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September 14, 2020

John R. Herin, Jr.
Fox Rothschild LLP
2 South Biscayne Boulevard
One Biscayne Tower, Suite 2750
Miami, FL 33131

RE: INQ 20-90, Section 2-11.1(t), County Ethics Code, *Cone of Silence*

Dear Mr. Herin:

Thank you for contacting the Miami Dade Commission on Ethics and Public Trust and consulting with us regarding the application of the County Ethics Code's Cone of Silence provisions to the procurement of Village Attorney services by Biscayne Park. This informal ethics opinion was previously provided via e-mail on August 28, 2020.

We responded as follows.

Facts:

The Village of Biscayne Park issued a RFP for Village Attorney legal services and received five responses. The RFP document did not provide for a selection committee or staff (Interim Village Manager) recommendation, but rather left it up to the individual Commissioners to vet and interview the candidates. The Village Commission conducted public interviews of 3 of the 5 candidates but delayed making a decision until the Commission's next meeting that was scheduled for September 1, 2020.

Issue:

Whether the Cone of Silence is implicated in the procurement of Village Attorney services by Biscayne Park, when a RFP is advertised and the Village Commission evaluates, ranks, and selects the winning proposal, without a recommendation from a selection committee or City staff.

Discussion:

To be clear, our guidance is predicated on the assumption that there was a formal RFP issued that contemplated sealed bids, imposition of a cone of silence, competitive evaluation, ranking and selection. *See* INQ 14-38. You have described a procurement scenario where an RFP was issued but there was no review or recommendation made by administration prior to consideration and selection by the elected body.

Put another way, there was: 1) no submission of proposals to a selection committee; 2) no selection committee presentation by proposers; 3) no vetting or evaluation of the various proposers; 4) no final ranking and recommendation of a finalist; and 5) no filing of the award recommendation by the Village Administrator with the Village Clerk for presentation to the Village Commission for vote on the selection of the Attorney. Rather, as generally explained, the various proposers submitted proposals and they were thereafter interviewed by the Village Commission in public session. The proposers are due for additional questioning and possible selection at an upcoming Village Commission meeting.

The County Cone of Silence (COS) is contained at Section 2-11.1 (t) of the County Ethics Code. Applying the provisions of that section to the above described procurement, the COS commenced at the time the bid was advertised. Thereafter, there should have been no communication regarding the RFP between the proposers or their representatives with selection committee members, the Mayor, or members of the Village Commission.

Subsection (t) provides that the COS is not lifted until the Administration makes its written recommendation to the elected body. In this case, there has been no such recommendation nor will there be. Applying the clear language of Ethics Code to the ongoing procurement process, we would opine that the COS is still in place. *See* INQ 20-02 and INQ 20-69.

While not directly on point, in prior ethics opinions relating to application of the COS to anomalous procurement processes, we have focused on whether there remained competition between two or more proposers. Competition has been the sine qua non of that analysis. If the competitive element still exists, then the COS is in place. *See* INQ 20-02 and INQ 20-69.

Conclusion:

Because in your described process, the elected body is operating as a selection committee, and two or more proposers are still competing for selection, then the COS remains in place. Therefore, Commissioners should not be having communications with proposers outside of publicly noticed meetings.

If some communications have occurred, then the remedial measure should be for the Commissioners to memorialize the communications and file them with the Village Clerk so that they are available to all proposers. Because you have sought guidance on their behalf then of course, any communications that may have occurred while you and I have been engaged, will not be reviewed for any enforcement actions.

Finally, this opinion addresses only the application of the Miami Dade Ethics Code, not the ethics code applying to local officers contained in Florida Statutes. For application of the State Ethics Code, you should please consult with the Florida Ethics Commission.

Should you need anything further, please do not hesitate to contact me.

Sincerely,

Jose J. Arrojo /s/

Jose Arrojo
Executive Director

Radia Turay
Staff Attorney

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.