

BOARD OF ETHICS
WASHINGTON SUBURBAN SANITARY COMMISSION

REQUEST FOR ADVISORY OPINION # A-10-03

SUBJECT: CODE OF ETHICS § 4-4 PARTICIPATION IN PROCUREMENT

By request dated April 20, 2010, an employee of the Washington Suburban Sanitary Commission (WSSC) has asked that the Board of Ethics (Board) issue an advisory opinion regarding the application of § 4-4 of the WSSC Code of Ethics (Code) to an Architectural/Engineering (A/E) consulting firm currently under contract with WSSC. At its May 13, 2010 meeting, the Board met with the employee (hereinafter "Requestor") to discuss the facts underlying this matter.

WSSC hired an A/E consulting firm to develop a facility plan for the biosolids handling facility at one its wastewater treatment plants. In the completed facility plan document, the consultant recommended that an entirely new biosolids handling facility be constructed at the plant and also recommended that the facility be constructed as soon as possible. Pursuant to this recommendation, WSSC is considering utilizing the Design-Build method of construction, which requires that "bridging documents" be produced up to the 30% design phase. Bridging documents consist of general scope and overview plans of the facility. Once the bridging documents are prepared, WSSC will advertise the Design/Build work to procure a contractor to complete the design while simultaneously constructing the facility.

Section 4-4 of the Code states:

Participation in Procurement.

- (a) 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.

- (b) For purposes of subsection (a) of this section, assisting in the drafting of specifications does not include:
 - (1) providing descriptive literature such as catalogue sheets, brochures, technical data sheets, or standard specification "samples", whether requested by WSSC or provided on an unsolicited basis;

- (2) submitting written comments on a specification prepared by WSSC or on a solicitation or bid or proposal when comments are solicited from two or more persons as part of a request for information or a pre-bid or pre-proposal process;
- (3) providing specifications for a sole source procurement made in accordance with the Procurement Manual; or
- (4) providing architectural and engineering services for programming, master planning, or other project planning services.

WSSC is considering offering the Consultant that completed the facility plan a contract extension to prepare the bridging documents. Requestor has asked the Board for ethics advice regarding this and presents these questions:

1. If a contract can be negotiated with the [consultant] design section to develop the bridging documents, would the design arm of [consultant] be eligible to bid on the design and construction phase of the project?
2. Can [consultant] be contractually forced to develop the bridging documents?
3. If [consultant] does not develop the bridging documents, would they be eligible to bid on the Design-Build portion of the project?
4. Would [the consultant's] lack of participation as the bridging consultant be held against them in the evaluation process for the design-build, contract?
5. If the [consultant] design team prepares the bridging documents, can the [consultant] construction arm bid the construction phase if they have a different tax identification number?

The Board shall provide an opinion as to questions 1 and 3 above because these questions directly concern the interpretation of Code § 4-4. As far as answers to the other three questions, the Board suggests that Requestor seek advice from the General Counsel's Office.

Question 1: If the consultant develops the bridging documents, may the consultant bid on the design and construction phase of the project?

It is the Board's opinion that if the consultant who completed the facility plan also prepares the bridging documents for the new biosolids facility, then the consultant is prohibited, per Code § 4-4(a), from competing for the Design/Build contract for the new biosolids facility. The preparation of the bridging documents, in the Board's opinion, is akin to "drafting specifications," as that phrase is utilized in Code § 4-4(a), because the documents will become part of the bid package and will essentially serve as the blueprint for the design.

Section 4-4 of the Code was intended to preserve the integrity of the competitive bidding process by prohibiting consultants that have been involved in the project planning process from

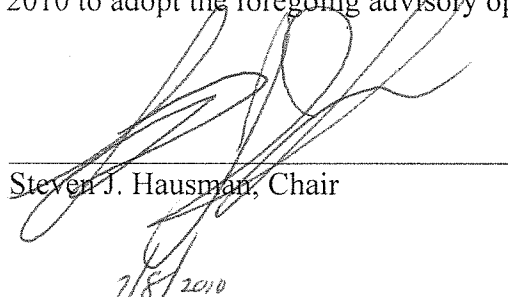
gaining a competitive advantage in later phases of the project.¹ The Board recognizes that § 4-4(b) of the Code provides exceptions that would allow a consultant to compete on later phases, however, none of the exceptions is applicable here. Section 4-4(b)(4) indeed addresses architectural engineering services, however, this exception was intended to apply to broad planning services, and not to project specific services.² As stated above, however, the bridging documents will become part of the bid package for the Design/Build contract and therefore are more than broad planning documents.

Question 3: If the consultant does not prepare the bridging documents, would the consultant be eligible to bid on the Design/Build portion of the project?

If the consultant does not prepare the bridging documents, then the consultant would be eligible to compete for the Design/Build portion of the project. The facility plan study that the consultant prepared was an initial planning document and would not become part of the bid package. It is the Board's opinion, therefore, that the services that the consultant provided in preparing the facility plan study fall squarely within the exception set forth in Section 4-4(b)(4) of the Code.

In conclusion, § 4-4 of the Code prohibits the consultant that prepares the bridging documents for the new biosolids facility from competing for the Design/Build phase of the project. If the consultant does not contract with WSSC to prepare the bridging documents, however, then the fact that the consultant prepared the facility plan would not prevent it from competing for the Design/Build phase.

On Motion by Bob Moore, seconded by George Pruden, the Board agreed at its meeting held on July 8, 2010 to adopt the foregoing advisory opinion.



Steven J. Hausman, Chair

7/8/2010

Date

¹ Code § 4-4 is modeled after a similar provision in the Maryland State Public Ethics Law. See Md. Ann. Code, State Government Article, § 15-508. The Maryland State Ethics Commission has interpreted § 15-508 in several advisory opinions and those opinions have been instructive to the Board in this matter. See Opinions 98.01, 99.01, 00.01 and 01.03, all of which are available through the State Ethics Commission website: <http://ethics.gov.state.md.us>

² See State Ethics Commission Advisory Opinions 98.01 and 99.02, which discuss the origin and application of this exception at length.