



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Robert Fernandez, Esq., Counsel, Equivant
Eric Zichella, Principal, P3Management

FROM: Martha D. Perez, General Counsel
Commission on Ethics

SUBJECT: INQ 20- 69, Cone of Silence – Section 2-11.1(t)
County procurement for Court Case Management System (CCMS)

DATE: July 7, 2020

CC: All COE Legal Staff
Hugo Benitez, Assistant County Attorney
Beth Goldsmith, Chief Negotiator

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

This inquiry came to us on 7/6/2020 as a result of Mr. Zichella's attempt to communicate with members of the Board of County Commissioners regarding RFP 01208. Mr. Zichella and Mr. Fernandez requested an informal ethics opinion to our office on the applicability of the Cone of Silence (COS) to RFP 01208- the CCMS procurement. It is their collective position that, in reference to RFP 01208 and the Formal Recommendation therein, the Cone of Silence is lifted until the BCC decides what it is going to do with RFP 01208, which is currently on the BCC agenda for this Wednesday, July 8, 2020. Further, that any Cone of Silence restrictions as it relates to the Replacement Solicitation (RFP 01622) is separate and distinct issue from RFP 01208.¹

¹ Email to Michael Murawski, COE, 7/6/2020

Facts

On 3/11/2020, RFP 01208, referred to by some County officials as “CJIS” [Criminal Justice Information System]), sought proposals for the delivery of “sound, scalable and state-of-the-art comprehensive Court Case Management System (CCMS) to replace manual paper-based processes and modernize the current criminal justice case management system” was advertised. The Cone of Silence (COS) went into effect at that time.²

Proposals for RFP 01208 were submitted by six entities: Tyler Technologies, CourtView Justice Systems dba Equivant, Cross Industry Solutions, Journal Tech and New Vision Systems Corp. The first three proposers were deemed non-responsive (not in compliance with all the terms and specifications of the RFP) and the latter three were deemed to not meet the operational/technical needs by the Competitive Selection Committee.³

Consequently, on 5/22/2020, the Mayor and his administration issued and advertised RFP 01622—a direct replacement to RFP 01208. RFP 01622 solicits proposals for a turn-key, configurable, commercially available software solution for a comprehensive Court Case Management System (CCMS) to address the needs of criminal justice agencies.

At the time that RFP 01622 was advertised, RFP 01208 remained “in limbo” pending official action by the BCC on the mayor’s recommendation to reject all of its proposals. Given this duplicated procurement quandary, any recommendation for award on RFP 01622 would have to be considered contingent upon a vote on the Mayor’s recommendation to reject all proposals in RFP 01208.

On 6/2/2020, Commissioner Heyman placed for discussion the item of “CJIS” procurement, emphasizing that “CJIS” is a critical issue and a priority for the courts. She explained that this matter has been pending for over one year; has been researched nationally; and, has been considered by all stakeholders, ISD, the courts, the Clerk and IT, on the different options available. She mentioned that “after 8 months,... over 1 month ago, [it] was determined that all responses were deemed non-responsive after the County had invested hundreds of thousands of dollars for the proposers to be rejected.

Commissioner Heyman then moved to direct the Mayor to evaluate the possibility of recommending a competitive bid waiver to limit competition in RFP 01622 to those proposers in RFP 01208 and report the findings of this recommendation at the next BCC meeting on 6/16/2020. The motion passed unanimously. There were no questions or concerns posed with regard to RFP 01208.

² Memorandum to BCC 7/8/2020 re Agenda Item 8(F)(2)

³ Id.

Pursuant to the BCC's directive, the Mayor and his administration presented the BCC's recommendation at the Pre-Bid conference on RFP 01622 the following day. On 6/11/2020, the Mayor submitted a Recommendation to reject all proposals (in RFP 01208) and introduce a competitive bid waiver (CBW) on RFP 01622, limiting the proposers to those proposers in RFP 01208. The recommendation was deferred on 6/16/2020. The item is scheduled to be heard 7/8/2020.⁴

Issue

Whether the Cone of Silence is implicated in the CCMS procurement in RFP 01208 and/or RFP 01622 when RFP 01622 has been advertised and a recommendation to reject all proposals in RFP 01288 has been submitted by the Mayor but pending vote by the Board of County Commissioners (BCC).

Discussion

Section 2-11.1(t) of the Conflict of Interest and Code of Ethics, commonly referred to as "Cone of Silence" (COS), prohibits certain communications among and between potential proposers, bidders, vendors, lobbyists and their consultants and County officials and personnel during the pendency of a competitive solicitation (RFP, RFQ or bid). The COS is in effect at the time that the solicitation is advertised and terminates when the Mayor issues his recommendation to the BCC:

Section 2-11.1(t) (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...

(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.

The Cone of Silence is intended to protect the integrity of the County's procurement process by, among other things, preventing undue influence from bidders, proposers and lobbyists during a professional and sanitized competitive solicitation. The Ethics Commission has viewed the competitive process *broadly*, focusing on whether *any* aspect of the competitive process potentially remains after the action by the Mayor *or* the Board of County Commissioners has occurred. See INQ 20-02

Therefore, our analysis must consider whether any aspect of the competitive process for the CCMS project potentially exists, whether it is characterized by RFP 01208 or RFP 01622, triggering the concerns articulated in prior ethics opinions.

⁴ The Fiscal Impact section of the Memorandum, states that there is no fiscal impact to the cancellation of this RFP.

In this case, the Mayor advertised a new solicitation for the CCMS project, in order to expedite the selection of what is undoubtedly a critical need in Miami-Dade County's court system.⁵ The Mayor's action in advertising a replacement to an otherwise non-viable competitive procurement, essentially transferred the purpose, scope of services, rules, regulations and restrictions (including the COS) from one to the other, such that, any communications regarding CCMS remain under the Cone. The competitive process regarding CCMS continues to be active until such time as the Mayor submits his recommendation for award in RFP 1622 to the BCC or the BCC takes other affirmative action ending the competitive process *regarding CCMS*.⁶

In prior ethics opinions, this office has concluded that, where two procurement components involve the same subject-matter, the COS applies equally to both. As observed in INQ 18-35 (concerning discussions regarding an unsolicited proposal (UP) between UP representatives and County officials on the same subject-matter as an advertised RFQ), "[i]t is difficult to conceive how, at this point, discussions regarding the UP between UP representatives and County officials could occur without some reference to the RFQ. There is no likelihood that both could simultaneously occur."

The circumstances of this particular procurement suggest an intermingling of RFP 01208 with a contemporaneous RFP 01622, due to the fact that it would be "very challenging (if not impossible) to engage in conversation regarding the original solicitation without having any discussion on the replacement solicitation as the two are for the same project purpose."⁷

Clearly, the two procurements in this matter (RFP 01208 and RFP 01622) are so inextricably intertwined that it makes it impossible to communicate separately on each, hence, all communications fall under the COS. See INQ 18-142

Conclusion

This office will not address the alleged inconsistencies and unconventional administrative procedures followed in this procurement. Our opinion is limited to the applicability of the Cone of Silence restrictions and/or prohibitions in the CCMS procurement as referenced in RFP 01208 and RFP 01622.

While we recognize that the Cone of Silence terminated in RFP 01208 when the Mayor submitted his recommendation to the BCC for the rejection of all proposals, the competitive nature of this procurement continued upon the advertisement of RFP 01622, thus, extending the COS restrictions to all potential proposers (limited by those who submitted proposals in RFP 01208).

⁵ Action on RFP 01208 would have required additional time in this highly critical procurement which was proceeding during the COVID-19 pandemic state of emergency.

⁶ The BCC could conceivably vote against the Mayor's recommendation to reject all proposals in RFP 01208 and in that case, the COS would be re-imposed until such time as the Mayor submitted a subsequent recommendation to the BCC.

⁷ Beth Goldsmith, Procurement Officer, Memorandum regarding Agenda Item 8(F)(2), 7/8/2020

To disassociate the competitive element in RFP 01208 from its corresponding RFP 01622 because it is technically "outside the Cone" would contravene the spirit of the COS ordinance and would result in communications and lobbying by potential proposers on a pending single subject-matter procurement, rejecting the very goal of a transparent and accountable government procurement process.⁸

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.

⁸ The COS ordinance provides for exceptions to prohibited communications, such as communications made at duly noticed public meetings, written communications with a copy to the Clerk of the Board, provided it is permitted by the bid, and other exceptions which may be found in Section 2-11.1(t) of the County Ethics Code.