



OFFICE OF THE COUNTY ATTORNEY

Douglas M. Duncan  
County Executive

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County Attorney

**MEMORANDUM**

March 28, 2006

TO: Carolyn Colvin, Director  
Department of Health and Human Services  
  
Ulder Tillman, Chief, Public Health Services  
Department of Health and Human Services  
  
FROM: Richard H. Melnick *RHM*  
Associate County Attorney

RE: *Asian American Health Initiative Steering Committee*

This memorandum responds to your request for legal advice regarding a procurement for services to support an Asian American Health Initiative ("AAHI") program.

**ISSUES**

Your memorandum notes the following issues:

1. Whether the County may send a Request For Proposal ("RFP") to an organization, or an organization may submit a proposal in response to an RFP, where the RFP solicits proposals for health services related to issues associated with Asian Americans, and the organization has a representative on the AAHI Steering Committee that identified the need for the solicited services.
2. Whether serving on a steering or advisory committee, itself, creates a conflict of interest that precludes an individual, or the entity the individual represents, from later responding to an RFP soliciting the services that the committee endorsed.
3. Whether guidelines exist that permit a non-profit organization, or its representative, that is on a steering committee, to submit a proposal in response to an RFP, where it otherwise would be precluded from doing so if it was a for-profit organization.
4. Whether DHHS should submit a memorandum to the Ethics Commission.

## SHORT ANSWER

1. As long as the steering committee on which the individual serves simply advises on community needs that the County may want to consider meeting through a contract for services, and neither the individual nor the organization is providing the advice as a County contractor, §11B-52 (b)(2) of the procurement law does not prevent an individual or organization from being sent, or responding to, an RFP to provide the services. However, the Ethics Commission may need to determine if the person is a "public employee" in a particular matter and, if so, determine if the person or entity has violated §11B-52(a) or the ethics law under Chapter 19A of the County Code.
2. Serving on a steering committee, by itself, does not create a conflict for the member, or the member's organization, to receive, or respond to, an RFP for services that the committee advises the County to consider.
3. No guideline exists to permit a member of a steering committee that represents a non-profit organization to participate in the procurement process, where, under the same circumstances, a conflict would preclude the member because the person represents a for-profit organization.
4. DHHS must consult Montgomery County Code, Chapter 19A, based on the facts of a given case, to determine if contacting the Ethics Commission is appropriate.

## FACTS

This memorandum is based on the limited background information you have provided. According to DHHS, the issues in this matter arise because Samuel Flood, Procurement Specialist II, of the Office of Procurement, informed DHHS "that community based organizations which had representatives serving on a County Steering Committee for the [AAHI] could not be sent the RFP nor [be] allowed to submit a proposal for the County's RFP for health services for Asian Americans because this was a conflict of interest."

DHHS contract staff, not the AAHI Steering Committee members, drafted and finalized the RFP's scope of services and all other requirements for the RFP. Staff was cautioned about the importance of adhering to the competitive nature and rules of RFPs, and under no circumstances did they share the RFP, or related information in its development, with anyone outside of the County or its contract staff. DHHS also notes that it has followed these cautions and this careful way of doing business often before with the Latino Health Initiative, which has a similar steering committee made up of community leaders, including leaders of non-profit organizations. And, in past years, a few of these non-profit organizations were awarded contracts through the County's competitive RFP process. According to DHHS, steering committee members identify service gaps, provide ideas for new programs, and suggest annual priorities for many new initiatives. It notes that this input is valuable, particularly since the steering committee members are the ones with the most expertise and community knowledge concerning that which would best serve the ethnic or interest group they represent. Furthermore,

steering committee members are made aware of potential conflict of interest issues, and are advised to excuse themselves from steering committee votes that may impact the organizations they represent, and from any involvement in RFP drafting or evaluating proposals submitted.

In light of this information from DHHS, I contacted Samuel Flood, who stated that the basis for his above-described comments to DHHS was the language that DHHS itself had placed in the RFP, which stated- "The Contractor must provide these services within the framework of the goals of the AAHI Steering Committee and collaboration with the County. **Members of this Steering Committee are precluded from responding to this solicitation.**" Mr. Flood acknowledged that DHHS placed this language in the RFP only after he and other individuals in the Office of Procurement had discussed with DHHS representatives that a possible conflict may arise from a steering committee member responding to the RFP.

### ANALYSIS

1. No general legal prohibition exists to prevent a steering committee member from receiving or responding to an RFP.

Your memorandum asks whether the procurement law prohibits a steering committee member from receiving or responding to an RFP. I am unaware of any blanket prohibition under the procurement law, given the facts you present. In general, procedures under which a government enters into a contract must allow for full and open competition; and, this means that all responsible sources are permitted to submit offers. *See, e.g.,* 41 U.S.C. §403 (6); *Cibinic & Nash*, *Competitive Negotiation*, pp. 86-91 (2<sup>nd</sup> ed.). Note that the language DHHS placed in the RFP precludes the AAHI Steering Committee members from responding to the solicitation. However, courts are likely to view a prohibition against competition, including one that prohibits participation by steering committee members, as anti-competitive and invalid, absent a legal basis for the restriction. Consequently, an RFP must not preclude a response from steering committee members, unless DHHS knows there is a conflict or other legal basis for doing so. And, when in doubt, the Ethics Commission ultimately is the agency with jurisdiction to make that determination. *See* Montg. Co. Code, §19A-9.

In addition to the above, the requirements governing valid RFP procedures are found at Montgomery County Code, §11B-10 and Procurement Regulation 4.1.2. Among other things, the County must comply with valid evaluation criteria and requirements stated in its RFP; otherwise, it will be exposed to a solicitation protest or other action asserting the County's processes were improper and anti-competitive for failing to follow its own requirements. *See id;* *see also* Montg. Co. Code, §11B-36; Proc. Reg. 14.1.

A proposed awardee must also be determined to be "responsible" (*e.g.* reputation, past performance, business and financial capability, integrity, and other factors), under §11B-20 of the Code and Section 6.3 of the Procurement Regulations. The Director of Procurement determines responsibility based on the facts of a particular case, in accordance with factors established in the Procurement Regulations. The facts you describe do not create a non-

responsibility basis that would prohibit a steering committee member from receiving or responding to an RFP.

Furthermore, County Code Section 11B-52 (b)(2) states, in relevant part, the following: "A contractor providing an analysis or recommendation to the County concerning a particular matter must not, without first obtaining the written consent of the Chief Administrative Officer: . . . seek or obtain an economic benefit from the matter in addition to payment to the contractor by the County." Since members of the steering committee are not contractors, this section of the County Code is inapplicable. In addition, even if a steering committee member was a contractor, this provision does not create a blanket prohibition because the law expressly permits the Chief Administrative Officer to consent to the contractor proceeding, in the manner otherwise prohibited, after finding the action would not impair the public interest. *See* Montg. Co. Code, §11B-52 (b) & (d). Accordingly, even if a steering committee member was a contractor to which §11B-52 applied, the language that DHHS placed in its RFP would improperly purport to prohibit that which the CAO otherwise would have the discretion to permit.

Note further that §11B-52(a) prohibits a person from employing or offering to employ a public employee if that employee's duties include significant participation in the procurement matter. Under §19A-13(c), "significant participation" includes recommending or rendering advice. So, if a particular AAHI Steering Committee member is determined by the Ethics Commission to be a public employee, and that employee is significantly participating in a procurement matter, the organization for whom that person works would be violating §11B-52(a). These determinations are within the jurisdiction of the Ethics Commission. I understand that a similar matter is presently before the Ethics Commission, and these issues regarding a steering committee member's status as a "public employee," and "significant participation," will be addressed at that time. I have asked counsel for the Ethics Commission to forward any decision in that matter to your attention. (*See also* Section 4 below).

In any event, DHHS should not use the broad, prohibitive language against a steering committee member responding to an RFP, unless a known conflict exists. Instead, DHHS may want to consider more general language that requires compliance with County law and regulations, including County Code §11B-52 (a) & (b) and the ethics law (Montg. Co. Code, Chapter 19A).

2. The mere fact that a person is on a steering committee does not, itself, create a conflict of interest in responding to an RFP.

This issue is largely covered under Issue #1 above. DHHS has indicated that a steering committee member is a volunteer that only provides advice on areas the County may wish to provide services, in order to meet the needs of particular interest or ethnic groups. The steering committee members do not establish the County's minimum needs, do not participate in any manner to develop an RFP or a contract, and do not participate in matters impacting their organizations. In the event particular facts exist that indicate a person was participating in the County's procurement process in a manner that would pose a conflict with its public interest

function as a steering committee member, DHHS may wish to consult the Ethics provisions found in Chapter 19A of the County Code. (See Issue #4 below).

3. No guideline exists to permit a non-profit organization representative to participate in a procurement, where a conflict of interest would preclude that same person who represents a for-profit organization from participating in the procurement.

The factual context of this matter, along with that which is noted in Issue #s 1 and 2 above, again, respond to this issue. A steering committee member is not precluded from receiving or responding to an RFP simply by virtue of the person's status as a steering committee member. Furthermore, the organization's status as being "non-profit" or "for-profit" is not material to the inquiry of whether a conflict of interest exists.

4. Facts in a given matter may warrant DHHS to contact the Ethics Commission, in accordance with Chapter 19A of the County Code.

The facts of a given case will determine whether a person has violated the ethics law. DHHS must look carefully at the surrounding circumstances before deciding to place language in its RFP to preclude a steering committee member from responding to an RFP.

The County ethics law governs the actions of a "public employee," and is found at Montgomery County Code, §19A-1, *et seq.* The definition of "public employee" includes: "any person appointed by the County Executive or County Council to a board, commission, committee, task force, or similar body, whether or not: (A) the person is compensated for serving on the body; or (B) the body is permanent or temporary." Montg. Co. Code, §19A-4 (m)(3). The information you provided is not clear regarding the manner in which the AAHI Steering Committee was created, or how its members are chosen. Nonetheless, based on the information you have provided, the AAHI Steering Committee members are not appointed by the County Executive or the County Council.

Depending on the facts of a given case, however, a person on the steering committee may be a public employee who is subject to the ethics law, if that person: "(A) exercises any responsibility for government-funded programs, procurement, or contract administration for an agency; or (B) has access to confidential information of an agency that relates to government-funded programs, procurement, or contract administration." Consequently, under a particular set of facts, a volunteer, purely advisory, steering committee member that you describe may be a "public employee," to whom the ethics law applies. If so, the steering committee member must comply with the County ethics law, including its "Conflict of Interest" provisions found at County Code §§19A-11 through -16. For instance, if a steering committee member is a public employee under the ethics law, absent a waiver and subject to express exceptions, §19A-11 prohibits the person from participating in any matter: (1) that affects, in a manner distinct from its effect on the public generally, any business in which the public employee has an economic interest; or, (2) in which the public employee knows or reasonably should know that any party to the matter is any business in which the public employee has an economic interest or is an officer, director, trustee, partner, or employee. See Montg. Co. Code, §19A-11(a)(1)(C), (a)(2)(A) & (b).

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Also, §19A-14(a) prohibits a public employee from using the prestige of office for private gain or the gain of another.<sup>1</sup>

The information you provided fails to provide sufficient facts to know whether a particular steering committee member in a particular matter is a "public employee," who then would be subject to the ethics law. The Ethics Commission is currently addressing a separate matter with similar facts that may be helpful in clarifying your questions concerning the ethics law in this situation. In the event you seek further guidance on the ethics law, please contact your agency counsel, Anne T. Windle, or the Ethics Commission.

### CONCLUSION

Based on the facts presented, DHHS's RFP prohibited AAHI Steering Committee members from responding to the solicitation. However, a legal basis must exist to support this or another restriction on competition, in order for the restriction in the RFP to be valid. If so, the County then must comply with the valid requirements noted in an RFP.

The County procurement law, at Section 11B-52(b), does not prevent a steering committee member from receiving or responding to an RFP, because the person is not a contractor. In addition, no guidelines differentiate between a non-profit and a for-profit organization in determining if a conflict of interest exists in responding to an RFP.

Section 11B-52(a) also may prohibit a steering committee member that significantly participates in a procurement matter from being employed by an entity engaged in the procurement matter, if the person is a "public employee" under the law. This decision must be made by the Ethics Commission, on a case-by-case basis. The Ethics Commission is presently considering a similar matter that should provide guidance in determining: if a steering committee member is a "public employee" subject to the ethics law; and, if so, whether particular activities constitute prohibited "significant participation." I have asked counsel for the Ethics Commission to forward you a copy of the impending decision in that matter.

You may wish to seek further guidance regarding the County ethics law, on a case-by-case basis, from your agency counsel or from the Ethics Commission.

cc: Marc P. Hansen, Deputy County Attorney  
Anne T. Windle, Associate County Attorney  
Edward B. Lattner, Associate County Attorney

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<sup>1</sup> While County Code §19A-12(a) requires approval by the Ethics Commission for a public employee to be engaged in other employment, COMCOR, at Section 19A.06.02.04, para. 4.12, exempts uncompensated County employees from outside employment waiver requirements.