

Palm Beach County Commission on Ethics

Honesty - Integrity - Character

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October 14, 2016

Ms. Diana Grub Frieser, City Attorney
City of Boca Raton
201 West Palmetto Park Road
Boca Raton, FL 33432

Re: RQO 16-024
Cone of Silence

Dear Ms. Grub Frieser,

The Palm Beach County Commission on Ethics (COE) considered your request for an advisory opinion, and rendered its opinion at a public meeting held on October 14, 2016.

QUESTION:

Does the cone of silence provision apply when the City of Boca Raton (City) is seeking bids from interested parties to purchase land owned by the City? If the cone of silence provision applies, when does the cone of silence terminate?

ANSWER:

The purpose of the cone of silence provision in the Palm Beach County Lobbyist Registration Ordinance is to stop any improper influence of officials and authorized employees during the competitive solicitation process. Moreover, the Lobbyist Registration Ordinance states that "to preserve and maintain the integrity of the governmental decision-making process, it is necessary that the identity and activities of certain persons who engage in efforts to influence the county commissioners, members of the local municipal governing bodies, mayors or chief executive officers that are not members of local municipal governing bodies, county and municipal advisory board members, and county and municipal employees on matters within their official duties, be publicly and regularly disclosed."¹ In other words, the key to preserving and maintaining the integrity of the governmental decision-making process is transparency.

The Lobbyist Registration Ordinance does not limit the need for transparency solely to the procurement process. Thus, transparency throughout the competitive solicitation process is required, whether the process involves securing bids for the procurement of goods or services from a vendor to the City or securing bids from interested parties for the sale of land by the City. To achieve this goal of transparency, the cone of silence prohibits all oral communication outside of a public meeting "regarding a particular request for proposal, request for qualification, bid or any other competitive solicitation" between any person seeking the award of such competitive solicitation and any City Council member or their staff or any employee authorized to act on behalf of the City Council.²

Here, the City has requested that any parties interested in purchasing the City's Municipal Golf Course West (Western Golf Course) submit its "best, last and final" written bid on October 21, 2016 between 4:30 p.m. and 5:00 p.m., and any offers made after that date and time will not be considered. Based on these facts, the cone of silence provision applies to this situation because the City is utilizing a competitive solicitation process in the sale of Western Golf Course. Because the City is soliciting competitive bids from parties interested in purchasing the

¹ §2-351

² §2-355(a)

land, the cone of silence provision will apply and goes into effect at the submission deadline. Any oral communication made outside of a public meeting between any person seeking the award of the sale/purchase contract and any City Council member, their staff, or any employee authorized to act on behalf of the City Council is prohibited after that time, unless an exception applies.

Further, the cone of silence is in effect from the deadline to submit the bid or other response to a competitive solicitation until the time the City Council "awards or approves a contract, rejects all bids or responses, or otherwise takes some action to end the solicitation process."³ Based on the facts provided, in this situation, the cone of silence provision would be in effect during any pre-award contract negotiations, and any oral communication conducted outside of a public meeting setting, between any person seeking the award of the contract to purchase the land and any City Council member, their staff, or any employee authorized to act on behalf of the City Council is prohibited unless an exception applies.

However, the cone of silence does not apply "to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selections committees, contract negotiations during public meetings, presentations made to the board or local municipal governing body as applicable, and protest hearings." Further, the cone of silence shall not apply to contract negotiations between any employee and the "intended awardee".⁴ Therefore, where the governing body has made a preliminary choice of offers and directed staff to negotiate overall terms of the contract, the cone of silence would not apply to those negotiations between an "intended awardee" and staff although the governing body itself would still be bound until the cone of silence terminated. The cone of silence terminates when the City Council awards the contract to one of the interested parties, rejects all of the bids from the interested parties, or takes some other action which ends the competitive solicitation process regarding the sale of the Western Golf Course.

FACTS:

You are the City Attorney for the City of Boca Raton. The City of Boca Raton owns Western Golf Course, a golf course located west of the City limits. Recently, the City received several unsolicited offers to purchase the Western Golf Course and decided to explore the possibility of a sale. The City wished to encourage interested parties to submit bids to purchase the golf course. The City has elected to allow all interested parties to submit their bids without prescribing any transaction parameters. The City has proposed a schedule for consideration of bids: October 21, 2016 is the intended bid submittal date, and November 22, 2016 is the date the City Council intends to consider the bids submitted.

You are of the opinion that the cone of silence provision does not apply to this situation. You have argued that the cone of silence only applies when there is a procurement or purchasing process involved.

LEGAL BASIS:

The legal basis for this opinion is found in the §2-355 of the Lobbyist Registration Ordinance:

Sec. 2-355. Cone of silence.

- (a) ***Cone of silence*** means a prohibition on any communication, except for written correspondence, regarding a particular request for proposal, request for qualification, bid, or any other competitive solicitation between:
- (1) Any person or person's representative seeking an award from such competitive solicitation; and
 - (2) Any county commissioner or commissioner's staff, any member of a local governing body or the member's staff, a mayor or chief executive officer that is not a member of a local governing body or the mayor or chief executive officer's staff, or any employee authorized to act on behalf of the commission or local governing body to award a particular contract.

³ §2-355(c); §2-355(f)

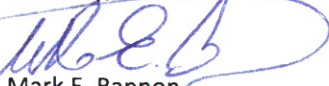
⁴ §2-355(d)

- (b) For the purposes of this section, a person's representative shall include but not be limited to the person's employee, partner, officer, director, consultant, lobbyist, or any actual or potential subcontractor or consultant of the person.
- (c) The cone of silence shall be in effect as of the deadline to submit the proposal, bid, or other response to a competitive solicitation. The cone of silence applies to any person or person's representative who responds to a particular request for proposal, request for qualification, bid, or any other competitive solicitation, and shall remain in effect until such response is either rejected by the county or municipality as applicable or withdrawn by the person or person's representative. Each request for proposal, request for qualification, bid or any other competitive solicitation shall provide notice of cone of silence requirements and refer to this article.
- (d) The provisions of this article shall not apply to oral communications at any public proceeding, including pre-bid conferences, oral presentations before selection committees, contract negotiations during any public meeting, presentations made to the board or local municipal governing body as applicable, and protest hearings. Further, the cone of silence shall not apply to contract negotiations between any employee and the intended awardee, any dispute resolution process following the filing of a protest between the person filing the protest and any employee, or any written correspondence at any time with any employee, county commissioner, member of a local municipal governing body, mayor or chief executive officer that is not a member of the local municipal governing body, or advisory board member or selection committee member, unless specifically prohibited by the applicable competitive solicitation process.
- (e) The cone of silence shall not apply to any purchases made in an amount less than the competitive bid threshold set forth in the county purchasing ordinance (County Code, chapter 2, article III, division 2, part A, section 2-51 et seq.) or municipal ordinance as applicable.
- (f) The cone of silence shall terminate at the time the board, local municipal governing body, or a county or municipal department authorized to act on behalf of the board or local municipal governing body as applicable, awards or approves a contract, rejects all bids or responses, or otherwise takes action which ends the solicitation process.

This opinion construes the Palm Beach County Code of Ethics Ordinance and is based upon the facts and circumstances that you have submitted. The COE does not investigate the facts and circumstances submitted but assume they are true for purposes of this advisory opinion. This opinion is not applicable to any conflict under state law. Inquiries regarding possible conflicts under state law should be directed to the State of Florida Commission on Ethics.

Please feel free to contact me at 561-355-1915 if I can be of any further assistance in this matter.

Sincerely,



Mark E. Bannon,
Executive Director

CEK/gal