



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Rebecca S. Varley, Hydrogeologist 3
Department of Regulatory and Economic Resources

Julie Whiteside, A/E Consultant Selection Coordinator
Internal Services Department

FROM: Radia Turay, Staff Attorney
Commission on Ethics

SUBJECT: INQ 20-25

DATE: March 12, 2020

CC: All COE Legal Staff

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

Facts: The County is currently in negotiations regarding Underline Project (HWR-861) Phase II (hereinafter “Underline Project”). The solicitation is currently under the Cone of Silence.

The firm with which the County is negotiating, has requested a meeting with the Department of Regulatory and Economic Resources (RER), Division of Environmental Resources Management (DERM).

It is our understanding that the meeting is NOT a negotiation meeting. The purpose of the meeting is for DERM to provide feedback to the firm regarding the requirements related to contaminated soil remediation during construction of the project pursuant to Miami-Dade County Ch. 24. The winning firm is required to submit to DERM for approval specific plans detailing how they propose to address contaminated soil and air monitoring and include specific approved engineering controls in the design plans.

DERM is not the user department or issuing department. It had nothing to do with the solicitation documents.

Issue: Whether this meeting between the proposer and DERM is prohibited by the County’s Cone of Silence?

Discussion:

The Cone of Silence at Section 2-11.1(t) of the County Ethics Code, goes into effect when a bid, RFP or RFQ is advertised and it generally terminates when the Mayor makes his recommendation to the Board of County Commissioners (BCC).

While the Cone of Silence is in effect, oral communications between the following parties are prohibited: potential vendor, bidder, lobbyist, consultant AND County's professional staff; Mayor, BCC or their staffs AND County's professional staff; potential vendor, lobbyist, bidder, consultant AND selection/evaluation committee; Mayor, BCC and their staffs AND selection/evaluation committee; potential vendor, bidder, lobbyist, consultant AND Mayor, BCC or their respective staffs; and, County's professional staff and selection committee.

The COE in various opinions has explained that the Cone of Silence restricts or prohibits communications between and among bidders, proposers, lobbyists and **specified** government officials, officers and employees during the pendency of a competitive solicitation. *See* INQ 12-44, INQ 13-121, INQ 15-97, INQ 15-241, and INQ 15-251.

For example, in INQ 12-44, the Assistant Controller of the Airport was advised that he was not a covered government employee under the Cone of Silence prohibitions for that solicitation, because he was not part of the professional procurement staff or County executive office staff, or the selection committee. He was therefore not prohibited from communicating orally with his supervisors and other individuals on a matter involving one of the bidders of that solicitation.

Additionally, in INQ 15-251, the COE explained that in general, the Cone of Silence prohibits oral communications regarding an RFP, RFQ, or bid between a potential vendor, service provider, bidder, lobbyist, or consultant and the County's professional staff. It noted however that police officers are **not** considered part of the **professional staff of the department involved in the procurement process** and would therefore not be considered "professional staff" under the Cone. Consequently, the Cone of Silence did not bar contacts between police officers and the technical support staff of a company bidding with the County for a body camera contract for the purpose of performing field testing of the equipment.

Further, the COE in INQ 15-241, indicated that during the time the Cone of Silence is in effect, bidders were not prohibited from communicating with the RER because RER did not determine the award of the project, and the bid documents themselves required approval of RER as a condition.

In this case DERM is a division of RER. DERM is not the user department or issuing department of this solicitation. DERM will not determine the award of the project. Similar to INQ 15-241, the bid documents require that the winning bidder submit to DERM for approval specific plans detailing how they propose to address contaminated soil and air monitoring; and include specific approved engineering controls in the design plan.

Opinion: Consequently, the Cone of Silence would not prohibit a bidder from meeting with DERM regarding the requirements related to contaminated soil remediation during construction of the Underline project because DERM/RER is not the user department; it is not responsible for making the final selection or determination as to what bidder will ultimately be awarded the project; and the bid documents require that the winning bidder submit to DERM/RER for approval, specific plans detailing how they propose to address contaminated soil and air monitoring.

However, please note that to the extent that the bidder communicates with RER in writing, those writings should be cc'd/submitted to the Clerk of the Board.

This opinion is limited to the facts as you presented them to the Commission on Ethics and is limited to an interpretation of the County Ethics Code only and is not intended to interpret state laws. Questions regarding state ethics laws should be addressed to the Florida Commission on Ethics.

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.