



# Memorandum



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To: Joseph Centorino, Executive Director  
Commission on Ethics

From: Patra Liu, Interim Inspector General *P.L.*

Date: November 1, 2013

Subject: **ISD Project No. E13-WASD-01R, Program and Construction Management Services Related to the Wastewater System Priority Projects for the Miami-Dade Water and Sewer Department**

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You asked for our comments and observations related to the ISD (Internal Services Department) E13-WASD-01R procurement to secure a Program Manager/ Construction Manager for Miami-Dade Water and Sewer Department Consent Decree Wastewater Priority Projects. The Office of the Inspector General (OIG) has been monitoring this program, including aspects of the procurement process. This memorandum serves to provide you with our comments regarding the above-captioned ISD Project. As you are thoroughly immersed in the chronology of events related to this procurement, they will not be restated.

As you know, the OIG contacted the Ethics Commission in September 2013 to seek clarification on whether a vendor (and/or its lobbyist) may directly communicate with selection committee members—by email—even when the Clerk of the Board is copied on the communication. Specifically, the exceptions in the County's Ethics Code [Section 2-11.1(t)(1)(c)(i) of the Code of Miami-Dade County] applies to written communications with any "County employee, official or member of the Board of County Commissioners..." The direct question was whether the term "official"—which is not defined in the Ethics Code/Cone of Silence statute—includes members of selection committees regardless of whether or not they are county employees or private citizens. By way of informal inquiry made to Deputy General Counsel, Ms. Miriam Ramos, (INQ#13-228), the OIG was advised:

During the Cone of Silence, written communication to a non-County employee who serves on a selection committee, with a copy to the Clerk, is permissible. The non-County employee serves in a capacity similar to that of an advisory board appointee and is considered a County official.

The OIG finds this to be a loophole that is at odds with the basic premise prohibiting ex parte communications during the pendency of the selection process. For example, a vendor/lobbyist could send emails to individual selection committee members, copy the Clerk of the Board, but not the County's Procurement Officer. A unique and

individualized message could be sent to each selection committee member, as there would be no requirement to address all committee members as a group. We find this troubling and will work with the COE to craft legislation to close this loophole.

Next, we believe that there are two issues with CH2MHill, Inc.'s (CH2M) email sent on August 9, 2013. The first issue is that this email was sent to all the selection committee members, the Procurement Officer, the Assistant County Attorney, and the Clerk of the Board five days before the scheduled First Tier Selection Committee meeting. As discussed earlier, this communication, according to the INQ#13-228, did not violate the Cone of Silence. Another issue with this email is that it contains CH2M's first notice of its intent to submit its project approach in time for the second-tier evaluation. We note that in the above referenced communication, CH2M clearly stated:

Furthermore, as consistent with prior procurements, and as consistent with the information requested in Tier 2, CH2MHILL will be presenting the relevant information regarding our proposed Project Approach during Tier 2.

Later, CH2M reiterated its earlier stated intention, in a letter dated August 22, 2013, to the Assistant County Attorney (copied to various county personnel, including the Procurement Officer and the Clerk of the Board):

We [CH2M] intend to submit our project approach in time for it to be distributed to the CSC [competitive selection committee] members, and reviewed prior, to the second-tier meeting on Wednesday, August 28, 2013.

We note that this practice—to submit a project approach for Tier Two Evaluation—as thought to be employed by CH2M, was at that time deemed “permissible under the instructions given in the Notice to Professional Consultants.”<sup>1</sup> What we believe was not envisioned was the sheer size of the submission and that it would be directly forwarded to the selection committee members, as well as to the Procurement Officer, and the Clerk of the Board two days before the Tier Two evaluation was to take place. Despite good intentions, the county's response to CH2M's announced intent(s) did not adequately set forth guidance on how to proceed.

In large part, we believe this was because the county did not anticipate the scope of CH2M's project approach submission. CH2M delivered directly to the above-identified parties, a voluminous submission of additional materials. These documents were delivered on August 26<sup>th</sup>, two days before the Second-Tier Evaluation was to take place on August 28<sup>th</sup>. A striking aspect of this second submission was the volume of the additional materials, which measured approximately four inches thick and contained over 400 pages.<sup>2</sup>

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<sup>1</sup> August 26, 2013 letter from Hugo Benitez, Assistant County Attorney to Mitchell A. Bierman, Esq., Weiss Serota Helfman and Pastoriza Cole & Boniske, P.L.

<sup>2</sup> The OIG does not provide any observations or evaluations about the content of the submittal, only to note that the sheer volume of the materials could have worked against CH2M. It could be just as easily perceived that CH2M's initial submittal was so lacking that CH2M had to add another 400 pages to it.

Importantly, this submission of CH2M's "project approach" provided CSC members with new information not included in its original proposal, as well as modified its initial submission. For example, this second submittal deleted from and added to CH2M's original project personnel and to its related work experience. We note that these changes to previous data were made after CH2M had access to AECOM's proposal. Interestingly, AECOM was offered a chance to supplement its original proposal, with access to CH2M's new information, but declined to do so.

Without delving deeply into perceptions and competitive advantages, which we understand you will be opining on, the OIG finds that an important element to this discussion is whether additional materials for the Tier 2 Evaluation may be submitted and, if so, by what means.

First, we note that A.O. 3-39 *Standard process for construction of Capital Improvements, acquisition of professional services, construction contracting, change orders and reporting*, describes the First-Tier and Second-Tier selections for Professional Services.<sup>3</sup> Specifically, concerning the Second-Tier selection process, the A.O. states:

Second-Tier evaluation provides the opportunity for the top firms identified in the First-Tier selection to submit additional information and may involve an oral presentation. CICC shall schedule a public hearing and invite each team to make an oral presentation not to exceed a specified duration. Oral presentations, when required, shall be followed by a question and answer period.

On its face, this passage indicates that the submission of supplemental information is not only permissible but is a standard practice. However, the wording contained in the Project's Notice to Professional Consultants (NTPC), puts that in doubt.

Section 2-2 of the NTPC is entitled *Submittal Requirements For Initial Submission And Second Tier Additional Information, **When Applicable*** (emphasis added by OIG). While the title hints at providing some sort of guidance for submitting additional material, the body of the section is silent as to how this should be done. The body of the section, while not specifying either initial or supplemental submissions, at least to the OIG, is geared towards submitting and receiving the initial submissions only. However, even if this section were interpreted to apply to both the initial and secondary submissions, the procurement process failed to offer any instructions on how and when (i.e., deadline) additional materials would be due.

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<sup>3</sup> While A.O. 3-39 sets forth the basic procedures, we acknowledge that the specifics in each procurement for professional services may have its own unique procedures. For example, A.O. 3-39 breaks down the scoring criteria for Tier 1 and Tier 2 selections, but in this particular Notice to Professional Consultants, the criteria and allocation of points is different.

In summary, the OIG observes that CH2M's "project approach" submission, given its size, as well as its distribution method and timing, was an irregular county practice. There is a question whether such a submission is permissible under county guidelines, but the guidelines themselves are imprecise and offer little in the way of useful guidance. That CH2M's submission of additional material disrupted the evaluation process is undeniable; the effect this had on the eventual award is a question that we cannot answer. Of overriding concern to the OIG is that we believe that CH2M's actions, whether permissible or not, give rise to a perception that the process was not equitable and we are uncomfortable with this perception.

It is apparent that when first put on notice of CH2M's intent to defer its project approach submission until the Tier Two Evaluation—that CH2M later reiterated in a second notice—the county did not effectively impose any guidelines on how this proposed action should take place; instead, the County allowed CH2M's initiative to dictate the process. As a result, the timing and method of CH2M's submission has raised many questions posed by all parties, about whether there was a fair, impartial evaluation of the respective proposals and justified recommendation to award the sought after contract. Accordingly, we believe that these events should be evaluated to determine how the county, in the future, could best prevent their recurrence.

We hope that our observations will provide you with an impartial perspective, as you complete your own assessment of the circumstances and in preparing a response to the Mayor's request.