



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

19 West Flagler Street, Suite 820 · Miami, Florida 33130
Phone: (305) 579-2594 · Facsimile: (305) 579-0273
Website: ethics.miamidade.gov

MEMORANDUM

TO: Maria Lievano Cruz, Esq.
Director of Corporate Development
Florida East Coast Industries (FECI)

FROM: José Arrojo, Executive Director
Commission on Ethics

Radia Turay, Staff Attorney
Commission on Ethics and Public Trust (COE)

SUBJECT: INQ 20-30, DB19-DTPW-02, Design & Construction of NW 107th Avenue,
FECI Contacts with County Staff, Section 2-11.1(s) and (t), County Ethics
Code, Lobbying and Cone of Silence

DATE: April 3, 2020

CC: All COE Legal Staff

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

Facts:

You are the Director of Corporate Development at Florida East Coast Industries (FECI), the parent company of Flagler Global Logistics (Flagler). Flagler owns over 500 acres of land, a former landfill, in Northwest Miami-Dade County within the boundaries of the City of Hialeah. Specifically, the boundaries are NW 97th Avenue to the east, NW 154th Street to the south, NW 107th Avenue to the west, and NW 170th Street to the north. Flagler is currently in the process of developing this parcel in phases to accommodate approximately 8 million square feet of Class-A industrial warehouse facilities.

On December 6, 2019, Miami-Dade County issued solicitation **DB19-DTPW-02** for the design and construction of NW 107th Avenue (hereinafter “the Project”). You stated that bid proposals are due on April 20, 2020. This solicitation is currently under the County’s Cone of Silence.

You have advised that FECCI is not a prospective bidder, selection or technical committee member. Neither FECCI, nor its parent company or subsidiaries have an interest in any of the proposers or the subcontractors of the proposers of this project. You have additionally advised that FECCI will not use any of the firms responding to the proposals in any project that FECCI will complete during the pendency of this solicitation that is related to scope of work involved in the procurement. Finally, you have indicated that FECCI will not advocate for the selection of any specific firm for the award of the project.

As regards lobbyists, FECCI will not be engaging any lobbyists that have also been retained to represent any proposers or subcontractors in this project.

Rather, you have related that FECCI is very interested in the successful completion of the NW 107th Avenue roadway project because it is necessary to accommodate vehicular access to current and future tenants of the business park. As such, FECCI is seeking to work with senior County administrators, to wit: Deputy Mayor Jennifer Moon; Director of the Department of Transportation and Public Works Alice Bravo; employees of DERM/RER; and, the County Attorney's Office, in an effort to assist the County and ensure the successful completion of the continuous uninterrupted roadway access to NW 107th Avenue from NW 138th Street to NW 166th Street by December of 2020, as contemplated in the solicitation documents.

Issue:

Whether FECCI's communication with senior County administrators regarding this Project is prohibited by the County's Cone of Silence as contained in Section 2-11.1 (s), of the County Ethics Code.

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 the County's professional staff; Mayor, BCC or their staffs AND the County's professional staff; potential vendor, **lobbyist**, bidder, consultant AND the selection/evaluation committee; Mayor, BCC and their staffs AND the selection/evaluation committee; potential vendor, bidder, **lobbyist**, consultant AND the Mayor, BCC or their respective staffs; and, County's professional staff and the selection committee. (See INQ 12-44; INQ 13-121; INQ 15-97; INQ 15-241; and INQ 15-251)

The COE in various opinions has explained 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.

In this instance, you advised that FECCI is not a prospective bidder, proposer, or selection committee member for this solicitation. Neither FECCI, nor its parent company or subsidiaries have an interest

in any of the proposers or the subcontractors of the proposers of this project. Further, you have indicated that FECCI will not advocate for the selection of any specific firm for the award of the project.

Rather, you stated that FECCI is very interested in the successful completion of the NW 107th Avenue roadway project; and is seeking to work with County administrators referenced herein (Deputy Mayor, Jennifer Moon; Director of the Department of Transportation and Public Works, Alice Bravo; employees at DERM/RER,¹ and the County Attorney's Office²) in an effort to assist the County and ensure the successful completion of the continuous uninterrupted roadway access to NW 107th Avenue from NW 138th Street to NW 166th Street by December of 2020, as contemplated in the solicitation documents.

Arguably, FECCI's communication with County administrators/personnel encouraging them to take any action, decision or recommendation during the time period of the entire decision-making process regarding this Project, which will foreseeably will be heard or reviewed by the County Commission, could be considered lobbying under section 2-11.1(s) of the County Ethics Code.³

However, even though FECCI's proposed actions will likely be considered lobbying activities under the Ethics Code, we do not believe that FECCI's proposed communications with the specified County officers and employees is prohibited by the Cone of Silence. This is because, the COE in various opinions has explained that the Cone of Silence puts significant restrictions on oral communications made by Commissioners, County staff, selection committee members, and **prospective contractors, as well as their lobbyists and consultants**, regarding any procurement matter during the time that the Cone is in effect. (See INQ 17-86; INQ 16-129, Cone of Silence

¹ Please note, in INQ 20-25 the COE explained that 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; and it is not responsible for making the final selection or determination as to what bidder will ultimately be awarded the project.

² Section (t)(1)(a)(vi)(ii) of the Ethics Code, excepts communications with the County Attorney and his or her staff from the Cone of Silence prohibitions.

³ Section 2-11.1(s) of the County Ethics Code, Lobbying, defines a lobbyist as "all persons, firms or corporations employed or retained by a principal who seeks to encourage the passage, defeat, or modifications of (1) ordinance, resolution, action or decision of the County Commission; (2) any action, decision, recommendation of the County [Mayor] or any County board or committee; or (3) any action, decision or recommendation of County personnel during the time period of the entire decision-making process on such action, decision or recommendation which foreseeably will be heard or reviewed by the County Commission, or a County board or committee." "Lobbyist" specifically includes the principal..." In other words, **an attempt to influence a decision-maker on an official action or decision of the government entity is considered lobbying**. See INQ 12-47.

prohibits oral communications with the selection/evaluation committee members **by the responding vendors, or their lobbyists or consultants**, or by the Manager and his staff, or by the Mayor or Council members or their staffs, or by the City's professional staff.)

In this instance, you advised that FECCI is not a prospective bidder, nor is FECCI representing the interest **of a bidder** or consultant to this solicitation. Neither FECCI, nor its parent company or subsidiaries have **any** interest in the proposers or the subcontractors of the proposers of this Project. Rather, FECCI is seeking to communicate with the County regarding this Project because it is very interested in the successful completion of the NW 107th Avenue roadway Project as it deems the Project necessary to accommodate vehicular access to current and future tenants of its business park.

Opinion:

Consequently, the Cone of Silence would not prohibit FECCI's communication with County administrators regarding this Project because FECCI is not a prospective bidder, nor is FECCI the **lobbyist of a bidder**, proposer or consultant to this solicitation. ⁴ (See INQ 17-86 and INQ 16-129)

However, FECCI's representatives who intend to engage with the County on this matter should comply with the County's lobbyist registration requirements as proscribed in section 2- 11.1(s) of the County Ethics Code.

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.

⁴ Please review the bid documents regarding this Project, prior to engaging in any interaction with County personnel regarding this solicitation, as the bid documents may include further restrictions regarding communications directed to County administrators/personnel regarding this Project.