



Advisory Opinion 13-001

This is an opinion of the Commissioner of Administration issued pursuant to Minnesota Statutes, section 13.072 (2012). It is based on the facts and information available to the Commissioner as described below.

Facts and Procedural History:

On October 29, 2012, the Information Policy Analysis Division (IPAD) received a letter dated October 26, 2012, from Leita Walker, on behalf of Star Tribune Media Company, LLC. In her letter, Ms. Walker asked the Commissioner to issue an advisory opinion about her client's right to gain access to certain data the Metropolitan Council maintains. IPAD asked for additional information, which Ms. Walker provided on November 8 and 16, 2012.

IPAD, on behalf of the Commissioner, wrote to Susan Haigh, Council Chair, in response to Ms. Walker's request. The purposes of this letter, dated November 19, 2012, were to inform her of Ms. Walker's request and to ask her to provide information or support for the Council's position. On December 10, 2012, IPAD received a response from Dave Theisen, Deputy General Counsel for the Council.

A summary of the facts as Ms. Walker provided them follows. She wrote:

On October 21, 2011, the Metropolitan Council issued a Request for Proposal for Contract No. 11P173, seeking "Engineering Services for Southwest Light Rail Transit Line." Attachment 1 to the Request for Proposal covered the scope of work and described that scope as follows:

1. Various services in support of COUNCIL performed Project Management activities.
2. 30% Preliminary Engineering (PE) for all aspects of the light rail system;
3. Advanced Preliminary Engineering for all aspects that require up to 90% completion to gain entry into Final Design;
4. Final Design; and
5. Design Support Services During Construction.

....

However, no bid was ever accepted and, at a July 25, 2012, meeting of the Metropolitan Council, the following motion carried:

That the Metropolitan Council authorize the Regional Administrator to:

Cancel the procurement for Contract 11P173 for an Engineering Services Consultant for Southwest Light Rail Transit (SWLRT);
 Develop and issues [sic] *new* Requests for Proposals for Engineering Services Consultant(s) for developing and engineering documents to 30% completion of project engineering;
 Develop and issue a *new* Request for Proposal for an independent engineering peer review consultant tasked with review of contract deliverables generated by the Engineering Services Consultant(s).

In August 2012, the Metropolitan Council issued two new Requests for Proposal: Contract Nos. 12P176 and 12P177. These contracts differ substantially from Contract No. 11P173. They cover only preliminary engineering, not advanced design work, and each contract is for a portion of the southwest corridor line, not the entire route as called for in Contract No. 11P173. The estimated cost of the new contracts is also substantially less than the \$94 million estimated cost of Contract No. 11P173.

[Emphasis provided; notes omitted.]

On July 30, 2012, Star Tribune asked for access to data “regarding the recently canceled procurement for Contract 11P173,” which the Council denied in part. Ms. Walker wrote:

On September 5, 2012, Star Tribune asked the Metropolitan Council to reconsider its decision to withhold data regarding the evaluation processes for procurement for the canceled purchase. Star Tribune referenced Minn. Stat. § 13.591 subd. 3 and noted both that the Metropolitan Council had explicitly canceled Contract No. 11P173 and that Contract Nos. 12P176 and 12P177 were significantly different in scope and cost. As Star Tribune explained, these new Requests for Proposal were not “initial” or “subsequent” procurements for the same engineering work, but completely separate procurements for vastly different work.

The Metropolitan Council responded on September 14, 2012. Despite the clarity of the July 25 meeting minutes, it denied that the Council had “abandoned” the purchase for Contract No. 11P173, and it characterized the new contracts as a “re-packaging” of the work envisioned by Contract No. 11P173. Specifically, it stated,

Data regarding the evaluation process for contract 11P173 remains protected nonpublic data. The Council has not abandoned the purchase and the evaluation process for Contract 11P173 was not completed. Contract 11P173 contained preliminary engineering work for the Southwest Corridor Light Rail line and 12P176 and 12P177 also contain preliminary engineering work for the Southwest Corridor Light Rail line. Significant elements of the work remain the same, although they are packaged differently....

Ms. Walker wrote to the Commissioner:

The Metropolitan Council does not deny that it “Cancel[ed] the procurement for Contract 11P173.” That decision is determinative. This is not a case where the Metropolitan Council rejected all the bids but left open the possibility of a re-solicitation (in which case the requested data would remain private/nonpublic for a year). Instead, this is a case where the Metropolitan

Council affirmatively and explicitly canceled - i.e., *abandoned* - a purchase. Therefore, all of the data in the bidders' responses to the Request for Proposal should be disclosed, with the exception of trade secret data.

The Metropolitan Council nevertheless refuses to disclose the data based on the argument that, although it might have canceled Contract No. 11P173, it has not abandoned the southwest corridor *project*. As its legal staff explained, "Significant elements of the work remain the same, although they are packaged differently." However, Minn. Stat. § 13.591 subd. 3, does not speak of *projects* or "*the work*." Instead, it refers to "abandon[ment] of the *purchase*."

Here, the "purchase" has been abandoned. The Metropolitan Council will not be purchasing preliminary engineering and advanced design work for the entire southwest corridor line at a cost of \$94 million from a single vendor. Instead, it will be purchasing something else, in response to separate Requests for Proposal. The Metropolitan Council cannot protect the data about abandoned Requests for Proposal simply by carving up projects and then issuing new Requests for Proposal. It cannot avoid the clear requirements of § 13.591 with a claim of "repackaging." [Emphasis provided.]

Issue:

Based on Ms. Walker's opinion request, the Commissioner agreed to address the following issue:

Did the Metropolitan Council comply with Minnesota Statutes, Chapter 13, when it denied access to the following data?

- Data of correspondence from January 1, 2012, to the present between URS Corporation or AECOM and Metropolitan Council staff regarding the recently canceled procurement for contract 11P173 for an engineering services consultant for Southwest Light Rail Transit (SWLRT). The data include emails, letters and any other written correspondence.

Discussion:

Pursuant to Minnesota Statutes, Chapter 13, government data are public unless otherwise classified. (Minnesota Statutes, section 13.03, subdivision 1.)

Minnesota Statutes, section 13.591, subdivision 3(b), provides:

Data submitted by a business to a government entity in response to a request for proposal ... are private or nonpublic until the responses are opened. Once the responses are opened, the name of the responder is read and becomes public. All other data in a responder's response to a request for proposal are private or nonpublic data until completion of the evaluation process. For purposes of this section, "completion of the evaluation process" means that the government entity has completed negotiating the contract with the selected vendor. After a government entity has completed the evaluation process, all remaining data submitted by all responders are public with the exception of trade secret data as defined and classified in section 13.37.

If all responses to a request for proposal are rejected prior to completion of the evaluation process, all data, other than that made public at the response opening, remain private or nonpublic until a resolicitation of the requests for proposal results in completion of the evaluation process or a determination is made to abandon the purchase. If the rejection occurs after the completion of the evaluation process, the data remain public. If a resolicitation of proposals does not occur within one year of the proposal opening date, the remaining data become public.

Here, the Council began, but did not complete, negotiation of Contract 11P173, and therefore did not “complete the evaluation process.” Hence, the classification of the data in question depends upon whether the Council re-solicited the request(s) for proposal, or abandoned the purchase.

The Legislature did not define the meaning of the phrase “abandon the purchase” in section 13.591, subdivision 3. Minnesota Statutes, section 645.08, provides that words and phrases not defined in statute are to be construed according to their common and approved usage. Collins English Dictionary - Complete & Unabridged 10th Edition (2009) defines “abandon” as “to forsake completely;” “to give up completely;” “to give up (something begun) before completion: to abandon a job.”

In his comments to the Commissioner, Mr. Theisen reiterated much of what the Council told Star Tribune. He wrote:

Except for the geographical focus of the two RFPs, the preliminary engineering services covered by the August 17, 2012 RFPs are substantially the same as the preliminary engineering services that were covered by the first two phases (Initial Preliminary Engineering and 30% Complete Preliminary Engineering) of the engineering services contract (Contract No. 11P173) that would have been procured under the RFP issued in October 2011.

Mr. Theisen stated, “[t]he Council did not ‘abandon’ the ‘purchase’ of engineering services for the SWLRT Project when it cancelled the procurement of Contract No. 11P173. The Council is proceeding to ‘purchase’ essentially the same preliminary engineering services under the RFPs for Contract Nos. 12P176 and 12P177 that it solicited under the October 2011 RFP for Contract No. 11P173.”

He commented further on details of the differences in the RFPs and stated:

According to SWLRT Project Office staff, none of these new provisions or clarifications changes the scope of the preliminary engineering services that were the subject of the October 2011 RFP. The preliminary engineering services that will be procured under the RFPs for Contract Nos. 12P176 and 12P177 are essentially the same preliminary engineering services that would have been procured under the October 2011 RFP for Contract No. 11P173.

Section 13.591, subdivision 3(b), states that data that are otherwise protected become public if an entity abandons the purchase of the subject of the RFP. Here, the Council cancelled procurement for Contract 11P173, thereby rejecting all responses to the RFP for engineering and related services for the SWLRT, prior to completion of the evaluation process. Three weeks later, the Council re-solicited two new RFPs for the project. It did not abandon the project.

The scope of Contract 11P173 differs from Contracts 12P176 and 12P177, but the project that is the subject of the RFPs is unchanged. The Commissioner respectfully disagrees with Ms. Walker’s

assertions that the Council's action to cancel procurement of Contract 11P173 and issue new RFPs is an *abandonment of the purchase*. The purchase is for engineering and related services for the SWLRT. Given the process set forth in section 13.591, it is clear that the Legislature contemplated that aspects of public projects could change and necessitate re-solicitation of RFPs, and that is the case here.

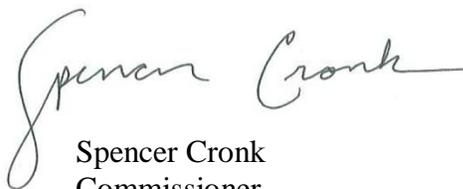
The Commissioner notes that the Council might have used clearer language that could have helped avoid this kind of confusion. For example, its July 25, 2012, motion could have stated that the Council authorized the Regional Administrator to cancel and re-solicit the procurement for contract 11P173, thus clearly stating its intent to re-solicit, rather than abandon, the purchase of engineering and related services for the SWLRT.

Opinion:

Based on the facts and information provided, the Commissioner's opinion on the issue raised by Ms. Walker is as follows:

The Metropolitan Council complied with Minnesota Statutes, Chapter 13, when it denied access to the following data:

- Data of correspondence from January 1, 2012, to the present between URS Corporation or AECOM and Metropolitan Council staff regarding the recently canceled procurement for contract 11P173 for an engineering services consultant for Southwest Light Rail Transit (SWLRT). The data include emails, letters and any other written correspondence.



Spencer Cronk
Commissioner

January 8, 2013