



August 22, 2019

Ms. Namita Uppal
Chief Procurement Officer
Strategic Procurement Division,
Miami-Dade County Internal Services Department

Re: **RQO 19-03** Cone of Silence

Dear Ms. Uppal:

At a public meeting on August 14, 2019, the Miami-Dade Commission on Ethics & Public Trust (COE) opined that, pursuant to Section 2-11.1(t) of the Miami-Dade County Conflict of Interest and Code of Ethics Ordinance, titled "Cone of Silence," written communications with any County employee, official or member of the Board of County Commissioners (BCC), which are copied to the Clerk of the Board, are permitted under the Cone of Silence (COS) except in those instances where the applicable RFP, RFQ or bid document specifically prohibits the written communications or restricts such written communications to specified individuals or groups. Furthermore, while the Cone of Silence is in effect, communicating in writing, when it is specifically prohibited by the bid document, constitutes a violation of the Ordinance.

In an Ethics Commission investigation into Cone of Silence (COS) violations, a firm's lobbyist alleged, *inter alia*, that a County Procurement Officer had violated the Cone of Silence ordinance when she communicated via email (copying the Clerk of the Board) when the RFP prohibited all forms of communication between any vendor and members of the Selection Committee (the procurement/contracting officer acting as the non-voting chairperson of the selection committee).¹

In response to this allegation, you asserted that the procurement process was followed because all communications (with the proposers) were done through emails which were copied to the Clerk of the Board in accordance with the COS ordinance.

COE investigated and concluded that there was no COS violation because such (written) communications are permitted, however, it was noted that, whether a prohibition on certain communications contained in the bid document, which would otherwise be permitted under the COS ordinance, constitutes a COS violation, is a matter of first impression.²

¹ A memorandum from the Mayor reflected the appointment of an ISD procurement officer to the selection committee as the Non-Voting Chairperson. According to Ms. Uppal, the Mayor does not appoint the Procurement Officer; rather, that person is selected by ISD staff. In addition, the Procurement Officer does not serve as a member of the selection committee.

² Refer to PI 18-58.

While in the aforementioned investigation (PI 18-58), the language of the bid document was arguably too vague and ambiguous to support a violation of the COS ordinance by the County's Procurement/Contracting Officer, the circumstances underlying this investigation prompted modifications by ISD's Strategic Procurement Division to the language of bid documents as well as a review by this agency of Section 2-11.1(t)1.(c)(i), the specific provision in the COS ordinance which exempts written communications (copied to the Clerk of the Board) from the communications prohibited by the Ordinance.

The COS Ordinance contains a general prohibition on any communication regarding an RFP, RFQ or bid between certain persons, entities or groups involved in the competitive solicitation.³ The COS, however, provides for exceptions from these prohibited communications. For example, the COS allows communications that would be barred by the general prohibition to occur during the pendency of a solicitation relating to housing funding, grant processes, minority business programs, meetings related to an unsolicited proposal in compliance with State law, communications at duly noticed public meetings and site visits.

Another exception in the COS may be found in subsection (t)1.(c) (i) (6) of the Ordinance, which provides that the restrictions of the Ordinance shall not apply to : "communication in writing with any County employee, official or member of the Board of County Commissioners unless specifically prohibited by the applicable RFP, RFQ or bid documents. The bidder or proposer shall file a copy of any written communication with the Clerk of the Board." (Exception 6) The Commission has interpreted the meaning of this clause by applying well settled rules of statutory construction and considering the reasoning contained in prior ethics opinions.

Looking at the common usage of the word "unless" and COE precedent, the Commission determined that, in the context of Exception 6, the phrase "unless prohibited by the solicitation document" means that Exception 6 will apply *except* when the solicitation document specifically restricts or prohibits an otherwise permissible written communication. Thus, any written communication prohibited by the bid document violates the COS Ordinance. This determination was further supported by the County's support for a policy which prohibits direct communications with competitive selection committees and their individual members.

Consequently, we conclude that the exception to prohibited communications in the COS Ordinance, permitting written communications to any County officer, official or employee, with a copy to the Clerk of the Board, shall not apply in instances where the RFP, RFQ or bid document has expressly prohibited written communications with persons or groups specified in the bid document.

³ The prohibited communications include communications between: vendors, proposers and the County's professional staff, Mayor, County Commissioners (and their respective staff) and selection committee members; Mayor, County Commissioners (and their respective staff) and selection committee members, County's professional staff and selection committee members.

If you have any questions regarding this opinion, please contact the undersigned or Staff Attorney Martha D. Perez at (305) 579-2594.

Sincerely Yours,

A handwritten signature in black ink, appearing to read 'José Arrojo', with a stylized flourish at the end.

JOSÉ ARROJO
Executive Director