

BOARD OF ETHICS

WASHINGTON SUBURBAN SANITARY COMMISSION

ADVISORY OPINION # A-20-02

SUBJECT: CODE OF ETHICS CHAPTERS 1.70.270 and 1.70.280
ETHICS IN PUBLIC CONTRACTING

By request dated December 7, 2020, a Director (“Requestor”) has asked the Board of Ethics (“Board”) to issue an advisory opinion as to whether the WSSC Code of Ethics (“Code”) prohibits consultants who are currently working on projects in a Washington Suburban Sanitary Commission (“WSSC”) business unit from serving as evaluators on review panels for WSSC solicitations.

As background, WSSC engages contractors to assist WSSC employees with a variety of tasks and duties. These consultants are retained due to their expertise on a particular subject matter. WSSC frequently issues solicitations for highly technical services and products. However, WSSC employees may not have as much expertise as the consultants who are already within the business unit assisting with other projects. WSSC buyers would like to have the benefit of the consultant’s expertise when evaluating bid responses in these situations.

Code Ch. 1.70.270(a) provides:

An individual or entity that employs an individual who assists WSSC in the drafting of specifications, an invitation for bids, a request for proposals for a procurement, or the selection or award made in response to an invitation for bids or a request for proposals may not:

- 1) submit a bid or proposal for that procurement; or
- 2) assist or represent another person, directly or indirectly, who is submitting a bid or proposal for that procurement.

Code Ch. 1.70.280(a) provides:

Each invitation for bids or requests for proposals for a contract that will involve the selection of a consultant who is to assist WSSC in the formation, award, or execution of any WSSC contract shall require that a bidder or offeror provide WSSC with an affidavit that discloses any actual or potential conflict of interest of which the bidder or offeror knows, or reasonably can be expected to know.

ADVISORY OPINION # A-20-01
SUBJECT: CODE OF ETHICS CH. 1.70.270
PARTICIPATION IN PROCUREMENT

Chapter 1.70.280(a) of the Code addresses situations when a consultant will be contracted specifically to provide assistance with the bid process:¹

Each invitation for bids or requests for proposals for a contract that will involve the selection of a consultant who is to assist WSSC in the formation, award, or execution of any WSSC contract shall require that a bidder or offeror provide WSSC with an affidavit that discloses any actual or potential conflict of interest of which the bidder or offeror knows, or reasonably can be expected to know.

Due to the potential existence of unknown conflicts, consultants who are currently assisting a business unit should not participate in the evaluation of bids unless there is a mechanism to identify and mitigate conflicts. The requirements contained in Code Ch. 1.70.280(a) were developed to avoid conflicts of interest that may exist with either the solicitation or potential bidders. Additionally, contracting specifically for these services allows the consultant’s employer to be aware up front that it may be precluded from working with bidders related to the contract as required by Code Ch. 1.70.270(a).

Based on the existing regulations above, the Board determines that contractors cannot participate in the bid evaluation process absent a contract for that service. One potential way to establish such contracting authority in advance of the need would be to amend the Procurement regulations to allow the employees of a specified group of contractors to be used for these purposes.² This would allow potential conflicts to be disclosed upfront and for the contractor to be on notice of the preclusion provisions contained in the Code.

The Board commends the Requestor for recognizing the Code of Ethics requirements and seeking the Board’s advice in this matter.

This opinion applies to the specific facts presented herein. Should circumstances change or additional concerns arise, Requestor should seek further guidance from the Board.

On motion of Member Hysen and seconded by Member Hausman, three members of the Board agreed at its meeting held on January 13, 2021, to adopt the foregoing advisory opinion.

DocuSigned by:
George E Pruden, II
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George E. Pruden, II, Chair

Jan 26, 2021 | 11:34 AM PST
Date

¹ Similarly, Code of Regulations, Procurement Ch. 6.15.450(c), anticipates that an independent peer reviewer can be retained related to architectural and engineering design plans.

² An example of such language is found in General Services Acquisition Manual (GSAM) Part 552.238-76 Use of Non-Government Employees to Review Offers.