



INQ 13-319

**MIAMI-DADE  
COMMISSION ON ETHICS & PUBLIC TRUST**

November 5, 2013

Hon. Carlos A. Gimenez  
Office of the Mayor, Miami-Dade County  
Stephen P. Clark Center  
111 N.W. 1<sup>st</sup> Street  
Miami, FL 33128

Re: Request for Opinion  
ISD Project No. E13-WASD-01R

Dear Mayor Gimenez:

Your letter of September 27, 2013 requested my opinion as Executive Director of the Miami-Dade Commission on Ethics and Public Trust in connection with several questions arising out of communications made by representatives of CH2M Hill, Inc. (CH2M), one of the proposers on the above-named project, with members of the selection committee during the evaluation period of the solicitation for same. Your request was made in light of concerns expressed by the other proposer, AECOM Technical Services, Inc. (AECOM) and by County staff concerning that process.

You have posed the following specific questions:

1. Is there an integrity problem created when a proposer communicates directly with each selection committee member during the evaluation process after the proposals are received, opened and made public?
2. Following the public opening and distribution of competitive proposals, is it appropriate to allow a proposer to supplement its original submittal to include additional information and staff credentials directly to selection committee members prior to the selection meeting?
3. Is there an integrity or competitive advantage problem created when a proposer submits a supplemental submittal to include a substantial amount of additional information?

The questions you have posed concern integrity issues and problems arising out of the process as it unfolded during the evaluation of the responses to the solicitation in question. To the extent that I have identified integrity issues in my review, they relate to the integrity of the solicitation and evaluation process itself, rather than to the personal ethics or morality of the individuals

engaged in the process. Any lack of integrity referenced herein points to a defective and ambiguous process that created conditions conducive to miscalculation, misinterpretation, and mistake. We should also recognize, however, that procedural defects are often the seeds of ethical misconduct in government.

Subject to the aforementioned qualification, all three questions are answered herein. I did find that there was an integrity problem raised by direct communication with selection committee members following public disclosure of the proposals; that the supplemental submission by CH2M of additional documentation on the scale that it occurred may not have been improper under its interpretation of the solicitation document, but was not perceived as fair by either the County staff or by AECOM under their own defensible interpretations of that document; and that there was both an integrity and competitive advantage problem created thereby. All of these issues have contributed to a serious public trust problem with this solicitation.

I wish to emphasize that this opinion presents only my own views regarding the questions you have posed. I do not speak for the entire Commission on Ethics, which has binding authority over the interpretation of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance. Since the questions you have posed do not involve such an interpretation, this opinion is rendered as non-binding guidance on a matter pertaining to the protection of the public trust. As you are aware, Ethics Commission staff has provided such informal "public trust" guidance upon the request of County officials or employees.

Your letter did not specifically ask for an opinion regarding the applicability of the Cone of Silence requirements pursuant to Section 2-11.1(t) of the County Ethics Ordinance. You have apparently accepted the opinion rendered by the County Attorney's Office, with which Ethics Commission staff is in accord. However, the context in which the communications in question occurred and the raising of the Cone issue by some of those involved in the process have led me to conclude that a discussion of the Cone's applicability to this situation is also warranted in consideration of your questions. Please be advised, however, that the discussion of the Cone in this letter is used only to provide explanatory background and context to the primary issues raised in your letter.

In preparing this response, I have reviewed materials submitted by the two proposers, CH2M and AECOM, during the evaluation process and subsequent to the Tier 2 presentations. I have listened to relevant portions of the audio recording of the Tier 1 meeting of the selection committee and the video recording of the Tier 2 presentations before the committee. Additionally, I have personally met with representatives of both proposers, County procurement staff, and the County Attorney's office to discuss these issues. I have also conferred with the Miami-Dade Office of Inspector General<sup>1</sup>, as well as with a respected procurement professional outside of County government. I have reviewed in detail the Notice to Professional Consultants (NTPC), as well as relevant County ordinances.

I have further concluded as follows:

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<sup>1</sup> The comments solicited from the Inspector General are attached hereto.

- 1) No individual representing either CH2M or AECOM intentionally violated any county ordinances or policies during the process;
- 2) The County's "Cone of Silence" ordinance, the applicability of which is disputed between the two proposers, was not violated, based upon interpretations of the Cone by Ethics Commission staff and by the County Attorney's Office. However, the language of the Cone Ordinance is not as explicit as it should be to adequately inform proposers of its requirements;
- 3) The NTPC or solicitation document was flawed in that it did not clearly state the conditions which the County staff intended that it state and believed it to have stated in connection with the submission of supplemental written materials directly to selection committee members, as well as the permissible scope of such submissions;
- 4) The decision-making process as a whole, on a project of great significance to Miami-Dade County, has raised substantial issues regarding the integrity of the process and the fairness of the outcome, which could have a negative impact upon the public trust in County government.

### **Factual Outline**

The general facts underlying this issue which will be referenced in this opinion are known to you, to County staff, and to both proposers. For the most part, they are not in dispute. They are recorded in detail in the County's public records, as well as in the various submissions by the proposers. They will not be repeated here except to note that the fairness of the process has been questioned due to 1) the initial favorable position attained by AECOM at the Tier 1 level, following its initial submission, which was considerably more detailed than the submission of CH2M; 2) the direct communication between representatives of CH2M and the members of the selection committee via email following submission of Tier 1 materials and the submission by CH2M of substantial supplemental materials on the eve of the Tier 2 presentation, after it had the opportunity to review the entire AECOM proposal; 3) the decision of the selection committee following the Tier 2 presentation to recommend CH2M for the contract.

### **The Cone of Silence**

Your letter requested no opinion regarding an interpretation of the Cone of Silence or whether it was violated during the evaluation process. However, the Cone issue has been raised by the County staff and by AECOM, which has based a portion of its protest on an allegation of a violation of its provisions by CH2M.

In short, AECOM has alleged that the Cone of Silence was violated in connection with an email sent by a representative of CH2M directly to members of the solicitation committee, as well as by the submission of supplemental materials directly to the members prior to the Tier 2 of the evaluation process.

The Cone of Silence, contained in Section 2-11.1(t) of the Code, prohibits oral communications between vendors and elected officials and their staffs, County professional staff and selection committee members during the evaluation period, but Subsection 2-11.1(t)1.(c)(i) permits written communications "with any County employee, official or member of the Board of County

Commissioners unless specifically prohibited by the applicable RFT, RFQ or bid documents,” provided that a copy of the communication is filed with the Clerk of the Board. In my opinion, it is the latter provision which raises the closest question under the Cone.

The first Cone issue raised by these facts is the question of whether members of selection committees, which are temporary advisory groups with no formal decision-making authority other than to make non-binding recommendations to the Mayor, are “officials” within the meaning of the latter Subsection. Prior informal opinions rendered by my predecessor and by Ethics Commission staff have found that such members are “officials,” and, therefore, are covered by this exception.<sup>2</sup> The County Attorney’s Office has likewise concluded that they are so covered.

County staff members, however, registered great surprise that such contact as occurred in this solicitation with selection committee members is considered appropriate under the Cone, and have maintained that such contacts should not and do not generally occur unless invited. Moreover, staff members point to Section 2.1 of the solicitation document, which requires that applicants submit their proposal materials in sealed envelopes which “shall be delivered” to the Clerk of the Board.

There is a fair argument, which has been made by representatives of AECOM, that the latter provision represents the exclusive method by which documents were to be submitted for this NTPC. The argument is buttressed by Section 1.13 of the solicitation document concerning “Confidential Information.” The latter section requires that trade secrets or other confidential information included in the materials submitted in response to the solicitation are to be redacted and returned to the proposer prior to their submission to the selection committee members. Admittedly, it is difficult to understand how this provision could be effective or meaningful if it were permissible for proposers to submit information directly to the selection committee.

Indeed, if Section 2.1 of the solicitation document represents the exclusive method of submitting documents in response to the NTPC and is interpreted to be a “specific prohibition” of direct contact with the selection committee, Section 2-11.1(t)1.(c)(i) would be applicable and the direct submission of any documents to the committee would be prohibited by the Cone. Sound public policy aimed at protecting the selection process from improper or deceptive practices would, in my opinion, support such a prohibition. Upon due consideration, however, it does not appear to this writer that the language of the bid document can be said to operate as a “specific prohibition.”

Based upon the above analysis, I have concluded that the Cone exception does apply and that the Cone was not violated by CH2M.<sup>3</sup> Nonetheless, the County’s procurement staff’s assumption

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<sup>2</sup> Because of the lack of any binding authority on this issue, as well as the importance of this interpretation of Cone provisions to this particular solicitation and to future county solicitations, this issue will be submitted to the Miami-Dade Commission on Ethics and Public Trust for a definitive and binding opinion.

<sup>3</sup> It should be noted that a representative of CH2M contacted the County Attorney’s Office prior to the supplemental submission of documents and was informed that the submission was permissible. Such a showing of good faith in avoiding a Cone violation should effectively avoid any enforcement action by the Ethics Commission against that representative, even if a Cone violation is ultimately found by the Ethics Commission.

that the direct submission was inappropriate, as well as the alternate interpretation of the bid document language offered by AECOM, should raise legitimate concerns in determining whether the process was fair. Where both parties to a major solicitation have reasonably drawn different inferences from relevant provisions of the Cone Ordinance and the language of the bid documents, resulting in an apparent benefit to one of the parties due to its differing interpretation, there is serious doubt about the integrity of the process and the fairness of the outcome.

### **The Supplemental Submission by CH2M**

The major issue raised in this matter is the submittal by CH2M of supplemental documentation regarding its "Project Approach" as well as other matters directly to the selection committee members on the day before the August 28 Tier 2 presentation.

On August 9, five days prior to the August 14 Tier 2 meeting, a representative of CH2M had sent an email to selection committee members (also to the Clerk and County staff) informing that CH2M would be presenting additional information regarding Project Approach on the basis that such information was not "required or requested" in the Tier 1 submittal. Project Approach information was not explicitly required in Tier 1 by the solicitation document, although "approach to the project" was included within the Tier 1 criteria under Criteria 2A of that document, under the heading, "Knowledge and past experience of similar type projects." County staff confirmed that this was a request for information concerning Project Approach on this project at the Tier 1 stage. However, this could easily have been missed or misinterpreted by CH2M due to its anomalous placement and ambiguity

Project Approach was included by AECOM, but not by CH2M, in their respective Tier 1 submissions. Following Tier 1, the selection committee requested in writing through County staff that the areas of Project Approach, as well as integration of team staff with WASD and allocation of time for key personnel be included in the Tier 2 "presentation." The Tier 2 presentation was to be an oral presentation by the two proposing teams. No additional documentation was specifically requested, but it obviously would not have been improper for further documentation to be submitted by either team in response to the request of the selection committee for information regarding the aforementioned items.

The Tier 2 document submission by CH2M far exceeded in volume its Tier 1 submission. It included information on Project Approach, as well as the other requested areas, but also other materials outside the scope of the request by selection committee and supplemental changes to its Tier 1 submission. While there appears to have been no explicit prohibition against such additional submissions, the supplemental submission has been challenged by AECOM due to its scope and volume. AECOM contends that the supplemental submission by CH2M after it gained access to AECOM's detailed Tier 1 submission, as well as its knowledge of the comments made by the selection committee members during the Tier 1 meeting concerning the initial submissions, provided an unfair opportunity for CH2M to "piggyback" on AECOM's submission.

CH2M counters that its Tier 2 documentation was invited by the selection committee. It further contends that AECOM was granted the same opportunity at the Tier 2 presentation by the County's offer to permit the delay of Tier 2 for two weeks to enable AECOM to prepare its own responsive submission. CH2M argues that AECOM, by declining to request a postponement of Tier 2, effectively waived the right to protest.

AECOM's position on the latter point is that, faced with the option of waiving what it considered to be grounds for a valid bid protest based on the Cone issue and the substantial expansion of CH2M's submittal, as well as the possibility of alienating selection committee members gathered at the Tier 2 presentation, it elected to proceed.

There is again ambiguity in the selection documents which prevents a clear-cut solution to these disparate views of the process. County staff appears to consider the submissions by CH2M as an unfair exploitation of the opportunity it had to digest and respond to AECOM's initial submission and the committee's comments.<sup>4</sup> This view is supported by the very idea of a process requiring submission of sealed proposals by a set deadline prior to the Tier 1 meeting. In theory, all of the document submission could have taken place prior to Tier 1 based on the Tier 1 criteria. The Tier 2 stage was to be primarily an oral presentation that did not require additional documentation. Nowhere does any specific request for additional documentation appear for Tier 2. The selection committee's request that certain matters be addressed at the Tier 2 presentation does not mention submission of further documents.

Nonetheless, in the absence of a specific prohibition in the bid documents, it cannot be concluded that the submission by CH2M was improper or in violation of any County rule or bid procedure. Yet, the existence of a deadline, the publication of the proposals, the breadth of CH2M's submission on the eve of the Tier 2 presentation, all raise doubts about the mutuality of understanding between the County and the proposers that must underlie such a process. The County staff appeared stunned by the size of the submission as well as the direct delivery to selection committee members.

These questions go to the heart of any assessment of the fairness or integrity of the evaluation process. While we cannot conclude the existence of any wrongdoing on the part of either proposer, we should be troubled by the not unreasonable disparate interpretations of the procedures and the reliance of each competitor on those disparate interpretations.

### **Conclusion**

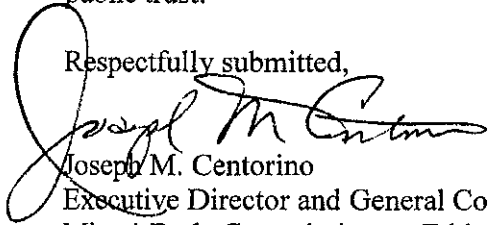
This opinion does not rely for its conclusions on a finding of fault by either party to this competitive solicitation. Legal ambiguities and the failure of the county's solicitation document to set clear guidelines have led to a flawed process that must be reassessed to assure an outcome consistent with the public trust. The integrity issues raised here are not those of the parties to the process but of the process itself.

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<sup>4</sup> County staff has now proposed to strengthen and clarify the language in its standard solicitation documents to prohibit both oral or written contact with selection committees outside of public meetings, as well as a prohibition on supplemental submissions unless specifically requested.

Although adherence to the rule of law and to the rules of the process should be the gauge of ethical conduct in most instances involving a sensitive government solicitation, they have failed in this instance to produce a result that the public can trust. Ethical concepts are not easily defined or explained and may not always provide the clearest path to a trustworthy government solicitation process. In this instance, Miami-Dade County should do better in protecting the public trust.

Respectfully submitted,



Joseph M. Centorino  
Executive Director and General Counsel  
Miami-Dade Commission on Ethics and Public Trust

cc: Miami-Dade County Commissioners