



Miami-Dade Commission on Ethics & Public Trust

Investigative Report

Investigator: Robert Steinback

Case P18-006	Case name: Kennedy-Diaz	<u>Date Open:</u> January 30, 2018	<u>Date Closed:</u>
Complainant(s): Susan Pascua, Chief of Procurement and Materials Management, WASD	Subject(s): John Kennedy; Ismael Diaz	CASE CLOSED Date: <u>4/11/18</u>	

Allegation(s):

Complainant alleges that the content of an e-mail sent by John Kennedy, CEO of Construction Affairs Inc., a Miami-Dade County Water and Sewer Department (WASD) contractor, revealed that someone violated the Cone of Silence by naming the winning bidder for the contract in question when the official winner had not yet been announced. Kennedy and Consultant/Project Manager Ismael Diaz were investigated in this connection.

Relevant Ordinances:

Complainant alleges a violation of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance, Sec. 2-11.1 (t)(a)(i-vi) Cone of Silence – [excerpted] – (a) "Cone of Silence" is hereby defined to mean a prohibition on:

(i) Any communication regarding a particular RFP, RFQ or bid between a potential vendor,

service provider, bidder, lobbyist, or consultant and the County's professional staff including, but not limited to, the County Manager and his or her staff;

(ii) Any communication regarding a particular RFP, RFQ or bid between the Mayor, County Commissioners or their respective staffs and any member of the County's professional staff including, but not limited to, the County Manager and his or her staff;

(iii) Any communication regarding a particular RFP, RFQ or bid between a potential vendor, service provider, bidder, lobbyist, or consultant and any member of the selection committee therefor;

(iv) Any communication regarding a particular RFP, RFQ or bid between the Mayor, County Commissioners or their respective staffs and any member of the selection committee therefor;

(v) Any communication regarding a particular RFP, RFQ or bid between a potential vendor, service provider, bidder, lobbyist, or consultant and the Mayor, County Commissioners and their respective staffs; and

(vi) Any communication regarding a particular RFP, RFQ, or bid between any member of the County's professional staff and any member of the selection committee therefor.

Investigation

Interviews

March 22, 2018 Thursday – Conference telephone call with **Susan Pascua** (Pascua) and **Basdeo Budhram** (Budhram).

Pascua is the Chief of Procurement and Materials Management for WASD. Budhram is Warehouse & Store Superintendent for WASD, and the Contracting Officer for the contract in question. Pascua and Budhram jointly filed the memorandum of concern with the Commission on Ethics (COE) office regarding the possible Cone of Silence violation.

Budhram stated that the contract in question was RFQ 00103 – CDWWTP Oxygen Train Rehab Project (Consent Decree Wastewater Treatment Plant in Virginia Key). He described the job as cleaning and coating of the drain tanks; essentially a rehab project involving the pressure washing, sealing and painting of the concrete tank walls. The Cone of Silence remains in effect until a winning bidder is selected.

Budhram and Pascua stated that they believe that an e-mail Budhram received from John Kennedy, Chief Executive Officer of Construction Affairs Inc., violated the Cone of Silence. Construction Affairs was one of the bidders for this two-stage project. The company ultimately won the bid for the first stage of the project; the second stage has been postponed until October.

After some discussion, Pascua and Budhram explained that the problem they saw was not that the e-mail had been sent [the Clerk of the Court was properly cc'ed, as the code requires], but

with a particular line in the body of the e-mail: "I (Kennedy) have received communication from the designated Project Manager prior to hearing from you [Budhram]." Pascua and Budhram say this line essentially is an admission that the Project Manager – Ismael Diaz (Diaz) – and Kennedy improperly communicated while the Cone was still in effect.

Pascua said Kennedy, the letter writer, "is disclosing his own violation of the Cone of Silence."

March 23, 2018, Friday – Daniel Edwards (Edwards), senior Program manager, WASD Consent Decree Program, at his office.

Edwards said that as soon as he was copied on the e-mail from Pascua and Budhram (the same e-mail thread sent to COE), he began to internally investigate what had happened.

What he discovered is that Diaz, a consultant hired by the County to serve as Project Manager, had directed the project's Construction Manager, Steven Cross (Cross), to call Kennedy and inform him that, as the winning bidder, he could begin the steps he would need to take to get to work on the job. Diaz told Edwards that he thought he had the all-clear to contact Kennedy because he, Diaz, had received what is called a "tally sheet" which identified Kennedy's company as the low bidder.

Edwards told the investigator that for this contract the sending out of the tally sheet did *not* represent the notice of award for the bid; effectively, that couldn't happen until Kennedy had formally signed and returned the tally sheet, which had not happened as of the moment Diaz gave approval to contact Kennedy.

What triggered the controversy, Edwards said, was that the approval process for the first stage of the contract had been delayed by several weeks. When Kennedy received "go-ahead" approval from Diaz (via Cross), he thought he should have been notified three weeks earlier, and wrote an e-mail to Budhram demanding to know why he was only finding out about winning the bid then instead of three weeks earlier, which he believes cost him three weeks of preparation time to do the work. That is the e-mail that triggered this complaint.

Edwards said Diaz based his action on an earlier, unrelated contract for which Diaz had also received a tally sheet. In that instance, Edwards said, it was likely that the tally sheet had been signed and returned by the time Diaz had inquired, so that the Cone had been officially lifted. Diaz's error in this case resulted in the premature contact with Kennedy, Edwards said.

Edwards said it is likely the Cone of Silence would have been officially lifted within a day or two of delivery of Kennedy's e-mail.

March 30, 2018 – Ismael Diaz, job Project Manager over Design process, in office.

Diaz stated that he was the Project Manager over the tank-rehab projects design. Now that one of the two jobs is underway and the other is postponed, he is no longer operating in that role.

Diaz stated that he did not personally contact Mr. Kennedy, but rather instructed his Construction Manager, Steven Cross, on Thursday January 18, that he could contact Kennedy to let him know had won the bid and could begin securing his ID badges and make other preparations to commence work.

Diaz stated that his understanding from history was that the tally sheet served as the bid award document. [Edwards says not so.]. He said that had been the case for an earlier, unrelated bid. "My understanding is that in other cases, an award letter is not required," that the tally sheet IS the award letter. "I didn't know an award letter was going to be prepared. ... I told Steve we're allowed to contact the contractor because the tally sheet was being approved."

Tally sheet had been approved and sent out first week of January.

Document/Audio/Video Review:

■ Kennedy-Diaz e-mail thread 1 (Attached)

...December 22, 2017 e-mail from Diaz to WASD staff – states that tally sheet is attached showing Construction Affairs as the lowest bidder.

...January 3, 2018, Wednesday, 7:54 a.m., e-mail from Jeff An (WASD) to Diaz – with tally sheet.

...January 3, 2018, Wednesday, 1:25 p.m. e-mail from Diaz to WASD staff – asking if Budhram has any questions for the Project Officer.

...January 5, 2018, Friday, 2:56 p.m., e-mail from Budhram to Diaz, cc: WASD staff – expects to have package ready for approval by next Friday.

■ Kennedy-Diaz e-mail thread 2 (Attached)

...January 22, 2018, Monday, 10:55 a.m., e-mail from Budhram to 7 bidders; WASD staff and Clerk of the Board. Subject: Notice of Recommendation for Award. – No text, but attached is memo stating, "**The following vendor is being recommended for award: Construction Affairs.**" The memo goes on further to state, "**This notice also serves to confirm the lifting of the Cone of Silence from this procurement action as dictated by Section 2-11.1(t) of the Miami-Dade County Code.**"

...January 22, 2018, Monday, 10:16 p.m., e-mail from Kennedy to Budhram and 6 other bidders; cc: Thomas Potok (WASD), Edwards, Diaz, and Clerk of the Board –

complaining about delay in hearing from County. Includes line, **“Indeed, I have received communication from the designated Project Manager prior to hearing from you,”** that prompted original complaint to COE.

...January 23, 2018, Tuesday, 8:45 a.m., Budhram to Kennedy, cc: WASD staff, Clerk of the Board – “As you are aware that this project was under the Cone of Silence until yesterday and as everyone was advised that there should be no communication. Secondly the letter you received yesterday is only a notice of recondition [sic] not an award...”

Conclusion

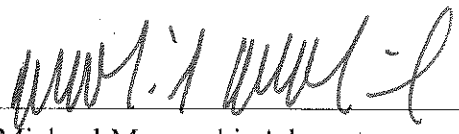
On January 18, 2018, Diaz, through Cross, contacted Kennedy to advise him that Kennedy’s company, Construction Affairs, was the low bidder on the RFP and was being awarded the contract. Diaz believed that the “tally sheet” was the bid award document. The Cone of Silence does not technically “lift” however until the “tally sheet” is signed by the winning bidder and returned to the County. Cross and Diaz did violate the Cone of Silence by communicating with Kennedy prior to the time the “tally sheet” was signed and returned by Kennedy. Edwards advised that it was likely the Cone of Silence would have been officially lifted within a day or two of delivery of Kennedy’s e-mail.

It appears as though the violation by Cross and Diaz was inadvertent based on their misunderstanding that the “tally sheet” constituted the bid award document when, in fact, it is not until the “tally sheet” is signed and returned that the Cone of Silence is lifted.

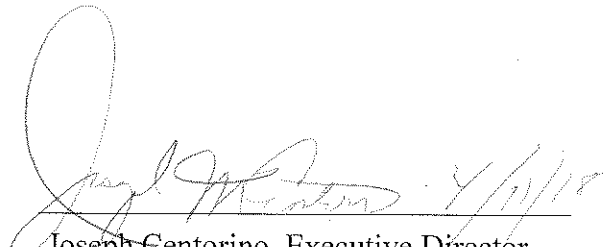
Any violation was unintentional and, all things considered, rather insubstantial. There is no indication that the Cone of Silence violation in this case affected or altered the ultimate winner of the bid. Mr. Diaz and Mr. Cross are now advised as to the proper time when the Cone of

Silence is in effect. Accordingly, the filing of formal complaints in this particular case is not warranted and the case is closed with no further action.

Robert Steinback, COE Investigator



Michael Murawski, Advocate



Joseph Centorino, Executive Director