



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 507

November 29, 2012

*Whether a former employee of a state regulatory agency who worked on a schematic for a particular highway construction project may receive compensation from a private employer for services related to the oversight of the construction project. (AOR-574)*

The Texas Ethics Commission has been asked if the “revolving door” provision in section 572.054(b) of the Government Code would prohibit a former employee of the Texas Department of Transportation (“TxDOT”) from receiving compensation from a private employer for services related to the oversight of a particular TxDOT highway construction project. Section 572.054(b) of the Government Code states:

A former state officer or employee of a regulatory agency who ceases service or employment with that agency on or after January 1, 1992, may not represent any person or receive compensation for services rendered on behalf of any person regarding a particular matter in which the former officer or employee participated during the period of state service or employment, either through personal involvement or because the case or proceeding was a matter within the officer’s or employee’s official responsibility.

Gov’t Code §572.054(b).<sup>1</sup> “Particular matter” means “a specific investigation, application, request for a ruling or determination, rulemaking proceeding, contract, claim, charge, accusation, arrest, or judicial or other proceeding.” *Id.* § 572.054(h)(2). “Participated” means “to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action.” *Id.* § 572.054(h)(1) (emphasis added).

While the requestor was a TxDOT employee, the agency prepared a request for proposals (“RFP”) whereby the agency sought proposals from private firms to compete for a “design-build contract” (“DB contract”) for the design, construction, and capital maintenance of portions of a state highway project. The RFP included a development agreement, which included documents that discussed the desired managerial approach and the strategy and procedures to be followed during construction. TxDOT hired a private third-party team to prepare portions of the RFP documents.

The requestor, as a TxDOT employee, was the initial point of contact for the third-party team regarding portions of the RFP documents and was asked to review materials for the project and make comments to the team as time permitted. A separate third-party team also developed a schematic of the highway project, which was included in the RFP. The requestor was not limited in the comments he was permitted to make regarding the materials he reviewed and, during the course of his review, he compared the schematic to the RFP documents and made comments and questions regarding a draft version of the documents. Some of the requestor’s comments and questions were typed into draft versions of the RFP documents, which the requestor sent to a member of the third-party team and to another TxDOT employee. The requestor also asked a member of the third-party team to review his comments and make any necessary adjustments. TxDOT subsequently hired a project manager for the project, at which point the requestor was no longer involved with the project. Subsequently, the RFP documents, including the schematic, were revised several times. The schematic was eventually approved by the TxDOT Design Division and presented to the private construction firm that was ultimately selected to fulfill the

DB contract. The construction firm will use the schematic to prepare detailed construction plans for the highway project. The requestor states that the approved schematic would not be subsequently changed, but may be consulted during the course of construction.

TxDOT also issued a separate “general engineering consultant” contract (“GEC contract”), which involved a selection, interview, and approval process that was separate from the DB contract. The GEC contract would require a selected private firm (“GEC firm”) to review the construction plans and design criteria developed for the DB contract and monitor the work performed under the DB contract to ensure that it complies with contract specifications, state laws, policies, and procedures. The GEC firm would evaluate the construction plans by comparing them to construction manuals published by TxDOT. The requestor states that if he were to work on the GEC contract for the GEC firm, he would review the detailed construction plans and possibly monitor construction. He further states that the GEC firm would notify the construction firm of any problems with the construction plans, which may require the construction firm to revise and resubmit the construction plans to the GEC firm. However, he states that neither he nor the GEC firm would review or work on the schematic. The requestor asks whether his participation in the DB contract, as a former employee of TxDOT, precludes him from working on the GEC contract on behalf of the GEC firm.

We have stated that a “particular matter” refers to a specific proceeding, including a contract, involving the exercise of discretion by an agency. *See, e.g.*, Ethics Advisory Opinion No. 397 (1998). We have also said that two separate contracts are generally two separate matters for purposes of the revolving door law. Ethics Advisory Opinion No. 364 (1997), 353 (1996). However, in a previous opinion we considered how the revolving door law applied to a former employee of TxDOT who made a recommendation regarding a consultant seeking to perform a feasibility study for the agency. Ethics Advisory Opinion No. 397 (1998). After the feasibility study was completed, TxDOT contracted with a different consultant to analyze the environmental impact of proposals made in the feasibility study. The former employee had participated in the feasibility study by making a recommendation about a consultant, and the issue was whether the former employee had also participated in the environmental study because the results of the feasibility study served as the basis for the environmental study. We held:

A conclusion that a particular work activity constitutes participation in one matter does not necessarily preclude the conclusion that the same activity also constitutes participation in another matter. In circumstances in which two matters are interdependent pieces of a larger project, an agency employee’s “participation” in one of the matters would also constitute “participation” in the other matter if the employee’s work on the first matter is being reviewed or analyzed in the second matter. . . . For example, the individuals who actually generated the substance of the feasibility study participated in the matter of the environmental study because the environmental study is a further analysis of the conclusions of the feasibility study.

*Id.* We concluded that the former employee did not participate in the environmental study because he had not worked on the substantive conclusions of the feasibility study that would have been examined in the environmental study. *Id.* Similarly, we concluded in another opinion that a redetermination proceeding regarding the results of a sales tax audit by the Comptroller would be a continuation of the audit because the redetermination proceeding was an appeal of the findings reached in the audit. Ethics Advisory Opinion No. 337 (1996).

Based on the requestor’s facts, the DB contract and the GEC contract are interdependent pieces of a larger project (the highway construction project). If the requestor’s involvement with the schematic and the DB contract included any participation in creating the essential components of the final highway design and construction provisions as set forth in the DB contract, then any subsequent review or analysis of those provisions under the GEC contract would constitute services regarding the DB contract. Thus, the requestor may not work on the GEC contract if his services under the contract include a review or analysis of the highway design and construction provisions that are essential components of the DB contract, including the schematic, in which he was involved as a TxDOT employee. Assuming that the requestor does not perform such review or

analysis, then the requestor would not be prohibited from working on the GEC contract for a private firm.<sup>2</sup> Whether the requestor performs such review or analysis depends on the specific facts.

### SUMMARY

A former TxDOT employee may perform services on behalf of a private employer regarding a general engineering consultant contract to oversee a design-build contract if the services do not include a review or analysis of any highway design and construction provisions that are essential components of the design-build contract in which he was involved.

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<sup>1</sup> The only former employees covered by this statute are those who were compensated over a certain amount prescribed by the General Appropriations Act. *Id.* § 572.054(c)(2). The requestor states that his compensation met or exceeded that amount.

<sup>2</sup> We cannot address any TxDOT rules or policies that impose additional restrictions. *See also* section 2252.901, Gov't Code (prohibiting a state agency from entering into certain contracts).