



To: Jack Shawde

From: Craig E. Leen, City Attorney for the City of Coral Gables

A handwritten signature in blue ink, appearing to be "CL", is written over the name "Craig E. Leen".

RE: Legal Opinion Regarding Cone Of Silence Violations By Downtown Towing

Date: August 2, 2012

I have reviewed your emails, along with sections 2-768 and 2-1059 of the City Code, and page 4 of the RFP. It is my opinion that you have not demonstrated a violation of the Cone of Silence as of this time.

Pursuant to my authority under section 2-201(e)(8) of the City Code, I interpret section 2-1059 of the City Code to permit discussions between an applicant and the Chief Procurement Officer. The exemption from the Code of Silence could not be more express: the clause indicates that the Cone of Silence does not apply to "[c]ommunications with the city attorney, city manager, or chief procurement officer." See § 2-1059(3)(b)(13).

In interpreting the Code, I look to the plain meaning of these words first, and the plain meaning could not be clearer communications with the Chief Procurement Officer are allowed. Moreover, the Department has interpreted this provision to allow conversations between proposers and the Chief Procurement Officer in the past. Indeed, it is my understanding from Mr. Pounds that your client availed itself of the opportunity to have discussions with the Chief Procurement Officer as well during this RFP process, which is again consistent with the interpretation that such discussions may occur, and undermines any argument that your client has to the contrary. See *Intercontinental Properties v. State Dept. of Health*, 606 So. 2d 380 (Fla. 3d DCA 1992) ("a party protesting an award to the low bidder must be prepared to show not only that the low bid was deficient, but must also show that the protestor's own bid does not suffer from the same deficiency")

Please note, the above interpretation is also consistent with section 2-768(g) of the Procurement Code, relating to competitive sealed proposals, which expressly permits "discussions" (emphasis added) with responsible offerors followings review of the proposals. It is my opinion that the Chief Procurement Officer would generally be the person who would conduct/oversee such

discussions. The only limitation in section 2-768(g) would be that "[o]fferors shall be accorded fair and equal treatment with respect to any opportunity for discussion and revision of proposals, and such revisions may be permitted after submissions and prior to award for the purpose of obtaining best and final offers." Your interpretation of the Cone of Silence, however, would frustrate implementation of section 2-768(g), as it would not allow for such discussions at all. My interpretation of the Cone of Silence both respects the plain wording of section 2-1059, while permitting implementation of section 2-768.

In addition, I have considered your argument that § 2-1059(3)(b)(12) allows certain "written communications" while (b)(13) allows communications more broadly. I read these exceptions together in a manner that provides meaning to both, which means that both written and verbal communications may be had with the chief procurement officer. It is my opinion that reading (12) in the manner you propose would undermine the plain meaning of (13), and would be contrary to the analysis in the prior two paragraphs, including the fact that section 2-768(g) expressly contemplates "discussions."

Finally, I have considered your argument regarding page 4 of the RFP, which generally describes the cone of silence, but does not go into detail, and does not discuss the exemptions. The City Code governs these proceedings, and any conflicting statements in an RFP, or lack of detail, would not take precedence over the Code as a matter of law. Moreover, the entire Cone of Silence, including the exemptions, is actually included as pages 41-42 of the RFP, and is required to be signed by a representative of the offeror. Exemption (13) is included on page 41, and is bolded in part to read as follows:

"Communications with the city attorney, city manager, or chief procurement officer;"
(emphasis in RFP)

Thus, it is clear that all offerors knew about this exemption. In the case of Sunshine Towing, the Cone of Silence was signed by your client's Vice President.

Osle, Zilma

From: Leen, Craig
Sent: Thursday, August 02, 2012 4:01 PM
To: Osle, Zilma
Subject: FW: Cone of Silence violations by Downtown Towing -- RFP 2011.03.23 Towing Contract
Attachments: Sunshine Response 2011.03.23.pdf

Please place this in the opinion file.

Craig E. Leen
City Attorney
City of Coral Gables
405 Biltmore Way
Coral Gables, Florida 33134
Phone: (305) 460-5218
Fax: (305) 460-5264
Email: cleen@coralgables.com

From: Leen, Craig
Sent: Thursday, August 02, 2012 4:00 PM
To: 'Jack Shawde'
Cc: Daniel Pascale; Pounds, Michael; Gomez, Diana; Foeman, Walter
Subject: RE: Cone of Silence violations by Downtown Towing -- RFP 2011.03.23 Towing Contract

Mr. Shawde:

I have reviewed your emails, along with sections 2-768 and 2-1059 of the City Code, and page 4 of the RFP. It is my opinion that you have not demonstrated a violation of the Cone of Silence as of this time.

Pursuant to my authority under section 2-201(e)(8) of the City Code, I interpret section 2-1059 of the City Code to permit discussions between an applicant and the Chief Procurement Officer. The exemption from the Code of Silence could not be more express: the clause indicates that the Cone of Silence does not apply to "[c]ommunications with the city attorney, city manager, or chief procurement officer." See § 2-1059(3)(b)(13).

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Finally, I have considered your argument regarding page 4 of the RFP, which generally describes the cone of silence, but does not go into detail, and does not discuss the exemptions. The City Code governs these proceedings, and any conflicting statements in an RFP, or lack of detail, would not take precedence over the Code as a matter of law. Moreover, the entire Cone of Silence, including the exemptions, is actually included as pages 41-42 of the RFP, and is required to be signed by a representative of the offeror. Exemption (13) is included on page 41, and is bolded in part to read as follows:

"Communications with the city attorney, **city manager, or chief procurement officer;**" (emphasis in RFP)

Thus, it is clear that all offerors knew about this exemption. In the case of Sunshine Towing, the Cone of Silence was signed by your client's Vice President. I am attaching your client's response to the RFP. The pages I am referring to correspond to pages 113 and 114 of the attached PDF.

Please let me know if you have any questions.

Craig E. Leen
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From: Jack Shawde [mailto:jshawde@rascoklock.com]
Sent: Thursday, August 02, 2012 12:37 PM
To: Leen, Craig
Cc: Daniel Pascale
Subject: FW: Cone of Silence violations by Downtown Towing -- RFP 2011.03.23 Towing Contract

Mr. Leen: as a follow up to my email below, page 4 of the RFP is entitled "Cone of Silence". It states: "A cone of silence shall be imposed upon each RFP....when advertised." That same page 4 has the following "Definition" of the cone of silence: "**Any** communication regarding a particular request for proposal...between a potential offeror....bidder....lobbyist...and city heads, their staff....." This prohibition in the RFP 's cone of silence could not be any broader since it prohibits "**any** communication" whatsoever.

This page of the RFP setting forth the cone of silence for this RFP – with its broadest possible prohibition against any communication -- makes no reference to the Cone of Silence set forth in Code section 2-1059. However, even though the "Cone of Silence" on page 4 makes no reference to Code section 2-1059, a copy of Code section 2-1059 is included on page 41 of the RFP. Every bidder was required to sign off on their promise to comply with the cone of silence.

The RFP sets forth a "cone of silence" on page 4 of the RFP that contains the broadest possible prohibition against "any communication", and the RFP also includes Code section 2-1059 where, in sub-section (12), "written communications"

are prohibited if they go beyond "process and procedure". Any bidder reading the broadest possible prohibition on page 4 of the RFP – dedicated exclusively to the cone of silence and titled as such – knew, or should have known, that the city was obviously concerned about prohibiting at the very least SOME communications that went beyond "process and procedure". It is inconceivable that a bidder (including Downtown Towing's experienced lobbyist Syl Lukis) --in the face of the broadest possible prohibition on page 4 taken together with Code section 2-1059(12)'s express prohibitions – could reasonably have then looked at section 2-1059(13) and concluded the exact opposite: that the City really did not mean to prohibit any communications whatsoever, and that every communication of any kind between a bidder and the procurement department was allowable. Why even bother including the "Cone of Silence" on page 4 –with its broadest possible prohibition against any communication -- in the RFP at all if every communication of any kind was allowable? Allowing any communication whatsoever would mean, in essence, that there was absolutely no cone of silence applicable to bidders in the RFP – which is an absurd result given that the RFP itself includes a Cone of Silence that each bidder must promise to comply with in order to be allowed to bid. The completely illogical result would be that a bidder is promising to comply with absolutely nothing. I seriously doubt that any court of law would uphold such an interpretation of this RFP.

We therefore reiterate our request, which is also incorporated into our protest (with our reservation of the right to amend in light of the recently produced documents), that the City determine that Downtown Towing violated the Cone of Silence on numerous occasions, including but not limited the filing of their written de facto bid protests of May 19, 2011, June 15, 2011 letter (which we never saw until the document production this past Monday), and October 11, 2011. In light of these violations, we reiterate our request that Downtown Towing be precluded from receiving any award of the contract, and that the City Manager withdraw his recommendation to award the contract to Downtown Towing. Thank you.

John C. "Jack" Shawde, Esq.
jshawde@rascoklock.com

RASCO KLOCK
REINOLDA PEREZ ESQUENAZI VOIL NIETO

283 Catalonia Avenue, 2d Floor
Coral Gables, FL 33134
Direct: 305-476-7113
Main: 305-476-7100
Fax: 305-476-7102

From: Jack Shawde
Sent: Wednesday, August 01, 2012 7:41 PM
To: Leen, Craig
Cc: Daniel Pascale
Subject: Re: Cone of Silence violations by Downtown Towing – RFP 2011.03.23 Towing Contract

Thank you for your email, and I can provide you with a more complete response tomorrow. However, as pointed out in our email as well as our protest, section 2.1059(3)(12) sets forth a specific and express prohibition of written communications that go beyond "process and procedure". Under fundamental principles of statutory construction, the Cone of Silence section must be read as a whole to harmonize all provisions in a consistent manner so as to implement the intent of the section. The intent of having a Cone of Silence during a procurement is to, obviously, prevent certain communications so as to avoid undue and secret influence on the decision makers. Because one must read the Cone of Silence as a whole, one cannot necessarily look at just a single sub-section to divine its meaning.

We assume that the city would want to interpret its own Cone of Silence in a manner such that it does not contradict itself. It makes no sense to have a specific express prohibition against written communications that go beyond process and procedure if the very next sub-section of the section is then interpreted to gut that specific express prohibition — why bother to include

the specific express prohibition, as it would be meaningless? Another canon of statutory construction provides that specific language will override general language. Accordingly, as we address more fully tomorrow, the specific prohibitions in section 2.1059(3)(12) were drafted into the Cone of Silence for a reason, and the specific prohibitions must have been intended to be enforced — otherwise, section 2.1059(3)(12) is meaningless and useless language, and we find it hard to believe that the city intended to put meaningless and useless language in its Cone of Silence, particularly where that language was obviously carefully drafted to address specific circumstances that deal with such and important topic as preventing secret back door influence peddling.

Jack Shawde
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From: "Leen, Craig" <cleen@coralgables.com>
Date: Wed, 1 Aug 2012 18:09:44 -0400
To: JOHN C SHAWDE <jshawde@rascoklock.com>
Subject: RE: Cone of Silence violations by Downtown Towing -- RFP 2011.03.23 Towing Contract

Mr. Shawde,

I am still in the process of reviewing your letter of July 26, 2012. As a preliminary matter, however, I would draw your attention to section 2-1059(3)(13) of the City Code, which exempts from the cone of silence "[c]ommunications with the city attorney, city manager, or chief procurement officer." (emphasis added). This provision expressly allows communications with the chief procurement officer. Please let me know if you have any response.

Craig E. Leen
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From: Jack Shawde [<mailto:jshawde@rascoklock.com>]
Sent: Thursday, July 26, 2012 4:11 PM
To: Leen, Craig
Subject: Cone of Silence violations by Downtown Towing -- RFP 2011.03.23 Towing Contract

Mr. Leen: attached please find our letter alleging violations of the cone of silence by Downtown Towing in connection with RFP 2011.03.23 for towing services. If you have any further questions, please feel free to contact me.

John C. "Jack" Shawde, Esq.
jshawde@rascoklock.com

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