TEXAS ETHICS COMMISSION

ETHICS ADVISORY OPINION NO. 586

February 16, 2023

ISSUE

Whether the revolving door law prohibition in section 572.069 of the Government Code would prohibit a former employee of a state agency from accepting certain employment. **(AOR 678.)**

SUMMARY

A former state employee participates on behalf of a state agency in a procurement or contract negotiation by drafting contract terms and having direct communications with a company regarding a potential contract.

A former state employee participates on behalf of a state agency in a procurement or contract negotiation with a subcontractor if the subcontractor is identified as providing work in the contract.

FACTS

The requestor is a former employee of the Texas Department of Transportation ("TxDOT" or the "department"). He asks whether he may accept employment at two different companies ("Firm 1" and "Firm 2").

During the requestor's employment with TxDOT, he was a "Team Lead" in charge of four TxDOT project managers. The requestor also served as a project manager on his own projects. The requestor states that all of his work for TxDOT was presented to another layer of TxDOT management for acceptance or rejection.

Some of the project managers he led managed outside consultants who performed project work. As Team Lead and project manager, the requestor was involved in some aspects of the contracting with Firm 1 and Firm 2.

Dealings with Firm 1

Firm 1 had an active contract with TxDOT when the requestor joined the department. At the request of a TxDOT supervisor, the requestor was involved in a contract negotiation with Firm 1 for a supplemental agreement to add additional "scope and fee" to the contract. While serving as interim project manager, the requestor coordinated with a TxDOT contracts manager and Firm 1 to ensure everything the TxDOT supervisor wanted was in the supplemental agreement. The requestor described is work on the contract as follows:

> Coordination in this situation consisted of setting up meetings, taking notes on decisions the schematic supervisor made, ensuring those notes were included in the contract, giving information on similarities between this project and others, comparing this contract to other contracts, and giving the contract a first review before passing it along to the schematic supervisor for further review and approval. The position was supposed to act as a go between between the schematic supervisor and Firm 1, but in this particular case Firm 1 repeatedly communicated directly with the schematic supervisor instead. When it came to discretion and independent decision making, my role was advisory in terms of "I think we should change this" or "I think this is appropriate", but never the ability to say "this is what we are going to do" or firmly make a decision.

The requestor stated he did not recall negotiating anything related to the fee. The supplemental agreement was then executed.

Dealings with Firm 2

Firm 2 was a sub-consultant for another firm (Firm 3). During the requestor's employment Firm 3 had active contract with TxDOT, managed by a project managers on the requestor's team. A TxDOT supervisor requested the project manager add a supplemental agreement to the original contract that included additional "scope and fee." The requestor provided guidance to the project manager on how to negotiate, gave a rough approximation to the project manager of what the requestor believed the fee should be, attended a scoping meeting with the project manager, Firm 3, and other supervisors. The requestor also provided quality control reviews regarding the scope and fee of the supplement agreement. The requestor left TxDOT while the supplemental contract was being negotiated and does not know the specific terms of the final agreement. The requestor states Firm 2 was not a signee on the contract or any supplemental agreement. However, Firm 2 was listed as a providing services on the contract and supplemental agreements.

ANALYSIS

Legal Standard:

Section 572.069 of the Government Code states:

> A former state officer or employee of a state agency who during the period of state service or employment participated on behalf of a state agency in a procurement or contract negotiation involving a person may not accept employment from that person before the second anniversary of the date the contract is signed or the procurement is terminated or withdrawn.

Tex. Gov't Code § 572.069.

Section 572.069 does not define the word "participated." However, we have applied the definition found in a companion revolving door law to Section 527.069. Tex. Ethics Comm'n Op. No. 568 (2021). We do so again. *See* Tex. Gov't Code § 311.011(b) ("Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly."). "Participated" means "to have taken action as an officer or employee through decision, approval, disapproval, recommendation, giving advice, investigation, or similar action." Tex. Gov't Code § 572.054(h)(1).

The former state employee participated on behalf of a state agency in a procurement or contract negotiation involving Firm 1.

We have held that "direct communications with a potential contracting partner over the terms of a prospective deal constitutes participating in a procurement or contract negotiation." Tex. Ethics Comm'n Op. No. 578 (2022). We have also held that a requestor participated in a procurement on behalf of a state agency by scoring and evaluating bid proposals for a contract to provide information technology services, even though the requestor did not participate any further in the request for proposal or participate in negotiation with vendors or the vendor selection. Tex. Ethics Comm'n Op. No. 545 (2017). However, a former employee does not participate in a procurement when a former state employee's only involvement is merely being kept informed of the status the procurements. Tex. Ethics Comm'n Op. No. 568 (2021).

A former state employee "participates" in a contract negotiation or procurement by making a "recommendation" or "giving advice." Tex. Gov't Code § 572.054(h)(1). Here, the requestor participated in the contract negotiation through his involvement in reviewing the contract, drafting contract terms, and giving advice and recommendations to his supervisor regarding contract terms. The requestor is therefore prohibited from accepting employment from Firm 1 for two years after the date the contract with Firm 1 was executed.

The former state employee participated on behalf of a state agency in a procurement or contract negotiation involving Firm 2, because Firm 2 was identified as providing services in the agreement.

The revolving door prohibition is triggered by participating in a procurement or contract negotiation "involving a person." Tex. Gov't Code § 572.069. Here, the requestor participated in the supplement agreement procurement with Firm 3 by providing guidance to the project manager on how to negotiate, giving a cost estimate, and attending a meeting involving the scope of the project with Firm 3 and other TxDOT employees.

The relevant question is whether the procurement involved Firm 2, a sub-contractor working on the contract between TxDOT and Firm 3.

A contract that identifies a subcontractor as performing work "involves" the identified subcontractor for purposes of Section 572.069. Ethics Comm'n Op. No. 545 (2017) (holding a former employee of a state agency would be prohibited from accepting employment from a subcontractor identified in a proposed contract which the former employee evaluated and scored).

The requestor states that Firm 2 was identified as providing work under the first agreement and the supplemental agreement with which the requester was involved. Therefore, consistent with Ethics Advisory Opinion No. 545, the contract negotiation involved Firm 2. Consequently, the requestor is prohibited from accepting employment from Firm 2 for two years after the date supplement agreement was signed or the procurement was withdrawn.