



MIAMI-DADE COMMISSION ON ETHICS AND PUBLIC TRUST

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MEMORANDUM

TO: Franklin Gutierrez, Selection Committee Coordinator
Miami-Dade County Strategic Procurement Department

Phillip Rincon, Senior Research Analyst
Office of the Commission Auditor (OCA)

FROM: Etta Akoni, Staff Attorney
Miami Dade County Commission on Ethics & Public Trust

SUBJECT: INQ 2023-10 Voting Conflict of Interest § 2-11.1(v); Appearances of
Impropriety

DATE: February 7, 2023

CC: All COE Legal Staff

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

FACTS:

We have reviewed your memorandum dated January 23, 2023, which was prepared in connection with the Appointment of the Selection Committee for Miami-Dade County Aviation Department Request to Advertise for Inspection Services and Environmental Oversight – Project No. E21-MDAD-06. 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.

The memorandum noted that a member of the selection committee made a disclosure on his Neutrality/Disclosure Form that merited submission to the Commission on Ethics for an opinion. Specifically, the memorandum notes that “Gary Clarke, Water and Sewer Department, disclosed business relationships on his neutrality affidavit with NOVA Consulting, WSP USA Environment & Infrastructure, Inc., and BND Engineers, Inc. Mr. Clarke is currently overseeing C&I services being performed by these firms. NOVA Consulting, WSP USA Environment & Infrastructure, Inc., and BND Engineers, Inc. are respondent to this solicitation.”

We conferred with Mr. Clarke. He is a Construction Manager 3 for the Water and Sewer Department (“WASD”). He confirmed that he is currently a project manager for a task authorization where Nova Consulting is a sub-contractor providing construction inspection services, and he is a project manager for a WASD Contract where Nova Consulting is the Engineer of Record. Mr. Clarke is also the Project Manager for a task authorization where WSP USA Environment & Infrastructure, Inc. is the Engineer of Record and provides construction inspection services. Additionally, Mr. Clarke is the Project manager for a WASD contract where WSP USA Environment & Infrastructure, Inc. With regards to BND Engineers, Inc., Mr. Clarke is currently overseeing BND Engineers, Inc. as they perform construction management reviews of change orders submitted by project contractors.

Mr. Clarke has no current ownership interest or other financial interest in NOVA Consulting, WSP USA Environment & Infrastructure, Inc., nor BND Engineers, Inc. Mr. Clarke also does not have any business, close social, or other relationship with any current employee(s) at NOVA Consulting, WSP USA Environment & Infrastructure, Inc., and BND Engineers, Inc. Mr. Clarke believes he can be fair and impartial when evaluating the respondents to this project.

DISCUSSION:

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).

Specifically, Section 2-11.1(v) of the County Ethics Code states that no quasi-judicial personnel or advisory personnel “shall vote on any matter presented to an advisory board or quasi-judicial 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.”

Based on the responses from Mr. Clarke, it does not appear that Mr. Clarke has a voting conflict of interest under Section (v) of the County Ethics Code because he will not be directly affected by the vote, and he does not currently have any of the enumerated relationships with any entity affected by the vote.

Further, due to the sensitivity of the procurement process and the need to sustain public confidence in it, this agency also opines concerning whether there may be an appearance of impropriety in a given situation that would justify the removal of a member of an appointed selection committee. *See* Section 2-1067, Miami-Dade County Code, 2.1(b) of the COE Rules of Procedure, and INQ 19-03.

As noted above, Mr. Clarke stated that he currently serves as Project Manager on WASD task authorizations and contracts for which NOVA Consulting, WSP USA Environment & Infrastructure, Inc., and BND Engineers, Inc. (a subcontractor), all respondents to this

solicitation, perform construction inspection services and are the engineers of record for their respective task authorizations and contracts. The COE has indicated in various informal opinions that, absent some other factor, the mere fact that a selection committee member has interactions with a respondent in connection with the member's County duties would not create an appearance of a conflict that could affect the public trust in the integrity of the procurement process. *See* INQ 14-279, INQ 16-165, INQ 17-286, INQ 18-47, INQ 18-230, and INQ 19-99. The COE's opinions note that, in fact, it may be valuable to have an individual on a selection committee who is personally familiar with the work of one or more of the responding firms, particularly where the member also has some special expertise in the services that are being sought by the County, *See* INQ 18-47, INQ 18-230, and INQ 19-99.

OPINION

We find that Mr. Clarke's service on this selection committee does not present a conflict of interest under the County Ethics Code because he does not have a current employment, financial, personal, or business relationship with NOVA Consulting, WSP USA Environment & Infrastructure, Inc., nor BND Engineers, Inc.; nor does he have any personal interest in the contract itself. *See* INQ 19-99. The fact that a selection committee member has supervisory authority over a respondent to a competitive procurement does not create any legal voting conflict of interest for that member under Section 2-11.1(v) of the County Code of Ethics, nor does said service on this selection committee present any appearance of impropriety. *See* INQ 18-47 and INQ 19-99.

We also remind Mr. Clarke that this solicitation is under the Cone of Silence, Section 2-11.1(t) of the County Ethics Code. Consequently, while he may communicate with responding firms on *existing* County contracts/projects, there should be no communication about this competitive solicitation with any of the respondents or their teams (absent permissible communications as per the Cone), Commissioners, Mayor (and their staffs) or other members of the County's Professional Staff/Client Department who are involved in any way with this solicitation, while the Cone remains in effect.

This opinion is limited to the facts as presented 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, P.O. Drawer 15709, Tallahassee, FL 32317, phone number (850) 488-7864, <http://www.ethics.state.fl.us/>.

We appreciate your consulting with the Commission in order to avoid possible prohibited conflicts of interest. If the facts associated with your inquiry change, please contact us for additional guidance.

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 Commission on Ethics 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.