

MIAMI-DADE COMMISSION ON ETHICS & PUBLIC TRUST



REPORT OF INVESTIGATION

K #: 11-152a Boucher Brothers Miami Beach LLC

Date Opened: Dec. 9, 2011

Date Closed: June 5, 2012

Name of investigator: Karl Ross

ALLEGATION:

On or about December. 7, 2011, COE received a tip concerning a possible Sunshine Law violation by Miami Beach leaders relating to a proposed no-bid contract award to Boucher Brothers of Miami Beach LLC, the city's incumbent vendor for beachfront concessions including the rental of beach chairs, umbrellas, equipment for water sports and the sale of food, beverages, sunscreen and other items. The caller advised that a decision had been made to waive competitive bidding on said contract during a May 2011 retreat for elected officials and senior staff at the W Hotel in South Beach. It was further alleged said retreat was not properly noticed to the public.

The caller also advised Commissioner Deede Weithorn may have improperly participated in discussions regarding the beachfront concessions agreement at the May retreat, and that Weithorn, a certified public accountant, has a conflict of interest because her firm provides services to Boucher Brothers. Weithorn subsequently

recused herself from voting on the pending bid-waiver and contract extension, citing this conflict.

INVESTIGATION:

COE opened an investigation into this matter on December 9, 2011, in order to determine whether a Sunshine violation or violation of the Miami-Dade Ethics Code may have occurred and began by examining available public records relating to the retreat and to the subsequent action by the Miami Beach City Commission on December 14, 2011 to grant a bid-waiver for said contract and to extend the contract to Boucher Brothers for up to 10 years. The bid waiver and contract extension passed by a unanimous vote.

A copy of a meeting notice provided by City Clerk Robert Parcher shows that on May 12, 2011 the city published a notice in the Miami Herald Beach Neighbors section announcing various meetings, including a Commission Retreat at the W Hotel, located at 2201 Collins Avenue., on May 20 and 21. There was no mention of any specific items that were to be discussed at said retreat. Mr. Parcher advised COE that additional notices were posted on the city's official Website, and on several bulletin boards located around City Hall. He said members of the public typically do not attend such retreats, adding: "It's kind of a strategy session." A copy of an "after-action" report prepared by Mr. Parcher's office did note that two members of the public – Dr. Morris Sunshine and Stanley Shapiro – attended the May 20 session of the retreat, and that Mr. Shapiro attended the May 21 session at which there was a discussion regarding whether to renew the contract with Boucher Brothers or to re-bid the beachfront concession program. A decision was reached to enter into negotiations with Boucher.

The after-action report shows that during the initial session of the retreat, city leaders participated in various exercises to promote team work, leadership and to

promote an “excellence model” that was moderated by Dr. Rick Jensen, founder of the Performance Center. What appears to have been a general discussion of the need to improve city services and to upgrade infrastructure ensued, as well as the need to generate more positive news coverage and to enhance the city’s profile internationally. Following this discussion, a number of specific items were identified as topics for the following day’s retreat, including beach concessions and other city programs, projects and contracts. It should be noted that none of these items – beach concessions, the MCM settlement, Club Madonna, red light cameras, to name a few – were specifically referenced in the public notice published in the Herald or were cited in a letter dated May 16 from City Manager Jorge Gonzalez to the city commissioners (LTC #118-2011) that outlined the “agenda” for the two-day retreat. The letter merely stated that at the conclusion of each day’s “interactive exercises” there would be a “discussion of ongoing policy items.”

The after-action report states on Page 7 that, during the final day of the retreat, City Manager Gonzalez distributed to city commissioners two handouts about the beach concession program that his office had prepared in advance. The report goes on to state that Gonzalez asked commissioners “if the concession program should be bid, or negotiate a renewal with the current provider the Boucher Brothers (sic).” The report further reflects Commissioner Weithorn “stated that if the final decision is to negotiate a new agreement as a savings to the City that whatever it would cost to prepare and process a bid that that cost must be provided, at a minimum, by the current vendor.” This discussion was held just prior to the commission’s lunch break at 1:05 p.m.

A copy of the handout shows that the city manager’s office discussed the future of the beach concession program in detail with Boucher Brothers, including city proposed “enhancements” to the program and suggested new revenue sources –

proposed by Boucher Brothers – such as the sale of beer and suntan products. While the handout does not recommend one course of action or another, it does note that it would take four to six months to institute a “competitive process” and describes Boucher Brothers as “a known entity with the organizational experience and capacity to continue to operate in Miami Beach.” The handout further states: “We have spoken with the current concessionaire about the status of the concession agreement and their interest. They are interested in continuing to service our public beach areas and have discussed with us the opportunities delineated above ...” Finally, the handout notes that “Boucher Brothers has requested an adjustment to the minimum guarantee (MG) back to the level of the MG at the time of the renewal,” the effect of which could be to keep its obligation to the city from increasing beyond current levels, depending on overall revenues.

A memorandum of the Finance and Citywide Projects Committee dated December 6, 2011, recaps discussion concerning the beachfront concessions program. It references the May 20-21 Commission Retreat, noting that “a discussion was held” regarding the program at said retreat and that: “In light of the satisfaction with the performance of the current concessionaire (Boucher Brothers), and a desire to ensure that the concession agreement addressed desirable items ... *staff was directed to negotiate a new concession agreement with Boucher Brothers*” (italics added for emphasis). The analysis portion of the memo noted that “while several entities may be qualified and interested in undertaking a large-scale beachfront concession operation,” the 12 other potential rival firms were smaller than Boucher Brothers. The committee supported renewing the agreement with Boucher Brothers, taking into consideration the costs imposed on the incumbent vendor for upgrading its rental equipment and for expanding its services to include new programs implemented at the city’s request.

During the December 14, 2011, City Commission meeting, Assistant City Manager Hilda Fernandez explained that in order to help offset these costs for Boucher Brothers, the city was willing to forgo any annual increase in the “guaranteed minimum payment” by the concessionaire until the fourth year of the new agreement. Fernandez explained that by refraining from imposing an “escalator” into the agreement that would have increased the guaranteed minimum payment by 3 percent or the Consumer Price Index – whichever is greater – this would save Boucher Brothers approximately \$75,000 that could then be used by the firm to re-invest in the program in the form of new equipment and furnishings. Fernandez noted: “Our commission, back in May at the commission retreat, had a discussion about the future of a beachfront concession program and at that time directed staff to begin negotiations with the current concessionaire to see if it would be possible to enter into a new agreement with enhanced services ...” The resolution was adopted by a 6-0 vote, Commissioner Weithorn abstaining.

As part of its investigation, COE reviewed Commissioner Weithorn’s statements of financial interest (Form 1s) dating back to 2007, her first year in office. COE also requested copies of all voting conflict memos (Form 8Bs) submitted by Commissioner Weithorn, and found three (3) concerning Boucher Brothers, including one for the vote on December 14, 2011, to grant a no-bid contract extension. It should be noted that since Commissioner Weithorn is not a principal in her accounting firm she is not required to abstain from voting or otherwise participating on Boucher’s items, though it would appear that she did so in an abundance of caution. COE further requested copies of all lobbyist registration forms for Boucher Brothers and its representatives, and found two (2) such forms. Neither related to the contract extension awarded on December 14, 2011, which is the item in question. Lastly, COE obtained a copy of the newspaper ad

publicizing the commission retreat, which was published in the Miami Herald's Neighbors section on May 12, 2011.

COE interviewed the following city officials and other individuals:

Anne Swanson, former aide to Miami Beach City Comm. Deede Weithorn
Jan. 10, 2012

Ms. Swanson advised that she did not attend the Commission Retreat at the W Hotel, but said that commissioners received a binder from the city manager's office with materials relating to said retreat. She said she had a copy of the binder, and would be willing to make it available to COE for review. She said she was not aware of any itemized agenda detailing which items were to be discussed at the retreat, but suggested that the binder might contain such items. She said the retreat is usually led by consultant Rick Jensen, who meets with commissioners individually and who serves as a "facilitator." She said she was aware that Comm. Weithorn recused herself from any participation in the discussion of the beachfront concession program item at the Dec. 6, 2011, finance committee meeting, citing a conflict due to her firm's involvement with Boucher Brothers. She said that, as far as she knows, Comm. Weithorn is not a partner in the accounting firm (Berkowitz et al.) and that Comm. Weithorn does not handle the Boucher Brothers account, at least not at present. She said she does not know if Weithorn previously handled their account, either with her current firm or with her previous employer. She said that it may be the case that Boucher Brothers left Weithorn's previous firm in order to follow her to Berkowitz.

Feb. 6, 2012

In a follow-up interview at COE, Ms. Swanson advised that prior to her termination effective Feb. 1, 2012, she worked for Comm. Weithorn for almost four years as a commission aide. Regarding the commissioner's relationship with Boucher Brothers, Swanson advised that the commissioner did not seem to have a lot of direct contact with company representatives. She said that Comm. Weithorn, a CPA, did handle their account prior to switching CPA firms about three years ago and that Boucher Brothers followed her to her new firm. She said that she believes that the account was transferred to somebody else at her firm, and that she stopped handling Boucher Brothers' books some time after she changed firms.

Miami Beach City Manager Jorge Gonzalez
March 20, 2012

Mr. Gonzalez advised that representative of Boucher Brothers initiated talks leading to the granting of a 10-year contract extension prior to the initial discussion with city commissioners at the W Hotel. He said he was not sure who was the first city official queried about a renewal/extension, but said that eventually he spoke to somebody at Boucher Brothers.

“They had a contract coming to term, to expiration, and they approached and said we’d like to stay, and I said that’s up to the commission ... That’s not unusual. When a company has done a good job, they will come to us and ask to stay.” Gonzalez said this happened recently with the management of the city’s golf course and that the commission directed him to enter into negotiations with the incumbent vendor. In another case at the convention center, Gonzalez said the food concessionaire asked to stay on but the commission decided to put the contract out to an RFP, citing complaints about the quality of the service. With respect to the Boucher Brothers contract for beachfront concessions, Gonzalez said: “This ran through a pretty standard course of conduct for us.” He added that if the incumbent has performed well, he will advise commissioners as to the expressed interest of the incumbent to continue its contractual relationship and seek direction from the commissioners. He said that he did not feel that he was being lobbied by representatives of Boucher Brothers when they first asked him about a contract extension. He further advised he never felt that Comm. Deede Weithorn “pushed” him or lobbied him on behalf of Boucher Brothers.

Miami Beach Commissioner Deede Weithorn
April 12, 2012

Comm. Weithorn said she handled compliance audits for Boucher Brothers starting several years prior to becoming a Miami Beach city commissioner in 2007. She said worked on a number of Boucher accounts, including the one for the city’s beachfront concession program. She said that after leaving her old firm about a year later, she transferred that responsibility to an associate and Lisa Interian presently works the account, along with George Lopez, another staffer. She said she has only minimal involvement. She added that she does not vote on any of Boucher’s items in order to avoid the appearance of a conflict. She was asked about any involvement in the discussion that took place at the W Hotel during the May 2011 Commission Retreat, and Weithorn stated that she did not remember participating in that discussion. (Note: The after-action report prepared by City Clerk Robert Parcher indicates otherwise as noted previously.)

CONCLUSION:

Based on the available information and in consultation with COE legal staff, it was determined that the circumstances surrounding the May 20-21 commission retreat at the W Hotel do not appear to violate the Sunshine Law. The retreat was noticed in an ad published in the Miami Herald and by other means, though no specific reference was made to the Boucher Brothers item and no agenda was provided. Under state law, an agenda does not need to be included as part of a meeting notice, though it is the opinion of this agency’s staff that such an agenda, assuming city administrators had time to prepare one, would have increased transparency and public confidence. It was

evident from subsequent references at public meetings that the decision to grant a no-bid contract extension to Boucher Brothers was arrived at during the retreat. The item did go before the Miami Beach City Commission on December 14, 2011, and was adopted by unanimous vote without any public protest or dissent among commissioners.

The investigation also found that while representatives of Boucher Brothers did not register to lobby in connection with the 10-year contract extension, no such disclosure was required since Boucher was the incumbent vendor and, as such, it would not be required to disclose such communication. This was the opinion of COE legal staff as well as that of City Manager Gonzalez, who described such requests as commonplace among incumbent vendors. Gonzalez said he did not feel that he had been improperly lobbied by Boucher Brothers with respect to the contract extension.

Given the above, the instant case is closed without further action.

