



MONTGOMERY COUNTY ETHICS COMMISSION

January 21, 2022

Waiver 22-01-002

The Office of Emergency Management and Homeland Security (“OEMHS”) is requesting an advisory opinion as to whether 19A-14(c) of the County’s ethics law precludes a contemplated transaction. In the alternative, OEMHS seeks a waiver of the ethics law so that it may engage in the contemplated action without fear of a violation of 19A-14(c). The Commission issues a waiver of 19A-14(c) to the class of persons who are involved in the procurement process associated with entering into the contemplated transaction and to all County employees who are involved in the administration of the County’s obligations pursuant to the arrangement.

Relevant Facts

OEMHS is responsible for coordinating emergency response and recovery efforts for the County. One such type of emergency for which OEMHS coordinates the County’s response is flooding, which causes and is anticipated to further cause loss of life and significant property damage. OEMHS tracks and monitors various water levels at streams and rivers across the County through US Geological Survey (USGS) gauges. The County Department of Environmental Protection (DEP) maintains a set of remote monitoring stations to track real-time water levels at DEP’s high and significant hazard dams. Through this effort, OEMHS and DEP have identified 24 flood-prone sites including dams, low-lying roadways and water crossings throughout the County for potential collaboration with United States Department of Homeland Security (DHS).

Since 2016, the Science and Technology Directorate (S&T) at DHS has been working with DHS scientists, equipment manufacturers, and stormwater utilities from around the United States to develop deployable, scalable, and low-cost flood-sensor networks. Designed for long-term deployment in flood-prone areas, DHS’s wireless sensors automatically detect rising water levels and send early flood warnings to officials and residents. In December 2021, the County’s DEP contacted OEMHS about an offer by the DHS to convey 24 flood control sensors to the County, at no cost to the County, pursuant to DHS’s Small Business Innovation Research (SBIR) and Small Business Technology Transfer (SBTT) program.

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DHS created the SBIR and SBTT programs to “fund a diverse portfolio of startups and small businesses across technology areas and markets to stimulate technological innovation, meet Federal research and development (R&D) needs, and increase commercialization to transition R&D into impact.” It is part of the stated mission of the SBIR and SBTT to, “increase private-sector commercialization of innovations derived from Federal research and development funding.”

In order to have the free access to the flood sensors DHS offers, the County will need to enter into a Cooperative Research and Development Agreement (CRADA) with both DHS and the company that created and owns the flood sensors, Intellisense Systems, Inc. (“Intellisense”), a California corporation. The CRADA between the County, DHS and Intellisense would convey the sensors to the County for its use at 24 locations for a period of 36 months at no cost. The County would be responsible for the installation costs (approx. \$15,000) and, after year one, cover the cost for the data transmittal from the sensors for the remaining 24 months (this is essentially 24 accounts similar to cell phone accounts).

From OEHMS and the County’s perspective, flood sensors can monitor flood-prone areas in real time for rapid detection to alert County staff, first responders, property owners, communities, and residents to potential flood hazards, thereby reducing fatalities from flooding events, protecting critical infrastructure, and reducing property losses. Long term real-time water level monitoring at the County’s dam sites will help identify potential clogging and other issues to assist preventive maintenance. The DHS flood sensors require little maintenance and cost much less than permanent flood sensors currently on the market. Many County agencies are involved in studying the changing climate indicators and developing mitigation strategies for future county actions. Collecting specific flood data will be extremely critical in developing flood control strategies for the future and this arrangement with DHS will greatly facilitate that need.

Under the CRADA, in exchange for access to and use of the sensors, DHS and Intellisense expect feedback as to how the sensors could be improved to allow Intellisense to “develop enhancements” of the sensors “potentially leading to commercial availability and adoption of the sensors” by others. This would include two feedback reports, one at the beginning of the project and one at the end, from County employees as to how the sensors performed and how they could be improved. The County would also have to work with Intellisense to “prosecute a patent application” for any inventions related to use of the sensors – a commitment of County employee time of unknown scope. Also of note, Intellisense plans to use Intellisense flood sensor data stored on Intellisense servers for “product development and commercialization.”

Legal Question

OEMHS requested an opinion as to whether the County’s participation in the CRADA arrangement with DHS and Intellisense would implicate County Code § 19A-14(c). That provision states:

A public employee must not use any County agency facility, property, or work time for personal use or for the use of another person, unless the use is: (1) generally available to the public; or (2) authorized by a county law, regulation, or administrative procedure.

The submission by OEMHS stipulates that the use of County employee work time to provide feedback to improve Intellisense's product or assist it in the pursuit of a patent is not generally available to the public. And the benefits conferred on Intellisense are not specifically authorized by any existing County law, regulation, or administrative procedure. The question submitted for the consideration of the Commission is whether the prohibition of 19A-14(c) applies where the County enters a cooperative arrangement pursuant to a federal program where local government employees would provide services and benefits to a private party.

From the County's perspective, it is receiving benefits through the cooperative agreement - a contract - with the federal government and the private company, Intellisense. A contract requires each party to extend "consideration" or something of value to the other party or parties. Usually, County contracts involve the expenditure of County funds in return for a contractor's provision of goods and services. 19A-14(c) certainly does not prohibit the County from entering into a contract where it is going to pay money to the contractor for the goods and services that the contractor is to provide even though the conveyance of money will benefit the contractor: the County is clearly authorized to enter into contracts to pay money for goods and services pursuant to Chapter 11B of the County Code. The County Attorney's Office (OCA) has advised OEMHS and the Commission that this transaction is not covered by Chapter 11B as OCA interprets Chapter 11B as applying only to contracts in which the County expends public funds in exchange for goods, services, or construction. The County's authority to enter into the transaction is therefore pursuant to its general authority as a Charter County under Maryland law.

There is no fact presented suggesting a lack of objectivity or impartiality of County employees. It is the unusual nature of the transaction that raises the question whether the ethics law is intended to prohibit the County's extension of services and work product, such as data, to a private party without express statutory or other authority permitting the action. A strict reading of the provision of 19A-14(c) suggests coverage by 19A-14(c) of this transaction. On the other hand, the Ethics Commission is reluctant to interpret the law in such a way that suggests that it would apply in circumstances where there is no threat of advancing private interests for an inappropriate purpose. The Commission notes that the process of submitting a request for a waiver assures that the transaction is reviewed at least at the level of the relevant agency head which itself provides a measure of assurance that there is no impropriety. The Commission notes that 19A-14(b) prohibits the use of County insignia by private parties without the approval of the Chief Administrative Officer. An agreement with the County allowing for a private party to use the County seal would require the CAO's approval, even where there is no question about the objectivity and impartiality of the employees involved in making an arrangement to use County insignia.

In the end, it is a close question as to whether the 19A-14(c) applies where there is no conflict of interest or factual basis to question the impartiality of a county employee working on the matter.

Waiver

The Commission has considered all the circumstances and determined that it will issue a waiver.

County Code Section 19A-8 provides that the Commission may grant a waiver of the prohibitions of Chapter 19A if the Commission finds that: (1) the best interests of the County would be served by granting the waiver; (2) the importance to the County of a public employee or class of employees performing official duties outweighs the actual or potential harm of any conflict of interest; and (3) granting the waiver will not give a public employee or class of employees an unfair economic advantage over other public employees or members of the public.

The circumstances presented meets each of the three requirements. Granting a waiver is in the County's best interest as it furthers the County's proactive approach to mitigate flood risks associated with urban development to safeguard life and property. The importance of having County employees performing official duties outweighs the actual or potential harm of any conflict of interest. (In fact, there is no actual or identifiable potential for a conflict of interest). And granting the waiver resulting in County participation in the CRADA will not give the employees working on the matter an unfair economic advantage over other public employees or members of the public.

The waiver is based on the facts as presented to the Commission and extends only to circumstances presented in the waiver request.

For the Commission



Susan Beard