



Preclusions

Claire McGuiness & Becky Blewett, GCD
and Dan Neal II, PEPS

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What is a Preclusion?



A preclusion is an action taken by the Department to exclude or prohibit an individual or firm from participating in a contract or work authorization.





A preclusion is a measure used to mitigate the risks associated with issues such as conflicts of interests.

- In the procurement process, notification is provided to the affected parties.
- A preclusion can be used on active contracts:
 - for firms working on particular projects
 - for individuals in certain areas or roles

Conflicts of Interest

The Department's Rules on Ethical Conduct

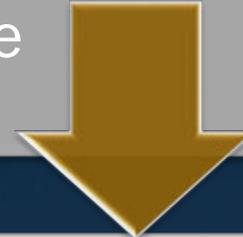
43 Texas Administrative Code (TAC) Chapter 10

The purpose for the rules is:

- to be good stewards of public resources, ensure the protection of public funds, and maintain a high level of transparency and accountability
- to ensure entities doing business with the department adhere to ethical standards of conduct

A firm is required to disclose conflicts of interest to the Department.

A firm doing business with the Department is required to disclose the existence of a conflict of interest between it and the Department (43 TAC §10.101).



The contract terms and conditions require a disclosure of nepotism when an employee of the firm or subprovider has a relative employed with the Department.

Conflict of Interest, what is it?

“It is a situation in which a person has a duty to more than one person or organization but cannot do justice to the actual or potentially adverse interests of both parties.” ~ Law.com





...a situation in which the concerns or aims of two different parties are incompatible...

...a situation in which a person is in a position to derive personal benefit from actions or decisions made in their official capacity...

Effects of Conflict of Interest



Inability to give impartial assistance or advice to Department

Objectivity in performing scope of work is or may be otherwise impaired

Has or appears to have unfair competitive advantage

Perception or appearance of impropriety



Organizational Conflicts of Interest

Examples of Potential Organizational Conflicts of Interest



Providing Preliminary Engineering Services for Same Project

Providing Architectural Services for Same Project

Providing Environmental Services for Same Project

Providing Traffic and Revenue Services for Same Project

Providing Procurement Services for Same Project

Providing Financial Services for Same Project



A consultant that is actively providing preliminary engineering and architectural services may participate, provided:



All the work products and data are made available to all proposers prior to the RFP



The executive director issues a written determination that:

- Consultant doesn't have access to information that gives them an unfair competitive advantage
- The data provided or the work products are irrelevant to the procurement
- The data or work products are available to all proposers



A consultant that is actively providing environmental services may participate, provided:



The executive director issues a written determination that:



- Consultant doesn't have access to information that gives them an unfair competitive advantage
- The data provided or the work products are irrelevant to the procurement
- The data or work products are available to all proposers
- The environmental record of decision or finding of no significant impact has been issued for the project



A consultant that is actively providing Traffic and Revenue services may participate, provided:

The executive director issues a written determination that:

- Consultant doesn't have access to information that gives them an unfair competitive advantage
- The data provided or the work products are irrelevant to the procurement
- The data or work products are available to all proposers



A consultant that is actively providing Procurement and Financial services may participate in another DB project, provided:

When the consultant becomes part of the proposer team, the consultant is prohibited from reviewing alternative technical concepts and proposals for the project until a contract for the project is entered into

And, the consultant must institute ethical walls or other safeguards required by the department

Who is Precluded?

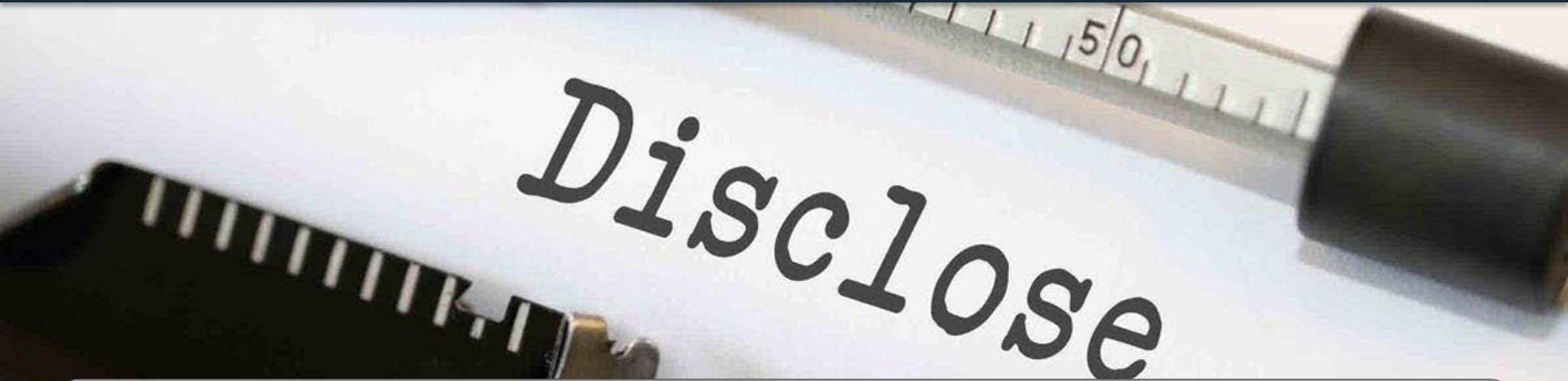
Design Build Project – Who is Precluded?

Every Design Build Project RFQ will include a list of Firms that are currently prohibited from proposing or joining a Proposer team.

The list of Firms in the RFQ may not be exhaustive, and potential Proposers are advised that there may be additional TxDOT consultants working on the Project with an organizational conflict of interest prohibiting them from joining a Proposer team.

Proposers are encouraged to review the Rules and discuss potential conflicts of interest with prospective team members.

A proposer is required to disclose organizational conflicts of interest to the Department.



Disclose

By submitting a Qualification Statement or a Proposal, each Proposer agrees that, if an organizational conflict of interest is thereafter discovered, the Proposer must make an immediate and full written disclosure to TxDOT that includes a description of the action that the Proposer has taken, or proposes to take, to avoid or mitigate such conflicts.

(Programmatic RFQ Section 6.3 & ITP Section 2.10.2)

Is there a Conflict of Interest?

Design Build Project – Is there a Conflict of Interest?

A TxDOT consultant may submit a request to the TxDOT executive director for a formal determination regarding whether its participation in a design-build project or the performance of particular services with respect to a design-build project would constitute a conflict of interest

Similarly, a TxDOT consultant with a conflict of interest may submit a request for approval of an exception to the applicability of 43 TAC Section 9.155(c) to provide certain services on a design build project.

Request for Conflict of Interest Determination & Exception



**TxDOT Considerations
in Evaluating a
Request for COI
Determination /
Exception**



Extent to which confidential or sensitive information was obtained that could provide an unfair competitive advantage with respect to the procurement or project at issue;



Type of consulting services at issue;



Particular circumstances of each procurement



TxDOT Considerations in Evaluating a Request for COI Determination / Exception



The specialized expertise needed by the department and proposers to implement the procurement



The past, current, or future working relationship between the consultant and the department



The period of time between the potential conflict situation and the project at issue; and



The potential impact on the procurement and project at issue, including competition.

Legislation & Rule Making

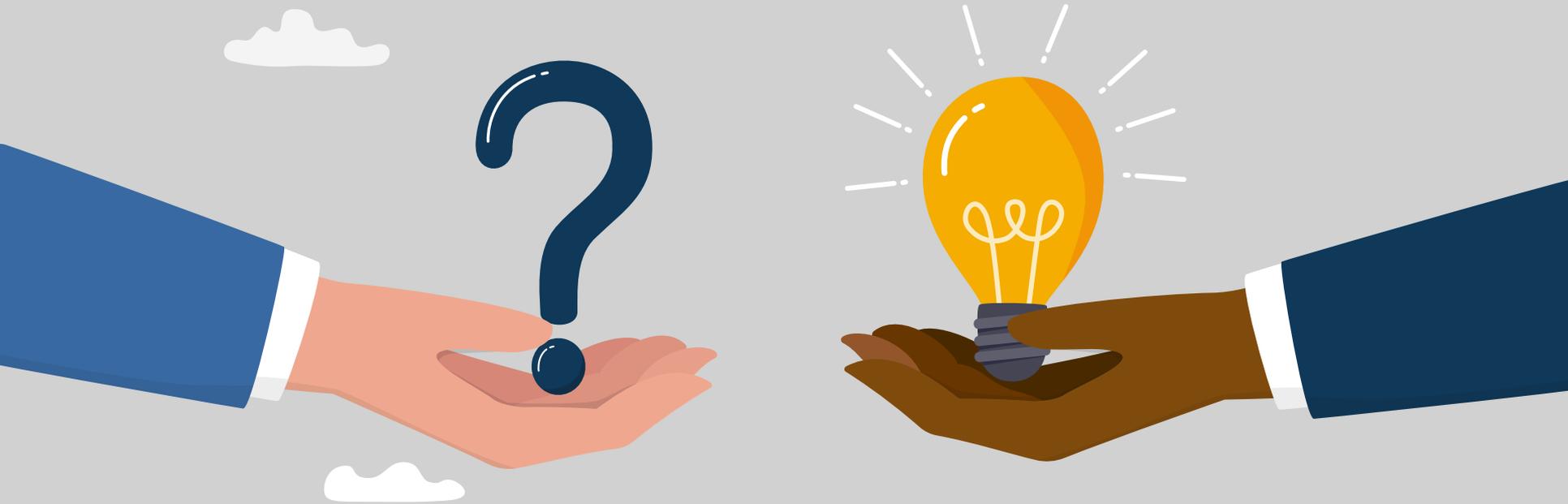


- H.B. 3989 passed by the 88th Texas Legislature
 - Sent to the Governor 5/22/2023
 - Signed by the Governor 6/11/2023
 - Effective 9/1/2023
- TxDOT is in the rule making process to implement the requirements of H.B. 3989 focusing on PEPS contracts
- Design-build preclusion rules are already in place and are compliant with H.B. 3989





Questions & Discussion



HELP

#EndTheStreakTX

End the streak of daily deaths on Texas roadways.

TxDOT.gov (Keyword: #EndTheStreakTX)



#EndTheStreakTX Toolkit

