



Ethics in PEPS Contracting

2022 PEPS Conference

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Expectations: Employees and Entities Doing Business with TxDOT should conduct themselves in a **lawful, professional, and ethical** manner that upholds the confidence and trust of the public.

TxDOT Standards of Conduct outline how, as a Texas state agency, we conduct business with the highest standards of ethics. TxDOT is committed to an environment where open, honest communications are the expectation, not the exception.

Values

People

Accountability

Trust

Honesty



- A TxDOT employee shall not accept or solicit any gift, favor, or service that:
 1. Might reasonably tend to influence the employee in the discharge of official duties, or
 2. That the employee knows or should know is being offered with the intent to influence the employee's official conduct
- You should always ask, why am I being given this gift, favor, or service?

Types of Gifts that May Be Accepted

- Promotional Items (buttons, pens, hats)
- Gifts from sources not involved with TxDOT
- Payment for services provided in a capacity other than as a TxDOT Employee (e.g. outside employment);
- Gifts due to an independent relationship
- Meal at a conference

Types of Gifts that May Not Be Accepted

- Working meals
- Gift baskets from consultants around the holidays
- Discounted or free tickets to sporting event
- Free or discounted admission to golf tournament
- Free or discounted access to hunting grounds
- Anything given in exchange for an official action (a bribe)



A TxDOT employee shall not:

- Accept other employment or compensation or engage in a business or professional activity that could reasonably be expected to impair the employee's independence of judgment;
- Have a personal or financial interest, that could reasonably be expected to create a substantial conflict or the appearance of a substantial conflict between the employee's private interest and the public interest;
- Have any financial or other personal interest in any real property acquired for a department project, unless the interest is openly disclosed, and the employee does not participate in the acquisition on behalf of the State.

First, disclose potential conflict to your supervisor **and** Compliance Division or General Counsel Division

Mitigate or manage conflicts – recusal, reassignment, modification of job duties, secondary checks on employee's work



Position	Any position of trust or authority (direct decision-making authority, advisory, participatory, sphere of influence)
Relationships	Friends, family, associates, (public vs. hidden)
Information	Internal operations, bidding process, confidential information, competitive advantage, award specifications
Concealment	Failure to disclose timely, false statements, altering records, falsifying documents, hiding relationships, omission, circumventing controls
Exchange	Benefits (gifts, entertainment, “loans”, tickets, ownership/stock), “consulting” fees, kickbacks

Framework by Colin May, CFE, ACE HUD-OIG



- For-profit entities doing business with TxDOT are responsible for complying with TxDOT's conflict of interest rules and State law.
- Rules aligned with State law and implemented to provide a fair and unbiased contracting system and to ensure high standards of ethics and fairness in the administration of TxDOT programs.
- Responsible for timely disclosing potential conflicts of interest to PEPS. PEPS will work with TxDOT's General Counsel Division to determine if conflict can be mitigated.
- May request a determination of whether hiring a former TxDOT employee would violate revolving door provisions by contacting TxDOT's General Counsel Division or Compliance Division.



Title 43 Texas Administrative Code §10.6:

A circumstance arising out of existing or past activities, business interests, contractual relationships, or organizational structure of an entity, in which:

1. the entity is or may be unable to give impartial assistance or advice to the department;
2. the entity's objectivity in performing the scope of work sought by the department is or may be otherwise impaired;
3. the entity has an unfair competitive advantage;
4. the entity's performance of services or participation in an agreement provides or may provide an unfair competitive advantage to a third party; or
5. there is a reasonable perception or appearance of impropriety or unfair competitive advantage

Example: A PEPS contractor employed a current TxDOT employee, and that employee performed work for the contractor on a TxDOT project



Particular Matter

- A former TxDOT employee may not work on a “particular matter” (e.g. specific contract, claim, application, investigation or proceeding) in which the former employee participated while employed at TxDOT.
- A former TxDOT employee in this category may work for the for-profit entity but may not work on “particular matters” that involved them while they worked at TxDOT.

Example: A PEPS contractor hired a former TxDOT employee and assigned the employee to work on projects the employee participated on while at TxDOT



A for-profit entity may not hire a former TxDOT employee who, while at TxDOT, participated in a procurement or contract negotiation for a contract awarded to the entity, unless more than two years have passed since the contract was signed.

Example: A PEPS contractor created a conflict of interest by hiring a former TxDOT employee, who participated on the evaluation team for a contract awarded to that entity, within two years of contract signing.



- Former TxDOT employees who were District Engineer/Division Director or above may not solicit business from, or attempt to influence a decision of, the Transportation Commission or TxDOT on behalf of a for-profit entity within one year of leaving TxDOT.

Ethical Conduct for Entities Doing Business with TxDOT

Title 43 Texas Administrative Code §10.101

An entity that does business with the department is required to:

- Disclose to TxDOT in writing the existence of a conflict of interest and adequately remedy the conflict
- Adhere to all civil and criminal laws related to business;
- Maintain good standing with the comptroller, other state agencies, states, and agencies of the federal government
- Notify TxDOT in writing and must adequately address:
 - A conviction of a bidding crime or of an offense indicating a lack of moral or ethical integrity, such as bribery or payment of kickbacks
 - Debarment of the entity by the comptroller, another state agency, another state, or an agency of the federal government
 - Any behavior of the entity that seriously and directly affects the entity's responsibility to TxDOT and that is also a violation of law or TxDOT's rules
- Disclose to TxDOT any discovery of credible evidence of:
 - A violation of a law involving fraud, bribery, or conflict of interest in connection with the award or performance of its contract;
 - A violation by a subcontractor or subprovider on its contract
 - An overpayment on its contract
- Cooperate fully with the department or any other government agency responsible for audits, investigations, or corrective actions;
- Prohibit its employees who have access to non-public information from using the information for personal gain

Ethical Conduct for Entities Doing Business with TxDOT

Title 43 Texas Administrative Code §10.101

An entity that does business with the department is required to:

- Refrain from committing acts indicating a lack of moral or ethical integrity and reflecting on the business practices of the entity, including:
 - Offering, giving, or agreeing to give a benefit to a TxDOT employee;
 - Submitting an offer below anticipated costs, with an expectation of increasing the contract amount after award;
 - Disclosing or receiving bid or proposal information in exchange for a thing of value or to give anyone a competitive advantage in the award of a TxDOT contract;
 - Retaliating against an employee for disclosing information to TxDOT relating to a violation of law related to a TxDOT contract;
 - Knowingly entering into a subcontract with an entity that is suspended or debarred by TxDOT;
 - Making false or misleading statements to obtain a benefit, including falsifying or permitting misrepresentation of its qualifications;
 - Disposing of waste in an unauthorized area.



Previous Ethical Violations:

- Failure to notify TxDOT of loss of required lab accreditation for material testing contract
- Allowing unqualified tester to test material for TxDOT project
- Failure to notify contractor that subcontractor precluded from doing work on the job
- Alteration of material test results
- Changed plans on a project without a work authorization and invoiced for an unrelated project for the work
- Providing a benefit to a TxDOT employee
- Offering a bribe to another TxDOT contractor
- Representing both TxDOT and a private party at the same time on the same road segment
- Consultant working on schematics for TxDOT along highway and also working for developers with tracts within that highway corridor
- Consultant working as DBE subcontractor on a CEI project and also subcontractor for prime on the same project providing design services.
- Consultant testing materials on an engineering contract for TxDOT and are also testing materials for the prime contractor on this same project



Preclusion

Errors &
Omissions

Working outside
scope of
contract or on
expired WAs

Procurement
process
violation

Use of
confidential
information

Overcharging



- **What is it?**

Action taken by TxDOT to exclude or prohibit an individual or firm from participating in a contract or work authorization.

- **How is it used at TxDOT?**

To mitigate the risk associated with issues (conflict of interest)

- CEI services on the same project on which the firm also performed design services
- Participating in the management of a contract while participating on the contract being managed
- Representing two interests simultaneously



- The “WHY”?

- TGC Sec. 2155.004. CERTAIN BIDS AND CONTRACTS PROHIBITED. (a) A state agency may not accept a bid or award a contract that includes proposed financial participation by a person who received compensation from the agency to participate in preparing the specifications or request for proposals on which the bid or contract is based.
- **Cost benefit:** Increased financial and resource cost associated with the creation and maintenance of a management and monitoring program to permit a firm to perform both design and CEI services, and not a significant benefit to the taxpayers
- **Liability:** Potential risks associated with failure are Safety – Financial – Public Perception



- **What is it?**

- Provided service that contain errors and omissions. Can be identified during PS&E development; as well as, before, during, or after construction

- **What should happen when it is identified?**

- PS&E Development: Corrected at the consultant's expense by the consultant
- Construction: During and after construction, errors and omissions can result in additional costs that TxDOT would not have incurred if the construction plans had been correct. The resulting additional costs are considered damages that TxDOT is entitled to collect.

E&O costs = extra cost – cost that would have been incurred if the project would not have had E&O issues



■ Issues

- E&O costs not collected from consultants = results in unallowable costs
- Consultant not notified of problem and not involved in effort to resolve
 - ❖ Resolved in house
 - ❖ Used another consultant under contract
 - ❖ Directed Construction company to hire a consultant
- Incorrect use of Reason Code in SiteManager does not allow for appropriate recognition of E&O related change orders



- **Goals**

- Identify E&O issues early
- Timely Consultant notification of issues
- Work together to correct, mitigate or minimize effects
- Identify costs incurred and track costs
- Resolution of cost responsibility

- **The “WHY”?**

- Cost of non-value added work (delays, inefficiencies, rework, extra work) are not reimbursed by FHWA.



- **What is it?**

- Any work that does not enable the project as planned to be done

- **Issues**

- Work that is not part of the main contract
- Work as described in the WA contract, but for a CSJ not covered in the WA contract
- Work as described in the main contract, but not in the WA contract

DON'T CONDUCT WORK OUTSIDE THE SCOPE

DON'T ASK CONSULTANTS TO CONDUCT WORK OUTSIDE OF SCOPE



- What is it?

- Any action that hurts transparency and fairness in procurement.
- Procurement integrity, *off-limits information*, employment discussions & hiring government employees, gifts & entertainment, anti-kickbacks, COI



■ Issues with Off-limits Information

Disclosure of Procurement Information

- May not disclose contractor bid or proposal documentation
 - Cost and pricing data
 - Proprietary information
 - Indirect cost and direct labor rates
 - Other info marked by contractor (even if it appears to be public)
- May not disclose source selection information
 - Evaluation matrix
 - technical evaluation plans
 - cost/price evaluations



■ Application

- It applies to both TxDOT employees and contracting community: employees are not to disclose the information and contracting community is not obtain the information
- It can have very serious ramifications and consequences since relies on a highly regulated system backed by criminal law enforcement
 - ❖ Bid protests
 - ❖ Criminal penalties
 - ❖ Fines
 - ❖ Contract rescissions
 - ❖ Debarment
 - ❖ Private cause for actions
 - ❖ Termination of employment



- The “WHY”?

The most fundamental attribute of procurement: Honesty & Integrity

CONSULT if there is ANY DOUBT

ERR on the SIDE of CAUTION and DO NOT DISCLOSE or ACCEPT the INFO



- **What is it?**

- A charge based on an incorrect rate, a service rate or service different to contract, incorrect, *any billing (unrelated to service failure) that results in incorrect charge.*

- **Issues**

It can occur both on main contractor and subcontractor side

- Billing multiple times for same services
- Submitting excess administrative costs, indirect costs
- Submitting different rates (charge per day instead of per month)

- **The “WHY”?**

- Waste of valuable taxpayer money
- Undermines the integrity of TxDOT’s procurement processes

What to expect when ...

... Submitting an Allegation



1. Allegation is received

TxDOT Watch  TxDOTWatch.com  877-769-8936	 TxDOT WATCH PEOPLE · ACCOUNTABILITY TRUST · HONESTY	Compliance Division  compliance@txdot.gov  512-465-7509
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2. Compliance Section triages the allegation
3. Anonymity and Confidentiality protected

	CMP	HRD	TOTAL
<u>Identified</u>	227 (67.76%)	132 (47.83%)	359 (58.76%)
<u>Anonymous</u>	108 (32.24%)	144 (52.17%)	252 (41.24%)
Total	335	276	611



4. Follow-up might occur, so keep ticket number
5. Concludes
6. Adjudication – not decided by CMP, but rather Districts, Divisions, or Committees
7. Review of actions

... something goes wrong.



1. You will be officially notified of the substantiated investigation and requested documentation
 - Cooperate and collaborate
2. Self-report and be transparent
3. Be prepared to present your documented Internal Compliance Program for remediations
 - Contact us and we are happy to work with you even if nothing went wrong to help you make and document this commitment to compliance



Title 43 Texas Administrative Code §10.252

TxDOT's Executive Director may impose a sanction for an ethical violation:

- A reprimand
- Prohibition from participating in a specified agreement
- A limit on the contract amount or amount of funds that may be awarded or paid to the entity for a period of not more than 60 months
- Debarment of the entity for a period of not more than 60 months
- Remove a person's or a firm's precertification and prohibit the person or firm from reapplying for precertification for a set period



Texas Administrative Code:

- Sanction considerations:
 - The seriousness and willfulness of the act
 - Whether the entity has committed similar acts
 - Whether the entity has fully compensated TxDOT for any resulting damages
 - Mitigating factors

- Mitigating factors:
 - Internal ethics and compliance program
 - Cooperation with TxDOT and a full and complete account of the entity's involvement
 - Disassociation from those involved in the ethical violation



Texas Administrative Code:

- Outlines required elements of an internal ethics & compliance program based on U.S. Sentencing Commission guidelines

- To have an effective compliance & ethics program an organization shall:
 - Exercise due diligence to prevent and detect criminal conduct; and
 - Otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.

- Key Considerations:
 - Expectations communicated to all employees through required periodic ethics training
 - Actively using monitoring and auditing systems to detect noncompliance
 - Publicizing a system to report suspected noncompliance without fear of retaliation

Questions and Discussion

Contact Information

TxDOT Watch



[TxDOTWatch.com](https://www.txdotwatch.com)



877-769-8936



Compliance Division



compliance@txdot.gov



512-465-7509

