



City Attorney's Communication #2022-385

February 22, 2022

TO: Carla Byrd, General Services Director

FROM: James E. Saunders III, Assistant City Attorney

RE: Conflict of Interest
Continuing Contract for Marine Engineering Services, RLI E-07-22

This Office is in receipt of your February 9, 2022, e-mail requesting a legal opinion regarding the ethical standards implicated by Mrs. Penny Cutt's employment with a professional engineering firm that desires to participate in the above City solicitation, while Mrs. Cutt continues to serve as a member of the City's Marine Advisory Board and Zoning Board of Appeals. After careful consideration and investigation, this Office has determined that there is no prohibition to the business entity submitting a proposal in response to the City's solicitation; however, if the proposer is awarded a contract, Mrs. Cutt's membership on the City's Marine Advisory Board will constitute a prohibited conflict of interest pursuant to Section 112.313(7)(a), Florida Statutes. But, such conflict may be waived by the City Commission, as the appointing authority, as prescribed in Section 112.313(12), Florida Statutes. Additionally, Mrs. Cutt is required to comply with Section 112.3143(3), Florida Statutes, and elect to recuse herself from matters where her vote or participation would inure a special private gain or loss for her employer.

FACTS

City Solicitation

According to your e-mail, the City will receive sealed proposals, on February 24, 2022, in response to its Request for Letters of Interest (RLI) for professional firms to submit qualifications and experience to provide marine engineering services to the City and its Community Redevelopment Agency (CRA) on a continuing as-needed basis. The City and CRA intend to assemble a rotation list of engineering firms to provide services for projects ranging from small-scale to large or specialized designs including, but not limited to, bridges; seawalls; docks; piers; boat ramps; jetties; stormwater outfalls; survey and mapping; canal dredging; beach renourishment; studies, evaluations and assessments; design and construction documents; permitting; inspections; grant assistance; and coordination with regulatory agencies (e.g., County, Army Corp of Engineers,

SFWMD and others). The professional services would be limited to projects where the construction costs will not exceed \$4 million and for any study activity where fees will not exceed \$500,000.00, consistent with Section 287.055, Florida Statutes (Consultants' Competitive Negotiation Act). The contract for professional services will have an initial term of five (5) years.

In light of the solicitation, Mrs. Cutt advised this office that she is currently Vice President/Senior Director (since February 2021) in the Fort Lauderdale office of a marine engineering firm that desires to participate in the City RLI, and that she is concerned about her membership on the City's Marine Advisory Board and Zoning Board of Appeals' and possible conflicts of interest that may prevent her firm's submission. According to the City Clerk's Office, Mrs. Cutt has served on the City's Marine Advisory Board as either an alternate or regular member since May 2009, and has served as a regular member of the Zoning Board of Appeals since January 2020.

Board Membership

As discussed in Sections 33.120 through 33.122 of the City Code of Ordinances, the City's Marine Advisory Board is comprised of six (6) city residents appointed by the City Commission to consider and make recommendations on a variety of marine subjects including, but not limited to, conditions of waterways and needed corrections, methods of maintaining the depths of waterways within the city; waterways, safety, and traffic control on waterways; operation of privately owned marinas; operations of small boat docking areas; regulation of water skiing and surfboarding; operations of excursion boats; regulation of boat docking on any navigable waterway within the city; regulation of water and boat shows and boat races; service operation of city marinas, boat launching, docks, and the like; traffic conditions under bridges; and sanitation problems and proposed laws governing effluents from boats. The Marine Advisory Board also reviews variance requests made for relief from the provisions of Chapter 151 (Beaches and Waterways) of the City Code of Ordinances and makes written recommendations that are forwarded to the Zoning Board of Appeals for review.

Under Section 155.2203, City Code of Ordinances, the Zoning Board of Appeals is comprised of six (6) voting members appointed by the City Commission, and tasked with reviewing and voting on applications for land development permits: special exception, major temporary use permit, interim use permit, variance, appeals of a decision of the Development Services Director on an application for interpretation, and requests for variances relating to regulations in Chapter 151 (Beaches and Waterways) of the City Code of Ordinances.

ANALYSIS

Applicable Standards of Conduct

Currently, the City does not have a code of ethics governing its public officials or employees, who have a contractual or employment relationship with a business entity, and where such entities desire to participate in municipal procurements. Florida law, however, does prescribe a code of

ethics generally stated in Section 112.313, Florida Statutes, setting forth standards of conduct required of state, county, and city officers and employees entitled, "Code of Ethics for Public Officers and Employees," including persons elected or appointed to hold office or serving on an advisory body.

The provisions of the Code of Ethics for Public Officers and Employees relevant to this inquiry is Section 112.313 (7)(a), Florida Statutes:

(7) CONFLICTING EMPLOYMENT OR CONTRACTUAL RELATIONSHIP.—(a) No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

Section 112.313(7)(a) has two parts. The first part prohibits a public officer from having or holding employment or a contractual relationship with another public agency or with a business entity if the agency or entity is subject to the regulation of or is doing business with the officer's public agency. The second part prohibits a public officer from having or holding any employment or any contractual relationship that would create a continuing or frequently recurring conflict between the officer's private interests and the performance of the officer's public duties or that would impede the full and faithful discharge of the officer's public duties. However, in order for a prohibited conflict to exist under either part of the statute, there must be an adequate intersection of the private interests of the officer and the functions, duties, or subject matter of his public agency.

For purposes of the analysis, Mrs. Cutt, admittedly, has an employment relationship with a business entity that may do business with her public agency. When that employment relationship involves a business entity subject to the regulation of or *is doing business* the officer's agency, a prohibited conflict is created.

Within this framework, we must ascertain the officer's agency that allegedly regulates or is doing business with the business entity. Because the Marine Advisory Board's duties do not include the final determination or adjudication of any personal or property rights, duties or obligations, the Marine Advisory Board is an "advisory board" to the City Commission as defined in Section 112.312, Florida Statutes. As a result, the Marine Advisory Board does not constitute a separate agency of government; instead it is a part of a larger government unit that exercises a governmental function, specifically, the City Commission. Consequently, the City Commission is the agency of individuals serving on the Marine Advisory Board. See CEO 89-25, 89-8 and 94-36. Conversely,

the Zoning Board of Appeals is the agency, for purposes of the Code of Ethics, for individual members of the Zoning Board of Appeals, precisely because its duties do include the final determination or adjudication of personal or property rights, duties or obligations. See CEO 87-39.

Now that the "agency" is defined, it must be determined whether the business entity is "*subject to the regulation of or doing business*" with the City or Zoning Board of Appeals. In order for "regulation" to exist, the business entity's operations or modes of doing business must be subject to the control or authority of the City or Zoning Board of Appeals. See CEO 74-8. Here, such control or authority is lacking. Neither the City nor the Zoning Board of Appeals controls or regulates the business entity's operation, beyond general legislation or adjudication of a land development application that may be submitted for review. Such items do not constitute regulation. See CEO 04-6 (where a city council appropriated funds for the entity's use); CEO 03-7 (where the government role was annexation); or CEO 79-82 (where the government role was occupational tax licensing for revenue purposes). However, where the business entity entered into a lease, contract, or other type of arrangement and where one party would have a cause of action against the other in the event of a breach or default, the business entity is "doing business" with the officer's agency. CEO 86-24 and CEO 07-11. As a result, if the business entity that employs Mrs. Cutt is awarded a contract to provide marine engineering services with the City, such action would constitute "*doing business*" with the City, a prohibited conflict of interest.

Waiver of Conflict; Exemption

But, in this instance, the conflict may be waived by the appointing authority pursuant to Section 112.313(12), Florida Statutes. Section 112.313(12), Florida Statutes, provides in relevant part:

EXEMPTION.—The requirements of subsections (3) and (7) as they pertain to persons serving on advisory boards may be waived in a particular instance by the body which appointed the person to the advisory board, upon a full disclosure of the transaction or relationship to the appointing body prior to the waiver and an affirmative vote in favor of waiver by two-thirds vote of that body. In instances in which appointment to the advisory board is made by an individual, waiver may be effected, after public hearing, by a determination by the appointing person and full disclosure of the transaction or relationship by the appointee to the appointing person. In addition, no person shall be held in violation of subsection (3) or subsection (7) if:

(a) Within a city or county the business is transacted under a rotation system whereby the business transactions are rotated among all qualified suppliers of the goods or services within the city or county.

(b) The business is awarded under a system of sealed, competitive bidding to the lowest or best bidder and:

1. *The official or the official's spouse or child has in no way participated in the determination of the bid specifications or the determination of the lowest or best bidder;*
2. *The official or the official's spouse or child has in no way used or attempted to use the official's influence to persuade the agency or any personnel thereof to enter such a contract other than by the mere submission of the bid; and*
3. *The official, prior to or at the time of the submission of the bid, has filed a statement with the Commission on Ethics, if the official is a state officer or employee, or with the supervisor of elections of the county in which the agency has its principal office, if the official is an officer or employee of a political subdivision, disclosing the official's interest, or the interest of the official's spouse or child, and the nature of the intended business.*

Because Mrs. Cutt's service as an advisory board member is creating the conflict, Section 112.313(12), Florida Statutes, authorizes the City Commission, which appointed her, by two-thirds vote, to waive the requirements after full disclosure of the transaction or relationship. Section 112.313(12)(a), Florida Statutes, also contains an exemption where the business transactions are rotated among qualified firms. According to the City RLI, the selected entity would be on a continuing "as-needed" basis. After speaking with the City Engineer, it is my understanding that the Engineering Department intends to select multiple entities and create a rotation list for such services. If true, the exemption would apply. Section 112.313(12)(b), Florida Statutes, also provide an exemption for business awarded under a system of sealed, competitive bidding to the best bidder with limitations on lobbying by the official and their spouse or child. The City's RLI is a competitive solicitation requesting letters of interest containing experiences and qualifications. In such instances, Mrs. Cutt, according to the provision, is required to file, prior to or at the time of submission of the bid/proposal, a statement with the Broward County Supervisor of Elections disclosing the official's interest, or the interest of the official's spouse or child, and the nature of the intended business.

Voting Conflict

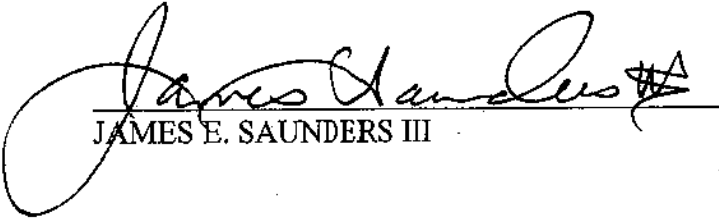
Further, Section 112.3143(3) and (4), Florida Statutes, prohibits a "public officer" or any person elected or appointed to hold office in any agency, including any person serving on an advisory body, from voting or participating "in any matter which would inure to the officer's special private gain or loss; which the officer knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained; or which he or she knows would inure to the special private gain

or loss of a relative or business associate of the public officer, without first disclosing the nature of his or her interest in the matter." Essentially, the public officer would be prohibited from voting or making any attempt to influence the decision by oral or written communication whether made by the officer or at the officer's direction (participating), where such action would inure or result in a special private gain or loss to herself, the firm in which she is employed or her relative or business associates. As stated before, the officer must file Form 8B, Memorandum of Voting Conflict for County, Municipal and other Local Public Officers, stating the nature of the conflict, within 15 days *after* the vote occurs or after participating in the matter. This written disclosure or Form 8B is filed with the person responsible for recording the minutes of the meeting, prior to the meeting in which consideration of the matter will take place, and must be incorporated into the minutes of the meeting. The disclosure becomes a public record upon filing and must immediately be provided to the other members of the respective board. The written disclosure must be read publicly at the next meeting held subsequent to the filing of this written memorandum. Notably, the disclosure is required to be made *prior to* the meeting; however, in the event that disclosure has not been made prior to the meeting or if the conflict is unknown prior to the meeting, the disclosure shall be made orally at the meeting when it becomes known that a conflict exists. The written disclosure must state the nature of the conflict and then be filed within 15 days after the oral disclosure with the person responsible for recording the minutes of the meeting and incorporated into the minutes of the meeting at which the oral disclosure was made. The written disclosure becomes a public record upon filing, and is immediately provided to the other members of the respective board, and is read publicly at the next meeting held subsequent to the filing of this written disclosure. Therefore, Mrs. Cutt would be required to abstain from voting or participating in matters, which would inure to the special private gain of her employer, as well as publicly disclose the nature of her interest in the matter in which she is abstaining, and file a memorandum disclosing her conflict (CEO Form 8B) within 15 days of the vote with the person responsible for recording the minutes of the meetings.

Notably, the City solicitation, as you have indicated, requires at the onset, in Paragraph 3, Conflict of Interest, in Article V. Standard Provisions, "*[f]or purposes of determining any possible conflict of interest, each Proposer must disclose if any Elected Official, Appointed Official, or City Employee is also an owner, corporate officer, or an employee of the firm. If any Elected Official, Appointed Official, or City Employee is an owner, corporate officer, or an employee, the Proposer must file a statement with the Broward County Supervisor of Elections pursuant to, Florida Statute, Section 112.313.*" This provision, however, merely requires the Proposer to disclose association and does not address the actual process for determining the possible conflict. Additionally, the provision is unclear regarding the requisite statement to be filed with the Broward County Supervisor of Elections. The Florida Commission on Ethics offers **Form 3A, Interest in Competitive Bid for Public Business**, which must be filed, before the waiver is granted, by an advisory board member who may have a conflict of interest waived by the appointing authority after disclosure of the transaction or relationship as provided in Section 112.313(12), Florida Statutes; or **Form 4A, Disclosure of Business Transaction, Relationship, or Interest**, which

similarly must be filed, before the waiver is granted, by an advisory board member who may have a conflict of interest waived by the appointing authority after disclosure of the transaction or relationship as provided in Section 112.313(12), Florida Statutes. Because the solicitation provision specifically references Section 112.313, Florida Statutes, the statement required to be completed should be Form 3A or 4A, requiring the disclosure of the business transaction, relationship and interest. Due to the confusion, some attention will be needed to correct this provision to properly report business transactions involving elected and appoint officials and public employees.

If you have any further inquiry, feel free to contact this office.



JAMES E. SAUNDERS III

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