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MARION SMITH
ROBERT C. LATHAM

May 24, 2018



Mississippi Ethics Commission
P.O. Box 22746
Jackson, MS 39225-2746

Re: Response to Opening Meetings Complaint
No. M-18-010 filed by Shadrack T. White

Gentlemen:

Enclosed please find Response to Open Meetings Complaint No. M-18-010 filed by Shadrack T. White.

If you have any questions, please call me.

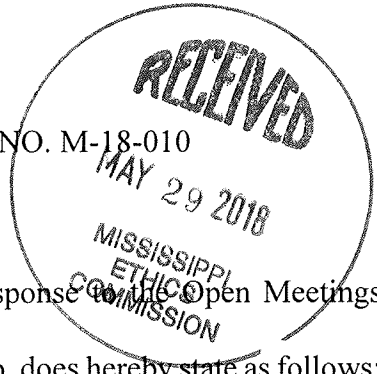
Sincerely,

Robert C. Latham

RCL:bb
Enclosure

cc: Mr. Shadrack T. White (w/encl.)

RESPONSE TO OPEN MEETINGS COMPLAINT NO. M-18-010
FILED BY SHADRACK T. WHITE



The City of Natchez, Mississippi, does hereby file its Response to the Open Meetings Complaint filed herein by Shadrack T. White, and in response thereto, does hereby state as follows:

FACTS:

On March 9, 2018, the City of Natchez initiated the process of Requests for Proposals for solid waste and recycling collection services for the City of Natchez. The advertisement stated that persons seeking to make proposals for curb side collection of solid waste and recyclables could obtain a copy of the Request for Proposals at the City Clerk's Office at 124 South Pearl Street, Natchez, Mississippi.

On page 3 of the RFP, Paragraph 5, Public Access to Proposals, and negotiation materials submitted in response to this RFP under Paragraph 1, General Provisions, provided that:

Due to the potential negotiations envisioned by the RFP process, Proposals shall not be opened publicly but shall be opened in the presence of the City Clerk and two or more Aldermen. Proposals shall be handled so as to avoid disclosure of contents to competing offerers during the process of negotiation, if any. A Register of Proposals shall be prepared and shall be open for public inspection after negotiation, if any, has been completed in accordance with Section 3. The Register of Proposals shall indicate the name of all vendors submitting proposals, the date each proposal was submitted and the location where each proposal shall be stored during the RFP process.

A copy of the RFP is attached to this Response as Exhibit "A."

On page 7 of the RFP, pursuant to Paragraph 13, Competency of Offerers, Paragraph (e), the Offerers were required to provide:

A copy of the latest available certified financial statement of the offerer (or its parent corporation if individual subsidiary or division financial statements are not prepared and generally available) certified by a local, regional or nationally recognized firm of independent certified public accountants.

The offerer may satisfy any or all of the experience and qualification requirements of this by submitting the experience and qualifications of its parent organization and subsidiaries or affiliates of the parent.

On April 10th at the regular Board meeting, the Board received the proposals which had been submitted by the various offerers. On April 12th, the request to review the waste proposals was made to Megan Edmonds, City Clerk. When Megan Edmonds contacted the undersigned as City Attorney for the City of Natchez, I advised Megan Edmonds that the waste proposals included financial and confidential information which was protected under the Public Records Act. I advised Ms. Edmonds that we were required to give notice to all parties submitting proposals a notice of the public records request and notify them that they would have twenty-one (21) days to file a Petition with the Chancery Court seeking a protective order prohibiting the release of financial and confidential information.

On May 3rd, the Natchez Board of Aldermen met in a specially called meeting for several purposes, one of which was to discuss the various Proposals submitted by companies desiring to locate an office in the City of Natchez for the purposes of handling the waste collection and recycling in the City of Natchez.

Section 25-41-1, et seq., of the Miss. Code Ann. of 1972, as amended, governs open meetings of public bodies. Said Section also provides the procedure for the public body, in this case, the City of Natchez, to proceed into a closed determination to determine if the public body has matters to discuss that would qualify for executive session.

On May 3rd, the Mayor and Board went through this procedure and informed the public that the discussion of the Proposals submitted by the various companies qualified for executive session on the basis that the Mayor and Board would be discussing a transaction of business and

negotiations regarding the location of a business in the City of Natchez.

At the May 3rd meeting, the Board of Aldermen followed its normal procedure of entering into a closed determination to determine if certain items for discussion qualified for execution session. The Board made the determination that certain items qualified for executive session including the Proposals in question and announced to the general public the basis for which they qualified prior to entering into executive session.

As stated hereinabove, the City of Natchez had submitted a Request for Proposals for companies to submit competitive sealed Proposals for the prospect of locating an office in the City of Natchez to conduct the business of waste collection and recycling.

The general public, as well as Shadrack T. White, were also informed that the Mayor and Board would be reviewing Proposals that were submitted with confidential and financial information that was protected by the Public Records Act. The statement made by Shadrack T. White that the only exemption claim by the City was the location of a business is not true. They were also informed that the legislature had recently passed a Best Practice Act for the conduct of Request for Proposals and Request for Qualifications that provided a process to discuss the contents of the Proposals without releasing the information contained in the competitive Proposals. Although the process does not specifically apply to municipalities, the new act is entitled "Best Practices for Soliciting Request for Proposals or Request for Qualifications." These provisions were added at the end of Chapter 7 - Public Purchases.

LEGAL AUTHORITY:

In determining whether or not the Mayor and Board of Aldermen were permitted on May 1st to proceed into executive session to review the Proposals submitted by the various Offerers pursuant to the RFP for waste collection and recyclables, a review of the statutory process for Requests for Proposals, the Mississippi Open Meetings Act, the Mississippi Public Records Act and the Best Practices for Soliciting Request for Proposals or Request for Qualifications needs to be received to make the determination.

Section 1. Statutory Process for Issuing Request for Proposals for Waste Collection.

The process for issuing RFP's for waste collection is provided for in Section 31-7-13(w) of the Miss. Code Ann. of 1972 as amended, as follows:

Solid waste contract proposal procedure. Before entering into any contract for garbage collection or disposal, contract for solid waste collection or disposal or contract for sewage collection or disposal, which involves an expenditure of more than Fifty Thousand Dollars (\$50,000.00), a governing authority or agency shall issue publicly a request for proposals concerning the specifications for such services which shall be advertised for in the same manner as provided in this section for seeking bids for purchases which involve an expenditure of more than the amount provided in paragraph © of this section. Any request for proposals when issued shall contain terms and conditions relating to price, financial responsibility, technology, legal responsibilities and other relevant factors as are determined by the governing authority or agency to be appropriate for inclusion; all factors determined relevant by the governing authority or agency or required by this paragraph ® shall be duly included in the advertisement to elicit proposals. After responses to the request for proposals have been duly received, the governing authority or agency shall select the most qualified proposal or proposals on the basis of price, technology and other relevant factors and from such proposals, but not limited to the terms thereof, negotiate and enter into contracts with one or more of the persons or firms submitting proposals. If the governing authority or agency deems none of the proposals to be qualified or otherwise acceptable, the request for proposals process may be reinitiated... .

The process for RFP for waste collection is exempt from the general bid requirements

mandated by Section 31-7-13(c), pursuant to Section 31-7-13(m)(xxii). See Attorney General Opinion dated November 16, 2016, to Scott Slover, No. 2012-00528, 2012WL6561354 (Miss. A.G.)

The RFP process also provides that the governing authority issuing the RFP can enter into negotiations with one or more of the persons making proposals. The opinion states as follows:

With respect to any restriction on the number of contracts procured, we have previously opined that governing authorities may select from the most qualified proposals and enter into negotiations with one of more of the persons submitting proposals. MS AG Op., Thomas (October 20, 2008); MS AG Op., Hollimon (September 16, 2002). Thus, there is no restriction on the number of requests for proposals issued or accepted in the procurement of garbage collection contracts. See MS AG Op., Trapp (June 19, 1998) (entity may advertise and solicit separate proposals or reinstate requests for proposals for either or both disposal and transportation after having already accepted bid for disposal). Furthermore, Miss. Code Ann., Section 31-7-3, states that the purpose of the provisions contained in the public purchasing statutes found at Section 31-7-1, et seq., is to ensure the coordination and the promotion of "... efficiency and economy on the purchase of commodities by the agencies of the state." Clearly, this same purpose applies to the solicitation and procurement of a garbage collection contract. MS AG Op., Thomas (October 20, 2008). In an effort to promote efficiency and in the interest of fiscal responsibility, the county may, within its discretion, negotiate to alter the proposal or proposals to make them more favorable to the county.

As stated in the above Attorney General Opinion, the purpose of the RFP process is to create an efficient and economical process which will allow the governing authority to obtain more favorable proposals.

If the governing authorities in the State of Mississippi had to discuss proposals submitted under the RFP process in open meetings, it would negate the ability to negotiate with various persons submitting proposals to gain the most favorable contract for the governing authority.

Section 2. Review of the Exception to the Open Meetings Act.

The legislative declaration of the Open Meetings Act set forth in Section 25-41-1 of the Miss. Code Ann. is set forth as follows:

It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

The declaration provides that any matters dealing with public policy should be conducted in open meetings. The Mayor and Board of Aldermen of the City of Natchez fully understand the policy as set forth in this declaration and that all matters dealing with public policy should be held in open meetings. The issue before the Commission is not one of discussing public policy in an open meeting. The issue is whether a governing authority should be required to discuss in an open meeting proposals submitted pursuant to a process established by the legislature that provides for maintaining confidentiality of the information provided for in the proposals until the notice of an award of the contract has been announced.

The discussion of the Proposals submitted pursuant to the RFP's qualify to be discussed in executive session pursuant to Section 25-41-7(j). Section 25-41-7(4)(j) of the Miss. Code of 1972, as amended, provides as follows:

Transaction of business and discussions or negotiations regarding the location, relocation or expansion of a business, medical service or an industry.

The above referenced exception to the Open Meetings Act is very broad in its terms. In seeking RFP of waste collection and recycling, the City of Natchez is requesting businesses, most of whom are located outside of the State of Mississippi, to provide information which could possibly include trade secrets, confidential information and financial information. Some people characterize this exception as the economic development exception; however, the legislature did not limit the

exception to economic development. The RFP for waste collection and recyclables does involve having companies to locate offices in the City of Natchez, hire employees to conduct their business and purchase supplies from local businesses. To that extent, this process does involve economic development.

In the case of *Miss. Dep't of Corr. V. Roderick & Solange MacArthur Justice Ctr.*, 720 So.3d 929 (Miss. 2017), the Mississippi Supreme Court in construing the Mississippi Public Records Act of 1983 states as follows:

P1. HNI. Adhering to our rule of law, we, the judiciary, should honor and enforce legislatively created exemptions to statutes. “[W]e must presume that the [Mississippi Legislature] meant what it said and said what it meant” *Id.*, at 929.

The City of Natchez submits that the *Miss. Dep't of Corr.* case supports the proposition that the exceptions set forth in Section 25-41-7(4)(j) is sufficiently broad to pertain to this particular fact scenario. It is inconceivable that the legislature would provide an exception from the Mississippi Public Records Act for competitive sealed Proposals and then expect the public bodies to openly discuss these competitive sealed Proposals in an open meeting.

Section 3. Mississippi Public Records Act - Competitive Sealed Proposals.

The recent amendments, effective July 1, 2016, to the Mississippi Public Records Act provide for the exception that the competitive sealed Proposals should not be released until after the notice of intent to award the winning Proposer.

Section 25-61-5 of the Miss. Code Ann. 1972, Section (1)(b), addresses the production of competitive sealed proposals which are part of ongoing negotiations.

(1)(b) provides as follows:

If a public body is unable to produce a public record by the seventh working day after

the request is made, the public body must provide a written explanation to the person making the request stating that the record requested will be produced and specifying why the records cannot be produced within the seven-day period. Unless there is mutual agreement of the parties, or the information requested is part of ongoing negotiations related to a request for competitive sealed proposals, in no event shall the date for the public body's production of the requested records be any later than fourteen (14) working days from the receipt by the public body of the original request. Production of competitive sealed proposals in accordance with requests made pursuant to this section shall be no later than seven working days after the notice of intent to award is issued to the winning proposer. Persons making a request for production of competitive sealed proposals after the notice of intent to award is issued by the public body shall have a reasonable amount of time, but in no event less than seven (7) working days after the production of the competitive sealed proposals, to protest the procurement or intended award prior to contract execution.

The above referenced section pertaining to competitive sealed Proposals without any reference to trade secrets or confidential information provided that the Proposals shall be made available no later than seven (7) working days after the notice of intent to award to the winning Proposer.

Section 4. Mississippi Public Records Act - Trade Secrets, Confidential or Financial Information.

As stated in the facts hereinabove, pursuant to the RFP, the Proposers were required to include financial information and possibly confidential commercial information in their Proposal.

Section 25-61-9 of the Miss. Code Ann. 1972, as amended, provides as follows:

(1) Records furnished to public bodies by third parties which contain trade secrets or confidential commercial or financial information shall not be subject to inspection, examination, copying or reproduction under this chapter until notice to third parties has been given, but the records shall be released no later than twenty-one (21) days from the date the third parties are given notice by the public body unless the third parties have filed in Chancery Court a Petition seeking a protective order on or before the expiration of the twenty-one-day time period. Any party seeking the protective order shall give notice to the party requesting the information in accordance with the Mississippi Rules of Civil Procedure.

The City of Natchez did, in fact, provide the twenty-one-day notice to all of the Proposers and two of the Proposers filed Petitions to restrict access to financial and other confidential information. A copy of the letters to the Proposers is attached hereto collectively as Exhibit "B."

Section 5. Best Practices for Soliciting Request for Proposals or Request for Qualifications.

Effective January 1, 2018, the legislature implemented the Best Practices for Soliciting Request for Proposals or Request for Qualifications codified in Section 31-7-401, et seq. The provisions of this Code Section were implemented to insure the best practices for soliciting Requests for Proposals. Section 31-7-419(3) provides that: "... Auction techniques, revealing one Offerer's price to another, and disclosure of any information derived from competing proposals is prohibited"

As stated above, this Section does not specifically apply to municipalities; however, it supports the proposition that all discussions pertaining to the review and negotiations of proposals should be performed outside of an open meeting.

Although there is not a statute that explicitly states that public bodies can meet in executive session to discuss the contents of competitive sealed Proposals, all of the statutory provisions pertaining to businesses submitting competitive sealed Proposals lead to that conclusion.

It would be inconceivable that the legislature would provide that competitive sealed Proposals are exempt from the Mississippi Public Records Act until after the award of the contract to the winning Proposer if the public body issuing the RFP could not meet in executive session to consider the Proposals.

Furthermore, the Mississippi Public Records Act exempts the release of documents containing trade secrets, confidential information and financial information for a period of twenty-

one (21) days so that businesses can seek a protective order to preserve the release of this information. Even if competitive sealed Proposals were not exempt from the Mississippi Public Records Act, the public body would be required to meet in executive session to review and discuss any aspects of the Proposals pertaining to trade secrets, confidential information or financial information.

The Attorney General Opinion stated in Mr. White's Complaint, Anthony E. Nowak, 2002 WL 1833281, at *2 (Miss. A.G. July 10, 2002), is not applicable to this factual situation inasmuch as this case involved meetings wherein the Board reviewed documents which are classified as trademark, confidential and financial information as well as competitive sealed Proposals which are protected under the Mississippi Public Records Act from disclosure to the general public.

Based on the facts and legal arguments submitted herein, the City of Natchez does hereby respectfully submit that it complied with the Open Meetings Act and, therefore, the Open Meetings Complaint No. M-18-010 filed against it should be dismissed.

Respectfully submitted, this the 21st day of May, 2018.

CITY OF NATCHEZ, MISSISSIPPI

BY: _____

Robert C. Latham, Attorney

OF COUNSEL:


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NATCHEZ, MS 39121
(601) 442-6495

CERTIFICATE OF SERVICE

I, ROBERT C. LATHAM, do hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing instrument to:

Mr. Shadrack T. White
520 George Street
Jackson, MS 39202.

SO CERTIFIED, this the 24th day of May, 2018.



ROBERT C. LATHAM