



## MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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### MEMORANDUM

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**TO:** Rita Silva, Division Director  
Internal Services Department

**FROM:** Jose J. Arrojo, Executive Director  
Commission on Ethics

**SUBJECT:** INQ 19-95, Application of Section 2-11.1 (t), Cone of Silence, Deferred Action by a Committee of the BCC on Mayor's Recommendation to Reject Proposals

**DATE:** October 9, 2019

**CC:** All COE Legal Staff

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Thank you for contacting the Miami-Dade Commission on Ethics and Public Trust and requesting our guidance regarding the following proposed transactions.

Issue:

Whether Section 2-11.1(t), Cone of Silence, is applicable when a Committee of the Board of County Commissioners defers action on the Mayor's recommendation to reject proposals. <sup>1</sup>

Answer:

No. The Cone of Silence, as contained in Section 2-11.1(t), is not reimposed when a Committee of the Board of County Commissioners, defers action on the Mayor's recommendation to reject all proposers.

Facts:

In 2014, the County issued RFP-00085 relating to a Compressed Natural Gas Program. The Cone of Silence commenced at that time on May 23, 2014. For the next several years, proposals were received and considered by a competitive selection committee. Thereafter, the selection committee recommended a proposer and staff began negotiations with that party. Negotiations

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<sup>1</sup> Section 2-11.1 (t) 1. (a), Cone of Silence, Code of Miami-Dade County.

were not successful and ultimately on January 7, 2019, a Mayoral recommendation for approval to reject all proposals was filed with the Clerk of the Board.

On May 16, 2019, the Mayor's recommendation for approval to reject all proposals was considered by a Committee of the Board of County Commissioners. That Committee, the Health Care and County Operations Committee, deferred action on the item to obtain further information about what it perceived to be the Administration's apparent change of policy regarding the use of compressed natural gas for County operations.

After the Committee deferral, there were two further contacts between the administration and the chosen proposer, the last occurring in August 2019. At that time, a question arose regarding the application of the Cone of Silence after the Committee deferral.

Discussion:

The Cone of Silence is contained in Section 2-11.1 (t), of the County Ethics Code. It provides, in relevant part, as follows:

(b) Procedure.

(i) A Cone of Silence shall be imposed upon each RFP, RFQ and bid after the advertisement of said RFP, RFQ or bid. At the time of imposition of the Cone of Silence, the County Manager [Mayor] or his or her designee shall provide for public notice of the Cone of Silence. The County Manager [Mayor] shall issue a written notice thereof to the affected departments, file a copy of such notice with the Clerk of the Board, with a copy thereof to each Commissioner, and shall include in any public solicitation for goods and services a statement disclosing the requirements of this ordinance.

(ii) The Cone of Silence shall terminate at the time the Manager [Mayor] makes his or her written recommendation to the County Commission; *provided, however, that if the Commission refers the Manager's [Mayor's] recommendation back to the Manager [Mayor] or staff for further review, the Cone of Silence shall be reimposed until such time as the Manager [Mayor] makes a subsequent written recommendation. (Emphasis added)*

We have previously opined that the Cone of Silence is intended to provide insulation from private lobbying or political influence during what should be a professional and sanitized competitive selection procurement process. Moreover, we have viewed the competitive process broadly to commence upon the announcement of the bid, through the evaluation of various proposers and the selection of the final proposer. For this reason, our opinions regarding the application of the Cone, its lifting or re-imposition, have focused on whether any aspect of the competitive procurement process potentially remains after the action by the chief executive officer or elected body has occurred.

In one prior case, a competitive selection process was utilized by a city to procure goods or services. At the conclusion of the selection committee's work, the City Manager requested written authorization from the elected body to commence negotiations with the selection committee's top ranked proposer, and if negotiations were unsuccessful, then with the second ranked proposer, and if necessary, with the third ranked proposer. Thereafter, as a result of the negotiations, the Manager would bring a final award recommendation to the elected body.

Because the City Manager's recommendation left three potential proposers still under consideration, the Ethics Commission opined that the Cone of Silence was not lifted when the City Manager made a recommendation to the elected body as it was not a final award recommendation. Put another way, there was still a competitive selection process that remained active. *See* INQ 17-78.

Conversely, in a second case, during a competitive selection process, the County Manager acted to affirmatively end the competitive process. The County Manager filed a recommendation for approval to waive the competitive selection process and instead proceed to negotiations with a firm with whom the Manager wished to contract. That firm's original subcontractor had been deemed unqualified.

The Ethics Commission was asked for guidance regarding the application of the Cone of Silence when the County Manager's recommendation is to cease the competitive selection process and instead proceed with negotiations with a single, identified proposer.

We noted in that opinion that the County Manager's recommendation and the elected body's action would have resulted in the termination of competitive selection; there were not two or more proposers still under consideration for award. There was no portion of the competitive selection process that remained active. Therefore, the Ethics Commission opined that the Cone of Silence was lifted when the County Manager made a recommendation to the elected body and it was not reimposed. *See* RQO 10-17.

Applying the rationale from these two opinions to the facts of this case, we consider whether the Mayor's recommendation for approval to reject all proposals, and the deferral by a Committee of the full elected body to defer action and refer the matter back to the administration, resulted in the termination of any competitive selection.

When, in this case, the Mayor filed a recommendation for approval to reject all proposals in this procurement, his action sought approval to affirmatively end any prospective competitive selection. There were no proposers that remained eligible to receive an award. Consistent with our prior opinion history, this recommendation would end the application of the Cone of Silence.

We would be inclined to opine that if the elected body with final authority, the Board of County Commissioner had rejected the Mayor's recommendation and referred the matter back to the Administration for further review, then the Cone might have been reimposed. Except that in this case there has been no action by the elected body with final authority over this matter, the Board of County Commissioners since the commission has not considered the Mayor's recommendation.

Because the full Board has not taken any action regarding the Mayor's recommendation for approval to reject all proposals in this procurement nor has the full Commission taken *any* action, then the last official action in the Compressed Natural Gas Program competitive selection was the Mayor's recommendation filed with the Clerk of Board.

Remaining faithful to the language of the ordinance, because Section 2-11.1 (t), that provides that "if the Commission refers the Manager's [Mayor's] recommendation back to the Manager [Mayor] or staff for further review, the Cone of Silence shall be reimposed until such time as the Manager [Mayor] makes a subsequent written recommendation" we are obliged to conclude that the Cone of Silence has not been reimposed at this time.

Conclusion:

The competitive process broadly commences upon the announcement of the bid, and remains through the evaluation of various proposers, the selection of the final proposer and the written recommendation to the County Commission. For this reason, the analysis regarding the application of the Cone of Silence, it's lifting or re-imposition, should focus on whether any aspect of the competitive procurement process potentially remains after the action by the chief executive officer or elected body has occurred.

In this case, the Mayor filed a recommendation for approval to reject all proposals in this procurement, effectively seeking approval to affirmatively end any prospective competitive selection. This recommendation ended the application of the Cone of Silence.

Because a committee of the Board of County Commissioners deferred on the recommendation and there has been no action taken by the full Commission, while it may appear counterintuitive, the Cone of Silence has not been re-imposed.

INQs are informal ethics opinions provided by the legal staff after being reviewed and approved by the Executive Director. INQs deal with opinions previously addressed in public session by the Ethics Commission or within the plain meaning of the County Ethics Code. RQOs are opinions provided by the Miami-Dade Commission on Ethics and Public Trust when the subject matter is of great public importance or where there is insufficient precedent. While these are informal opinions, covered parties that act contrary to the opinion may be referred to the Advocate for preliminary review or investigation and may be subject to a formal Complaint filed with the Commission on Ethics and Public Trust.