

M E M O R A N D U M

TO: COMMISSION ON ETHICS AND PUBLIC TRUST
FROM: ARDYTH WALKER, STAFF GENERAL COUNSEL
RE: RQO 08-27 (Amended)
DATE: JUNE 18, 2008
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Per the Commission's request, I reviewed the use of employee references during the selection process and in evaluating contractor and vendor performance.

I. CURRENT PRACTICE

A. References During the Selection Process

The Office of Capital Improvements (OCI) and the Department of Procurement Management (DPM) currently require bidders and proposers to provide information regarding past work on similar projects. The information generally includes the name and phone number of the project manager on similar county contracts. The references are generally contacted only if the firm is selected for award.

Selection committees are currently comprised of a non-voting chairperson from OCI, DPM or the issuing department. The selection committee also contains voting members from the user department, the selection committee pool and the Department of Small Business Affairs. One of the voting members from the user departments is frequently the project manager on the solicitation or the project manager for the expiring contract. In some instances, the project manager is also the reference for the firm bidding on the work that is similar to the work that the firm is doing or has done for the department.

The OCI solicitation documents provide that County employees are only permitted to provide written references after the Cone of Silence is imposed. Although the firms once submitted written references, the practice of written references has discontinued.

OCI and DPM also attach past evaluations of recommended firms (if any) to bid award information that is provided

to the County Manager and the Board of County Commissioners. Per ordinance, the past performance information is evaluated as one of the factors in the selection process.

B. Contractor Evaluations

The current contractor evaluation process provides for contractors to be evaluated periodically during the term of the contract and at the end of the contract. The information is maintained on county's internal contract information system. The information is generally provided by the department's project manager. The evaluations are not required by every department and are not consistently maintained for every project.

DPM is planning to initiate a pilot project where evaluation criteria will be included in solicitation documents. Evaluation information will have to be regularly collected and maintained by the department as a contractual requirement. DPM will generate a simple form that evaluates criteria such as quality of materials, responsiveness, management and quality of work. The forms will be submitted by the project manager or the departmental personnel responsible for overseeing the contract.

II. CONFLICT OF INTEREST ORDINANCE

Section 2-11.1(p) provides that "(n)o person included ... may recommend the services of any lawyer of law firm, architect or architectural firm, public relations firm or any other person or firm, professional or otherwise, to assist in any transaction involving the County or any of its agencies, provided that such recommendation may properly be made when required to be made by the duties of office."

III. ETHICS COMMISSION PRIOR OPINIONS

RQO 05-27- The Ethics Commission opined that the Conflict of Interest and Code of Ethics ordinance permits an employee to provide the reference required by OCI. However, if the form is completed during the time that the project is covered by the Cone of Silence, all requests and

communications regarding references between firms and county personnel must be in writing with a copy to the Clerk of the Board. The Commission's opinion is provided in the solicitation documents for OCI contracts.

RQO 07-35- The Ethics Commission opined that a project manager who served on the selection committee could provide references to a firm that was bidding on the work. Pursuant to 2-11.1 (p), an employee may provide references when they are required as a part of the employee's work responsibilities.

RQO 05-100- The Ethics Commission opined that the Conflict of Interest ordinance does not prohibit an employee from the limited activity of providing introductions between an AE firm and personal or business acquaintances.

COMPLAINT 07-19- The Ethics Commission found that an employee was prohibited from recommending the services of a firm to fulfill a contractor's minority business requirements.

IV. RECOMMENDATIONS

1. A county employee (Project Manager) who has supervised a firm on a contract may provide information regarding a contractor's past performance on a county contract because that information is required for consideration by county selection committees.
2. References should not be provided by other departmental personnel (i.e. division directors, deputy directors or other departmental personnel who were not responsible for management of the project)
3. References should not be provided by selection committee members. Contractor evaluations should be used in place of references.
4. References must be in writing while the Cone of Silence is in effect.
5. References should be standardized and in writing.
6. A person covered by the Conflict of Interest and Code of Ethics ordinance may not recommend a person, firm or entity to provide services on a county contract to fulfill CSBE requirements, perform specialized services or for any other purpose.
7. Departmental personnel may provide references for firms seeking work outside the county if the person is familiar with the person or entity's performance on

contracts with Miami-Dade County. The person may not be compensated, directly or indirectly, for the reference.

Walker, Ardyth (COE)

From: Samuels, Faith (OCI)
Sent: Tuesday, May 27, 2008 12:33 PM
To: Walker, Ardyth (COE)
Cc: Millan Donovan Luisa (OCI)
Subject: Departmental Ethics Officer Meeting
Attachments: Ethics Opinions Rendered 7-07 to Present.pdf

Good Afternoon Ardyth:

At last Thursday's Departmental Ethics Officer Meeting, a copy of the summary of Ethics Opinions rendered July 2007 to Present was distributed to all in attendance. One of the opinions rendered, INQ 08-48 stated the following: "A County Employee may prepare a letter of recommendation on official County letterhead for a consultant based on the employee's experiences in County government working with this consultant."

Language in our Notice to Professional Consultants (NTPC) states the following: "Pursuant to Section 2-11.1(P) of the Miami-Dade County Code, County Employees may not provide personal letters of recommendation for professional services for any person or firm for the subject project." Pursuant to the opinion rendered in INQ 08-48, the above language will be required to be deleted from our NTPCs.

Can you please provide us with a copy of the opinion INQ 08-48.

Should you require any additional information, please do not hesitate to contact me.

Faith Samuels

Sr. A/E Consultant Selection Coordinator

Office of Capital Improvements

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"Delivering Excellence Every Day"

Every firm or team of firms, whether a sole respondent, a prime consultant firm, or a sub-consultant firm, **MUST BE RESPONSIVE TO ALL** applicable items contained in the following sections. Proposers shall **NOT MODIFY** any of the forms provided and **MUST SUBMIT** in their proposal the completed forms listed below. Failure to provide all of the requested information may deem your proposal non-responsive.

PROPOSERS ARE ADVISED TO SUBMIT IN THEIR PROPOSAL ONLY THE REQUIRED FORMS AS INDICATED BELOW:

1. A letter of interest/project approach summary.
2. **OCI FORM 1 – Architect-Engineer Qualifications Form.** The Prime Consultant or sole respondent is required to complete Form 1 in its entirety. The Federal Employer Identification Number(s) (FEIN) for the sole respondent or the Prime Consultant together with its team members are required to be listed on this form. Please be advised that each firm possessing a FEIN is considered a separate legal entity and is therefore mandated to meet all necessary requirements of this NTPC to provide professional services, as applicable in Miami-Dade County. **BE ADVISED THAT THE COUNTY MAY IN ITS DISCRETION NOT EVALUATE ANY TEAM MEMBER NOT SPECIFICALLY IDENTIFIED IN FORM 1.** Changes to the proposed team composition, such as adding, deleting or replacing a firm(s), or individual subconsultant(s) after the response deadline specified herein, will only be allowed at the discretion of Miami-Dade County. In no circumstances shall a change be allowed which results in a proposer gaining a competitive advantage over the other proposers.

An Architect-Engineer Qualifications instructional sheet is provided with the form together with a sample form. This form together with all other OCI applicable forms are available on Miami-Dade County's web page at the following link: www.miamidade.gov/cicc/aande_forms.asp.

PLEASE NOTE, ANY ADDITIONAL DOCUMENTATION AND/OR COMPANY LITERATURE/BROCHURES WILL BE DISCARDED, AND WILL NOT BE CONSIDERED BY THE COMPETITIVE SELECTION COMMITTEE. ONLY SUPPLEMENTAL INFORMATION AND/OR GRAPHICS WILL BE ACCEPTED FOR THOSE PROJECTS INDICATED IN SECTIONS F AND G OF OCI FORM 1.

FAILURE TO PROVIDE THE INFORMATION REQUIRED BY MIAMI-DADE COUNTY MAY RESULT IN THE NEGATIVE EVALUATION OF THE TEAM OR AT MIAMI-DADE COUNTY'S SOLE DISCRETION, DISQUALIFICATION OF THE TEAM.

PLEASE ENSURE THAT EACH ONE OF YOUR REFERENCES HAS BEEN ADVISED THAT THEY MAY BE CONTACTED BY OCI STAFF OR DESIGNEE TO VERIFY THE INFORMATION PROVIDED IN SECTIONS F AND G OF OCI FORM 1.

PURSUANT TO A COMMISSION ON ETHICS AND PUBLIC TRUST OPINION DATED

MARCH 15, 2005, RESPONDENTS REQUESTING PROFESSIONAL REFERENCES FROM MIAMI-DADE COUNTY EMPLOYEES MUST SUBMIT SAID REQUEST IN WRITING, TO THE ATTENTION OF SUBJECT COUNTY EMPLOYEE, AND COPY THE CLERK OF THE BOARD (COB). NOTE THAT THE COB MAY BE REACHED EITHER VIA E-MAIL AT CLERKBCC@MIAMIDADE.GOV, OR FACSIMILE AT (305) 375-2484.

PURSUANT TO SECTION 2-11.1(P) OF THE MIAMI-DADE COUNTY CODE, COUNTY EMPLOYEES MAY NOT PROVIDE PERSONAL LETTERS OF RECOMMENDATION FOR

PROFESSIONAL SERVICES FOR ANY PERSON OR FIRM FOR THE SUBJECT PROJECT.

3. **Local Business Preference Affidavit (Form 3)** shall be completed and provided by the prime claiming local preference in Miami-Dade County. Proposers must complete, sign and notarize the form and attach applicable documents. Local preference is only applicable to the prime firm.
4. **Lobbyist Registration (Form 5)** shall be submitted listing all members of the presentation team who will be participating in the second-tier (oral presentations) with the proposal. An amended Lobbyist Registration Form must be submitted to the Clerk of The Board (COB) five (5) days prior to the second-tier (oral presentations) if additional individuals will be speaking at the subject meeting. The amended form should be titled as AMENDED and should denote those members that have been substituted and/or added with an asterisk. Please make sure to submit the AMENDED form to both OCI and the COB within the above stated time frame. Applicable fees may be required.

Pursuant to the Miami-Dade County's Ethics Commission Rules and Procedures, Section I, subsection 9.7, Selection Committee Registration Requirements, please be advised of the following:

- a. Any person who appears as a representative for an individual or firm for an oral presentation before a County certification, evaluation, selection, technical review or similar committee shall list on an affidavit provided by the county, all individuals who may make presentation. The affidavit shall be filed with the Clerk of the Board at the time the response is submitted.
- b. The individual or firm must submit a revised affidavit for any additional team members with the Clerk of the Board at least two (2) days prior to the oral presentation. Any person not listed on the revised affidavit or who is not a registered lobbyist will not be permitted to participate in the oral presentation.
- c. All additional team members, who are lobbyists, as defined herein, must file a principal authorization form (for the individual or entity) with the Clerk of the Board of County Commissioners prior to the oral presentation.

5. CBE/DBE forms

- Section-2**
1. Attach full education and experience resumes of Florida registered professionals and other key individuals assigned to the proposed team, limited to no more than two pages per personnel.

THE COUNTY MANAGER MAY IMPOSE THE LOSS OF ELIGIBILITY TO PARTICIPATE IN COUNTY CONTRACTS FOR A SPECIFIED PERIOD OF TIME, NOT TO EXCEED FIVE (5) YEARS, FOR AN APPLICANT, ITS INDIVIDUAL OFFICERS, ITS SHAREHOLDERS WITH SIGNIFICANT INTERESTS, AND ITS AFFILIATED BUSINESSES FOR VIOLATIONS OF OR NON-COMPLIANCE WITH ADMINISTRATIVE ORDER 3-39, INCLUDING THE FALSIFICATION OF INFORMATION PROVIDED IN A PROPOSAL AND /OR CONSULTANT SELECTION DOCUMENTS.

2.2 SUBMITTAL REQUIREMENTS

Interested firms must submit their proposal in **SEALED ENVELOPES OR CONTAINERS**. All sealed

M E M O R A N D U M

TO: COMMISSION ON ETHICS AND PUBLIC TRUST
FROM: ARDYTH WALKER, STAFF GENERAL COUNSEL
RE: RQO 08-27
DATE: MAY 28, 2008
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BACKGROUND

Faith Samuels of the Office of Capital Improvements is seeking an advisory opinion regarding when a county employee may provide references for county contractors.

FACTS

The Office of Capital Improvements (OCI) requires all prime consultants and subconsultants who respond to solicitations to submit a project experience form. The form requires that proposers seek references from firms for whom they have performed similar services. The form must be submitted with the other bid documents. Prime Consultants frequently seek references from county staff who manage construction projects for their departments. In RQO 05- 27, the Ethics Commission opined that the Conflict of Interest and Code of Ethics ordinance permits an employee to provide the reference required by OCI. However, if the form is completed during the time that the project is covered by the Cone of Silence, all requests and communications regarding references between firms and county personnel must be in writing with a copy to the Clerk of the Board. The Commission's opinion is provided in the solicitation documents for OCI contracts.

In 2005, the Ethics Commission also considered the degree to which a project manager could provide a reference and introductions for a county vendor seeking other work. In RQO 05-100, the Ethics Commission opined that the Conflict of Interest ordinance does not prohibit an employee from the limited activity of providing introductions between an AE firm and personal or business acquaintances. An introduction through a phone call or a letter is akin to a personal reference which county employees may provide to contractors and vendors who do business with the county.

Earlier this year, an inquiry was provided which stated that an Assistant County Manager could provide references to firms seeking outside work. The Office of Capital Improvements is seeking an opinion regarding any limitation on the use of references by county personnel in seeking contracts inside and outside of the County.

ARGUMENT

The Conflict of Interest and Code of Ethics ordinance prohibits county employees from recommending the services of a firm for county work unless the reference is required as part of their work responsibilities. Section 2-11.1(p) provides that "no person included in the terms defined in subsection (b) (1) through (b) (6) may recommend the services of any lawyer or law firm, architect or architectural firm, public relations firm or any other person or firm, professional or otherwise to assist in any transaction involving the County or any of its agencies, provides that such recommendation may properly be made when required to be made by the duties of the office and in advance at a public meeting attended by other County officials, officers or employees". Under that language, a county employee who has supervised a firm on a contract may provide information regarding a contractor's past performance on a county contract because that information is required for consideration by county selection committees. The reference information is required by the duties of the office of project manager.

However, an employee may not generally recommend the services of a firm if the department is looking for firms to perform a particular scope of work or seeking CSBE firms to fulfill the requirement of a contract. (See Complaint 07-19). Further, an employee who is not a project manager or did not manage a particular contract may not provide references or past performance information on a contract unless that information is requested by county officials.

Finally, as Inquiry 08-48 correctly states, an employee may provide a non-compensated reference to a firm seeking work outside of the county. Section 2-11.1(p) is limited to firms seeking work with Miami-Dade County. However, the limitations contained in RQO 05-100 apply which prohibit an employee from being compensated in any way for providing

references or introductions between a county contractor and another potential employer.

CONCLUSION

The Conflict of Interest and Code of Ethics ordinance permits county employees to provide project references and past performance information when required by a county solicitation. If the contract is covered by the Code of Silence, all communications regarding the reference must be in writing with a copy to the Clerk of the Board. A county employee may also provide a non-compensated reference or letter of introduction to firms seeking work with other employers. However, Section 2-11.1(p) prohibits an employee from recommending any firm to provide services if the firm is submitting an unsolicited proposal to the county or if the department is seeking vendors or contractors to perform a particular scope of work or if a contractor is seeking additional CSBE firms to fulfill a contractual commitment.