

Sanchez, Rodzandra (COE)

From: Diaz-Greco, Gilma M. (COE)
Sent: Friday, April 27, 2018 4:00 PM
To: Sanchez, Rodzandra (COE)
Subject: Eric Zichella, Principal P3 Management (Public Records) INQ 18-81

INQ 18-81 Zichella

From: Centorino, Joseph (COE)
Sent: Friday, April 27, 2018 3:24 PM
To: 'Eric Zichella' <ez@p3-na.com>
Cc: Murawski, Michael P. (COE) <Michael.Murawski@miamidade.gov>; Turay, Radia (COE) <Radia.Turay@miamidade.gov>; Perez, Martha D. (COE) <Martha.Perez2@miamidade.gov>; Diaz-Greco, Gilma M. (COE) <Gilma.Diaz-Greco@miamidade.gov>; Rosenthal, Oren (CAO) <Oren.Rosenthal@miamidade.gov>; Sanchez, Gerald (CAO) <Gerald.Sanchez@miamidade.gov>; Kirtley, Eddie (CAO) <Eddie.Kirtley@miamidade.gov>
Subject: INQ 18-81 Eric Zichella, Principal P3 Management (Public Records)

Eric:

You have requested an opinion regarding a pending public records issue based upon your public records request under Chapter 119, Florida Statutes, to the Miami-Dade County Internal Services Department for a copy of the unsolicited proposal submitted by NFCDP. The County has declined to provide the records based upon an exemption from Section 119.07 found in Section 255.065(15), Florida Statutes that applies to unsolicited proposals submitted to responsible public entities. We have jurisdiction over public records matters by virtue of Section (A)(3) of the Miami-Dade County Citizens' Bill of Rights, which provides that, "All audits, reports, minutes, documents and other public records of the county and municipalities and their boards, agencies, departments and authorities shall be open for inspection and copying, consistent with the requirements of the State of Florida's public records laws at reasonable times and places convenient to the public." I have met with both you and Assistant County Attorney Oren Rosenthal on this matter to hear your respective arguments. I have also reviewed the relevant statutes and the Florida Senate Bill Analysis and Fiscal Impact Statement on SB 126, the bill that created the exemption from public record and public meeting requirements for unsolicited proposals for public-private partnership (P3) projects for public facilities and infrastructure. Additionally, I spoke with one of the legislative analysts in Tallahassee who worked on the report on the bill.

As I have indicated both to you and the County Attorney's Office, this issue is a fairly complicated one, due to the strong policy under Florida law in favor of public records; the significant public interest in the downtown court house project which underlies both the unsolicited proposal; the County's pending Request for Qualifications on a somewhat different version of the project; and the language of the statute and ordinance involved, which are not, in my opinion, models of clarity.

The exemption in Subsection 255.065(15)(b)(1) states as follows: "An unsolicited proposal received by a responsible public entity is exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution until such time as the responsible public entity provides notice of an intended decision for a qualifying project." There is no definition or clear reference in the statute to what is meant by "notice of intended decision." Taken out of any textual context, it could refer to a recommendation made to a governing body by the chief executive of the public entity. It could also mean the notice of a meeting of the County Commission at which it will make a decision; or it could, as the County Attorney's office maintains, not occur until the County Commission actually votes on the unsolicited proposal. None of these interpretations seems particularly satisfactory. Either the proposer suffers the disadvantage of having its proposal revealed publicly prior to a competitive solicitation, or else the public is denied access to a proposal on which the

County's governing body is acting. Subsection 119.071(b)(2), Florida Statutes, which deals generally with the exemption from the public records law in connection sealed bids or proposals on procurement matters, has similar language, stating that the records of such bids, proposals or replies are exempt "until such time as the agency provides notice of an intended decision or until 30 days after opening the bids, proposals or final replies, whichever is earlier." Again, however, little explicit statutory guidance is provided that would assist in interpreting the precise meaning of "notice of intended decision."

The reality of what occurs in the County in competitive procurements also provides little practical assistance in this regard, due to the fact that under County procedures the documents routinely become available publicly shortly after the opening of the bids and long before there is anything that might be interpreted as a notice of intended decision, either by the selection committee making its recommendation to the Mayor, or the Mayor's submission of a recommendation to the County Commission.

Section 255.065(15) does have other provisions regarding the expiration of the public records exemption that seem to provide some basis for keeping the records exempt throughout the competitive solicitation process, which both State and County procedures indicate should happen if an unsolicited proposal is not rejected outright. Subsection 3 under that provision provides that, "An unsolicited proposal is exempt for no longer than 90 days after the initial notice by the responsible public entity rejecting all proposals." Further, and more persuasive, Section 255.065(15)(c) provides, "If the responsible public entity does not issue a competitive solicitation for a qualifying project, the unsolicited proposal ceases to be exempt 180 days after receipt of the unsolicited proposal by such entity. The latter provision is difficult to square with an interpretation that the records lose the exemption anytime prior to the competitive process.

But the fact of an exemption from public records disclosure under State law does not itself mandate confidentiality. However, Section 2-8.2.6, Miami-Dade Code, in what may be a misjudgment of the significance and importance of access to public records, does mandate confidentiality.

Section 2-8.2.6 of the County Code of Ordinances, which sets out the County's procedures in connection with public-private partnerships and unsolicited proposals, simply adopts the exemptions from public records and public meetings provided in Section 255.065(15), without further elaboration on their interpretation in light of County procedures. Moreover, it takes the exemption one step further in mandating that the records not only are exempt from public records disclosure, but are "confidential." This means that the discretion provided under Section 255.065(15) afforded to local officials to decide whether, under any given circumstances, the records should be provided publicly regardless of the exemption, is now removed. County officials have no discretion on whether to make public the records of unsolicited bids. They must keep them confidential until a triggering event such as a notice of intended decision, the expiration of ninety days after the initial notice by the responsible public entity rejecting all proposals pursuant to a competitive solicitation, or if there is no competitive solicitation, 180 days after receipt of the unsolicited proposal by the public entity.

While I do not find that the County's position, based on its adopted Ordinance, on the non-public nature of the unsolicited proposal is appropriately mindful of the spirit of the public records law, I cannot dispute that the weight of the relevant provisions under State law and County ordinance strongly suggests that the records are to be kept confidential until there is a public solicitation process. I am sympathetic to your concern, and that of other interested observers, that the process is flawed and needs to be re-examined for future unsolicited proposals.

As always, I am available to further discuss this with you.

Sincerely,

Joe Centorino

Joseph M. Centorino

Executive Director and General Counsel
Miami-Dade Commission on Ethics and Public Trust
19 W. Flagler Street, Suite 820
Miami, FL 33130
Tel: (305) 579-2594
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ethics.miamidade.gov



From: Eric Zichella [<mailto:ez@p3-na.com>]
Sent: Friday, March 30, 2018 2:48 PM
To: Murawski, Michael P. (COE) <Michael.Murawski@miamidade.gov>; Centorino, Joseph (COE) <Joseph.Centorino@miamidade.gov>
Subject: Fwd: Public Records Request - Unsolicited Proposal

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Eric Zichella
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786-401-4000 office
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Begin forwarded message:

From: "Zichella, Eric" <ez@p3miami.com>
Date: March 7, 2018 at 6:10:12 PM EST
To: Joe Centorino <centori@miamidade.gov>
Cc: "Smith, Tara C. (ISD)" <Tara.Smith2@miamidade.gov>
Subject: Fwd: Public Records Request - Unsolicited Proposal

Joe - Thank you for your time on the phone today.

Below in this email chain is my public records request and my communications with Tara Smith. Please note that I continue to contend that the Cone of Silence does not apply to conversations about the unsolicited proposal that was made for a project that is materially different from a project for which the County has issued a competitive solicitation. Therefore I do not copy the Clerk of the Board on my public records request or any other communications about the Unsolicited Proposal.

After a notice of intended decision is issued by the Mayor, the documents should be public records (See: 255.065 (13)(b)1. The mayor's recommendation in procurement matters is always the notice of a decision, regardless of any action the board takes on the recommendation (notice of intended decision). Departing from that standard would create a very murky standard of when the cone would terminate on future unrelated projects, or in this case, when documents should be made public.

Further, the Cone of Silence cannot be triggered by a private party. It can only be triggered by the County, when it advertises a project in accordance with the law. In order to advertise an RFP in accordance with the law, the County must first contract with an A/E entity selected in accordance with CCNA (Chapter 287) to prepare a design criteria package with specific requirements related to the Unsolicited Proposal. The county has not done that for the unsolicited proposal, and moreover they have not even accepted the unsolicited proposal. Until all those steps are taken, there can be no cone of silence.

The addition of an additional site in the RFQ for a new Civil Courthouse is not relevant, as it is not the "same project" as was submitted in the Unsolicited Proposal. Further it was stated on the record in a meeting of the Chairman's Policy Council in February 2018 that the footprint of the courthouse submitted in the Unsolicited Proposal is smaller than the County specified in their solicited procurement (see comments on the record by Tara Smith in that meeting). For that reason, it is also not compliant with the Court Facilities Master Plan that was adopted by the Board of County Commissioners and included as a minimum footprint requirement in the solicited RFQ. It has been stated that the Unsolicited Proposal includes the repurposing of 73 West Flagler Street, which is not included as a component of the solicited RFQ. These are clearly two different projects, even though they may intend to address the same problem.

So, to summarize, I contend that: 1, there is presently no cone of silence with regard to communications only related to the unsolicited proposal; and 2, a notice of intended decision was in fact issued by the Mayor, which ended the exemption from public records for the Unsolicited Proposal.

The county should release copies of the Unsolicited Proposal immediately regardless of whether they continue with the review process or not. The County can still proceed on a parallel path, as the Board of County Commissioners has directed the Mayor to do, but the unsolicited proposal should be made public immediately.

Thank you for your time and consideration of my request. I look forward to your future guidance on this matter, and I hope it will come soon as time is of the essence.

Eric Zichella
Principal
P3 Management
2100 Coral Way, Suite 405
Miami, FL 33145
786-401-4000 *office*
786-708-7000 *mobile*



Begin forwarded message:

From: "Smith, Tara C. (ISD)" <Tara.Smith2@miamidade.gov>
Subject: Re: Public Records Request - Unsolicited Proposal
Date: February 12, 2018 at 10:00:14 PM EST

To: "EZ@P3MIAMI.COM" <EZ@P3MIAMI.COM>

Thanks for the specific references, allow me to review tomorrow and get back to you.

Tara C. Smith
Director, Internal Services Department
Miami-Dade County
305-375-1135

On Feb 12, 2018, at 9:23 PM, Zichella, Eric <ez@p3miami.com> wrote:

Thanks for getting back to me. The section of the statute you are quoting would seem to apply to a Qualifying Project for which a Responsible Public Entity chooses to not issue a Competitive Solicitation. For instance, a Responsible Public Entity could choose to evaluate an unsolicited proposal, and continue its evaluation for an extended period of time, and in this instance, the Unsolicited Proposal would be exempt up until 180 days has expired.

The present circumstance is different. The Unsolicited Proposal that was submitted has been reviewed and an intended decision has been issued. The decision is that the County is rejecting the Unsolicited proposal, and moving forward with a competitive solicitation for a different project, at a different location than the one included in the Unsolicited Proposal. Therefore, the Unsolicited Proposal that was submitted is no longer exempt from public records under state law.

"265.055 (13)(b)1. An unsolicited proposal received by a responsible public entity is exempt from s. [119.07\(1\)](#) and s. 24(a), Art. I of the State Constitution until such time as the responsible public entity provides notice of an intended decision for a qualifying project."

My contention would be that the Unsolicited Proposal received is materially different from the current competitive solicitation. Therefore the County did not elect to not issue a competitive solicitation, and it is not planning to issue a competitive solicitation related to the unsolicited proposal. Any recordings or records of meetings held outside the sunshine would still be exempt from public records for 180 days, but the proposal itself should be a matter of public record now that a notice of intended decision has been issued.

Therefore, I respectfully renew my public records request for a copy of the Unsolicited proposal.

Thank you for your consideration.

Eric Zichella
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On Feb 12, 2018, at 9:03 PM, Smith, Tara C. (ISD)
<Tara.Smith2@miamidade.gov> wrote:

Eric,
It is my understanding that the legislation keeps the proposal confidential for 180 Days from receipt (Jan 11).

Tara C. Smith
Director, Internal Services Department
Miami-Dade County
305-375-1135

On Feb 12, 2018, at 2:01 PM, Zichella, Eric
<ez@p3miami.com> wrote:

Tara - I'm writing to respectfully request, under chapter 119 f.s., a digital copy of the unsolicited proposal submitted by NFCDP, which was recently rejected by the County. As it has been officially rejected, that unsolicited proposal should now be a matter of public record. If you would kindly provide the document today, it would be appreciated.

Thank you for your diligence in reviewing that document quickly. I believe the County reached the appropriate conclusion in light of the ongoing procurement.

Thank you,

Eric Zichella
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