



Preclusions

2023 PEPS Conference

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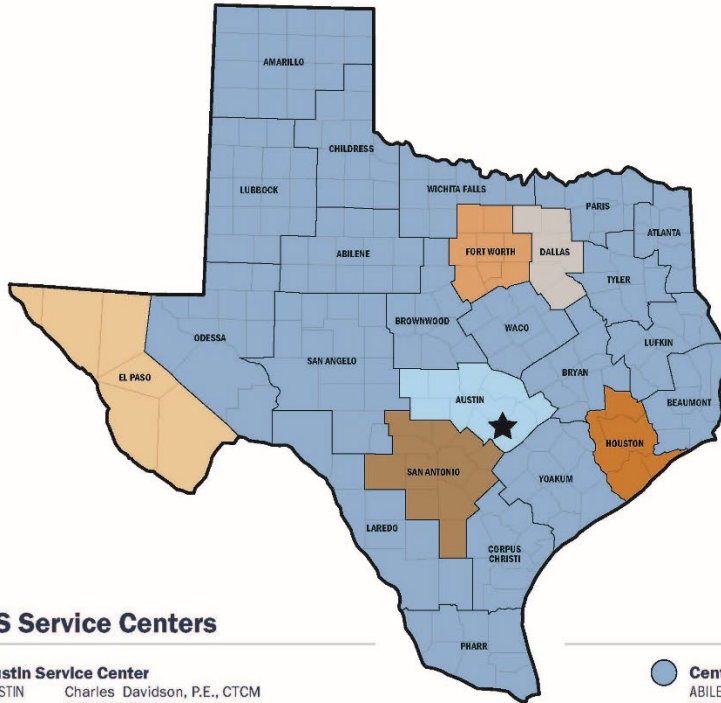
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What is a Preclusion?

A preclusion is an action taken by the Department to exclude or prohibit an individual or firm from participating in a contract or work authorization.





A preclusion is a measure used to mitigate the risks associated with issues such as conflicts of interests.

- In the procurement process, notification is provided to the affected parties.
- A preclusion can be used on active contracts:
 - for firms working on particular projects
 - for individuals in certain areas or roles

Conflicts of Interest

The Department's Rules on Ethical Conduct

43 Texas Administrative Code (TAC) Chapter 10

The purpose for the rules is:

- to be good stewards of public resources, ensure the protection of public funds, and maintain a high level of transparency and accountability
- to ensure entities doing business with the department adhere to ethical standards of conduct

A firm is required to disclose conflicts of interest to the Department.

A firm doing business with the Department is required to disclose the existence of a conflict of interest between it and the Department (43 TAC §10.101).



The contract terms and conditions require a disclosure of nepotism when an employee of the firm or subprovider has a relative employed with the Department.

“It is a situation in which a person has a duty to more than one person or organization but cannot do justice to the actual or potentially adverse interests of both parties.” ~ Law.com



...a situation in which the concerns or aims of two different parties are incompatible...



...a situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity...



Inability to give impartial assistance or advice to Department

Objectivity in performing scope of work is or may be otherwise impaired

Has or appears to have unfair competitive advantage

Perception or appearance of impropriety



Types of Conflicts of Interest



Unfair Competitive Advantage

Financial Interest

Revolving Door

Nepotism

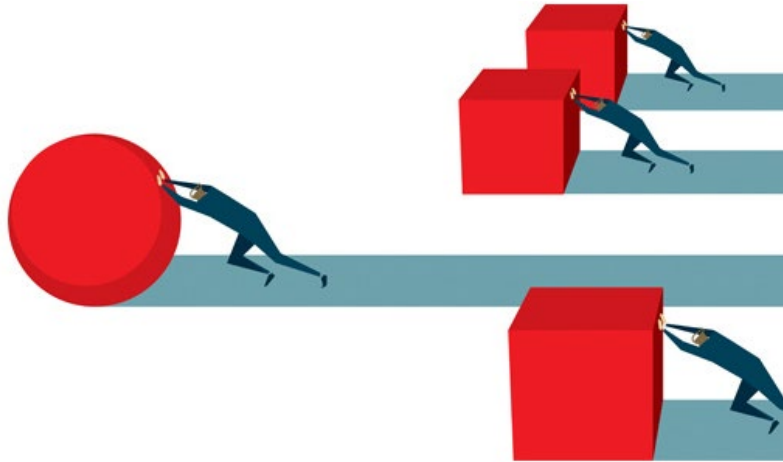
Management Roles

Other Parties

Construction Engineering Inspection (CEI)

Unfair Competitive Advantage: A Firm has Information That is not Available to Other Competitors

Typically a result of the firm's participation in a previous or existing agreement with the Department. Example:



The firm has been contracted to develop the schematic and environmental documents, all of the information on the project is not publically available, and the contract for the Plans, Specifications, and Estimates is being advertised.



A firm is precluded from entering into a contract with any of the following agency employees who have a financial interest in the firm

- Commission
- Executive Director
- General Counsel
- Chief Procurement Officer
- Procurement Director



Texas Gov. Code §2261.252



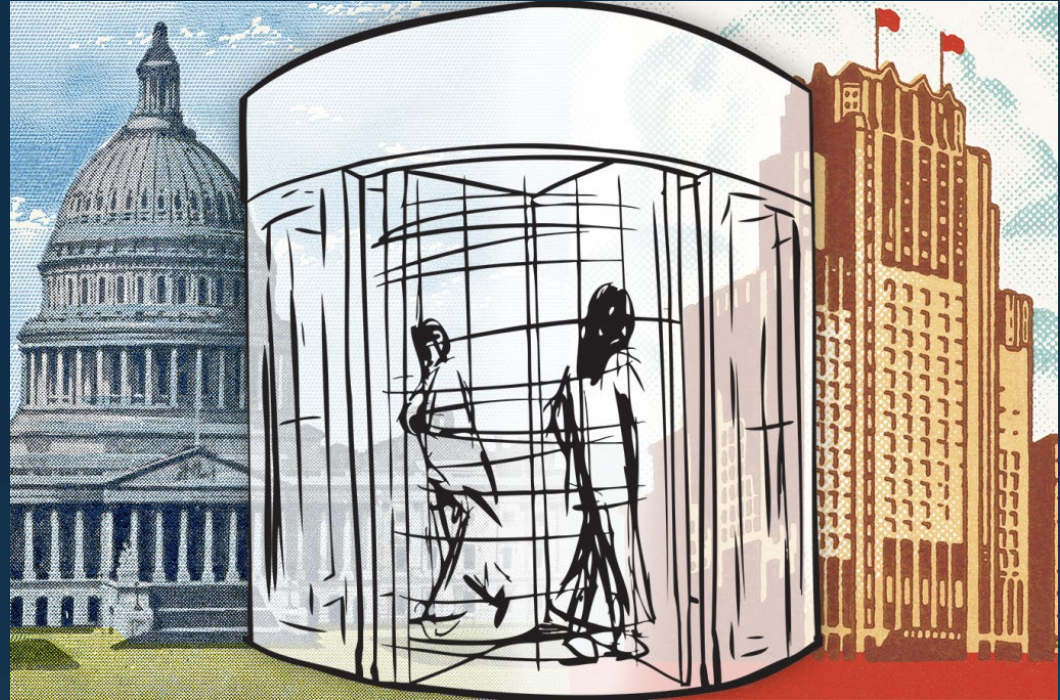
Includes family members of these employees within the second degree of consanguinity or affinity

Consanguinity (By Blood)		Affinity (By Marriage)	
First Degree	Second Degree	First Degree	Second Degree
Parent Child	Grandparent Grandchild Brother or Sister	Spouse Parent Child	Grandparent Grandchild Brother or Sister

Revolving Door Conflicts for Former Employees: Conflict Due to Work on Project (or Matter) or Former Position at Department

Former employees at or above pay level A17 who participated on matter

Individuals in positions at or above District Engineer, Division Director, Office Director, or higher





A firm has a conflict if it employs a former employee who participated in the procurement or negotiation of the awarded contract with the firm, within two years of the execution of that contract.



43 TAC §10.6 Conflict of Interest – Texas Gov. Code Chapter 572

Conflicts Involving Family Members: Potential for Favoritism or Bias



When family members work for both Department and firm in selection or management of contract



It is a conflict for a firm to participate in the management contract while participating on the contract being managed.

General Engineering Consultant (GEC)

Program Management Consultant (PMC)

Comprehensive Engineering Consultant (CEC)



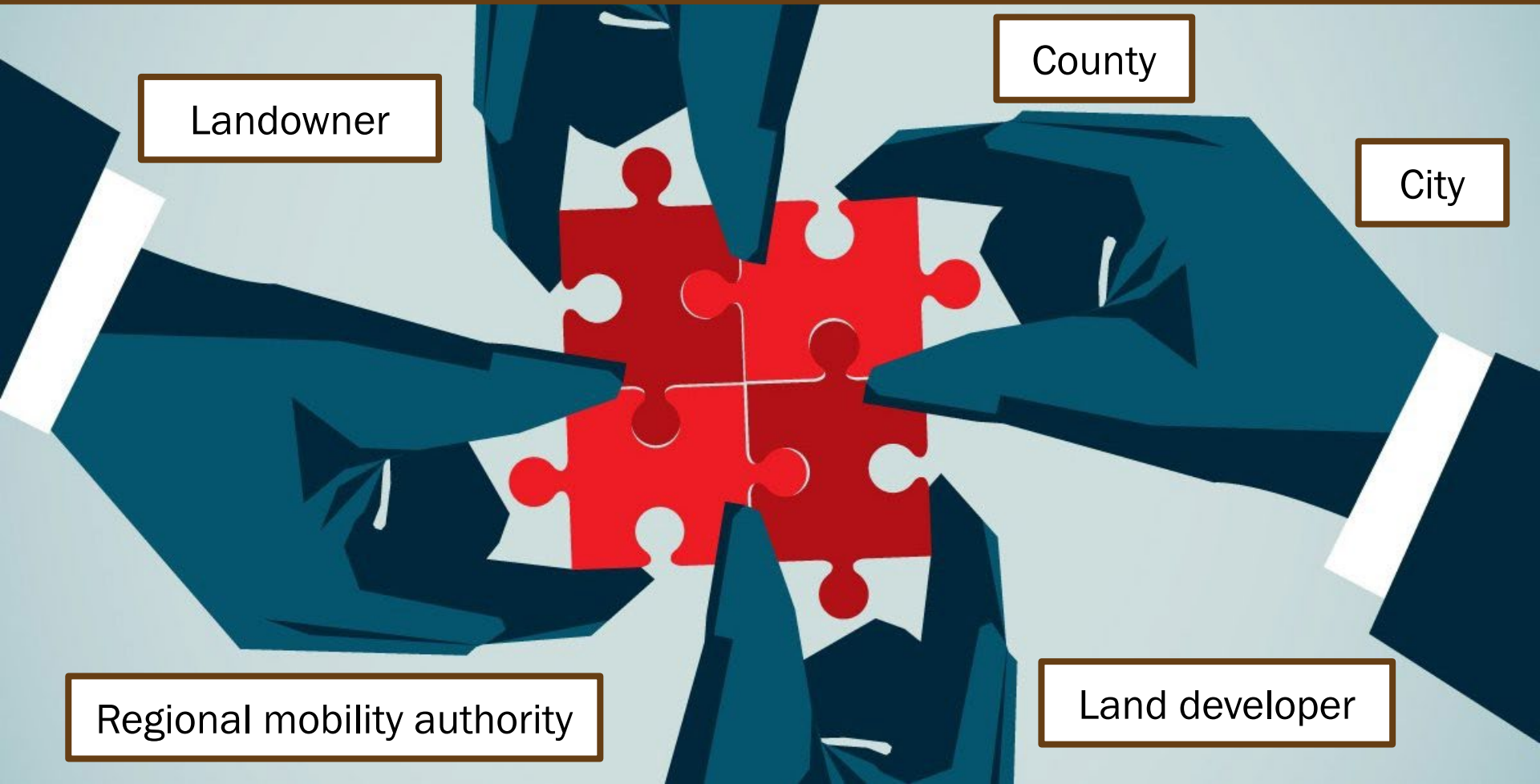


It is a conflict for a firm who participated in the design of the project to participate in the inspection of the construction of the project.



Construction Engineering Inspection (CEI)

A conflict exists for a firm who represents two entities on the same project.



TxDOT / ACEC Workgroup



TxDOT Members

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Becky Blewett
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ACEC Members

Peyton McKnight
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John Lamb
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The general approach considered by the work group



A consultant must notify TxDOT when performing engineering services for the same project, location, or assignment for TxDOT and another client, without violating its duty to maintain confidentiality of the other client

In assessing the conflict TxDOT will consider,

- Whether the firm will perform tasks on the same element of the project or assignment
- Whether the tasks to be performed are separate and distinct

If determined to be separate and distinct then no conflict may exist

If the conflict exists and there is no mitigation, the firm may be precluded from the conflicting element

The firm may appeal a determination to the PEPS Division Director, or the PEPS Director's decision to the Executive Director or his designee.

Legislation & Rule Making



- H.B. 3989 passed by the 88nd Texas Legislature
 - Sent to the Governor 5/22/2023
 - Signed by the Governor 6/11/2023
 - Effective 9/1/2023
- TxDOT is in the rule making process to implement the requirements of H.B. 3989

Questions and Discussion



HELP #EndTheStreakTX

End the streak of daily deaths on Texas roadways.

[TxDOT.gov](https://www.txdot.gov) (Keyword: #EndTheStreakTX)



#EndTheStreakTX Toolkit





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