



Preclusion Updates
2019 PEPS Conference
Dan M. Neal II, P.E., P.G.

November 20, 2019

Presentation Topics



- 1 • What is Preclusion?
- 2 • Conflicts of Interest
- 3 • Types of Conflicts of Interest
- 4 • Construction Engineering Inspection
- 5 • Questions and Discussion

2019 PEPS Conference

November 20, 2019

2



What Is A Preclusion?

2019 PEPS Conference

November 20, 2019

3

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.



4



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 effected 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

7

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.

8

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



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





Types of Conflicts of Interest

Conflict of Interest Examples



Unfair Competitive Advantage

Financial Interest

Revolving Door

Nepotism

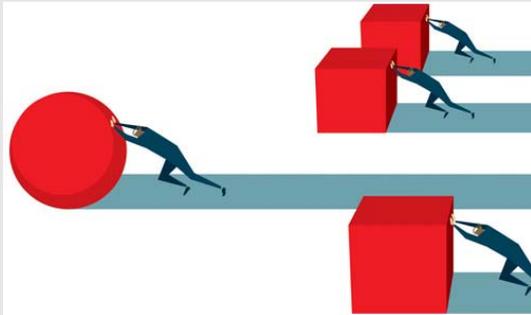
Management Roles

Other Parties

Construction Engineering Inspection (CEI)

Unfair Competitive Advantage: A Firm has Information That is not Available to Other Competitors

This is typically a result of the firm's participation in a previous or existing agreement with the Department. Example:



The firm has been contracted to develop the schematic and environmental documents, all of the information on the project is not publically available, and the contract for the Plans, Specifications, and Estimates is being advertised.

Individual Bias Based on Financial Interest

A firm is precluded from entering into a contract with any of the following agency employees who have a financial interest in the firm

- Commission
- Executive Director
- General Counsel
- Chief Procurement Officer
- Procurement Director

Texas Gov. Code §2261.252



Financial Interest



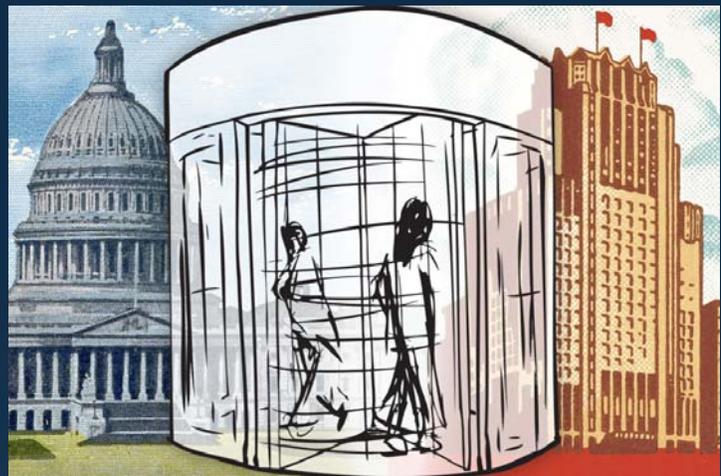
Includes family members of these employees within the second degree of consanguinity or affinity

Consanguinity (By Blood)		Affinity (By Marriage)	
First Degree	Second Degree	First Degree	Second Degree
Parent Child	Grandparent Grandchild Brother or Sister	Spouse Parent Child	Grandparent Grandchild Brother or Sister

Revolving Door Conflicts for Former Employees: Conflict Due to Work on Project (or Matter) or Former Position at Department

Former employees at or above pay level A17 who participated on matter

Individuals in positions at or above District Engineer, Division Director, Office Director, or higher



Revolving Door Conflicts for Former Employees



A firm has a conflict if it employs a former employee who participated in the procurement or negotiation of the awarded contract with the firm, within two years of the execution of that contract.



43 TAC §10.6 Conflict of Interest – Texas Gov. Code Chapter 572

Conflicts Involving Family Members: Potential for Favoritism or Bias



When family members work for both Department and firm in selection or management of contract

It is a conflict for a firm to participate in the management contract while participating on the contract being managed.

General Engineering Consultant (GEC)

Program Management Consultant (PMC)

Construction Engineering Inspection (CEI)



23 Code of Federal Regulations (CFR) §172.7 ¹⁹

A conflict exists for a firm who represents two entities on the same project.

Land owner

County

City

Regional mobility authority

Land developer

20

Construction Engineering Inspection (CEI)

Conflicts Related to Review of One's Own Design



A firm performing CEI on the same project on which the firm also performed design services provides the firm an opportunity to influence or affect project decisions on:

- scope changes,
- design changes,
- construction revisions,
- contract change orders, and
- other related issues.

The Department permits a subprovider providing data collection and/or minor support services to participate on both design and CEI, such as:

Materials engineering

Geotechnical

Surveying

Utility services

Public involvement

Environmental

Scheduling support

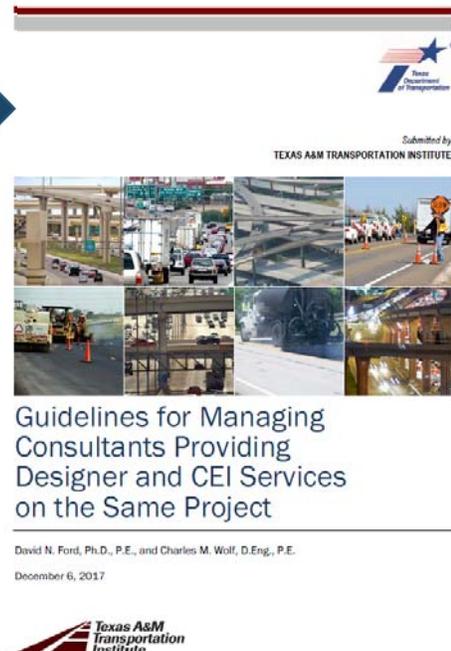
2019 PEPS Conference

November 20, 2019

Study Performed to Evaluate and Make Recommendations on CEI Preclusion

Purpose: determine best practices and needs for the Department to consider allowing consultant to perform in dual role

2019 PEPS Conference



Core Elements for Implementing a Dual Role Program



Guidelines, policies, and procedures for firms performing dual roles

Identification, disclosure, and mitigation plans and procedures for firms and Department staff

Consultant errors and omissions policies and procedures

Sanction policies and procedures to address violations

Reporting hotlines

Core Elements for Implementing a Dual Role Program (continued)



Well-defined scope and contract terms and conditions

Providing Department resources for the necessary management and oversight of the program and each contract

Monitoring, evaluation, and reporting on compliance

Training for Department and consultant staff

Communication and discussion with the industry

Additional Recommendations



- Dual role should be opened to all firms and roles – not split between primes and Subproviders



- CEI services should be procured separately and not bundled



- Limits of authority should be established for independent verses dual role firms



- More oversight on dual role firms should be provided



- Errors and omissions policy should be modified to include CEI-driven errors and omissions



- Responsibility for change order or determination of cause must be assessed by the Department



- Hotline or communication path for contractors to discuss issues or problems with Department should be established

27

WHERE ARE WE NOW?

PEPS worked with General Counsel, Compliance, and Construction Divisions to develop requirement and recommendations

Shift in current policy requires approval from Department Administration and Federal Highway Administration (FHWA)



A Decision on Firms Providing Dual Services has been Made



TxDOT made the decision not to permit a firm to provide both design and CEI service on the same project

As a result of the decision, TxDOT will continue to preclude the design firm from providing both design service and CEI services on the same project

Factors Considered



- Cost benefit: There is an increase financial and resource cost associated with the creation and maintenance of a management and monitoring program to permit a firm to perform both design and CEI services, it did not offer a significant benefit to the taxpayers
- Liability: Potential risks associated with failure are
 - Safety
 - Financial
 - Public perception



Questions and Discussion



Dan M. Neal II, P.E., P.G.
TxDOT PEPS Center of Excellence
✉ 512-416-2667
☎ Dan.Neal@Txdot.gov