

BOARD OF ETHICS

WASHINGTON SUBURBAN SANITARY COMMISSION

ADVISORY OPINION # A-20-01

SUBJECT: CODE OF ETHICS CHAPTER 1.70.270
PARTICIPATION IN PROCUREMENT

By request dated June 30, 2020, a Division Manager (“Requestor”) has asked the Board of Ethics (“Board”) to issue an advisory opinion as to whether the WSSC Code of Ethics (“Code”) restricts Washington Suburban Sanitary Commission (“WSSC”) from using a rider available in an existing contract issued by another government agency to procure services when the company that received the award completed related work on another contract.

As background, WSSC is a member of the Metropolitan Washington Council of Governments (“COG”), which is an independent, nonprofit association of local municipalities and agencies. The COG manages the contract for the use of DC Water’s Blue Plains regional sewer processing facility. WSSC employees, along with other users of the facility, are members of the Blue Plains Regional Committee (“BPRC”). WSSC employees also participate in the Technical Subcommittee of the BPRC.

One of the goals of the COG is to issue and manage contracts that affect all BPRC agencies through their use of Blue Plains and to facilitate cooperative services among them. In 2015, the COG awarded a contract to RJN Group (“RJN”) to conduct a survey of the sewer meters used by each BPRC member to monitor the flow of wastewater to the Blue Plains facility. The primary goal of this contract was to provide information to the Technical Subcommittee on the type of meters so that the agencies could eventually establish uniform servicing standards. The Technical Subcommittee used the results of the survey to help develop the metering and calibration specifications for servicing the sewer meters owned by BPRC that calculate flow to the Blue Plains facility. In 2019, DC Water issued a solicitation for servicing the flow meters based on the Technical Subcommittee’s recommendations. DC Water conducted its solicitation process and awarded the contract to RJN.

The crux of the question presented here is whether riding DC Water’s contract with RJN for the sewer meter servicing would be impermissible under the “Participation in procurement” provisions of the Code due to RJN’s work on the prior and related contract with the COG.

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

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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.

The aforementioned "Participation in procurement" provisions of the Code are generally interpreted liberally with the goal to avoid the appearance of improper influence. (See, State Ethics Commission Opinion 94-09 (1994) and Maryland State Board of Contract Appeals "In the Appeal of MGT Consulting Group", Docket No. MSBCA 3118 (2019)).

The question presented here is whether contracting with RJN to provide sewer meter servicing would be impermissible under the "Participation in Procurement" provisions of the Code due to RJN's predecessor contract with the COG. The crux of the question is what is considered as assistance to WSSC. In this case, two agencies other than WSSC issued the subject contracts. Procurement regulations allow for WSSC to utilize contract riders to obtain services by either an intergovernmental and/or cooperative purchasing agreement¹ or a bridge contract. Because the situation presented here contains elements of both contracting vehicles, each will be discussed further below.

Intergovernmental and/or cooperative purchasing agreements are joint contracts or multi-party contracts with another public agency. In this instance, WSSC helped to develop the technical aspects of the surveying and servicing contracts through its participation on the Technical Subcommittee. Additionally, and prior to the solicitation being released for bid, DC Water asked whether WSSC would adopt the servicing contract once it was awarded. These factors support that evaluation as a cooperative purchase. Under such a purchase, WSSC would have been fully involved in the entire contracting process so any assistance by a person or entity provided during the procurement process clearly would have been given to WSSC.

Bridge contracting, on the other hand, can be used when WSSC adopts a contract as its own after another agency has controlled the solicitation and selection process. In the situation that is the subject of this opinion request, WSSC employees did not: 1) develop the final solicitation for the servicing contract; 2) control the solicitation process; and/or 3) participate in evaluating bids or selecting the vendor. Accordingly, WSSC's lack of involvement in this critical portion of the DC Water procurement also supports evaluation of this purchase under the bridge contract regulations. However, this lack of involvement does not automatically mean that an evaluation of the propriety of the purchase process does not take place.

Before a bridge contract can be utilized, the Chief Procurement Officer is required to make the following determinations:

¹ The Procurement regulations for Intergovernmental and cooperative purchasing state: "WSSC may participate in, sponsor, conduct, administer, or enter into a cooperative purchasing contract for the procurement of any goods and supplies, services, or construction, or the cooperative use of goods and supplies, services, or construction with a public entity. The cooperative procurement may include joint contracts or multi-party contracts." (Code of Regulations Ch. 6.15.270).

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- (1) The person has an existing contract with another public entity for the goods and supplies, services, or construction which WSSC would like to procure;
- (2) A bridge contract is in the best interests of WSSC; and
- (3) The contract between the person and the other public entity was awarded as the result of a competitive selection process acceptable to the Chief Procurement Officer. (Code of Regulations Ch. 6.15.290)

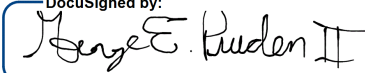
Of particular relevance to the Board for evaluation of this procurement is the requirement that the Chief Procurement Officer determine that the contract was awarded under “a competitive selection process that is acceptable to the Chief Procurement Officer.” The subject award needs to be evaluated under this process, with careful attention given to the goal of the Code’s “Participation in procurement” provisions of avoiding the appearance of improper influence.

In conclusion, the Board holds that a vendor can be determined to have provided assistance to WSSC through a contract with another agency under the “Participation in procurement” provisions of the Code. At this point the Board does not have the information necessary to determine whether RJN provided impermissible assistance on this solicitation. Accordingly, the Board defers evaluation of this purchase to the Chief Procurement Officer. The Board strongly recommends that the Chief Procurement Officer review this matter with particular attention to the goal of the Code to avoid the appearance of improper influence during the evaluation.

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 Hausman seconded by Member Hysen, three members of the Board agreed at its meeting held on **October 14, 2020**, to adopt the foregoing advisory opinion.

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George E. Pruden, II, Chair

Nov 6, 2020 | 8:34 AM P
Date