

From: Sheryl Sculley (CMO)
Sent: Sunday, February 12, 2017 6:11 PM
To: Ivy R. Taylor (Mayor)
Cc: Andy Segovia (City Attorney); Lori Houston (CMO); Ben Gorzell (CMO)
Subject: Barge operator RFP

Mayor,

We share your view that the River Barge concession agreement is a very important contract for the City of San Antonio and City Staff took extra efforts to ensure fairness, objectivity, and transparency in the process. As you know since my arrival in San Antonio in 2005 we completely revamped the City's procurement process and focused on removing political priorities from the Staff's recommendation so that City Council can either concur with the recommendation or go another route for policy reasons. We established consistent, transparent, objective, and most importantly, professional evaluation processes resulting in recommendations aimed at selecting the most competent and qualified providers for the City. We have continually enhanced these processes to include best practices.

The selection process for the River Barge concession included the following:

- Staff identified the contract early on as a High Profile Contract
- Staff developed a comprehensive Request for Proposal
- Staff briefed the Audit/High Profile City Council Subcommittee prior the RFPs release
- Staff briefed City Council at least 5 times in executive session over the past two years and followed policy direction provided by City Council
- Staff conducted two pre-submittal conferences for potential bidders
- Staff established an eleven member diverse evaluation committee with representation from various local constituencies with relevant expertise and included only two City Staff members
- Procurement Office communicated with bidders to seek clarification on the Contract Disclosure Form and other submittal forms to ensure opportunity for all bidders to provide necessary information
- Scoring process ensured the Selection Committee only scored on Experience and Financial Capability, and Quality of Proposal representing 55 out of 100 points
- SBEDA, Local Preference, Veterans Preference and Economic Terms points were scored consistent with City Ordinance and previous practice and these

categories were scored independent of the selection committee and were not revealed to the selection committee until after they completed their scoring

I am fully confident that the selection process was fair and objective given the process parameters and Legal requirements. In short, there was nothing in the process that gave any proposal an unfair advantage over the other proposals and the scoring differential reinforces that the recommended proposal is the strongest for the City of San Antonio.

My Staff provided the following information to address your specific questions:

- Definition of "Black Out Period"

Answer: The "blackout period" is defined in Section 2-309 of the Municipal Campaign Finance Code. During this period a respondent for a high profile discretionary contract with the City is prohibited from making financial contributions to City officials and candidates for office from the 10th business day after the solicitation was released and through the 30th day after the City Council awards the contract. There is also a period where communications are prohibited with City Officials by a respondent which is covered by Section 2-61 of the Ethics Code. This is frequently referred to as the "Cone of Silence" and begins the day the solicitation is released, in this instance October 4, 2016, and ends when the contract is posted on a City Council "A" Session agenda. The solicitation document will also list other permitted contact during the solicitation period. In essence, all communications related to the solicitation are funneled through the City's Procurement Office.

- Participation in Presentations

Answer: While a City attorney routinely attends high profile contract interviews, it has been the standard process for the City to exclude lobbyists and attorneys from interviews for high profile discretionary contracts for many years. The policy is set forth in the City of San Antonio Procurement Policy and Procedures Manual (4.4.3.3d). Each of the barge operator proposers was asked to submit the names of those attending the presentations. On January 25th Entertainment Cruises provided a list of attendees for the interview that included Mayor Hardberger as a participant in his capacity as a lawyer with Dykema Cox Smith. The notification prompted a meeting with the City Attorney's office to clarify participation of attorneys and lobbyists. On January 27, 2017, the City Attorney Andy Segovia made the decision to permit participants to bring their attorneys to ensure that a City attorney's presence during the presentations would not be viewed as unethical or giving the City an unfair advantage to contract language development. The City Attorney strongly felt that any clarifications from the RFP or new concepts addressed during the presentations must be documented in the City's concession agreement and discussed openly with the participant's legal team. This practice of having City attorneys present during High Profile contract presentations is consistent with past City practice and with private industry practices for major agreements. What was altered in terms of participation of attorneys was strictly aimed at ensuring ethical compliance, fairness, transparency, and equity for both sides. The decision was also made on January 27th to continue the City's policy of prohibiting lobbyists from attending. All respondents were notified in writing of the ability to have an

attorney present, and of the exclusion of lobbyist and in fact two teams did bring attorneys.

- *What is the difference between Lobbyist and Attorney?*

Answer: Section 2-62 of the ethics Code defines lobbying and a lobbyist as the following:

(h) Lobbyist means a person who engages in lobbying, whether directly or through the acts of another. If an agent or employee engages in lobbying for a principal or employer, both the agent and the principal, or the employee and the employer, are lobbyists.

Lobby or Lobbying, except as provided below, means any oral or written communication (including an electronic communication) to a City official, made directly or indirectly by any person in an effort to influence or persuade an official to favor or oppose, recommend or not recommend, vote for or against, or take or refrain from taking action on any municipal question.

Listed exceptions include merely inquiring about facts, comments during a public meeting, and written responses to requests for specific information from a City official.

Lobbying firm means:

- 1) a self-employed lobbyist, or*
- 2) a person that has one or more employees who are lobbyists on behalf of a client or clients other than that person.*

Section 2-64(9) defines attorney as a licensed attorney who is performing an act that may be performed only by a licensed attorney.

A person can be a lobbyist without being an attorney, and vice-versa. An attorney representing a party in contract negotiations is responsible for understanding the key business objectives of the client so that legal advice and support can be provided in negotiating contract terms. Consequently the roles in this context can overlap particularly where the attorney is not one of the lead presenters but responds to questions and offers clarifying comments. Examples of lawyers functioning as lawyers in a contract negotiation:

- *Drafting templates or specific provisions*
- *Negotiating terms and conditions particularly those of a legal versus a business nature, e.g., indemnity, applicable law, and dispute resolution.*

Examples of lobbying activity include meeting with elected officials to discuss zoning applications, large developments and high profile contracts. They also regularly meet with City Staff on these matters.

- Penalties for not Registering as a Lobbyists

Answer: An entity that hires an unregistered lobbyist could be subject to a complaint that they violated the Ethics Code requirements, by not identifying their lobbyist on the contracts disclosure form. The unregistered lobbyist is also subject to application of the requirements to register as a lobbyist. The cure is simple: register the lobbyist and submit an updated contracts disclosure form. The period to register as a lobbyist begins the day the person engages in lobbyist activities, and must be completed within 90 days. With respect to penalties the Ethics Review Board may recommend to the Council a number of civil remedies including:

- *disqualification from contracting or lobbying*
- *recommendation to void or ratify a contract*

The Ethics Review Board may also impose a civil fine up to \$500 and to provide written counseling through letters.

In conclusion, City Staff's recommendation to engage San Antonio River Cruises as the operator for the river barges results from a fair, objective, transparent, and professional process that the residents of San Antonio have come to value and expect. Furthermore, I do not recommend that the Mayor and Council interview respondents. The Council is always free to disregard the Staff's recommendation for policy reasons. They should not act based on a false premise that the Staff recommendation resulted from a flawed process. Since my arrival we have focused on building an organization and communication flow where Staff makes professional recommendations that follow City Council policy and represent best value to our broader community.

Lastly, late Wednesday, you asked that staff brief each council member one on one. Three of those council briefings have occurred; your briefing is scheduled for Monday at 1:30 pm which was the soonest your staff would schedule a meeting. On Saturday morning I read the email you sent to me Friday evening. After attending a Women in Policing recruitment workshop Saturday morning, I asked my staff in charge of the barge contract to review your email and prepare answers to your questions. City Attorney Andy Segovia, Assistant City Manager Lori Houston, and Chief Financial Officer Ben Gorzell are in charge of this high profile barge operator process and worked with me on this response Saturday and Sunday. They have conducted themselves in a professional manner as they consistently do. The council strongly urged staff to seek competition on this barge contract and staff has done that. In a competitive process, there is one winner and often, disgruntled losers. Some council members may not like the outcome and are entitled to make a different decision. But to blame the process is not based on fact.

We look forward to talking with you on Monday about this important contract.

Sheryl Sculley