

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

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ALL Districts

The Texas Transportation Commission (commission) finds it necessary to propose 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 proposed 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 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:

Bob J. ...
General Counsel

Recommended by:

Phil ...
Executive Director

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Minute Number Date Passed

1 Proposed Preamble

2 The Texas Department of Transportation (department) proposes
3 amendments to §10.6, concerning Conflict of Interest, and
4 §10.102, concerning Grounds for Sanctions.

5

6 EXPLANATION OF PROPOSED AMENDMENTS

7 The department is proposing these amendments to expand the
8 definition of conflict of interest to include revolving door
9 restrictions for certain former upper-level employees and to add
10 additional consequences to the current sanction provisions for
11 violating the new prohibitions.

12

13 Amendments to §10.6 expand the definition of conflict of
14 interest to include certain activities that former upper-level
15 department employees may perform on behalf of their new
16 employers. The rule imposes a two-year ban on former upper-
17 level administrators of the department, in subsection (b)(1),
18 and a one-year ban on former district engineers, division
19 directors, office directors, and region directors, in subsection
20 (b)(2), that prohibits them from soliciting business from the
21 department or attempting to influence the Texas Transportation
22 Commission (commission) on behalf of a business entity. The ban
23 does not apply for interim positions. Subsection (b)(3)
24 prohibits all former employees whose last salary was at or above
25 the level of the state's Salary Group A17 from working for a

1 business entity on any matter that they worked on while employed
2 by the department. Subsection (b)(3) is similar to the
3 prohibition in Government Code, §572.054(b), which is subject to
4 statutory interpretation by the Texas Ethics Commission. The
5 department will follow the ethic commission's opinions related
6 to that statutory provision in making its determinations under
7 subsection (b)(3). The amendments to §10.6 are needed in order
8 to provide a fair and unbiased contracting system and to ensure
9 high standards of ethics and fairness in the administration of
10 the department's programs.

11
12 The amendments to §10.6 apply to current employees of the
13 department and recent retirees. Appeals would be handled
14 through existing appeals processes. A disqualification could be
15 appealed by the filing of a protest, denial of payment could be
16 appealed by the filing of a contract claim, and regular
17 sanctions will be handled through the sanction appeal process.

18
19 Amendments to §10.102 allow the department to impose non-
20 sanction consequences for entities whose employees violate the
21 new provisions of §10.6 under a contract with the department.
22 In addition to possible sanctions, the department may disqualify
23 an entity from participating in the contract or it may refuse to
24 pay the entity for any work performed by the former employee
25 under the contract. This amendment is intended to deter

1 violations of the proposed revolving door restrictions and to
2 provide the department with an appropriate remedy should a
3 violation occur.

4

5 FISCAL NOTE

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

11

12 Bob Jackson, General Counsel, has certified that there will be
13 no significant impact on local economies or overall employment
14 as a result of enforcing or administering the amendments.

15

16 PUBLIC BENEFIT AND COST

17 Mr. Jackson has also determined that for each year of the first
18 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 improved integrity in the department's
21 contracting processes. There are no anticipated economic costs
22 for persons required to comply with the sections as proposed.
23 There will be no adverse economic effect on small businesses.

24

1 SUBMITTAL OF COMMENTS

2 Written comments on the proposed amendments to §10.6 and §10.102
3 may be submitted to Bob Jackson, General Counsel, Texas
4 Department of Transportation, 125 East 11th Street, Austin,
5 Texas 78701-2483. The deadline for receipt of comments is 5:00
6 p.m. on March 12, 2012.

7

8 STATUTORY AUTHORITY

9 The amendments are proposed under Transportation Code, §201.101,
10 which provides the commission with the authority to establish
11 rules for the conduct of the work of the department.

12

13 CROSS REFERENCE TO STATUTE

14 None.

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 senior administrative
18 position of the department solicits business from or attempts to
19 influence a decision of the commission or department on behalf
20 of that entity within two years after the date of the
21 individual's separation from the department;

22 (2) an individual who held a position that is at or above
23 the level of district engineer, division director, office

1 director, or region director but that is not a senior
2 administrative position solicits business from or attempts to
3 influence a decision of the commission or department on behalf
4 of that entity within one year after the date of the
5 individual's separation from the department; or

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

15 (c) For the purpose of subsection (b) of this section,
16 "senior administrative position" means the position of executive
17 director or a position that is:

18 (1) at or above the level of district engineer, division
19 director, office director, or region director; and

20 (2) directly accountable to the commission or the
21 executive director.

22 (d) Subsections (b)(1) and (2), and (c) of this section do
23 not apply to a position that is designated as an interim

1 position.

2 (e) For the purpose of subsection (b)(3) of this section,
3 an individual participated in a matter if the individual made a
4 decision or recommendation on the matter, approved, disapproved,
5 or gave advice on the matter, conducted an investigation related
6 to the matter, or took a similar action related to the matter.

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.