

MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST



April 8, 2020

Via U.S. Mail & email: dustin.eaton@emerson.com

Dustin C. Eaton, Esq.
Associate General Counsel
Emerson Electric Co. – Emerson Process
200 Beta Drive
Pittsburg, PA 15238

Re: INQ 20-33, Section 2-11.1(s), Miami-Dade Code, Emerson SCADA Procurement

Dear Mr. Eaton:

Thank you and your colleagues for continuing to engage with County procurement officials and the Miami-Dade County Commission on Ethics and Public Trust regarding the application of Section 2-11.1(s) of the County Ethics Code to the ongoing Emerson SCADA procurement.

Ethics Commission lawyers have been consulting with County procurement officials and Emerson representatives on this matter for almost a year, dating back to May 2019.

As a preliminary matter, the title of Section. 2-11.1(s) Ethics Code is misleading. References to that section as the “County Lobbyist Ordinance” ignore the fact that the subsection contains very broad language and as a result it applies not only to traditional third-party, compensated, elected official lobbying activities relating to legislation, policy, and procurement, but also to a range of activities by vendor representatives, account executives, and other professionals involved in the County’s public procurement process. The section should more accurately reference vendor representatives.

Section 2-11.1 (s) of the Ethics Code, applies to three categories of persons transacting with the Board of County Commissioners (BCC), County boards/agencies, County Departments, and Jackson Health Systems (JHS):

- Those that seek to encourage the passage, defeat, or modification of an ordinance, resolution, action or decision of the Board of County Commissioners (BCC) or Public Health Trust (PHT); and
- Those that seek to encourage the passage, defeat, or modification of any action, decision, or recommendation of the Mayor or the JHS CEO or any other County or JHS board or committee; and
- Those that seek to encourage the passage, defeat, or modification of any action, decision, or recommendation of County or JHS personnel, during the time period of the entire decision-making process, including negotiation of contract terms, on such action, decision, or recommendation which foreseeably will be heard or by the BCC, PHT or a County or JHS board or committee.

This section is not limited in its application to “lobbyists” as traditionally defined. Rather, it applies to persons advocating policy, legislation or procurement decisions.

In procurement scenarios, vendors or representatives are encouraged not to focus on self-description, their work titles or product line, or whether the procurement goal is an initial, successor, or maintenance contract. Rather, the emphasis should be on whether the vendor representative is engaged in one of the functions described above: advocacy or negotiation.

If in proposing or selling a service or product, in-house representatives are encouraging purchase or procurement actions or decisions by County staff, then the section will likely apply to those persons and activities. Likewise, if there is a “back and forth” between the vendor representatives and County officials over substantive terms of an agreement that go beyond scrivener’s or drafting corrections, then again, the section will likely apply.

In this jurisdiction, because of the section’s broad language, sales representatives or contract professionals that engage in negotiations, lawyers, architects, engineers, and traditional third-party retained lobbyists are all required to register pursuant to the section. Therefore, to reiterate, in our guidance we encourage persons that we consult with to focus not on their professional self-description but rather to focus on their negotiation and advocacy activities vis-à-vis the County.

Finally, in procurement scenarios, the section applies to not only traditional competitive procurement processes but also sole source procurement and renewals. Again, the focus of the section should not be on the competitive or non-competitive nature of the procurement, or whether it is a new or renewed procurement, but rather on the vendor’s negotiation and advocacy activities.

Applying these general interpretation principals to what has been described as Emerson's interaction with the County, we previously advised that if there was no negotiation and rather simply a "re-up" and scrivener's drafting exchanges between Emerson and County personnel/counsel, then the section would not apply. Without negotiation or advocacy on substantive terms of a renewed procurement agreement, then the section would not require registration by Emerson representatives.

However, at this point in the procurement process, County procurement officers and our lawyers have been advised by the County Attorney's Office that final negotiations involving the procurement contract cannot be accurately described as scrivener's drafting exchanges on non-substantive terms and instead involve substantive term arms-length negotiation.

For these reasons, while the Emerson representatives are not acting as traditional third-party lobbyists, we are obliged to opine that the broadly worded, Section 2-11.1(s) of the Ethics Code applies to the Emerson representatives engaged in these final negotiation activities and requires their registration.

Going forward, please note that after the product or service has been purchased by the County/or the contract has been approved/executed by the County Mayor and/or the Board of County Commissioners/PHT, Emerson representatives who are simply servicing the contract, would not be required to register under Section 2-11.1(s) of the Ethics Code. *See* RQO 06-04 (The County Code of Ethics does not require County vendors to register as lobbyists to provide technical assistance after the product has been purchased by the County); *See also* RQOs 05-134 and RQO 05-114 (The Ethics Commission opined that there is no need to register as a lobbyist when a vendor's function or activity is part of the scope of services of its current contract); and INQ 18-218 (The Ethics Code does not require that a medical product sales representative register as a lobbyist when he services an existing contract with Jackson Health Systems/Public Health Trust).

Ms. Turay and I hope that this formal guidance specifying that while Emerson representatives are not engaged in traditionally defined third-party lobbyist activities at this point in the Emerson SCADA procurement, that as negotiating in-house vendor representatives, Section 2-11.1 (s) of the Ethics Code in this jurisdiction requires registration. Please do not hesitate to contact Ms. Turay or me should you or your colleagues require any further assistance.

Good luck in your continuing procurement activities with Miami-Dade County.

Sincerely,

Jose J. Arrojo

JOSE J. ARROJO
Executive Director

Radia Turay

RADIA TURAY
Staff Attorney

cc: Beth Goldsmith, Chief Negotiator, ISD
Martha Diaz Perez, General Counsel, COE