic
7 living relationship between a department employee and an
8 employee of the entity, and because of which:

9 (1) the entity's objectivity in performing the scope of
10 work sought by the department is or might be affected; or

11 (2) the entity's performance of services on behalf of the
12 department or participation in an agreement with the department
13 provides or may reasonably appear to provide an unfair
14 competitive advantage to the entity or to a third party.

15 (b) A for-profit entity, including a sole proprietorship,
16 has a conflict of interest if:

17 (1) an individual who held a position at or above the
18 level of district engineer, division director, office director,
19 or region director solicits business from or attempts to
20 influence a decision of the commission or department on behalf
21 of that entity within one year after the date of the
22 individual's separation from the department; or

23 (2) a former department employee whose last salary from

1 the department was at or above the minimum amount prescribed for
2 salary group A17 of the state position classification salary
3 schedule performs work on behalf of that entity regarding a
4 specific investigation, application, request for ruling or
5 determination, contract, claim, or judicial or other proceeding
6 in which the former employee participated, whether through
7 personal involvement or within the former employee's official
8 responsibility, while employed by the department.

9 (c) Subsection (b)(1) of this section does not apply to a
10 position that is designated as an interim position.

11 (d) For the purpose of subsection (b)(2) of this section,
12 an individual participated in a matter if the individual made a
13 decision or recommendation on the matter, approved, disapproved,
14 or gave advice on the matter, conducted an investigation related
15 to the matter, or took a similar action related to the matter.

16 (e) Before submitting a bid or undertaking some other
17 interaction with the department, a for-profit entity or a former
18 employee of the department to whom subsection (b) of this
19 section applies may request from the department a determination
20 of whether the interaction would constitute a conflict of
21 interest under subsection (b) of this section. Such a request
22 must be made in writing and must contain a concise explanation
23 of the relevant facts. The department will not respond to a

1 request under this subsection before consulting with the Office
2 of General Counsel. The department will issue a written
3 determination in response to a valid request made under this
4 subsection as soon as practicable.

5 (f) Subsection (b)(1) of this section applies only to an
6 individual whose employment with the department ends on or after
7 the date that paragraph takes effect.

1 SUBCHAPTER C. REQUIRED CONDUCT BY ENTITIES DOING
2 BUSINESS WITH THE DEPARTMENT

3 §10.102. Consequences of Violation [~~Grounds for Sanctions~~].

4 (a) An entity's violation of §10.101 of this subchapter
5 (relating to Required Conduct) is a ground for the imposition of
6 sanctions, score reduction, or removal from precertification
7 status under this chapter.

8 (b) In addition to any consequences imposed under
9 subsection (a) of this section, the department may disqualify an
10 entity with a conflict of interest described by §10.6(b) of this
11 chapter (relating to Conflict of Interest) from participating in
12 a contract to which the conflict applies, or may deny payment
13 for work performed by the former department employee under the
14 contract. The department may not disqualify or deny payment to
15 an entity under this subsection on the basis of facts if the
16 department has issued to the entity a written determination
17 under §10.6 of this chapter that those same facts do not
18 constitute a conflict of interest.