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**Dino Ioannides**, *Executive Director*

## **Advisory Opinion 19-07** (Travel Expenses Paid by US Government)

**Summary:** It would not be a violation of Article XXIX for the Director or staff of the Colorado High Performance Transportation Enterprise (“HPTE”) to accept travel-related expenses from the US government for foreign travel.

### **I. Background**

Requester is the Director of HPTE. He also submits this request on behalf of two staff members, the HPTE Budget and Special Projects Manager and the HPTE Liaison and Program Coordinator. The HPTE is a statutorily-created enterprise (*i.e.*, a government-owned business) that is responsible for financing surface transportation infrastructure projects in the state of Colorado. It is a division of the Colorado Department of Transportation (“CDOT”). Its primary function is procuring public-private partnerships to deliver public infrastructure improvements. Requester has submitted an advisory opinion request to determine whether he or his staff may accept an offer of travel and related expenses from the U.S. Department of Commerce’s Commercial Law Development Program (“CLDP”). CLDP will cover expenses per the Federal Travel Regulations, including economy airfare, lodging, per diems (meals and incidentals), and travel related costs such as taxis.

The program pays for individuals in both the private and public sector to travel to countries seeking to develop infrastructure based on the public-private partnership (“P3”) framework and seeking to develop processes for accepting unsolicited proposals. “CLDP’s mission is to improve the legal environment for doing business in developing and transitional countries around the globe and thereby foster greater political stability and economic opportunity for local entrepreneurs and U.S. companies alike.”<sup>1</sup> HPTE staff have been invited to participate because they are nationally recognized experts in the field and have experience in implementing major P3 projects.

Upon approval by the Commission, CLDP and HPTE will be able to finalize plans for the countries to which travel is approved. Per diems are determined using rates set by the Federal General Services Administration (“GSA”), and travel costs will vary by country. While CLDP is

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<sup>1</sup> <https://cldp.doc.gov>.

currently contemplating travel to Nepal and Timor-Leste, country selection may change. CLDP sets agendas and workplans in coordination with each specific country on a rolling basis, and programs in each country generally last for two to three days. Generally, CLDP endeavors to use the same experts not more than two to three times annually. Selection of individuals is based on prior experience on projects.

## **II. Jurisdiction**

Requester, the Budget and Special Projects Manager, and the HPTE Liaison and Program Coordinator are all “government employee[s]” subject to the Commission’s jurisdiction. Colo. Const. Art. XXIX, § 2(1).

The Independent Ethics Commission has authority to issue advisory opinions on ethics issues arising under Article XXIX or any other standards of conduct or reporting requirements as provided by law. *See* Colo. Const. art. XXIX, § 5(5).

## **III. Applicable Law**

Section 3(2) of Article XXIX of the Colorado Constitution provides,

No ... government employee, either directly or indirectly as the beneficiary of a gift or thing of value ... shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars [currently adjusted to \$59] in any calendar year, including but not limited to, ... travel ... without the person receiving lawful consideration of equal or greater value in return from the ... government employee who solicited, accepted, or received the gift or other thing of value.

## **IV. Discussion**

The purpose of Article XXIX of the Colorado Constitution is to restrict gifts to public employees and officials acting in their official capacities. Section 3(2) of Article XXIX (“the gift ban”) prohibits gifts to covered individuals. Reimbursement of travel expenses to covered individuals constitutes a prohibited gift unless such reimbursement does not inure to the benefit of the covered individual but rather to the governmental entity, department, agency, or institution that employs the covered individual. *See* Position Statement 12-01 at 5. The Commission employs a five-factor test in determining whether a gift is to a covered individual or to the state. The Commission considers: (1) whether the offer is to a specific individual or to a designee of the state agency; (2) whether the offer of reimbursement is *ex officio*; (3) whether the event is related to the official duties of the covered individual; (4) whether there is an existing or potential conflict of interest or appearance of impropriety; and (5) whether the primary purpose of the travel is educational or business-related, or primarily for entertainment. *See* Position Statement 12-01.

Under the first factor, the Commission finds that the offer was made to the designee of HTPE. The invitation from CLDP to Requester is in his role as the Director of HTPE, by virtue of

HTPE's nationally recognized expertise. While the traveler may be the Director, travel may also be delegated to a specific HTPE staff member depending on the needs of CLDP and the expertise of the staff member.

Under the second factor, the Commission finds that the offer of reimbursement was *ex officio*, or made by virtue of Requester's (or his staff's) specific position(s) in CDOT's HTPE program.

Under the third factor, the Commission finds that the events are related to the official duties of Requester (or his staff). HTPE's staff are being selected specifically for the value they would add to CLDP's overseas efforts based on their experience with P3 project procurement and implementation, including accepting unsolicited proposals. Specifically, CLDP develops workplans with the host country, then assesses which experts may be a good fit for the project. CLDP represents that it is looking to use CDOT's expertise in countries that are just starting the P3 process and need assistance developing guidelines for procurement, value for money, and evaluation of proposals. The invitation provided by Requester, for example, suggests that the HTPE Liaison and Program Coordinator may be best suited to participate in a program on Unsolicited Proposals Policy.

Under the fourth factor, the Commission finds that there is no existing or potential conflict of interest, or an appearance of impropriety. HPTE and CLDP do not have a regulatory relationship with one another. Nor does HPTE have a regulatory relationship with the foreign countries to which travel is contemplated. While USDOT may provide federal funding to CDOT for specific projects, such as those involving interstate highways, CLDP is administered by the Department of Commerce, not the Department of Transportation. CLDP does not provide funding to HPTE.

Under the fifth factor, the Commission finds that the purpose of the travel is primarily educational in nature. The contemplated travel is an opportunity to share best practices between governments for leveraging private investment in transportation projects. While HPTE staff are sharing their expertise, their participation in CLDP also benefits the state by exposing those staff to the expertise and experience of other experts and gaining perspective on implementation of P3 projects in a variety of contexts.

The Commission finds that the invitation to Requestor presents an institutional opportunity and is not a gift to Requester under Section 3(2) of Article XXIX. Requester (or his staff) may accept CLDP's payment of travel expenses to the countries approved by CLDP in accordance with applicable federal travel regulations.

## **V. Conclusion**

It would not be a violation of Article XXIX for Requester or other staff of HPTE to accept travel and related expenses from CLDP in conjunction with CLDP's foreign outreach efforts, as described above.

The Commission cautions that this opinion is based on the specific facts presented herein, and that different facts could produce a different result. The Commission therefore encourages individuals with particular questions to request more fact-specific advice through requests for

advisory opinions and letter rulings related to their individual circumstances.

**The Independent Ethics Commission**

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Dated: January 14, 2020