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Conflicts of Interest:

How to avoid it and what to do when you get stuck

2024 PEPS Conference

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Conflicts of Interest Overview

What is a conflict of interest?

- As defined in Texas Administrative Code 10.6...

(a) For the purposes of this chapter, a conflict of interest is 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 on behalf of the department or participation in an agreement with the department 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 benefiting the entity or a third party as a result of the entity's participation in an agreement with the department.

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

- (1) an individual who held a position at or above the level of district engineer, division director, or office director solicits business from or attempts to influence a decision of the commission or department on behalf of that entity within one year after the date of the individual's separation from the department;
- (2) a former department employee whose last salary from the department was at or above the minimum amount prescribed for salary group A17 of the state position classification salary schedule performs work on behalf of that entity regarding a specific investigation, application, request for ruling or determination, contract, claim, or judicial or other proceeding in which the former employee participated, whether through personal involvement or within the former employee's official responsibility, while employed by the department; or
- (3) the entity employs a former department employee who participated on behalf of the department in the procurement or negotiation of an awarded contract, for which the entity was the prime contractor or an equity partner of the prime contractor, unless more than two years have elapsed since the date that the contract was signed.

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

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

(e) Before submitting a bid or undertaking some other interaction with the department, a for-profit entity or a former employee of the department to whom subsection (b) of this section applies may request from the department a determination of whether the interaction would constitute a conflict of interest under subsection (b) of this section. Such a request must be made in writing and must contain a concise explanation of the relevant facts. The department will not respond to a request under this subsection before consulting with the General Counsel Division. The department will issue a written determination in response to a valid request made under this subsection as soon as practicable.

(f) Subsection (b)(3) of this section applies only to an entity's employment of an individual whose participation in a procurement or contract negotiation occurs on or after September 1, 2015. Subsection (b)(3) does not apply to a contract awarded under a low-bid process.

(g) For purposes of subsection (b)(3) of this section, a person participated in the procurement or negotiation of an awarded contract only if the person played an active part in the original procurement or contract negotiation with the prime contractor or equity partner of the prime contractor by personally approving or performing a step that was materially relevant in the original procurement or contract negotiation process. An action is materially relevant if the action provides an opportunity to steer a contract toward a particular vendor, or involves the negotiation of price or contract terms with a vendor or the approval of negotiated prices or terms. Handling administrative matters and performing ministerial duties are not materially relevant steps.

What is a conflict of interest?

- More simply put ...

A conflict of interest is when a personal interest has the **potential** to influence a decision, judgement or action.

Types of Conflicts of Interest

Unfair Competitive Advantage

Financial Interest

Revolving Door

Nepotism

Management Roles

Construction Engineering

Other Parties

Unfair competitive advantage

What is it?

- Entities have access to information from previous engagements that is not publicly available.

How is it identified?

- Entities must review their own scope of services and identify if there are any overlaps in information

Financial interest

What is it?

- Entities or individuals have a financial interest or financial relationship that may or may be influence by the decision

How is it identified?

- It is up to the firm and the individual to disclose this information. This may include second degree relationships

Revolving door

What is it?

- Former employees who had key decision making roles who have participated in the project development and/or procurement process

How is it identified?

- Former DOT employees who participated in the procurement of a contract, within two years of execution of that contract

Nepotism

What is it?

- Family members who work for Firm and firm in considered for selection

How is it identified?

- Key relationships are up to the individual to report

Management Roles

What is it?

- A firm participating in a management role (GEC, PMC, CEC) while participating on the contract being managed

How is it identified?

- During the procurement process, existing contracts is reviewed against the potential scope of work for any potential conflicts of interest in the management function

Construction Engineering

What is it?

- A firm that participated in the design cannot participate in the construction of the project

How is it identified?

- During the procurement process, existing contracts is reviewed against the potential scope of work for any potential conflicts of interest in design/construction overlap

Other Parties

What is it?

- Entities are representing two entities at the same time on the same project

How is it identified?

- In the procurement phase, existing contracts, both with TxDOT AND impacted parties, are reviewed for potential overlap

Why does it matter?

- Perception of issues is critical
- The taxpayer is the ultimate beneficiary, work needs to be conducted in their best interest
- Teams must conduct themselves in an ethical manner
- No one wants to be penalized

Preclusions

Preclusions

- As previously defined...
 - Unfair access to information creates an imbalanced advantage
- TxDOT uses preclusions as a method to limit the exposure of this risk

Preclusion - Identification

- Through the procurement process, TxDOT reviews the project determine if there are any COI
- Prior to pre-RFP meeting, projects and firms are identified where scope may create an unfair advantage
- Project scope is further reviewed to determine if there is an actual unfair advantage
- When the RFP is released, the list of precluded firms is included as part of the bid documents

Preclusion

SO, your firm has been identified as precluded. What next?



Identification

Validation

Resolution

Conflicts of Interest Updates

Legislative Updates

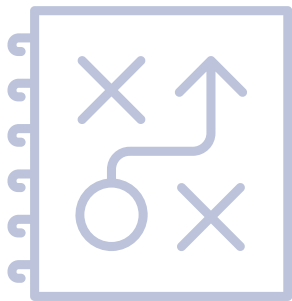
- HB 3989 was introduced and signed into effect on September 1, 2023
- Per the Bill, TxDOT is developing a policy regarding preclusion policy that is:
 - Published or distributed that ensures private design firms in this state are aware of the policy
 - Be notified in writing on the potential basis for preclusion
 - Provide an appeals process

Case Study

Preclusion – Case Study



Preclusion - Case Study



Identification



Validation



Resolution

Wrap Up

Conclusion

1. Multiple types of conflict of interest exist
2. Preclusions appeals process is under development
3. Timeline is critical
4. PEPS is here for firms to help navigate

Questions?