

Andrew J. Meyers
County Attorney

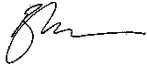


OFFICE OF THE COUNTY ATTORNEY
115 S. Andrews Avenue, Suite 423
Fort Lauderdale, Florida 33301

954-357-7600 · FAX 954-357-7641

MEMORANDUM

TO: Board of County Commissioners

FROM: Benjamin R. Salzillo
Assistant County Attorney 

DATE: November 24, 2020

RE: **Revision of the Procurement Code, Chapter 21 of the Broward County Administrative Code**

This Office has completed a comprehensive rewrite of the Broward County Procurement Code ("Procurement Code"). The main goal of this effort has been to simplify and clarify the Procurement Code to make it more user friendly for the County and the public. To that end, the revised Procurement Code reflects primarily structural and stylistic changes. Provisions of the Procurement Code have been consolidated where appropriate, and many provisions have been deleted where redundant, no longer reflective of current practice, or more appropriate for inclusion in a competitive solicitation document or the resulting contract.

Due to this significant restructuring, a comparison between the two versions showing deletions and additions would not be conducive to your review of the Procurement Code. Thus, the County Attorney has asked me to prepare the attached synopsis of the material changes. The section numbers identified in the synopsis refer to the section numbers in the revised Procurement Code. Only the material changes are summarized in the synopsis; minor changes that will not have substantive impact on the procurement process are not noted. These revisions include a number of material changes requested by the Board or proposed by County Administration or the County Auditor. These specifically requested or proposed changes are identified in Section I of the attached synopsis. Section II of the synopsis identifies a number of additional changes that are less material but still noteworthy.

If you have questions or would like a more detailed briefing on these changes, please contact the County Attorney, Chief Deputy County Attorney René Harrod, or me.

BRS/dp
Attachments

SYNOPSIS OF MATERIAL CHANGES

I. MATERIAL CHANGES REQUESTED BY THE BOARD OR PROPOSED BY COUNTY ADMINISTRATION, THE COUNTY AUDITOR, OR THE OFFICE OF THE COUNTY ATTORNEY

21.3. Ethical Standards in Procurement.

This section is new. The current Procurement Code states generally that all “laws relative to ethics” apply to the individuals who participate in the procurement process. The section now specifies the ethics laws that apply to County employees and Elected Officials, and further specifies the ethical standards applicable to vendors who participate in the procurement process.

21.7. Direct Procurement Authority.

(a) This section clarifies that when the Board acts as the direct procurement authority for the County, the Board performs the functions that would otherwise be performed by an Evaluation Committee. This is implicit but not explicitly stated in the current Procurement Code, so it is made explicit in the new Procurement Code for sake of clarity.

(c) The current Procurement Code says that when the Board acts as the direct procurement authority, the entire Procurement Code is waived. That provision has been deleted because Section 21.6 of the revised Procurement Code permits the Board to waive as much or as little of the Procurement Code as it determines appropriate, so there is no need for an automatic total waiver of the Procurement Code when the Board acts as the direct procurement authority.

21.10. Procurement of Airport Concessions.

Currently, the Aviation Department conducts its own procurement of concession services separate and apart from the Procurement Code or the Purchasing Division. Under the new Procurement Code, the Purchasing Division would conduct such procurements and the Procurement Code would apply to such procurements, but also provides that with approval from the County Administrator, the Director of Aviation may act in the role of the Director of Purchasing relative to the applicable concession procurement(s).

21.14. Vendor Performance Rating System.

This section was updated to codify current practice and reflect the direction from the Board regarding final evaluation scores below 2.6 on a scale of 1 to 5.

21.23. Competitive Solicitations.

This section was completely rewritten to more clearly identify the four primary methods of competitive solicitation, when each is used, and the applicable requirements for each.

21.37. Acceptance of Responses and Waiver of Technicalities or Irregularities.

This section clarifies and explains the circumstances under which the County will permit vendors to “cure” technical deficiencies or irregularities in their responses to solicitations. The language used is derived from other procurement codes in the state and is considered to be the best practice for addressing such situations.

21.40. Determinations of Responsiveness and Responsibility.

(a) *Determination of Responsiveness.* In the current Procurement Code, the Purchasing Division makes a determination regarding a vendor’s responsiveness to a solicitation, but the ultimate decision on this is made by an Evaluation Committee. Under the new Procurement Code, the Purchasing Division’s determination on responsiveness would be conclusive and could not be changed.

(b) *Determination of Responsibility.* This section has also been revised to make clear the Board has the ultimate authority to determine whether a vendor is responsible. The new Procurement Code also clarifies that a joint venture submitting a response to a solicitation will not be determined to be responsible unless each member of the joint venture is determined to be responsible. This is consistent with best practices.

21.41. and 21.42. Procedures for ITBs and Procedures for RFPs, RLLs, and RFQs.

These two sections are new. They set forth the procedures for the methods of competitive solicitations in a single location, rather than having them dispersed throughout the Procurement Code.

In accordance with the recent amendments to the County’s local preference ordinance, these sections now provide that the first criterion for breaking ties in the award of solicitations is whether the vendor is (in order) a locally based business, a locally based subsidiary, or a local business.

The current Procurement Code provides that the last criterion for breaking a tie is which vendor has received the lowest dollar volume of payments from the County in the preceding five years. This has been clarified consistent with recent Board direction so that the dollar volume is calculated based on the amount paid to the vendor minus the amount paid by the vendor to CBE firms.

21.42. Procedures for RFPs, RLLs, and RFQs.

(e) *Notice of Ranking.* This section now provides that before the Purchasing Division posts a notice of ranking, the Purchasing Division must provide vendors with a summary of their rights to object to and protest the rankings. This codifies current practice, which was recently put in place at the Board’s direction.

(f) *No Objection or Protest of Ranking.* This section now provides that a ranking will become final if no vendor has filed an objection or protest and no Commissioner objects to the ranking within five (5) days after receiving notice of the ranking. This codifies current practice, which was put in place at the Board’s direction.

(g) *Discovery of Material New Information.* This section clarifies that the Purchasing Division may reconvene an Evaluation Committee if the Purchasing Division, after the initial ranking but before award, discovers new information that that the Director of Purchasing believes would have been material to the Evaluation Committee’s initial ranking.

(h) *Objection to Ranking.* The current Procurement Code permits a vendor to file an objection when it believes that a ranking was “unfair or incorrect.” That has been changed so that a vendor may only file an objection based on information that the Evaluation Committee did not have when it ranked the vendors. In addition, the Purchasing Division will only send this information to the Evaluation Committee when the Director of Purchasing believes it would have been material to the Evaluation Committee’s initial ranking.

21.63. Right to Protest.

The current Procurement Code provides that a vendor may only protest awards in excess of the Director of Purchasing’s award authority (i.e., \$500,000). In accordance with current practice, this has been changed so that vendors may protest awards in excess of the mandatory bid amount (i.e., \$100,000).

The current Procurement Code provides that protests of awards under the Director of Purchasing’s award authority must be filed within three (3) days, and that protests over that amount must be protested within five (5) days. This is revised for consistency so the timeframe for both types of protests is five (5) days.

21.65. Filing Fee (Protests).

The current Procurement Code provides that filing fees for protests are nonrefundable. In accordance with best practice, this has been revised so that the filing fee is refundable if the protest is upheld.

21.68. Director of Purchasing’s Decision (Protests).

The current Procurement Code provided no timeframe by which the Purchasing Division must respond to protests. Under the revised Procurement Code, the timeframe would be fifteen (15) days unless documented extenuating circumstances require a longer time for a response.

21.79. Matters that May Be Appealed.

(b) The current Procurement Code provides for appeals of “any protested solicitation.” This has been changed so that only protests of rankings or awards may be appealed, but that protests regarding a solicitation’s specifications may not be appealed.

II. ADDITIONAL CHANGES

21.5. Exemptions from the Procurement Code.

Sections 21.18 of the current Procurement Code exempts a number of categories of purchases from the requirements of the Procurement Code. The new Procurement Code clarifies these exemptions and adds the following additional exemptions/modifications at the recommendation of the Purchasing Division:

- Direct purchases of advertising or advertisements from media organizations, including creative work provided by the applicable media organization in connection with the purchase. (This reflects recent changes to the Administrative Code.)

- Subscriptions to publications, periodicals, trade journals, training materials, research tools, databases, and other similar items, whether in hard copy or electronic form. (The current Procurement Code limits this to library purchases.)
- Purchases of items with an estimated current market value of not more than \$3,000 that are made available for resale to the public. (The current Procurement Code limits this to items sold at the Library gift shop.)
- Services for the County Administrator to be used in investigations or special projects of limited duration. (The current Procurement Code limits this to services used by the County Auditor.)

21.8. General Provisions.

(b) *Requirement of Good Faith.* The current Procurement Code applies this standard to all participants in the procurement process. The County Auditor has suggested making it a provision that cannot be waived; this suggestion was incorporated.

(d) *Determinations and Recommendations.* The revised Procurement Code requires all determinations and recommendations be made in writing. The current Procurement Code does not require this, although it is current practice.

(e) *Contingency Fees Prohibited.* The current Procurement Code prohibits all contingency fees in the procurement process. An exception has been added to allow such fees for insurance brokers who present the County with options for insurance coverage. This change is consistent with industry practice for insurance broker compensation.

21.13. Duties of the Director of Purchasing.

The current Procurement Code requires the Director of Purchasing to maintain a warehouse for supplies and surplus property. This has been deleted because it is no longer the practice of the County.

21.18. Environmentally Preferable Specifications.

The current Procurement Code contains specifications for the procurement of energy efficient products. Those specifications have been updated based on recommendations of the Environmental Protection and Growth Management Department and retitled “Environmentally Preferable Specifications.”

21.25. Sole Source Procurement.

This section has been clarified to reflect that sole source procurements are exempt from County procurement preferences (e.g., CBE/SBE, local business, domestic partnership).

21.29. Open-End Contracts.

The current Procurement Code says that purchase orders made on open-end contracts are limited to the mandatory bid amount (i.e., \$100,000). That limitation has been removed at the

recommendation of the Purchasing Division because open-end contracts are subject to the regular competitive solicitation requirements for amounts over the Mandatory Bid Amount.

21.30. Emergency Purchases.

(a) The current Procurement Code allows the Director of Purchasing to make emergency procurements but does not require formal declaration of an emergency. The revised Procurement Code would now require an emergency to be declared by the Board or the County Administrator.

(b) The current Procurement Code allows the Director of Purchasing to make emergency purchases above the Director's award authority (i.e., \$500,000). The revised Procurement Code would require these purchases to be reported to the Board within fifteen (15) days, and would also require increases in such purchases exceeding ten percent (10%) to be reported to the Board within fifteen (15) days.

21.34. Responses to Competitive Solicitations.

(b) *Number of Responses – Extensions.* The current Procurement Code allows the Director of Purchasing to extend the deadline for submissions to RLI's if fewer than three (3) responses are received. The new Procurement Code would apply this to all competitive procurements, which is a best practice.

21.43. Procedures for Two-Step Solicitations.

The current Procurement Code permits two-step solicitations only for construction services. The revised Procurement Code would permit two-step solicitations to be used for all goods and services.

21.45. Evaluation Committees.

The current Procurement Code requires Evaluation Committees include a representative of the County's Cultural Division for all architectural or engineering services involving the construction or renovation of public buildings. The requirement has been eliminated at the request of the Purchasing Division because as a matter of practice it applies only with respect to projects featuring public art, and in those cases the Using Agency directly engages the assistance of the Cultural Division.

(d) *Quorum.* The current Procurement Code requires a physical quorum of a majority of the members of an Evaluation Committee. This has been modified so that a physical quorum is not required if a statute, ordinance, or emergency order provides otherwise. This was changed for situations like the COVID-19 pandemic.

21.46. Award and Execution Authority.

(b) *Director of Purchasing*

(b)(3) The current Procurement Code permits the Director of Purchasing to execute contract amendments, extensions, and renewals with a cumulative value up to \$500,000. This has been

amended so that the Board may replenish this authority to the full \$500,000 when the Board approves a contract amendment, extension, or renewal.

(b)(4) Under the current Procurement Code, the Director of Purchasing's award authority (including contract awards, amendments, extensions, and renewals) is \$500,000. However, any exercise of this authority in excess of \$400,000 must be co-signed by the County Administrator. This co-signature requirement has been deleted at the recommendation of County Administration and the Office of the County Attorney.

21.47. Rescission of Award.

The current Procurement Code provides that the Board may only rescind a contract based on the Director of Purchasing's recommendation. That limitation has been deleted.

21.49. Authority to Reduce Scope of Construction Projects and Negotiate.

The current Procurement Code provides that when all responses to a solicitation for a construction project exceed available funds, the County Administrator may, subject to certain conditions, negotiate a contract with a reduced scope provided the lowest price offered does not exceed available funds by five percent (5%). This amount has been raised to ten percent (10%) at the recommendation of County Administration to provide greater efficiency and flexibility.

21.50. Contracts Resulting from Solicitations or other Procurements.

The current Procurement Code provides that "lump sum" contracts should be used whenever possible. This has been eliminated at the recommendation of County Administration to provide greater flexibility so that the County can enter into the form of contract that best suits its needs.

21.51. Approval of Contracts by County Attorney.

The current Procurement Code requires the Office of the County Attorney to approve contracts with a value of greater than \$5,000. This has been changed to \$10,000 at the recommendation of the Office of the County Attorney.

21.54. Advance Payments.

The current Procurement Code sets forth limited situations in which the County may make advance payments. This has been amended to state that it is the County's policy not to make payments unless the Director of Purchasing and the Using Agency determine that doing so would be in the best interest of the County.

21.55. Change Orders – Construction Contracts.

The current Procurement Code permits the Directors of Public Works, Aviation, and the Port to approve construction change orders with a value up to five percent (5%) or \$250,000 of the contract value. This provision has been changed so this authority may now be exercised by the Contract Administrator.

21.56. Right to Audit.

The current Procurement Code permits the County to audit all contracts except those with a fixed, firm price. At the recommendation of the County Auditor, this limitation has been deleted so that the County may audit all contracts.

21.58. Contract Administration.

(g) *Evaluation of Performance of Vendors.* The current Procurement Code requires the County to conduct vendor performance evaluations only on construction contracts. This has been amended so that performance evaluations are performed on all contracts.

21.72. Cause for Suspension.

The current Procurement Code limits suspension of a vendor to three (3) months. The new Procurement Code creates an exception if the Purchasing Division moves to debar the vendor, in which event the suspension would continue until the debarment process is concluded.

21.73. Cause for Debarment.

(a) The new Procurement Code provides that a vendor may be debarred when any of its officers, directors, owners, members, partners, or management level employees engage in prohibited conduct. This provides greater precision in determining when debarment is warranted.

(e) and (f) The current Procurement Code provides that a vendor awarded a contract may be debarred for failure to provide bonds or insurance information after request of the Purchasing Division, or for failing to accept a purchase order or execute a contract the vendor has been awarded. However, the current Procurement Code provides no timeframe for vendors to comply with these requirements. The revised Procurement Code sets that timeframe at ten (10) days.

(g) The current Procurement Code provides that a vendor may be suspended or debarred if another entity with the same principals or officers was suspended in the prior three (3) years. This provision has been modified so that it does not apply if there is clear evidence that the principal or officer was not involved in the conduct that led to the prior debarment of the other entity.

(i) The current Procurement Code provides that a party may be debarred for violation of the Code of Silence, without specifying the number of violations or timeframe in which the violations occurred. This has been modified to provide that debarment is available only if there are three (3) or more violations with the prior five (5) years.

21.85. Stay of Procurements During Appeal.

The current Procurement Code provides that solicitations and awards are stayed pending appeal unless the Director of Purchasing determines that a “substantial interest of the County” calls for the solicitation or award to proceed. This provision has been modified so that a stay may be waived to protect the “the health, safety, and welfare of the County’s residents, visitors, or employees.” This change has been made to provide greater specificity.

21.86. Hearings (Appeals).

The current Procurement Code has no timeframe for conducting hearings on appeals. The revised Procurement Code requires hearings be held within thirty (30) days.

The current Procurement Code permits the hearing officer to award costs and fees to the County for frivolous appeals but has no timeframe for payment of such fees. The revised Procurement Code requires payment within ten (10) days.