FLORIDA
COMMISSION ON ETHICS
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STATE OF FLORIDA
COMMISSION ON ETHICS

CONFIDENTIAL

In re: Keith James,

Respondent. **Complaint No. 19-180**

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ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, Keith James, serves as Mayor of the City of West Palm Beach. Complainant is Adam Giddens of Jacksonville, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Section 112.313(6), Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on March 16, 2020.

ALLEGATION

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by urging the award of a no-bid security contract to a company operated by one of his friends.

APPLICABLE LAW

Section 112.313(6), Florida Statutes, provides as follows:

> MISUSE OF PUBLIC POSITION. No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

The term "corruptly" is defined by Section 112.312(9), Florida Statutes, as follows:

> "Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.

2. Respondent must have:
   a) used or attempted to use his or her official position or any property or resources within his or her trust,
   or
   b) performed his or her official duties.

3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for him- or herself or others.

4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting him- or herself or another person from some act or omission which was inconsistent with the proper performance of public duties.

ANALYSIS

Section 66-64 of the West Palm Beach City Code of Ordinances is titled, "Single source" and provides that upon justification from the "user department" the City's procurement official may choose one selected supplier or source, even though there are other suppliers that provide similar products. (ROI 15, 21, Exhibits C and D) The procedure is set forth as follows: the user department provides justification and proposes a single source; the procurement official conducts a search for available sources and then may select a single source without competition if the official determines that only a single source is practicable or is in the City's best interest; the official provides written approval of the single source selection; contract negotiations with the single source begin; and a contract may be executed. (Exhibit C1) The official must maintain a record of single source procurements, including the name(s) and the nature and amount of the procurement. (Exhibit C1)

On the other hand, Section 66-94 of the West Palm Beach City Code of Ordinances is titled, "Contracts which require commission approval." (Exhibit D) Certain categories of contracts require the approval of the Commission prior to execution by the Mayor or a matter can be placed on the meeting agenda for Commission approval if requested. (Exhibit D)

This case involves a no-bid contract for security services awarded to Professional Security Consultants (PSC) after the existing contract for such services with Giddens Security Corporation was terminated. (ROI 1, 3, 4)

On March 8, 2019 and March 22, 2019, former West Palm Beach Mayor Jeri Muoio issued two solicitations (RFPs) for City security guard services. (ROI 5)

On April 4, 2019, Respondent took office as the newly elected West Palm Beach Mayor and Chief Executive Officer.[1] (ROI 1, 7) Upon assuming office, Respondent appointed a new police chief. (ROI 24, 42)

According to then-City Administrator Jeff Green, the City's security guard services were split throughout the City – one security firm provided services downtown, another firm provided services to City Plaza, and another firm provided services to other areas of the City. (ROI 24) This caused problems and inconveniences and was confusing to the residents, the City, and the police. (ROI 24) Additionally, the City was not satisfied with the services provided by Giddens. (ROI 24) City Administrator Green and Respondent agreed to allow the new chief to evaluate the City's security services process. (ROI 24)

City Administrator Green directed the City's Procurement Director Frank Hayden to cancel the two RFPs issued under former Mayor Muoio. (ROI 24) After consultation with the new police chief, the deputy police chief, and Respondent, City Administrator Green concluded it was best for the City to have one security firm oversee all areas of the City. (ROI 24) Respondent denies playing an active role in the discussions regarding security guard services. (ROI 41) Neither of the pending RFPs issued by the former Mayor addressed the splintered security services experienced in the City. (ROI 24) There was discussion about amending the scope of work on the two RFPs to include the entire City but City Administrator Green said "it would be underhanded to modify an existing RFP or issue a new RFP whereby the requirements would be written so narrowly that only 'one firm' would be qualified to win the award by virtue of its existing contracts with neighboring entities [which was PSC]." (ROI 25) He maintained that seeking cohesive security services throughout the City with a single firm would be cost effective. (ROI 26)

[1] Respondent has been a City Commissioner since 2011. (ROI 7)

With that in mind, on April 15, 2019, Procurement Director Frank Hayden sent a letter to six of the proposers, including PSC, stating that they were "disqualified from the award process" for failure to meet one of the minimum requirements. (ROI 6, 8) On April 18, 2019, Procurement Director Hayden sent another letter to "All Proposers" advising that the City was canceling both RFPs but intends to re-issue a solicitation in the near future, but the process never resumed. (ROI 9, 30, 40) City Administrator Green denied that he canceled the RFPs because PSC had been disqualified. (ROI 26)

On July 22, 2019, City Senior Purchasing Agent Josephine Grosch e-mailed PSC Senior Vice President Shaul Maouda and PSC Regional Director Willie Perez regarding the "Possibility of Piggyback of Other FL Government Agencies" and inquiring whether PSC had current security service agreements with any governmental agencies in the State *other than* the Delray Beach Downtown Development Authority and the West Palm Beach Downtown Development Authority.[2] (ROI 10) A PSC contract with Pompano Beach Northwest Community Redevelopment Agency met Purchasing Agent Grosch's criteria because it had been competitively awarded through an RFP and had at least a three-year term remaining. (ROI 11, 12) The City was interested in the possibility of a "piggyback" with PSC's contract with the Downtown Development Authority (DDA). (ROI 13)

Respondent contends that due to PSC's experience, knowledge regarding the City, and due to its existing contracts with the City, PSC was "uniquely qualified" to be the City's single provider of security services. (ROI 39) In addition, Respondent made a campaign promise "to have security ambassadors working throughout the City to combat the City's homeless situation." (ROI 39)

[2] PSC had approximately 37 contracts in West Palm Beach and Broward County. (ROI 36)

On August 26, 2019, Procurement Director Hayden terminated all agreements with Giddens Security Corporation, effective September 30, 3019. (ROI 14)

On September 6, 2019, a security services agreement with PSC to provide security services for City facilities and roving services in Northwood was placed on the consent agenda. (ROI 15, 40) However, at the request of City Commissioner Cory Neering, the matter was moved from the consent agenda for a presentation at the September 9, 2019 City Commission meeting. (ROI 16, 34, 43) Commissioner Neering found it unusual that a multi-million-dollar contract would be approved as a consent agenda item. (ROI 34)

Prior to the September 9 Commission meeting, Giddens' attorney sent a letter to all City Commissioners and City Attorney Kimberly Rothenburg requesting a two-week delay of consideration of the matter and an internal investigation or audit into the procurement process for these security services. (ROI 17) Attorney Rothenburg advised City Administrator Green that it was permissible to bring a single source contract before the Commission for a vote or to put the contract back out to bid in an expedited process. (ROI 35)

On September 9, the City Commission voted unanimously to waive the Procurement Code Requirements and approve PSC as the City's security services provider for a term of three years, with an option to extend for an additional two years.[3] (ROI 19) Commissioner Neering voted in favor of the no-bid contract because Attorney Rothenburg and Procurement Director Hayden did not express any reservations either during the meeting or at another time. (ROI 34) Respondent did not vote on the matter; however, he spoke in favor of the other Commissioners voting to award the contract to PSC. (ROI 19)

[3] The contract amount for PSC was $4,751,227.30 for a three-year term, with an option to extend the contract for two years making the potential value $7.9 million. (ROI FN 9, Exhibit E)

Following the September 9, 2019 Commission meeting, Respondent met with then-interim City Administrator Johnson[4] who informed him that Attorney Rothenburg and Procurement Director Hayden had both advised City Administrator Green against taking steps to award a no-bid contract. (ROI 44) Respondent alleged that he was unaware of this and presumed both were in agreement with executing a single source contract because no one informed him otherwise. (ROI 44)

On September 19, 2019, Giddens filed a lawsuit against the City. (ROI 20) The next day, Procurement Director Hayden authored a "Single Source Justification City-Wide Security Services" letter explaining why the security contract was not competitively bid. (ROI 21, Exhibit B) Procurement Director Hayden stated:

> I have received information and justification from various City departments regarding the requirements for security services for the City. The fact of two differing security firms providing security services downtown is of significant concern to the Police Department and City Administration. The Police have indicated a lack of coordination and communication between the two current security firms....Neither current firm provides adequate service for the City Center plaza, each identifying the other as the responsible firm....Members of the public and City staff complain....Merchants in Northwood desire the same "ambassador" type security service provided by DDA's firm [PSC] to the downtown merchants.
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> * * *
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> Based on the City's need for comprehensive security services from one security firm, and the fact that the DDA's contract will not expire for 5 years, it was my determination that selection of PSC as a single source is justified because no other firm is in a position to serve both the DDA and City and be able to provide seamless security services during the next 5 years.
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> * * *

[4] City Administrator Green resigned from his position in October 2019 due to this complaint and another unrelated controversy. (ROI 28)

> However, in the interest of transparency, it was determined to take the contract to the City Commission for approval, and the use of Section 66-94 was the means to bring the contract to the Commission for approval. Accordingly, at that time I did not reduce my single source finding to writing since Commission approval was sought. (ROI 21, Exhibits B, D)

Current-City Administrator Faye Johnson advised Respondent that, based on her experience, the single source contract justification letter should have been provided by staff of the City departments prior to the Commission's vote, rather than after the no-bid contract was approved. (ROI 31) She then sought guidance from Respondent regarding the City's practice regarding no-bid contracts for high dollar values in the absence of a detailed policy or code. (ROI 33)

Current-City Administrator Johnson stated that Procurement Director Hayden and Attorney Rothenburg had advised City Administrator Green that even though the City could legally issue a single source contract, it was not the direction the City should take. (ROI 32) However, then-City Administrator Green had made up his mind to proceed with a no-bid contract. (ROI 32)

Respondent said that City Administrator Green served as the intermediary between himself and Attorney Rothenburg. (ROI 41) Respondent denied that he was aware of "legal" advising City Administrator Green that a no-bid contract should not be done. (ROI 41) Rather, Respondent said that he never communicated directly with Attorney Rothenburg but said "legal's" advice was that a non-competitive, single source award was legal pursuant to the Charter, but the contract would require Commission approval. (ROI 41, 43)

PSC Director Perez has had a friendship with Respondent and City Administrator Green. (ROI 28, 36, 38 45) PSC Director Perez is/was personal friends with Respondent, has known him for approximately eight or nine years, and they socialized a couple times per month. (ROI 36, 45)

Respondent denied any bias or favoritism toward PSC or any type of arrangement or deal with City Administrator Green or PSC Director Perez for a special benefit. (ROI 45)

City Administrator Green is/was friends with Respondent and with PSC Director Perez and said they frequently socialized together outside of work. (ROI 28) City Administrator Green denied being influenced, pressured, or coerced by Respondent to award a no-bid contract to PSC and denied being involved with Respondent in any scheme or plan to award a contract to PSC in return for a percentage of PSC Director Perez's commission,[5] or any other special benefit, favor, or compensation. (ROI 28, 38)

PSC Director Perez denied discussing with City Administrator Green or Respondent any active RFPs for security guard services. (ROI 38) As stated previously, in October 2019, City Administrator Green resigned from his position amid this complaint and another unrelated controversy. (ROI 28)

Commissioner Neering opined that he would have been much more scrutinizing about voting in favor of the contract if he had been aware that Respondent and PSC Director Perez were friends, yet, he stated that some of the business reasons presented in favor of a single source contract were legitimate. (ROI 34)

Procurement Director Hayden has been with the City since 2013 and has almost 50 years of experience in procurement. (ROI 29) He recommended the City Commission approve the no-bid, non-competitive contract with PSC. (ROI 29) Procurement Director Hayden said that the City Procurement Department conducted research, which it presented at the September 9, 2019 Commission meeting, and performed its due diligence to arrive at what he determined was the overall "best value," based on competitive rates and the City's need for a vendor who could provide

[5] Perez is a salaried employee but he receives an annual bonus and a quarterly commission of 1% of each individual contact PSC is awarded. (ROI 36, 37)

a cohesive City-wide security presence. (ROI 29) Procurement Director Hayden denied being pressured or unduly influenced by Respondent or anyone else. (ROI 30)

At the time the Commission on Ethics' investigation was completed, PSC was operating under the newly awarded single source contract and that contract had not been terminated because Respondent did not want to leave the City without security in the interim. (ROI 46)

As stated previously, Respondent had urged the Commission to award the security contract to PSC because he said there should be only one security firm interacting with the police department throughout the City to ensure seamless communications. PSC already worked downtown for the Downtown Development Authority and at Rosemary Square (formerly known as City Place) and it made sense to award PSC the overall contract. (ROI 19, 39, 42) He promised the Commissioners that the single source contract would provide a more comprehensive approach to public safety. (ROI 42) Respondent believed PSC was right for the job and he acted "stubborn" on the matter because PSC would be able to provide everything necessary for the City to have a public safety infrastructure that was working. (ROI 42) Respondent "made 'no bones' about the fact that he wanted PSC to have the contract for security guard services" and he was willing to take the "political heat" for awarding it a contract on a non-competitive basis, which he viewed as risky. (ROI 39, 42, 46) If he had known there had been advisement against awarding a no-bid contract, he would not have moved forward. (ROI 46) Especially as a newly elected Mayor, he never would have gone against the advice of the City Attorney or the City's Procurement Office. (ROI 46)

Numerous City employees and public officials were involved in one way or another in the no-bid contract award to security company PSC: Respondent, Purchasing Agent Josephine Grosch, Procurement Director Hayden, City Procurement Supervisor Nathaniel Rubel, City Attorney

Kimberly Rothenburg, Deputy City Attorney Urcheck, then-City Administrator Green, current-City Administrator Johnson, and five City Commissioners. (ROI 10, 17, 18, 19, 24, 31, 32, Exhibit A) City Administrator Green claimed that Respondent was involved in all discussions and meetings related to security guard services from the very beginning. (ROI 27) Respondent denied Green's claim and asserted that Green served as the intermediary between himself and legal. (ROI 39-41)

Importantly in the analysis of the misuse of public position allegation, City Attorney Rothenburg publicly advised the Commissioners that awarding the non-competitive, single source contract to PSC did not violate the City's Charter, Ordinances, or Procurement Code. (Exhibit A3) Moreover, Respondent's various statements indicate a legitimate justification to award the contract to PSC. (ROI 39, 41-46, Exhibit A) Respondent's concerns appeared to be first and foremost to best protect the public's safety through the collaboration and cooperation of its security services rather than to benefit his friend's company. (Exhibit A3). Notwithstanding an acknowledged friendship between PSC Director Perez and Respondent, these facts present no evidence of favoritism or bias by Respondent based on their friendship. In fact, Respondent was so certain this action was in the best interests of the public he was willing to stake his political future on this safety issue. (Exhibit A3) The secondary or incidental benefit to Respondent's friend, standing alone, does not indicate that Respondent acted "corruptly" as the term is defined in Section 112.312, Florida Statutes, which requires that the conduct complained of be done with wrongful intent and that the act or omission be inconsistent with the proper performance of the person's public duties. *Blackburn v. State Commission on Ethics*, 589 So. 2d 431, (Fla. 1st DCA 1991). In sum, there is no evidence of Respondent's misuse of public office or its resources.

Therefore, based on the evidence before the Commission, I recommend that the Commission find no probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes.

RECOMMENDATION

It is my recommendation that:

There is no probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes, by urging the award of a no-bid security contract to a company operated by one of his friends.

Respectfully submitted this 4th day of May, 2020.

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