



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Justin Espagnol, Selection Committee Coordinator
Internal Services Department

Phillip G. Edwards, Esq., BCC Legislative Research Manager
Office of the Commission Auditor (OCA)

FROM: Martha D. Perez, General Counsel
Miami-Dade Commission on Ethics & Public Trust

SUBJECT: INQ 21-117, Voting Conflict of Interest § 2-11.1(v), Appearance of Impropriety
and Resolution No. 449-14

DATE: August 18, 2021

CC: COE Staff

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

Background

We have reviewed your memorandum dated August 13, 2021, which was prepared in connection with the Appointment of the Selection Committee for Miami-Dade Parks, Recreation and Open Spaces (PROS) Department Request to Advertise for Rickenbacker Causeway Bond Engineering Services- Project No. E20-PROS-03. The memorandum was prepared in connection with Resolution No. R-449-14, directing the Office of the Commission Auditor (OCA) to conduct background checks on members serving on evaluation/selection committees and submit the results to the Internal Services Department and the Commission on Ethics.

The memorandum noted that two members of the selection committee made disclosures on their Neutrality/Disclosure Forms that merited submission to the Commission on Ethics for an opinion. Specifically, the memorandum notes that:

(1) Victor Fernandez-Cuervo, PROS, indicated on his Neutrality/Disclosure Form that, on or about 1983, he worked as an Intern for Metric Engineering, Inc., a subconsultant for EXP US Services, Inc (Metric Engineering), which is a respondent to this solicitation.

(2) German Arenes, Department of Transportation and Public Works (DTPW), indicated on his Neutrality/Disclosure Form that his previous supervisor, Albert Hernandez, currently works for HNTB Corporation (HNTB), a respondent to the solicitation.

Facts

(1) Victor Fernandez-Cuervo: We conferred with Mr. Fernandez-Cuervo, a voting member of the selection committee.

He is employed as at PROS as a Construction Manager 3. In his County position, he oversees the progression of PROS projects, i.e., engaging in funding objectives, finalizing scope of services and the overall reporting on the progression of the projects.¹ He confirmed that he previously engaged in a paid internship as a college student during the summer of 1983 (perhaps 1984) for Metric Engineering- a subconsultant of EXP US which is a respondent to this solicitation. He indicated that the conclusion of the internship was amicable. He has no current ownership interest or other financial interest in the company. He also does not have any business, close social, or other relationship with any current employee at the company. Mr. Fernandez-Cuervo believes he can be fair and impartial when evaluating the respondents to this solicitation.

(2) German Arenes: We conferred with Mr. Arenes who is an Alternate member of the selection committee.

He is the Chief of Transit Construction at DTPW². He confirmed that his former supervisor, Albert Hernandez, P.E., is presently working for respondent HNTB.³ Mr. Arenes indicated that he worked with Mr. Hernandez in the County for approximately seven (7) years, adding that their professional relationship was an amicable one.⁴ Mr. Arenes has no current ownership interest or other financial interest in HNTB. He also does not have any business relationship with any current employee at the company, including Mr. Hernandez. He stated that he and Mr. Hernandez socialize on occasion by getting together for lunch and “talking once in a while.”⁵ Mr. Arenes believes he can be fair and impartial when evaluating the respondents to this solicitation.

¹ Causeways, including the Rickenbacker, are under PROS the jurisdiction.

² As part of his duties, Mr. Arenes oversees, manages, and coordinates internal construction projects relating to transit construction; oversees structural inspections and consultants in PSAs; manages all 200 plus bridges; and assists PROS with the evaluation of structures, including causeways.

³ Albert Hernandez is Vice-President at HNTB since June 2019.

⁴ Although Arenes has known Hernandez since 2003 since they share a profession in common, Hernandez is the former Assistant Director of DTPW and was Arenes’ direct supervisor from 2012 through 2019, responsible for Arenes’ yearly evaluations/reviews.

⁵ However, any in-person socializing has ceased with the pandemic.

Jurisdiction

This agency conducts reviews of these issues under the County Ethics Code, which governs conflicts by members of County advisory and quasi-judicial boards. We also consider whether there is an appearance of impropriety created and make recommendations based on R-449-14 and Ethics Commission Rule of Procedure 2.1(b).

Discussion

Section 2-11.1(v) of the County Ethics Code states that no advisory personnel shall vote on any matter presented to an advisory board on which the person sits if the board member will be directly affected by the action of the board on which the member serves *and* the board member has any of the following relationships with any of the persons or entities appearing before the board: (i) officer, director, partner, of counsel, consultant, employee, fiduciary or beneficiary, or (ii) stock holder, bondholder, debtor or creditor.

Neither Mr. Fernandez-Cuervo or Mr. Arenes has a voting conflict of interest under Section 2-11.1(v) of the County Ethics Code because they will not be directly affected by the vote and they do not currently have any of the enumerated relationships with any entity affected by the vote.

Section 2-11.1(x) of the County Ethics Code, commonly referred to as the Reverse Two-Year Rule, which bars County employees from participating in contract-related duties on behalf of the County with a former employer for a period of two years following termination of the employment relations, would not apply to Mr. Fernandez-Cuervo since his summer internship with the subconsultant of one of the respondents to this solicitation ended over 35 years ago. *See* INQ 17-17-183 and INQ 21-17. It is also not applicable to Mr. Arenes as he has not been formerly employed by any of the respondents in this solicitation.

Importantly, Resolution 449-14 provides that background checks must be conducted to verify, *inter alia*, that none of the owners, officials or employees of the respondent firms was an immediate supervisor of the selection committee member during the preceding eighteen (18) months. We note that Mr. Hernandez was the immediate supervisor of Mr. Arenes for approximately 7 years until May 2019, when he separated from the County, however, the 18- month timeframe has since expired.⁶

Further, due to the sensitivity of the procurement process and the need to sustain public confidence in it, this agency also opines on whether there may be an *appearance of impropriety* in a given situation that would justify the removal of a prospective voting member (or alternate member) of a selection committee. *See* Section 2-1067, Miami-Dade County Code and Section 2.1(b) of the COE Rules of Procedure.

⁶ *See* INQ 2020-136 (withdrawing a request for COE review of Mr. Arenes' selection committee appointment since he had disclosed that his former supervisor, Mr. Hernandez, worked for HNTB, a subconsultant to a respondent to solicitation E20-DTPW-02)

As noted above, Mr. Fernandez-Cuervo disclosed that he engaged in a paid internship with a subconsultant of a respondent to the solicitation. The summer internship at Metric Engineering ended over thirty-five years ago on an amicable basis. Additionally, Mr. Fernandez-Cuervo does not have any business or social relationship with current employees at that entity, hence, it is our opinion that his service in the selection committee would not create an appearance of impropriety or in any way detract from the County conducting a fair and objective evaluation for this project. See INQ 16-214

With regard to Mr. Arenes, we note that he maintains (or maintained up to the onset of the pandemic) a social relationship with Mr. Hernandez- his former supervisor and current Vice-President of HNTB- a respondent to this solicitation.

Further inquiry revealed that Mr. Hernandez has a defined role in the subject proposal as a P.E. in the project and Quality Assurance/Quality Control Project Manager. Hence, Mr. Hernandez is noted as key personnel working on specific elements of the overall project. Additionally, Mr. Hernandez is a registered lobbyist on behalf of HNTB and is also listed on the ISD Form Affidavit, which identifies persons who will appear and present before this selection committee.

This office has considered the *appearance of impropriety* in situations involving professional and social relationships between a prospective selection committee member and an officer or employee of a respondent firm.

In INQ 16-214, this office opined that a “former supervisory relationship between a selection committee member and an employee of a respondent company involved in the solicitation does not by itself raise any prohibited voting conflict under Section 2-11.1(v) of the County Ethics Code...[nevertheless] given the prior relationship and the need for procurements in the County to be free of *appearance of impropriety* influence, it would probably be wise for [the selection committee member] to not serve on this particular committee.”

Shortly thereafter, in INQ 16-242, we considered whether a County Assistant Director could serve as a member of a negotiation committee, where the representative of one of the recommended proposers was a fraternity brother and personal friend. Although technically, the member did not have a prohibited conflict of interest serving on the committee because he would not personally benefit from the vote and he did not have a prohibited relationship with any of the parties, in order to avoid an *appearance of impropriety* created by the social relationship, the member was advised to consider withdrawing from the negotiation committee because “in all procurement matters, where appearances of integrity and fairness are paramount, ‘there is a need for the County to conduct its procurement operations in a manner that will not create appearances of impropriety, favoritism or undue influence... [which] may require a higher standard of ethics...’ ” See INQ 21-81, citing to INQ 14-242.

Lastly, in INQ 20-40, it was suggested that ISD consider withdrawing a prospective selection committee member from a selection committee due to the possible *appearance of impropriety* created by his social/professional relationship with a current employee of one of the responding firms to a solicitation, who was identified by the respondent firm as a key member of their team and was also identified as one of the individuals that would make a presentation before the

selection committee. Similarly, Mr. Hernandez is listed in the proposal submitted in response to this solicitation and is identified as serving in a defined role should this contract be awarded to the respondent team.

Opinion:

Accordingly, we do not find that Mr. Fernandez-Cuervo has a conflict of interest under the Ethics Code that would prevent him from serving on this selection committee because he will neither be directly affected by the vote nor does he currently have any of the enumerated relationships with any entity affected by the vote. In addition, his service in the selection committee would not create an appearance of impropriety.

Although Mr. Arenes also does not have a conflict of interest under the Ethics Code that would prevent him from serving on this selection committee because he will neither be directly affected by the vote nor does he currently have any of the enumerated relationships with any entity affected by the vote,⁷ we must nevertheless consider the former supervisor-employee relationship and the continuing (albeit interrupted) social interaction between Mr. Hernandez and Mr. Arenes.

While it clear that Mr. Arenes has the moral character and ethical constitution to perform his duties with objectivity and impartiality, we must nevertheless consider the *appearance of impropriety* created in this specific instance: Mr. Arenes was supervised in the County for approximately seven years by Mr. Hernandez and maintains a casual social relationship with him and, Mr. Hernandez not only holds an executive position in a respondent firm but is also listed in the proposal submitted and has been identified by the proposal as serving in a defined role should this contract be awarded to the respondent team. *See* INQ 16-242 (citing to INQ 14-242 concluding that, “[t]he need for the county to conduct its procurement operations in a manner that will not create appearances of impropriety, favoritism or undue influence is always paramount and may require a higher standard of ethics than is imposed under the aforesaid resolution or county ordinances. While emphasizing that there has been no issue raised concerning [the prospective selection committee member’s] personal integrity, ...the county should reconsider whether [he] is an appropriate member of the selection committee in question)

Consequently, we recommend that ISD should consider excusing Mr. Arenes from this selection committee as alternate member because of the *appearance of impropriety* created by his former working relationship and current social relationship with an individual who has a defined role in this solicitation.

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.

⁷ *See* INQ 14-246, INQ 16-242, INQ 19-99, INQ 20-40, INQ 21-81

