



## Miami-Dade Commission on Ethics & Public Trust

### Investigative Report

Investigator: Sylvia Batista

<b>Case:</b> K17-012-A	<b>Case Name:</b>	<b>Date Open:</b>	<b>Date Closed:</b>
<b>Complainant(s):</b> Pedro J. Betancourt, Aviation Sr. Procurement Contract Officer,	<b>Subject(s):</b> Robert H. Fernandez.	08/28/14	<b>CASE CLOSED</b> Date: 7/10/17

#### Allegation(s):

Pedro J. Betancourt (Betancourt), Aviation Sr. Procurement Contract Officer for Miami-Dade Aviation Department (Aviation) provided information regarding the actions of Attorney Robert H. Fernandez (Fernandez), a partner at Zumpano & Castro. Betancourt suspected that Fernandez might be engaged in unregistered lobbying by submitting correspondence to him and others in connection to an Aviation request for proposals, specifically RFP No. MDAD-13-14 (the RFP) for Parking Access and Revenue Control System. Fernandez's letters advised that Zumpano & Castro was retained by Skidata, Inc. (Skidata), one of the bidders which submitted a proposal in response to the RFP, which has been deemed non-responsive by Betancourt.

In his correspondence to Betancourt and in a subsequent letter to Tara C. Smith, Director, Internal Services Department, Fernandez specifically responds to Betancourt's letter to Skidata dated 08/01/16 in which he informs that its submitted proposal in response to the RFP has been deemed non-responsive as per the legal opinion of Assistant County Attorney David Murray (Murray). In his correspondence, Fernandez explains that he is seeking reconsideration of the non-responsive determination based on specific facts and established Florida procurement law. In his letters, Fernandez outlines those facts and presents arguments to dissuade Betancourt from designating Skidata's proposal as non-responsive, or alternatively, to follow the recommendation made in a legal opinion by the County Attorney to reject all bids and begin a new process.

Betancourt provided information from the Miami-Dade County Lobbyist Registration database

which reflects that neither Fernandez nor Zumpano & Castro have at any time registered to lobby on behalf of Skidata.

The COE initiated an investigation to determine whether Fernandez violated the Conflict of Interest and Code of Ethics Ordinance by failing to register to lobby on behalf of Skidata, while submitting correspondence to Betancourt seeking to modify his decision that Skidata's proposal was non-responsive.

**Relevant Law:**

The Conflict of Interest and Code of Ethics Ordinance, Sec. 2-11.1 (s)(2):

All lobbyists shall register with the Clerk of the Board of County Commissioners within three (3) business days of being retained as a lobbyist or before engaging in any lobbying activities, whichever shall come first.

**Investigation:**

***Interviews/Contacts***

**03/24/17 – Robert Fernandez, Esq., Zumpano Castro –**

Fernandez was asked to come to the COE to give his statement with regards to the unregistered lobbying allegation made by Betancourt.

Fernandez explained that his practice consists of business and commercial litigation, and election law. He is not a lobbyist, although he has registered to lobby in the past. Fernandez said that he doesn't believe that what he did by way of his letters to Betancourt and Tara Smith (Smith) was lobbying. The letters set forth a legal argument in support of considering Skidata's proposal as responsive, and, as such, copies were sent to Murray for his determination as is instructed in the bid document. Nonetheless, Fernandez advised that he went ahead and registered to lobby on behalf of Skidata after being contacted by the COE.

Fernandez explained that, since the impasse had not risen to the level of a bid protest, he was under the impression that his communications were to be addressed to the County Attorney. Fernandez noted that his impression is supported by the bid document which states that, "all decisions regarding whether a Proposal shall be deemed not responsive shall be made by the Office of the County Attorney." The communications consisted of legal arguments. The only reason that the letters were addressed to the procurement officer (Betancourt) was due to the bid instruction, which states that all communication must be sent to the procurement officer.

Fernandez explained that he was hired by Skidata when Skidata received the 08/01/16 letter from Betancourt advising that its proposal was non-responsive and attaching the supporting legal opinion from Murray. The 08/01/16 letter from Betancourt triggered his three (3) letters. The decision as to whether or not a proposal is responsive rests with the County

Betancourt is the designated procurement contract officer and bidders are supposed to communicate with him while providing a copy of the correspondence to the County Attorney and the Clerk of the Board. Fernandez said that he followed the procedure set forth in the bid instructions.

Fernandez pointed out that of the three proposals submitted on the subject RFP, only one remains responsive. Fernandez said that in his October letter he makes reference to this. Betancourt has not replied to his letters, but he did acknowledge their receipt. Fernandez said that even Diana Mendez, counsel representing the last surviving bidder, HUB Parking Technologies, Inc. (HUB), asked Murray to let Skidata back in as a responsive bidder. Fernandez said that he did not meet with Murray prior to writing the letters. Fernandez said that he has not communicated with anyone other than through the letters. This procurement allows for a bid protest.

Fernandez explained that on 02/08/17, at his client's request, he sent the letter to Tara Smith and has not received a reply to date. Fernandez said that this letter may have triggered Betancourt's complaint about him to the COE. In his letters he was dealing with the issue of responsiveness of the bid, and not arguing the merits of Skidata's proposal. Fernandez said that he had no intent to lobby and was making a legal argument. This is the reason why he copied the County Attorney. Skidata already had a registered lobbyist on this procurement, Eric Zichella. This is an issue of lawyering vs. lobbying.

**06/26/17 – Pedro J. Betancourt, Aviation Sr. Proc. Contract Officer –**

Betancourt met with the COE investigator, Advocate, and Staff Attorney regarding the question of whether or not Fernandez was required to register to lobby before writing the subject correspondence to Betancourt and Smith.

Betancourt said that he sent the matter to the COE because he was not certain whether Fernandez needed to register to lobby for Skidata prior to sending the letters disputing the decision that Skidata's proposal was unresponsive. Betancourt was advised that the COE has previously issued an opinion which states that attorneys' making a legal argument or inquiring about process and procedure are not required to register to lobby because they are not trying to influence the decision of the selection committee. Betancourt was told that Fernandez needed to register to lobby on this procurement because a bid protest was possible, and the attorney representing a bidder in a bid protest proceeding is required to register as a lobbyist. Betancourt was sent a copy of the subject opinion (INQ 15-217). A copy of the opinion is attached hereto as Exhibit A.

Betancourt agreed that in the future he will send requests for advisory opinions whenever the question of whether an attorney should register to lobby.

***Document Review:***

**Document Review:**

**07/25/16** – Legal Memorandum from Murray to Betancourt providing a legal opinion as to the question of Skidata’s bid being responsive. Murray concluded that, although Skidata has a right under the RFP to insist that its proposal was confidential by inserting the word at the footer of each page of the proposal, Skidata cannot now disclaim the marking to stay in the procurement. Allowing this would give them a competitive advantage not provided to other proposers. Thus, Skidata’s proposal is non-responsive.

**11/15/16 Letter from Fernandez to Betancourt as designated procurement officer at MDAD for the RFP. Fernandez makes several points in his letter, as follows:**

- HUB also inadvertently left a “confidential” designation on pages of Exhibits “A” and “B” of its proposal. However, MDAD has deemed HUB responsive while deeming Skidata’s bid unresponsive for the same error. This disparate treatment of HUB and Skidata makes MDAD’s actions arbitrary and capricious under Florida procurement law. Skidata is requesting that its bid be given equal consideration under Florida procurement law as a responsive and responsible bidder to the RFP.

**11/01/16** - Letter from Diana Mendez, lobbyist for HUB, to David Murray.

**02/09/17** – Letter from Fernandez to Tara Smith, Director of Internal Services Department - The letter was written to Smith due to the fact that there was no response from Betancourt to his two previous letters.

**03/03/17** – Review of Miami-Dade County Registrations by Lobbyist reveals that neither Fernandez nor the law firm, Zumpano and Castro registered with the Clerk of the Board to lobby in Miami-Dade County on behalf of Skidata.

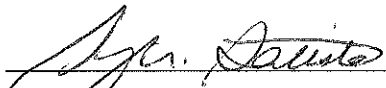
**03/31/17** – Review of Miami-Dade County Registrations by Lobbyist reflects that Fernandez registered to lobby on behalf of Skidata on 03/24/17.

RFP No. MDAD-13-14 Bid Document was reviewed and the accuracy of Fernandez’s statements made during his interview was confirmed.

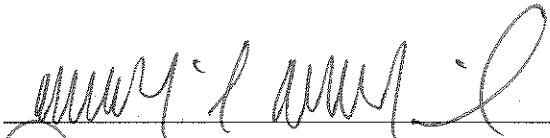
**Conclusion(s):**

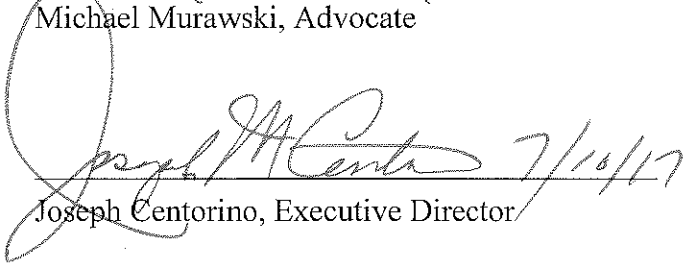
After discussion with the COE Advocate it was determined that Fernandez was engaged in “lawyering” not “lobbying” and was not required under this set of facts to register as a lobbyist. Accordingly, this matter is closed with no further action.

(Signature)

  
\_\_\_\_\_  
Sylvia Batista, COE Investigator

Approved by:

  
\_\_\_\_\_  
Michael Murawski, Advocate

  
\_\_\_\_\_  
Joseph Centorino, Executive Director 7/10/17

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**From:** Diaz-Greco, Gilma M. (COE)  
**Sent:** Tuesday, September 22, 2015 11:35 AM  
**To:** Sanchez, Rodzandra (COE)  
**Subject:** FW: Keith Knowles, Senior County Commission Clerk, Miami-Dade Clerk of the Board (lobbying) INQ 15-217

INQ 15-217 Knowles

**From:** Diaz-Greco, Gilma M. (COE)  
**Sent:** Tuesday, September 22, 2015 11:35 AM  
**To:** Knowles, Keith (COC)  
**Cc:** Centorino, Joseph (COE); Perez, Martha D. (COE)  
**Subject:** Keith Knowles, Senior County Commission Clerk, Miami-Dade Clerk of the Board (lobbying) INQ 15-217

Dear Keith:

You have inquired whether an attorney hired to represent a County vendor at a bid protest proceeding would be required to register as a lobbyist.

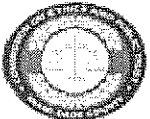
Generally, an attorney that is performing routine administrative/ministerial functions such as inquiring about process and procedure or filing paperwork is not required to register as a lobbyist. *See* RQO 04-33, INQ 13-84 and INQ 04-40. The County Ethics Code also exempts from lobbyist registration those that represent clients at a quasi-judicial hearing where *ex parte* Communications are prohibited. *See* Miami-Dade Code §2-11.1(s)(1)(b).

However, the Third District Court of Appeal, in a case interpreting the Miami-Dade County bid protest ordinance (Miami-Dade Code at Section 2-8.4) held that the decision on an award "is the exercise of an executive function rather than a quasi-judicial act..." *See MRO Software, Inc. v. Miami-Dade County*, 895 So. 2d 1086 (2004). Consequently, given that bid protests proceedings are not considered quasi-judicial proceedings, an attorney representing a bidder in bid protest proceedings is required to register as a lobbyist.

Please contact us if you have any further questions.

Best regards,

Gilma (Mimi) Diaz-Greco  
Staff Attorney



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[www.facebook.com/MiamiDadeEthics](http://www.facebook.com/MiamiDadeEthics)

**From:** Knowles, Keith (COC)  
**Sent:** Tuesday, September 08, 2015 8:59 AM  
**To:** Diaz-Greco, Gilma M. (COE)  
**Subject:** Bid Protest and Lobbyist Registration

Good morning Mimi,

Would it be your opinion that an attorney hired by a vendor to represent them at a bid protest proceeding be required to file lobbyist registration? My initial thought was they should, but I want to be sure before I respond to the requestor.

Thanks

Keith A. Knowles  
Senior County Commission Clerk  
Miami-Dade County Clerk of Courts  
Clerk of the Board Division  
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