

BOARD OF ETHICS
WASHINGTON SUBURBAN SANITARY COMMISSION

ADVISORY OPINION # A-24-01

SUBJECT: CODE OF ETHICS SECTION 1.70.270, PARTICIPATION IN PROCUREMENT

Recently, WSSC Water’s Code of Regulations Section 1.70.270 “Participation in Procurement,” otherwise known as the “participation clause,” has been the subject of several inquiries from both vendors and WSSC Water’s staff. Specifically, in response to an inquiry from a potential vendor, an employee of WSSC Water requested an advisory opinion from the Board on the application of the participation clause to another vendor’s potential participation in an upcoming procurement for Phase II of the Lead Service Line Replacement Program. Following that request, the Board issued Advisory Opinion #A-24-01. Following publication of its opinion, WSSC Water received inquiries from two potential vendors seeking further clarification and expressing concerns about the proper implementation of the participation clause. In response to these inquiries and pursuant to its authority under WSSC Code of Regulations Section 1.70.060, the Board hereby reissues this advisory opinion in replacement.¹

The goal of this opinion is to provide guidance to both WSSC Water procurement staff and end users, as well as prospective and current outside vendors, on the appropriate interpretation of WSSC Code of Regulation 1.70.270. The Board issues this advisory opinion to provide the Chief Procurement Officer (“CPO”) with the appropriate analytical framework in which to make those determinations. This opinion is published also as a guide to assist the vendor community in making sound business decisions on whether to participate in future solicitations.

The participation clause appears in WSSC Water’s Code of Ethics, Article IV “Ethics in Public Contracting” and reads as follows:

¹ At its September 11, 2024, meeting the Board voted to rescind the originally-posted advisory opinion.

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1.70.270 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 regulations (WSSC Chapter 6.15); or

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- (4) Providing architectural and engineering services for programming, master planning, or other project planning services.

It should be noted at the outset that the decision on whether the participation clause would properly bar a specific vendor from participating in a specific procurement involves a primarily fact-based analysis. The underlying facts in each case, the degree and extent of the vendors involvement with or contribution to the drafting of the specification of the procurement, are best known by the WSSC procurement team and the vendor itself. This fact-dependent inquiry makes it impractical for the Board to issue advisory opinions that specifically address whether a particular vendor is barred from bidding on a particular solicitation. It is more properly the purview of the CPO, who is cognizant of the underlying facts, to make that determination in each case. (*See*, Board of Ethics Advisory Opinion A-20-01).

Section 1.70.270(a) 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. It serves to increase confidence in WSSC Water procurements, as well as fair and equitable treatment to all vendors who participate in WSSC Water procurement process. WSSC Water's participation clause mirrors the "Participation in Procurement" prohibition applicable to Executive branch agencies throughout the State as codified in Md. Code Ann., State Fin. & Proc. § 13-212.1. That provision was initially codified in Maryland's Code of Ethics in the Maryland Code of Ethics, Md. Code Ann, Gen. Prov. § 5-508 (2014 Volume). However, in 2015, it was transferred to the State Finance and Procurement Article and jurisdiction to adjudicate application of the statute was transferred from the State Ethics Commission to the Maryland State Board of Contract Appeals ("MSBCA"). (*See*, 2015 Maryland Laws Ch 271 (H.B. 738)). Accordingly, we look to decisions of both the State Ethics Commission and the MSBCA in interpreting this similar statutory language as persuasive authority on the proper interpretation of Section 1.70.270(a).

Like the State Ethics Commission and the MSBCA, we believe that the participation clause should be construed liberally in order to accomplish the purposes and policies of the regulation. (*See, In the Appeal of MGT Consulting Group, LLC*, MSBCA 3108, Opinion and Order dated June

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28, 2019. *See also*, State Ethics Commission Advisory Opinion Nos. 94-9 at 2 (1994); 00-01 at 3-4 (2000); 01-02 at 3 (2001); 06-02 at 3 (2006)). It is the consensus of these two agencies, and we concur, that “assistance in drafting” is a factual determination to be made based on the totality of the circumstances. The following facts are relevant to making this determination: 1) the nature of the vendor’s input; 2) the frequency and timing of the vendor’s input; and 3) the nature of the process and whether there was access to draft specification documents.

We do not believe that the words “assistance in drafting” should be read narrowly to include only those situations in which there is a clear tie between something proposed by the vendor and the solicitation documents. We concur with the State Ethics Commission and the MSBCA that “a broader view of these words is necessary to ensure accomplishment of the purposes and policies underpinning” the participation clause. (*In the Appeal of MCT Consulting Group, LLC*, at 33). There are numerous ways in which actions of a vendor other than drafting can constitute “assistance.” This is, however, a factual determination that must be made based upon all of the surrounding circumstances. For example, the MSBCA concluded that “extensive and extended consultation...over an eight month period, the sharing of information back and forth, as well as discussions of the details of the Project (including scheduling and pricing) during at least two meetings, served as the functional equivalent” of assistance. (*Id.* at 35). Given the totality of those facts, the MSBCA affirmed the Procurement Officer’s conclusion that the vendor in question was barred by §13-212.1 from participating in the solicitation. (*Id.* at 37).

Likewise, the appropriate analysis includes a determination of whether the vendor in question has gained an unfair competitive advantage over other potential offerors. If a vendor has been given early access to information that would allow it to prepare its technical and price proposals before any other offeror or if it is given access to information that other offerors did not have the benefit of, factors heavily in favor of a finding that the vendor is barred by the participation clause from submitting a proposal.

In sum, the determination regarding whether a particular vendor is barred by the participation clause from participating in a particular procurement is a factual one based upon the totality of the circumstances. Specifically, both the CPO and the vendor must look to the nature of the vendor’s input into the specification preparation process, the frequency and timing of that

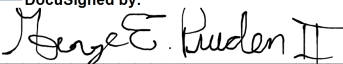
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input, and whether there has been an exchange of information between the vendor and the agency during the solicitation process that would confer an unfair competitive advantage on the vendor over other potential offerors. In each case, these facts need to be evaluated to determine whether permitting that vendor's participation would undermine WSSC Water's obligations to provide a level playing field to all prospective offerors and maintain the integrity of the procurement process.²

The CPO is advised that the Ethics Officer is available to assist Procurement with applying the aforementioned guidance to a particular contract.

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

On motion of Member Hysen and seconded by Member Hausman, three members of the Board agreed at its meeting held on October 9, 2024, to adopt the foregoing advisory opinion.

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George E. Pruden, II
Chair

² In addition to opinions issued by the State Ethics Commission and the MSBCA on this issue, the Board invites interested parties to review its prior advisory opinions on the proper application of WSSC Water's participation clause. (*See*, Board of Ethics Advisory Opinions A-20-01 and A-10-03).