Texas Department of Transportation

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September 4, 2008

Participants in TxDOT CDA Program

RE: Conflict of Interest and Ethics Policies for Comprehensive Development Agreements

On June 1, 2007, my predecessor sent a letter to private entities participating in the comprehensive development agreement (CDA) program of the Texas Department of Transportation (TxDOT), notifying those entities of the adoption of administrative rules concerning conflict of interest and ethics policies applicable to those private entities, including proposers and their subcontractors and consultants, as well as contractors and consultants to TxDOT.

Those rules include restrictions on offering gifts and benefits to members of the Texas Transportation Commission (Commission) and TxDOT employees, and rules of contact (restrictions on ex parte communications). The rules also provide for possible sanctions for not complying with those restrictions.

From the inception of the CDA program, the Commission has emphasized that TxDOT will operate the program to the highest standards of integrity in order to promote and ensure fairness and a level playing field, and to instill confidence in the CDA program in the Texas Legislature, the citizens of Texas whom TxDOT serves, and the Texas marketplace.

We are at a critical time in the CDA program. As you are probably aware, the Texas Legislature will consider the continuation of the statutory authority for the CDA program in the legislative session beginning in January 2009. Any action by a private participant in the program that violates these rules, such as by sending gifts to members of the Commission and TxDOT employees, and by engaging in improper ex parte communications, could negatively affect the continuation of the program, or could result in a disqualification or protest that prevents the execution of a CDA within the time frames set out in the project schedules. At all times we must protect the integrity of the program and guard against any perception that it is anything other than qualifications based, transparent, and focused on results.

The purpose of this letter is to remind all participants in the CDA program of the requirements of the rules, and to act as a warning that any action in contravention to the rules will result in a referral of that action to me for possible sanctions. All participants

and potential participants in the CDA program, including proposers and their subcontractors and consultants, as well as contractors and consultants to TxDOT, should carefully review the attached provisions of Title 43, Texas Administrative Code, Section 27.8, entitled "Conflict of Interest and Ethics Policies", and new Section 27.9, entitled "Sanctions." Those two sections are discussed below.

Gifts and Benefits

Generally, all gifts and benefits from private participants in the CDA program are prohibited. The rules specifically prohibit all proposers, developers, consultants, and subconsultants, as well as their affiliates, from offering, giving, or agreeing to give a "gift or benefit" to a member of the Commission or to any TxDOT employee who has any involvement in a CDA procurement or the administration of a CDA. That would include, but would not be limited to, any member of the TxDOT Administration, and any other TxDOT employee providing services that would constitute procurement services as defined in Title 43, Texas Administrative Code, Section 27.2.

The term "gift or benefit" is defined to include all benefits or favors not only to a Commissioner or employee, but also to anyone in whose welfare a Commissioner or employee is interested. Reimbursement by the recipient will not render a gift or benefit permissible. The rules allow a TxDOT consultant or a subconsultant, unless the consultant or subconsultant is a member of a proposer or developer team, to pay for an ordinary business lunch or to give an employee a token item, valued at no more than $25, which is distributed generally by the participant as a normal means of advertising. There are no other exceptions.

Please note that the Commission has also adopted general ethics policies that prohibit TxDOT employees from accepting gifts, benefits, or favors from an entity that does any kind of business with TxDOT or could reasonably be expected to do business with TxDOT in the future. There are limited exceptions to that prohibition, but those exceptions do not apply to employees who are involved in the procurement process for a contract if the gift, benefit, or favor is offered by anyone who could reasonably be expected to have an interest in or benefit from the resulting contract.

Conflicts of Interest

Generally a private entity providing consulting services to TxDOT on a CDA project cannot be a proposer or participate on a proposer team for that CDA project. Generally, however, a TxDOT consultant providing services on a CDA project is permitted to participate as a proposer or proposer team member on a different CDA project. The notable exception to the latter general rule is a private entity providing procurement services to TxDOT. A private entity actively engaged and performing procurement consulting services on a CDA project cannot be a proposer or proposer team member

for that CDA project or for any other CDA project. The rules also contain provisions defining the period of time in which a conflict of interest applies, and the process for requesting a determination if participation in a CDA project or the performance of particular services with respect to a CDA project would constitute a conflict of interest, or to request approval of an exception to the applicability of the conflict of interest provisions to those services.

Rules of Contact

Each request for qualifications (RFQ) and request for proposals (RFP) issued for a CDA project will contain rules of contact regulating communications between proposers or any proposer team members and the Commission, TxDOT, and third parties involved in the procurement. Those rules of contact will become effective upon issuance of the pertinent RFQ or RFP.

The rules of contact prohibit a proposer or any of its team members from communicating with another proposer or its team members with regard to the project, RFQ, RFP, or request for competing proposals and qualifications, or either team's qualifications submittal or proposal. The rules prohibit all ex parte communications between a proposer or potential proposer and any member of the Commission or TxDOT staff, advisors, contractors, or consultants involved in the procurement. Each RFQ and RFP will name an ombudsman who is authorized to receive confidential communications (including questions, comments, or complaints regarding the procurement) from proposers who may wish to remain unidentified to TxDOT staff involved in the procurement. The ombudsman will remove all references to the entity submitting the confidential communication before forwarding the anonymous communication to TxDOT's authorized representative for the procurement.

As Executive Director, I am authorized to disqualify a proposer from the procurement or otherwise sanction the proposer, if it is determined that the proposer has violated the rules of contact for a given RFQ or RFP. The rules of contact permit communications in exceptional circumstances if approved by designated TxDOT personnel authorized to approve such communications. TxDOT has included in each RFQ and RFP the TxDOT employee authorized to approve such communications. We will also include in an RFQ or RFP a more specific description of the procedures for the designated TxDOT employee's approval of otherwise prohibited communications.

Sanctions

There are several grounds for which TxDOT may sanction a private entity. These grounds include the commission of bidding crimes, acts indicating a lack of moral or ethical integrity, and debarment by a federal or state agency. Violation of the conflict of interest and ethics policies may result in the private entity's preclusion from participation

in a project or sanctions being imposed. Under the rules, the Executive Director is responsible for determining the appropriate level of sanction in each case. There are four levels of sanctions: Level 1 is reprimand; Level 2 is prohibition against a private entity's participation on a particular CDA project; Level 3 is debarment of the private entity for up to three years; and Level 4 is permanent debarment of the private entity. Any entity that is sanctioned may petition TxDOT for a hearing at the State Office of Administrative Hearings.

The rules related to ethics, conflicts of interest, and sanctions, will be valuable tools for both TxDOT and the private sector in continuing to forge meaningful partnerships. In that vein, I urge you to become familiar with TxDOT's administrative rules for the CDA program, particularly Sections 27.8 and 27.9. I also urge you to share this letter with any person in your organization, in your parent company, if any, or in a subsidiary, such as in the marketing department or similar group, that may send out gifts or take other actions to which the rules would apply. You can view all CDA rules online at:

http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=5&ti=43&pt=1&ch=27&sch=A&rl=Y

Please direct any questions about these new rules to either Jack Ingram or John Wright in the Office of General Counsel at (512) 463-8630.

Sincerely,

Amadeo Saenz, Jr., P.E.
Executive Director

Attachment