

MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST



LETTER OF INSTRUCTION

To: Ximena Nuñez

From: Miami-Dade County Commission on Ethics and Public Trust

Re: Ethics Complaints C19-40-10 and C 20-01-01

Date: February 12, 2020

Ethics complaints were filed against Respondent, Ximena Nuñez, by Thom Mozloom (The M Network) and Richard Rosen (Madison South) respectively (collectively referred to as Complainants). Complainants alleged that Nuñez violated the Cone of Silence provision found at Section 2-11.1(t) of the Conflict of Interest and Code of Ethics Ordinance (County Ethics Code).

On December 11, 2019 and February 12, 2020, the Ethics Commission found probable cause concerning the Cone of Silence violations and determined that the violations appeared to have been inadvertent, unintentional, and/or insubstantial. The Ethics Commission further found that the public interest would not be served by proceeding further and dismissed the complaints, ordering a Letter of Instruction to be issued.

WHEREFORE, the Commission on Ethics and Public Trust issues this Letter of Instruction:

Section 2-11.1(t) of the Ethics Code entitled, Cone of Silence states, in pertinent part, that a Cone of Silence shall be imposed upon each RFP, RFQ and bid after the advertisement of same. Furthermore, "the provisions of this ordinance shall not apply to oral communications at pre-bid conferences, oral presentations before selection committees *duly noticed* as a public meeting..."

This Commission determined that Nuñez had been misinformed as to the application of the Cone of Silence to the 2019 Advertising Creative and Graphic Design Mini-bids advertised by The Children's Trust. Trust officials and personnel were under the belief that the Cone of Silence did not apply to the mini-bid solicitation. Furthermore, The Children's Trust conflict of interest policy contradicted the Cone of Silence selection committee presentation requirements. Consequently, Nuñez met with Mozloom, a potential vendor and competitor of Madison South, and discussed the scope of services of the bid, but the meeting was not duly noticed or recorded in accordance with the Cone of Silence. The confusion surrounding the mini-bid solicitation process caused The Children's Trust to seek guidance from this Commission. On October 4, 2019, the Executive Director issued an informal opinion (INQ 19-94) to The Children's Trust confirming the applicability of the Cone of Silence.

This Commission affirms INQ 19-94 and reiterates that Cone of Silence requirements will apply to The Children's Trust competitive solicitations, including mini-bids processes involving pre-selected members of vendor pools. It is our hope that by issuing this Letter of Instruction we have impressed upon Ms. Nuñez the importance of compliance with the Ethics Code and that she will familiarize herself with the prohibitions and requirements of the Cone of Silence as contained in the County Ethics Code.



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

19 West Flagler Street, Suite 820 · Miami, Florida 33130
Phone: (305) 579-2594 · Facsimile: (305) 579-0273
Website: ethics.miamidade.gov

MEMORANDUM

TO: Imran Ali, Chief of Staff
The Children's Trust

FROM: Jose J. Arrojo, Executive Director
Commission on Ethics

SUBJECT: INQ 19- 94, Application of Section 2-11.1 (t), Cone of Silence, to
The Children's Trust's Competitive Procurements

DATE: October 4, 2019

CC: All COE Legal Staff

Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding the following proposed transactions.

Issue:

Whether Section 2-11.1(t), Cone of Silence, is applicable to the procurement of goods and services by The Children's Trust.

Answer:

Yes, when The Children's Trust's procurement policy requires the use of a competitive selection process, Section 2-11.1 (t), Cone of Silence, as contained in the County's Code of Ethics Ordinance, shall be applicable.

Facts:

The Children's Trust maintains a vendor pool of creative advertising firms. It recently engaged in what was described as a mini-bid for advertising services related to the "Young Talent Big Dreams" initiative. The budgeted amount for the procurement was at least \$270,000. Arising from that process, a member of the vendor pool raised questions regarding the mini-bid procedures that were used in the advertising services procurement process. Specifically, the vendor questioned

whether the procurement was conducted in compliance with the Cone of Silence as referenced in The Children's Trust policies and procedures documents.¹

Discussion:

The Children's Trust has an established Purchasing and Procurement Policy.² Section 2000A of that policy provides in relevant part as follows:

- A. Conflict of Interest and Code of Ethics: The purchase of goods and services and direct community services shall be made in compliance with the Children's Trust's conflict of interest policy, the County's conflict of interest policy, *the County's code of ethics ordinance*, the state of Florida's code of ethics for public officers and employees, and applicable state statutes. [emphasis added]

By establishing a board policy that the purchase of goods and services shall comply with the County's code of ethics ordinance, The Children's Trust has adopted Section 2-11.1 (t) of the Code of Miami-Dade County, Cone of Silence.³ See generally RQO 07-11, INQ 19-19.

The language of the Cone of Silence is broad, and it applies to communications regarding any competitive procurement process, to specifically include any RFP, RFQ, or bid. The Cone is imposed upon the advertisement of the bid documents and remains in place until the executive officer or his or her designee makes a written recommendation to the elected body. During this time period, the Cone of Silence imposes prohibitions on a myriad of communications between bidders, potential vendors, The Children's Trust's professional staff, selection committee members, president/chief executive officer or his or her designate, and board members.⁴

The Children's Trust has additionally established a General Purchasing and Procurement Policy.⁵ Section 2000 of that policy provides, in relevant part, as follows:

The Children's Trust recognizes that competitive solicitation ensures that there is no favoritism during the vendor selection process, and also inspires public confidence that contracts are awarded equitably and economically. Unless exempt from the formal competitive procurement process, all purchases of goods and

¹ The vendor also raised concerns that might be characterized as public meeting breaches, but those concerns are not the subject of this opinion.

² Sections 2000A to 2010, The Children's Trust Purchasing and Procurement Policy.

³ While not the subject of this informal opinion, by adopting the County's code of ethics ordinance, The Children's Trust has also adopted Section 2-11.1 (s), Lobbying, of the Code of Miami-Dade County, and thus all persons that seek to encourage a procurement decision of the board of directors, the president/chief executive officer, or staff, when such decision will foreseeably be heard or reviewed by the board or a Children's Trust committee, must register as a lobbyist and comply with other provisions contained in the lobbying subsection.

⁴ Section 2-11.1 (t) 1. (a), Cone of Silence, Code of Miami-Dade County.

⁵ Section 2000, The Children's Trust Purchasing and Procurement Policy.

services above \$50,000, or direct community services of \$25,000 or greater from a single vendor in a fiscal year, must be secured in accordance with the Formal Competitive Procurement Process.

This policy therefore establishes the formal competitive procurement process as the preferred method for the acquisition of goods and services by The Children's Trust.

As regards the establishment of qualified vendor pools, The Children's Trust's policy preference for formal competitive procurement processes likewise applies.⁶ In qualified vendor pool scenarios, the Request for Qualifications (RFQ) policy provides for the use of a two-step competitive process to "pre-qualify" potential vendors. Thereafter, those only those prequalified vendors will be allowed to "compete" when a procurement opportunity is announced.⁷

Conclusion:

The Children's Trust has adopted a policy that explicitly provides that the purchase of goods and services and direct community services shall be made in compliance with the County ethics code.

Moreover, because The Children's Trust has also adopted a policy that competitive procurement methods will be used for all higher monetary value purchases of goods and services, then the Cone of Silence as contained in Section 2-11.1 (t), of the County's code of ethics ordinance specifically applies to these processes, including so-called mini-bids involving pre-selected members of vendor pools.

Bidders, proposers, procurement staff, persons serving on competitive selection committees as voting members or non-voting technical advisors, and procurement executive decision makers, are encouraged to familiarize themselves with the prohibitions and requirements of the Cone of Silence as contained in the County's code of ethics ordinance.

For County employees, and thus for similarly situated employees of agencies that have adopted the Cone of Silence, a knowing violation of the section subjects the employee to disciplinary action up to and including termination. A violation by a bidder or proposer shall render the procurement award voidable.⁸

⁶ Section 2004, Vendor Pools, The Children's Trust Purchasing and Procurement Policy.

⁷ Section 2000A, Request for Qualifications (RQO), The Children's Trust Purchasing and Procurement Policy.

⁸ Section 2-11.1 (t) 3. Penalties, Cone of Silence, Code of Miami-Dade County.

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.