

**OFFICE OF ETHICS, COMPLIANCE & OVERSIGHT
CITY OF JACKSONVILLE
117 WEST DUVAL STREET
SUITE 450
JACKSONVILLE, FL 32202
PHONE: (904) 255-5510**

MEMORANDUM

**TO: C. Christopher Anderson, III, Executive Director and General Counsel
State of Florida Commission on Ethics 325 John Knox Road Building E, Suite 200
Tallahassee, FL 32303**

FROM:

RE: JEA Conflict of Interest Inquiry: ITN 127-19 Negotiation Team Members

DATE: November 1, 2019

I. INTRODUCTION

Pursuant to Rules 34-6.002 and 34-6.004, on behalf of Melissa Dykes, Herschel Vinyard, and Jordan Pope (the "ITN Negotiation Team Members"), and in accordance with their request, we are writing to request an informal written advisory opinion on the ethics laws inquiry set forth below. The ITN Negotiation Team Members have requested an opinion be issued by the Commission on Ethics as soon as possible. Please be advised that the Office of General Counsel has discussed this inquiry with you in prior telephone conversations.

II. FACTUAL BACKGROUND

A. The ITN Process and Negotiation Team

On July 23, 2019, the JEA Board of Directors (the "JEA Board") approved Resolution 2019-07, authorizing the CEO of JEA to issue a competitive solicitation to investigate and pursue a non-traditional utility response as presented to the JEA Board at the July 23, 2019 JEA Board Meeting. Pursuant to this authority, on August 2, 2019, JEA issued Invitation to Negotiate #127-19, entitled "Strategic Alternatives" (the "ITN"), inviting interested parties to submit Replies detailing strategic alternatives that are aligned with JEA's goal of maximizing customer, community, environmental, and financial value over the long term. Potential alternatives that could be proposed included, but were not limited to, operational changes, structural changes, joint ventures, development partnerships, community ownership, corporate ownership, an initial public offering, private placement, technology conversion, oil and gas conversion, utility conversion, or another

[PAGE]

[DOCPROPERTY "CUS_DocIDChunk0"]

recapitalization. Consistent with Resolution 2019-07, the ITN set forth certain process goals as minimum requirements for maximizing customer, community, environmental, and financial value over the long term. Those minimum requirements include (among others) protection of certain employee retirement benefits and maintenance of substantially comparable employee compensation and benefits for three years. Initial Replies to the ITN were received and a public bid opening meeting was held on October 7, 2019. Following the evaluation of the initial Replies as called for under the ITN, a Notice of Intent to Negotiate was posted on October 14, 2019, announcing JEA's intent to negotiate with ~~nine~~ qualified Respondents.

Consistent with the terms of the JEA Procurement Code, Section 3.3.2 of the ITN calls for the appointment of a Negotiation Team consisting of at least three individuals to conduct negotiations with Respondents within the competitive range, review revised Replies and Best and Final Offers ("BAFOs"), and formulate a recommended award. Section 3.3.8 of the ITN contemplates that the Negotiation Team will review the final round of BAFOs and meet to determine which offer constitutes the best value to JEA based upon the Selection Criteria set forth in the ITN. Thereafter, the Negotiation Team will develop a recommendation that identifies the award that they assess will provide the best value to JEA based upon the Selection Criteria. The ITN recognizes that, following rendition of the Negotiation Team's recommendation, the JEA Board of Directors will make the final decision as to which Respondent should be selected for award, if any, based on the recommendation of the Negotiation Team. This recommendation will be considered by the JEA Board in conjunction with additional possible alternative approaches, such as an initial public offering or the formation of a cooperative. ~~It is possible that~~

The JEA Board will determine that no contract resulting from the ITN should be pursued as significant discretion regarding how to handle the recommendation received from the Negotiation Team, and can accept or reject the recommendation, request additional or further negotiations, request alternative terms, or reject the recommendation and determine that no contract resulting from the ITN should be pursued. In addition, ~~the~~ and the JEA Board can chose to move forward with any option, or to move forward with no option and maintain the status quo.

In the event that the JEA Board approves moving forward with a transaction that would result in transferring any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private, certain additional approvals are required. Specifically, Section 21.04(p) of the Charter of the City of Jacksonville provides that:

Nothing in this article shall authorize or be construed to authorize JEA to transfer any function or operation which comprises more than ten percent of the total of the utilities system by sale, lease or otherwise to any other utility, public or private without approval of the council; provided, however, that no approval by the council shall become effective without subsequent referendum approval of the terms and conditions of the sale.

[PAGE]

[DOCPROPERTY "CUS_DocIDChunk0"]

Thus, in order for any proposed transaction which would result in the transfer of more than ten percent of the total utility system to occur, approval by the Jacksonville City Council and approval in a referendum of the electorate of the City of Jacksonville would be necessary.

Consistent with the terms of Section 3.3.2 of the ITN, calling for the appointment of a Negotiation Team consisting of at least three individuals, JEA has appointed Melissa Dykes, Herschel Vinyard, and Jordan Pope to the Negotiation Team while stating on the record that it is seeking a conflicts review by the OGC and the Commission on Ethics, & SEC and that such review is pending. Ms. Dykes is JEA's President and Chief Operating Officer. Mr. Vinyard is JEA's Chief Administrative Officer. Mr. Pope is JEA's Director of Economic Development and Real Estate. Each of these ITN Negotiation Team Members are current JEA employees and have been appointed to serve on the Negotiation Team solely in their capacity as JEA Employees.

In addition to the three above referenced ~~three~~ ITN Negotiation Team Members, JEA plans to appoint the current Chairperson of the JEA Board Compensation Committee (the "Committee Chair"), a member of the JEA Board of Directors, as a fourth member of the ITN Negotiation Team, and to vest the sole and exclusive responsibility for negotiating matters concerning employee compensation and benefits with the Committee Chair. The Committee Chair, by contrast to the other ITN Negotiation Team Members, is not a JEA employee and does not participate in JEA employee benefit programs. The Committee Chair receives no compensation or employment benefits for serving on the JEA Board, and would receive no compensation or employment benefits for service on the ITN Negotiation Team. ~~JEA additionally plans to appoint the current JEA Board Compensation Committee Chairperson (the "Chair"), a member of the JEA Board of Directors, as a fourth member of the ITN Negotiation Team with sole and exclusive jurisdiction over the negotiation of employee compensation and benefits matters. The Chair receives no compensation or employment benefits for her service on the JEA Board and would receive no compensation or employment benefits for serving on the ITN Negotiation Team. She is not a JEA employee.~~

B. Employee Retention Program and the Long-Term Performance Unit Plan

At the July 23, 2019, meeting of the JEA Board, the JEA Board adopted Resolution 2019-09, approving an Employee Protection and Retention Program and a Form Non-CEO Executive Employment Agreement, and Resolution 2019-10, approving a Long-Term Performance Unit Plan ("PUP").

Resolution 2019-09, authorizing the Employee Protection and Retention Program, provides the JEA CEO or his designee with the authority to execute with each full-time employee who is actively employed with JEA on the date of the resolution, or as otherwise recommended by the CEO and approved by the Chair of the Compensation Committee, an employment protection and retention program agreement on the terms and conditions set forth in the Employee Protection and Retention Summary attached to the Resolution. These terms and conditions generally provide, subject to the occurrence of a Recapitalization Event and the satisfaction of the conditions described in the Summary, that each eligible employee may receive a cash payment equal to 100%

of his annual base salary in effect on July 23, 2019. Pursuant to the terms of the Summary, all full-time employees who are actively employed with JEA on July 23, 2019, are eligible to receive such cash payment. For purposes of the Summary, a "Recapitalization Event" is defined as follows:

the closing and funding of a transaction or a series of related transactions in accordance with Article 21 of the Charter of the City of Jacksonville and any other applicable law that results in either (i) unencumbered cash proceeds to the City of Jacksonville of at least Three Billion Dollars (\$3,000,000,000) or (ii) at least 50% of the net depreciated property, plant and equipment value of either JEA's electric system or JEA's water and wastewater system being transferred, assigned, sold or otherwise disposed of.

Resolution 2019-09 additionally approved the Form Non-CEO Executive Employment Agreement (Exhibit 3 to Resolution 2019-09). Both Mr. Vinyard and Ms. Dykes, as members of the SLT, have since executed their Executive Employment Agreement in substantially the same form as the Form Executive Employment Agreement. Those Agreements set forth the material terms and duties of the respective employees, including relevant termination-related provisions. Exhibit A to those Agreements is a Separation and Transition Agreement subject to execution and mutual release and providing that the employee shall serve as a consultant to JEA for a period of six months if terminated by JEA without cause or by employee for Good Reason. The consulting fee is calculated using an annualized amount equal to the combined total of all items reflected on the employee's total compensation statement for the most recent 12-month period. No additional payment or benefits are due or payable to the employee consultant.

With respect to the PUP approved by Resolution 2019-10, the PUP allows eligible employees to defer compensation in order to purchase a specified number of performance units from JEA and redeem them for a cash payment equal to the redemption price. The PUP is entirely voluntary. Any eligible employee may decide to participate or decline. Eligible employees include all full-time employees (including full-time attorneys from the Office of the General Counsel dedicated exclusively to JEA, appointed employees, and represented employees) actively employed with JEA for at least three months prior to the performance unit purchase date. The eligibility of employees to participate in the program is dependent solely on their employment status and execution of and compliance with a performance plan participation agreement. To participate, the employee must agree in a performance plan participation agreement to comply with the following covenants: (i) devote his/her best efforts to faithfully discharge his/her duties on behalf of the JEA and not take any action that would be contrary to the best interests of the JEA and (ii) not disclose confidential JEA information except as required by law or to perform employment duties. A breach of these covenants would result in the forfeiture of unvested units except for a return of the aggregate purchase price for such units. The agreements regarding the Plan will be subject to sections 409A and 457(f) of the Internal Revenue Code and will be governed by the laws of Florida and subject to arbitration in Duval County.

A pool of units will be allocated¹ amongst employees based on his/her position level and the most recent annual performance review. The units will be available for purchase at \$10.00 per unit in the early months of the calendar year following the calendar year in which JEA's annual financial audit statement is completed. Unpurchased units will return to the pool. Eligible employees will pay the purchase price of the unit by electing to defer a portion of his/her salary (equal to the aggregate purchase price for the performance units) into an FDIC-insured savings account. At redemption, the employee will receive a cash payment in the amount of the redemption price that will include the purchase price paid per unit. JEA's Chief Financial Officer will calculate the redemption price, and it will be certified no later than 30 days following the completion of JEA's annual financial audit statement. The PUP was developed at the instruction of the JEA Board, authorized by it, and will be administered under Board auspices and the redemption price certified by the Board. Further, an independent auditor will certify all values and financial results that will substantiate the value of the PUP.

The calculation of the redemption price is dependent on JEA's current year value, which is defined as the sum of JEA's net position per JEA's annual audited financial statement, the aggregate consideration paid, distributed, credited, or otherwise provided to the City of Jacksonville during the 12-month period prior to the end of the performance period, and the aggregate consideration paid, distributed, credited, or otherwise provided to JEA's customers during the 12-month period prior to the end of the performance period. Depending on the increase or decrease of JEA's current year value, the redemption price for the units will increase or decrease. Payments made regarding the units will be paid less applicable withholding taxes.²

The employee must be actively employed on the vesting date for the units to vest. If an employee is involuntarily terminated (without cause or due to death or disability) prior to the vesting date, then the employee will receive a payment for the units at the same time as the amounts would have been paid had the employee not been terminated. If the employee's termination of employment is voluntary, then the employee forfeits the units. If an employee is retirement-eligible and retires prior to the vesting date, the units will vest on the normal vesting date.

III. DISCUSSION

ISSUES

(1) Whether a prohibited conflict of interest arises under section 112.313(7), Florida Statutes, for the ITN Negotiation Team Members, as a result of the Employee Protection and Retention Program or the PUP?

¹ The allocation of performance units available to each employee for purchase will be directed by the JEA Compensation Committee Chair, who is the Administrator of the Plan.

² The occurrence of a Recapitalization Event would truncate the performance period, which would then end on the closing date of such Recapitalization Event.

Formatted: Indent: First line: 0"

Formatted: Indent: First line: 0"

(2) Whether a voting conflict arises under section 112.3143(3)(a), Florida Statutes, for the ITN Negotiation Team Members, as a result of the Employee Protection and Retention Program or the PUP or in the case of the Committee Chair, as a result of her service on the ITN Negotiation Team?

LAW

Section 112.313(7)(a), Florida Statutes, provides that:

No public officer or employee of an agency shall have or hold any employment or contractual relationship with any business entity or any agency which is subject to the regulation of, or is doing business with, an agency of which he or she is an officer or employee, excluding those organizations and their officers who, when acting in their official capacity, enter into or negotiate a collective bargaining contract with the state or any municipality, county, or other political subdivision of the state; nor shall an officer or employee of an agency have or hold any employment or contractual relationship that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties or that would impede the full and faithful discharge of his or her public duties.

Additionally, section 112.3143(3)(a), Florida Statutes, prohibits a county, municipal, or other local public officer from voting in an official capacity upon any measure which would inure to his or her special private gain or loss; which he or she knows would inure to the special private gain or loss of any principal by whom he or she is retained or to the parent organization or subsidiary of a corporate principal by which he or she is retained, other than an agency as defined in s. 112.312(2); or which he or she knows would inure to the special private gain or loss of a relative or business associate of the public officer. Section 112.3143(1)(d), Florida Statutes, defines a "special private gain or loss" as follows:

an economic benefit or harm that would inure to the officer, his or her relative, business associate, or principal, unless the measure affects a class that includes the officer, his or her relative, business associate, or principal, in which case, at least the following factors must be considered when determining whether a special private gain or loss exists:

1. The size of the class affected by the vote.
2. The nature of the interests involved.

3. The degree to which the interests of all members of the class are affected by the vote.

4. The degree to which the officer, his or her relative, business associate, or principal receives a greater benefit or harm when compared to other members of the class.

The degree to which there is uncertainty at the time of the vote as to whether there would be any economic benefit or harm to the public officer, his or her relative, business associate, or principal and, if so, the nature or degree of the economic benefit or harm must also be considered.

ANALYSIS

A. There Is No Prohibited Conflict of Interest Under Section 112.313(7)(a)

Section 112.313(7)(a), Florida Statutes, generally prohibits agency employees from holding employment or contractual relationships with business entities or agencies that are subject to the regulation of, or do business with, the agency by which the individual is employed. This statute further prohibits agency employees from having employment or contractual relationships that will create a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties. It appears clear that no conflict of interest under this provision can arise with respect to the ITN Negotiation Team Members.

As described above, the three ITN Negotiation Team Members are employees of JEA. The contemplated fourth Negotiation Team member, the Committee Chair, is a member of the JEA Board of Directors and chairs the JEA Board's Compensation Committee. Pursuant to section 21.03(a) of the Charter of the City of Jacksonville, the JEA Board is "[t]he governing body of JEA," and consists of 7 members appointed by the mayor and confirmed by the City Council, and whose members, pursuant to section 21.03(b) of the Charter, are not entitled to compensation, pension, or other retirement benefits on account of service on JEA.

Commented [JU1]: Need to add BOD member discussion

The "agency" of the ITN Negotiation Team Members is JEA, as the Negotiation Team is an advisory board that merely renders a recommended award (a recommendation) to JEA. See CEO 16-2 ("We have long held that the 'agency' of a member of an advisory board to a governing body is the governing body."); CEO 06-24 ("We also have found the 'agency' of board members whose boards were solely advisory in nature to be that unit of government which they serve."); CEO 94-36 ("[I]n determining an individual's 'agency' for purposes of the Code of Ethics, an advisory board to a governing body is a part of that body. . . . Referring to the definition of 'public officer,' above, if each 'advisory body' were an 'agency,' it would not have been necessary to specify that any person appointed to hold office in an agency includes 'any person serving on an advisory body.' In our view, an advisory body does not constitute a separate agency of government; instead it is a part of a larger government unit that exercises a governmental function."). Thus, because

the relevant “agency” of the ITN Negotiation Team Members for purposes of section 112.313(7)(a) is JEA, the ITN Negotiation Team Members’ employment by JEA, or service on the governing body of JEA, by definition, cannot constitute an employment or contractual relationship with a business entity or agency subject to the regulation of or doing business with JEA. Simply stated, JEA is neither subject to the regulation of, nor does it do business with, itself.

For much the same reason, it appears clear the ITN Negotiation Team Members’ employment by JEA or status as a JEA Board of Directors member cannot constitute a contractual or business relationship that creates a continuing or frequently recurring conflict between his or her private interests and the performance of his or her public duties as a JEA employee or Board of Directors member. Each of the ITN Negotiation Team Members is a potential participant in the Employee Protection and Retention Program and the PUP because they are a full-time JEA employee, and the JEA Board has approved such programs with respect to all full-time JEA employees. It would simply be illogical to assert that an individual’s status as a JEA employee or Board member, who is by definition eligible for the same Board-approved employment benefit programs as every other full-time JEA employee — or as a JEA Board member who is not eligible for JEA employee benefit programs at all are not eligible at all (in the case of the Board member) — in some way constitutes an employment relationship that creates a continuing or frequently recurring conflict with his or her public duties under the very same employment or Board member relationship with JEA.

B. There Is No Voting Conflict Under Section 112.3143(3)(a)

Section 112.3143(3)(a), Florida Statutes, requires county, municipal, and other local public officers to abstain from voting upon any measure which would inure to his or her special private gain or loss, or which he or she knows would result in a special private gain or loss to certain other persons or entities with specified relationships with the officer.

As the Commission has repeatedly and consistently found, section 112.3143(3)(a) “is not applicable when the gain or loss is ‘remote and speculative.’” CEO 12-01. Stated differently, “if there is uncertainty at the time of the vote as to whether the measure will directly affect the officer or any of the listed others and, if so, what the nature or magnitude of the gain or loss might be, the measure/vote does not require the officer’s declaration, abstention, and filing.” *Id.*

In CEO 12-01, the Commission reasoned that city commissioners who owned businesses frequented by cruise ship passengers were not required to abstain from voting upon a measure to seek a channel-widening feasibility study that could ultimately result in an increase in the number of cruise ship passengers visiting their business if additional intermediate steps necessary to actually undertake such a channel widening occurred, as any potential future gain to their businesses was remote and speculative. The Commission reasoned that there was “significant uncertainty” as to whether the vote would ever result in gain or loss to the Commissioners’ businesses, as a significant number of additional events and approvals – including Congressionally-sanctioned changes to regulations – would have to occur before any channel widening that could actually result in a gain or loss to the Commissioners could be completed. *See also* CEO 05-15 (benefit to client developer from affordable housing ordinance was “remote and

speculative” “given the many approvals and events that would have to occur for the client . . . to engage in a particular new project, such as DCA approval or planning board approval[.]”); CEO 06-21 (no special private gain or loss where there were still “innumerable hurdles before any profit could be realized” and individual “[d]id not stand to benefit in any direct way as a result of the measure under consideration.”).

This circumstance is very similar. While three of the ITN Negotiation Team Members (the employees), like all other roughly 2,000 full-time JEA employees, may stand to receive a monetary gain by virtue of the Employee Protection and Retention Program and/or the PUP if a recapitalization of JEA were to ultimately occur³, any actual recapitalization of JEA is so far removed, and requires so many additional uncertain steps and approvals to be taken, that any potential gain to those ITN Negotiation Team Members is remote and speculative. As described in the above factual background, the role of ITN Negotiation Team Members is simply to conduct negotiations with the Respondents to the ITN. Such negotiations for the competitive solicitation will be occurring while JEA meanwhile continues to explore at least four other strategic alternative (including maintaining the status quo, pursuing certain significant cost-cutting and revenue increasing measures, an initial public offering, and a community ownership structure). Through the negotiation process, the ITN Negotiation Team Members will assess which Respondent (if any) is able to meet certain the Board-mandated minimum requirements and constitutes the best value to JEA and should be recommended for award. Furthermore, assuming *arguendo* the negotiation phase of the procurement even results in a recommendation, that recommendation of an award by the ITN Negotiation Team Members in no way results in a recapitalization of JEA occurring. It is merely a recommendation. The Board maintains full discretion and control over the outcome. Before any recapitalization of JEA could occur, the recommendation by the ITN Negotiation Team would first have to be approved by the JEA Board, which retains the discretion to reject in whole or in part the recommendation of the ITN Negotiation Team, to elect to award to a different Respondent, or to elect to go in a different direction entirely and not award a contract resulting from the ITN. If the JEA Board accepted the recommendation of the ITN Negotiation Team and voted to award a contract resulting from the ITN, that contract would then require the approval of the Jacksonville City Council. If the Jacksonville City Council likewise voted to approve the contract, that contract would then require approval in a referendum by the electorate of the City of Jacksonville. Only after each of these approvals had occurred could any transaction close and a “Recapitalization Event” within the meaning of the Employee Protection and Retention Program or PUP actually occur. This factual scenario (even should it materialize) requiring the approval of each of: (1) the appointed JEA Board; (2) the elected Jacksonville City Council; and (3) a referendum of the electorate of the City of Jacksonville, appears to be even more distant and remote than that which the Commission determined to be “remote and speculative” in CEO 12-01

Formatted: Footnote Text

³ While neither the Employment Agreement nor attached Separation and Transition Agreement are in any way linked to, contingent upon, or associated with a Recapitalization Event, should Melissa Dykes or Herschel Vinard be terminated without cause or resign for Good Reason as a consequence of a Recapitalization Event, the contractual right to a 6-month consultancy may be triggered as it would under any other termination context.