

Frigo, Victoria (COE)

From: Frigo, Victoria (COE)
Sent: Monday, April 15, 2013 4:58 PM
To: Libhaber, Bruce (CAO)
Cc: Young, Vontressia (MDT); Centorino, Joseph (COE)
Subject: STS Contractor and Auditor (INQ 13-94)
Attachments: Organizational Conflicts.pdf

Mr. Libhaber,

As we discussed today, the County Ethics Commission does not have jurisdiction to issue binding ethics opinions regarding County contractors or bidders unless the Ethics Commission has been named in the contract as the authority to opine and criteria upon which to base the opinion are identified.

Our informal and nonbinding opinion, however, is that First Transit does not have an organizational conflict of interest to audit the Special Transportation Services (STS) provider, Transportation America, in spite of First Transit's recent loss of the STS contract to Transportation America and the fact that First Transit is the sole bidder on the current auditing contract.

Organizational conflicts frequently arise when a contractor is in a position to evaluate its own work, process its own payments, specify products and services that only it can provide, or obtain information not available to others and which it can subsequently use to its advantage. *See* 48 CFR § 9.5 (2013). In the instant case, an organizational conflict is clearly removed by hiring a separate, independent contractor to audit its competitor. Under common law and professional codes of conduct, an auditor has a fiduciary duty to the County to give a fair and accurate reporting of its findings.

Attached is a Letter of Instruction recently issued by the Ethics Commission regarding organizational conflicts of interest. If you have additional questions about the Letter, please feel free to contact me.

Sincerely,

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MIAMI-DADE COUNTY
COMMISSION ON ETHICS & PUBLIC TRUST

LETTER OF INSTRUCTION
ORGANIZATIONAL CONFLICTS OF INTEREST

At a public meeting of the Miami-Dade Commission on Ethics,¹ the Commission stated that only under the following circumstances will binding ethics opinions be issued regarding whether a bidder, proposer, contractor, or subcontractor has a prohibited conflict of interest in connection with its involvement in a contract with a local government entity:

1. The terms of the local government contract or proposal must provide the Commission on Ethics with the authority to make a binding determination of the issue presented.
2. The terms of the local government contract or proposal must state the standards by which the organizational conflict of interest will be determined.
3. Prior to the submittal date, a bidder, proposer, contractor, or subcontractor may request an opinion only about its own potential conflicts, not the potential conflicts of competitors.
4. Prior to the submittal date, the local government contracting officer may request an ethics opinion about the potential conflicts of any bidder, proposer, contractor, or subcontractor.
5. Ethics opinions regarding organizational conflicts of interest shall be rendered prior to the contract being awarded.
6. When the Commission on Ethics determines that a bidder, proposer, contractor, or subcontractor has a conflict to bid on a contract, the determination of the Commission on Ethics shall render the submittal presented by the conflicted party as nonresponsive, and its decision shall be deemed final and binding.

7. Standards associated with organizational conflicts are comparable to those established under the Federal Acquisition Regulation (FAR),² which prohibits a government contractor from being awarded any contract in which its independence of judgment might be impaired. Organizational conflicts arise in, but are not limited to, instances in which contractors evaluate their own work, process their own payments, specify products and services that only they can provide, or obtain information not available to others and which they can subsequently use to their advantage.

8. An example of contract language authorizing the Miami-Dade Commission on Ethics to issue binding opinions related to organizational conflicts might include the following:

Questions regarding organizational conflicts of interest shall be submitted prior to the submittal date and addressed to the Miami-Dade Commission on Ethics by any bidder, proposer, contractor, or subcontractor regarding potential organizational conflicts pertaining to its own bid, or by the local government contracting officer regarding potential organizational conflicts pertaining to any bidder, proposer, contractor, or subcontractor. The Commission on Ethics shall evaluate the request based on standards established under the Federal Acquisition Regulation (FAR) at 48 CFR § 9.5 (2013) in order to determine if any possible organizational conflicts of interest exist. Determinations by the Commission on Ethics shall be deemed final. When a bidder, proposer, contractor, or subcontractor is found to have a conflict, the submittal presented by the conflicted party shall be rendered nonresponsive.

¹ The discussion occurred on Mar. 20, 2013, in connection with an ethics opinion requested by Benedict P. Kuehne, Esq., on behalf of his client, Ovations Food Services LP, a bidder for the food and beverage services contract at the City of Miami Beach Convention Center. *See* RQO 13-03.

² 48 CFR § 9.5 (2013).