

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA**

UNITED STATES OF AMERICA	:	CIVIL ACTION NO.
		12-CV-01924
VERSUS	:	
		SECTION E
CITY OF NEW ORLEANS	:	JUDGE SUSIE MORGAN
	:	
		DIVISION 2
		MAGISTRATE WILKINSON

**OPPOSITION TO MOTION TO MODIFY IN PART AND CONFIRM IN PART
MONITOR SELECTION PROCESS**

The City opposes the Department of Justice’s (“DOJ”) *Motion to Modify in Part and Confirm in Part Monitor Selection Process* (the “Motion”) because it fundamentally alters the agreed-upon selection process as ordered by the Court and seeks to prevent the City from having a meaningful opportunity to negotiate price as explained below.

PROCEDRUAL HISTORY

The members of the selection committee met on April 1 to develop a process to select a Monitor. After meeting for hours and then exchanging numerous redlines, the parties agreed upon a process. The Court issued an Order on March 6, 2013, approving the parties’ *Agreement on Process to Select a Consent Decree Monitor* (the “Agreement”). The Agreement provides:

Fourth Public Meeting: Contingent Selection of Proposed Monitor:

On **April 9, 2013 at 9am** until as late as necessary, the Evaluation Committee will meet to attempt to select a proposed Monitor. If the Parties cannot reach agreement on a proposed Monitor at the April 9 meeting, a team consisting of four Evaluation Committee members (two from each Party) will have further discussions with both selections and seek to come to agreement upon one of the two monitor candidates.

As soon as a Monitor is selected, the City will work with that candidate to negotiate a formal contract, as set out in the Professional Services Agreement agreed to by the Parties in their Joint Motion for Approval of Contract for the Consent Decree Monitor, [ECF Nos. 121-2] and approved by the Court [ECF No. 122-1].

Fifth Public Meeting: Confirm Selection of Proposed Monitor

On **April 30, 2013 at 9am** until as late as necessary, the Evaluation Committee will meet to confirm selection of the proposed Monitor. The Evaluation Committee will describe any changes to the selected monitoring team. If the Parties are able to confirm selection, they will submit their selection to the Court for approval this same day. Pursuant to the Consent Decree and the RFP [Consent Decree ¶ 477; RFP section VI], the Court may conduct a private interview of the Parties' proposed Monitor prior to approval.

If, after the completion of the above-described process, the Parties are unable to agree upon a proposed monitor, the Parties will jointly submit two proposed Monitors to the Court and the Court will select the Monitor from among those two candidates, in accordance with the requirements of the Consent Decree and the RFP. Consent Decree ¶ 477, 478; RFP section VI.

(Rec. Doc. 206-1).

The Agreement recites the following key facts:

- “[T]he City will work with that candidate to negotiate a formal contract”
- The Fourth Public Meeting was intended to be a “Contingent Selection of Proposed Monitor” subject to further negotiation.
- Even if the Parties do not reach agreement on a proposed Monitor at the Fourth Public Meeting, then “a team consisting of four Evaluation Committee members (two from each Party) will have further discussions with both selections and seek to come to agreement upon one of the two monitor candidates.”
- At the Fifth Public Meeting, on April 30, 2013 the Evaluation Committee will meet to confirm selection of the proposed Monitor.
- The Parties will submit their joint selection or two selections to the Court on April 30.

Since that process was approved, the City, in good faith, agreed to DOJ's request to reschedule the Fourth Public Meeting from April 9 date to April 15 to allow the Parties sufficient time to obtain additional information regarding the remaining monitor candidates. (Rec. Doc. 209). We now question the DOJ's motivation for that delay given that as of today, April 11, DOJ has not made a single request for follow-up information to either of the two candidates. In the public selection committee meeting on April 3, the City designated Erica Beck as its point person for any requests for additional information on the record and followed up on its commitment by email that same day. See Email of April 3, 2013, attached hereto as Exhibit A. DOJ declined to designate anyone at the meeting and has not reached out to the City with any proposed follow-up.

DISCUSSION

1. The Court should not modify the agreed-upon and court-ordered selection process mid-stream.

As set forth in the Agreement, the City intends to discuss the two remaining candidates and work towards making a contingent selection on April 15. If a contingent selection is made, then the City needs time to negotiate the cost before the selection is confirmed on April 30. As stated in the Agreement, during that time "the City will work with that candidate to negotiate a formal contract."

If a contingent selection is not made, then the selection committee needs the time to have "further discussions with both selections and seek to come to agreement upon one of the two monitor candidates." Part of that discussion will and should include negotiation of price by the City.

Contrary to DOJ's statement, the City is not looking to unilaterally renegotiate the terms in the Professional Service Agreement itself, but we are certainly looking to

negotiate hourly rates, expenses, and maximum caps. Any attempt to suggest that the City intends to rewrite the Professional Service Agreement is unfounded and a red herring.

The City needs and deserves the opportunity to negotiate the price before submitting either one name or two names to the court. The City hopes that the Court will consider price in approving or selecting a Monitor and believes that the Court would benefit from knowing whether the City was able to negotiate any cost savings. That negotiation must necessarily come before the Court issues an Order selecting a monitor because, once the Court issues an Order, the die will be cast. Everyone agreed to schedule a Fifth Public Meeting on April 30, and that final meeting remains important to the selection process.

2. The City has the right to negotiate price, not DOJ.

The City is once again being confronted by DOJ's deliberate indifference about the financial impact of this Consent Decree. DOJ's request that it be allowed to negotiate price should be denied because DOJ has refused to contribute any money to the cost of the Monitor and has demonstrated a remarkable insensitivity to the City's budgetary constraints.

The potential cost ranges from around \$7 million to around \$9 million over four years, which represents a significant expenditure for a City facing severe budgetary constraints. The City is required every fiscal year to have a balanced budget. As a result, every additional dollar that the Monitor costs must be taken from a different section of the City's fisc. For every additional dollar spent on the Monitor, that money

cannot be used to hire policemen and fireman, fund NORDC programs, or to pay for the other innumerable obligations of the City.

Moreover, the Agreement specifically states that “the City will work with that candidate to negotiate a formal contract.” No one ever suggested that DOJ would negotiate the price of the Monitor as long as the City is paying for it. Simply put, if DOJ is not willing to pay for the Monitor, then it should not be the one to negotiate the price.

3. The City requests that both the Mayor and the Court interview the Monitor before the Court approves the selection.

The City members of the selection committee firmly believe that the candidate interviews were invaluable to the selection process. To that end, the City recommends that both the Mayor and the Court have the opportunity to interview the proposed Monitor(s) before any selection is confirmed. Thus, if the selection committee makes a contingent selection on April 15, then the City hereby requests that the Mayor and the Court interview the contingent selection between April 15 and April 30 when a contingent selection will be confirmed by the selection committee. Alternatively, if the selection committee does not make a contingent selection on April 15, then the City hereby requests that the Mayor and the Court interview both Monitor candidates, Mr. Jonathan Aronie of Sheppard, Mullin, Richter and Hampton, LLP and Mr. Terry Hillard of Hillard Heintze, between April 15 and April 30.

CONCLUSION

With the instant Motion, DOJ is trying to circumvent both the language and the spirit of the process that was agreed upon and ordered by the Court. Most egregiously, DOJ is trying to prevent the City from negotiating the price of the Monitor which it

expects the City to then pay. The Court should deny the Motion, adhere to its original Order and reiterate that the City is the proper party to negotiate price.

Respectfully submitted,

/s/ Sharonda R. Williams
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all counsel of record through the Court's CM/ECF electronic filing system this 11th day of April, 2013.

/s/ Sharonda R. Williams
SHARONDA R. WILLIAMS

Erica N. Beck

From: Erica N. Beck
Sent: Wednesday, April 03, 2013 1:57 PM
To: 'Gunston, Emily (CRT)'; Sharonda R. Williams; Judy R. Morse; Andrew D. Kopplin; Daniel V. Cazenave; Lopez, Christy (CRT); Austin, Roy (CRT); Parker, Steve (USATNW); Ederheimer, Joshua (COPS); Richard F. Cortizas
Subject: NOPD Monitor Selection Next Steps

To follow-up on today's selection committee meeting and as Sharonda mentioned at the meeting, I'll be the City's designee for any follow-up with Sheppard Mullin or Hillard Heintz. Let me know when you all decide who will be handling the follow-up from your end, and we can coordinate reaching out to the applicants. We ask that any contact with the applicants be made by DOJ and the City jointly.

In addition, if you all would like to push back the April 9 meeting to the following week to have additional time to get more information, then we think you may need to file a motion with the court to that effect. We would propose holding the meeting on the afternoon of April 15th the following week.

Thanks,

Erica

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