



# TEXAS ETHICS COMMISSION



## ETHICS ADVISORY OPINION NO. 523

*December 2, 2014*

*Whether a former employee of a state regulatory agency who participated in the selection of a consultant to perform a feasibility study related to a bridge replacement project may receive compensation from a private employer for services related to managing the construction quality of the project. (AOR-591)*

The Texas Ethics Commission has been asked if the state “revolving door” law would prohibit a former employee of the Texas Department of Transportation (“TxDOT”) from receiving compensation from a private employer for services related to managing the quality acceptance aspects of a state highway construction project (“the project”) that includes the replacement of a bridge and other state highway improvements.

### Background

The requestor states that he was employed by TxDOT as a deputy district engineer until May 2003. During that time, his job duties included meeting with public officials, making presentations to the public, attending meetings, and providing direction to other areas of the district.<sup>1</sup> The requestor was also a voting member of a five-member team that selected the consultant that prepared a feasibility study of the project in the requestor’s district.<sup>2</sup>

The requestor states that, as part of the selection team for the feasibility study, his job was to become familiar with the consultant’s work so that he could present information regarding the consultant’s work to TxDOT staff and the public at public meetings. To prepare for each meeting, the requestor was required to meet with other TxDOT staff and the consultant to review the materials at issue in each meeting. Once prepared, the requestor opened the meeting, welcomed and made introductions for those present, and turned the meeting over to the consultant to present the technical and environmental details of the project. The requestor’s job was also to make sure that TxDOT staff and the consultant moved along the project in a timely manner. He states that any decisions regarding the project were made by other TxDOT staff and the consultant and that he did not manage or advise the consultant or determine the potential corridors of the project. The final meeting for the feasibility study was in May 2003.

The requestor was also the interim district engineer for the same district from June 2003 to November 2003, during which his job duties included providing direction in planning, location, design, construction, operation, and maintenance of highways and bridges; directing funding and overseeing agreements with other bodies; collaborating with other agencies and groups; answering public inquiries; administering grant programs; and directing the district’s construction program. The requestor also approved final project acceptance and oversaw area engineers who directed construction projects. The requestor had direct supervisory authority over various TxDOT employees, including employees who oversaw the feasibility study and environmental impact statement for the project and planning for all projects in the district. He further states that no employees in his office designed or determined the quality standards for the project, but some of the employees managed the consultant who was performing the preliminary feasibility study and environmental planning work for the project.

The requestor was transferred to another district in December 2003, and his involvement with the feasibility study ended before the Federal Highway Administration approved the findings of the feasibility study. After the requestor's involvement with the feasibility study ended, the environmental impact study for the project was initiated. The requestor ceased employment with TxDOT in 2009. The project has not been designed and the final right-of-way determination is still being made.

### Prospective Employment

TxDOT intends to enter into a design-build-maintain comprehensive development agreement with one or more private firms that will provide various services for the bridge project. TxDOT is currently seeking proposals for the project. The requestor now seeks to work for a private firm and provide services related to the project as a construction quality assurance manager ("CQAM") who would be responsible for managing the quality acceptance aspects of the work. The CQAM would report to the developer's management team and TxDOT and would not report to any person or party directly responsible for design or construction production. The requestor states that the prospective work is not at all related to the feasibility study and would not involve any review or oversight of any work that was done by the feasibility study consultant. Furthermore, the requestor states that the feasibility study produced only a preferred general corridor that would be significantly narrowed and adjusted in the environmental impact study and in the subsequent design of the project by another consultant.

The requestor states that the position of CQAM would not involve any review or analysis of the feasibility study of the project, the public meetings in which he participated concerning the project, the consultant who performed the functions of the feasibility study, or any other work in which he or any other person he supervised was involved.

### Revolving Door Law

Section 572.054(b) of the Government Code states:

A former state officer or employee of a regulatory agency ... 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>3</sup>

A "particular matter" is "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).

Whether a person participated in a particular matter as an employee of a state agency depends upon the specific facts. 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. Ethics Advisory Opinion Nos. 364 (1997), 353 (1996). Similarly, the fact that two matters relate to the same general subject matter of a proposed agency project does not make them part of the same particular matter. *See, e.g.,* Ethics Advisory Opinion Nos. 496 (2011) (state road construction projects that were rejected and redesigned were considered separate matters), 345 (1996) (an application for a federal grant and the selection of a contractor through a competitive bidding process related to the same transportation project were separate matters), 324 (1996) (review of permit for landfill and certification of groundwater monitoring system for same landfill were separate matters).

For purposes of this request, the particular matter at issue is a specific contract: a comprehensive development agreement into which TxDOT now intends to enter with a developer selected through a procurement process.

The requestor seeks to provide services to a private firm under that agreement. Thus, the issue is whether the requestor participated in the specific contract while he was an employee of TxDOT.

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) (EAO 397). 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 had not participated 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.*<sup>4</sup>

The requestor's situation is somewhat analogous to the circumstances presented in EAO 397. The project at issue is a lengthy process that includes several interdependent pieces, including the feasibility study, the environmental study, and the design, construction, and maintenance contract. Based on the requestor's facts, the requestor participated in the feasibility study by, in part, selecting the consultant that prepared the feasibility study. In addition, the requestor held authority over employees who were involved in the studies, both as deputy district engineer and interim district engineer, and therefore participated in those studies. However, that fact alone does not mean that the requestor is prohibited from providing services related to all other aspects of the same project. It appears that the requestor's prospective services would not include the review or analysis of work that he performed in selecting the consultant for the feasibility study or of work performed by an employee who was under his authority related to either of the studies. Furthermore, the requestor has stated that neither he nor any of the employees under his authority participated in the design or construction quality standards for the project. Assuming those facts, the requestor would not be prohibited from providing services as the CQAM for a private firm as described in this opinion.<sup>5</sup>

## SUMMARY

Section 572.054(b) of the Government Code does not prohibit a former employee of the Texas Department of Transportation from performing services related to a bridge replacement project as described in this opinion unless the services would include a review or analysis of a matter in which the former employee participated as an employee of the agency.

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<sup>1</sup> As deputy district engineer, the requestor had direct supervisory duties over personnel in various offices, including the district maintenance office, an operations office, and a special projects construction office, which handled a rehabilitation and maintenance project of an existing state bridge that is scheduled to be replaced by the bridge project. While the district engineer was absent, the requestor also performed the duties of the district engineer, which included all areas of the district's operations, and provided direction to staff. The requestor states that during this time, TxDOT's criteria for defining supervisory authority was the ability to hire, fire, or discipline employees, determine duties and performance plans, give merit raises and promotions, and perform annual evaluations. He further states that while he was the deputy district engineer, he never had direct supervisory authority, according to TxDOT's criteria for supervisory authority, over any employees who worked on the feasibility study, designed the project, determined the quality standards for the project, or were otherwise involved in the project.

- <sup>2</sup> The purpose of the feasibility study is to provide a general overview of a proposed project by determining whether a project is reasonable, feasible, and cost-effective and considering other alternatives. After a feasibility study is complete, it is presented to the Federal Highway Administration for approval. If it is approved, an environmental impact study is conducted to determine any environmental impacts. If the project is approved, TxDOT may enter into a comprehensive development agreement, by which TxDOT seeks proposals to design the project, acquire right-of-way, build the project, and maintain the project (if desired).
- <sup>3</sup> The revolving door restriction applies to state employees of executive branch agencies 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>4</sup> We have also considered a situation in which a former TxDOT employee had worked on a contract and schematic for a highway construction project and wished to work for a private employer by overseeing the same construction project. We stated that the employee could not work on the construction project if his services would include a review or analysis of the highway design and construction provisions that were essential components of the contract and schematic. Ethics Advisory Opinion No. 507 (2012).
- <sup>5</sup> The requestor may not have had the authority to hire, terminate, promote, or evaluate other TxDOT employees as the deputy district engineer. However, it appears that the requestor directed numerous employees while he held both positions in the district, including employees who were directly involved in either the feasibility study, the environmental impact statement, or both. See Ethics Advisory Opinion No. 285 (1995) (participation in a matter includes being in a position of authority over those who have personal involvement in the matter).
- <sup>6</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).