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Date: June 2, 2020

To: Brenda J. Billingsley, Director
Purchasing Division

From: Fernando Amuchastegui
Assistant County Attorney

Re: **Legal Opinion for RFP No. PNC2119168P1**

This legal opinion concerns the question raised by the County Commission as to whether Calvin Giordano and Associates (“CGA”) qualifies for location points for RFP No. PNC2119168P1. The question arose because LSN Government Affairs (“LSN”), which represents the third-ranked vendor BCC Engineering, LLC, objected to CGA receiving twenty-five (25) location points (five per EC member), which points elevated CGA from third place to first place. The basis of this objection was that CGA is a wholly-owned subsidiary of Safebuilt, a corporation headquartered in Colorado. The final recommended rankings were presented for the Board’s consideration on May 19, 2020.

Per Section 21.84.h of the Procurement Code, the Board elected to send the final rankings back to the Committee to consider new significant information and either ratify the final rankings or reorder the list. The Board requested that the Hertz “nerve center” test (from the 2010 U.S. Supreme Court decision in Hertz Corp. v. Friend) be used to determine whether CGA qualifies for location points. The Hertz decision defines “principal place of business” as referring to a place where a corporation’s officers direct, control, and coordinate the corporation’s activities, i.e. its “nerve center.”

The location attestation form, while unclear in many ways, mentions a few different criteria to be considered in determining whether the location points will be awarded. Most directly, the form specifies that the “Vendor’s principal place of business in Broward County **shall** be the Vendor’s ‘Principal Address’ indicated with the Florida Department of State Division of Corporations, for at least six months prior to the solicitation’s due date.” (Emphasis added). CGA’s “Principal Address” listed with Sunbiz is in Broward County, and that address has been listed with Sunbiz for the requisite time period. However, because of the Board’s direction on May 19, we note that this requirement is met but do not find it dispositive. Nor, based on the Board direction, do we find dispositive, in a disqualifying way, that CGA is a wholly-owned subsidiary of a foreign corporation (which is another criteria listed on the attestation

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form). Rather, our opinion is based on our analysis of the “nerve center” test, as discussed below, and is reinforced by information provided regarding the location of CGA’s employees who would perform the contracted work.

In response to the direction received on May 19, the County Attorney’s Office drafted eighteen (18) specific questions to determine whether CGA’s “Principal Address” listed with Sunbiz is also its “nerve center” location. The questions were based on federal cases applying Hertz to determine a firm’s “nerve center.” On May 27, 2020, CGA provided its response to the questionnaire. The County Attorney’s Office analyzed that response and asked for further information with regard to four of CGA’s answers, which were also analyzed upon receipt. The County Attorney’s Office considered information in SAFEbuilt’s “Acquisition Welcome Kit” that had been raised as part of the objection, questioned CGA on it, and received responses that did not contradict the determination that there is adequate factual support for a finding that CGA’s “nerve center” remains in Broward County.

It is our opinion that CGA meets the “nerve center” test for location point purposes under Hertz, as we believe CGA has sufficiently shown that its officers direct, control, and coordinate its activities from Broward County. Furthermore, it is generally recognized that, absent proof of certain facts that are absent here, a subsidiary, which is a distinct entity from its parent, has its own principal place of business at its location and not at the location of its parent. Therefore, notwithstanding the fact CGA is a wholly-owned subsidiary of SAFEbuilt, we believe CGA is entitled to receive the location points.

Please feel free to contact either the County Attorney or me with any questions or concerns or if you wish to further discuss this matter.

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Date: March 3, 2020

To: Brenda J. Billingsley, Director
Purchasing Division

From: Fernando Amuchastegui
Assistant County Attorney

Re: **Legal Opinion for Continuing Engineering Services for Traffic
Roadway & Civil Projects – Principal Place of Business**

This is a supplement to my prior legal opinion regarding the question raised by the Purchasing Division as to whether Calvin Giordano and Associates (“CGA”) qualifies for location points for RFP No. PNC2119168P1. The question arose because LSN Government Affairs (“LSN”), which represents the third-ranked vendor BCC Engineering, LLC, asserted an objection contending that CGA should not have received five points (per evaluator) for location since CGA is a subsidiary of Safebuilt, a corporation headquartered out of state.

I had previously opined that CGA complies with the Code definition of a local business. This opinion was based on my analysis of the Board’s intent behind the local preference policy. It appears the Board intended local preference points be awarded based upon the “nerve center” of the vendor, rather than on technicalities that could be subject to abuse or misapplication. In light of that intent, I recommended construing the attestation statement at issue in favor of the vendor, given that the vendor otherwise meets the Code requirements for a local business.

The primary issue arose in connection with the fourth numbered statement in the location attestation form, which states: “Vendor has not merged with another firm within the last six months that is not headquartered in Broward County and is not a wholly owned subsidiary or a holding company of another firm that is not headquartered in Broward County.” This attestation statement (like other statements on the form) is susceptible to multiple interpretations. The intended interpretation is presumably that (1) a vendor did not merge with another firm within the prior six (6) months that is not headquartered in Broward County, and (2) the vendor is not a wholly owned subsidiary or holding company of another firm not headquartered in Broward County. However, a somewhat strained but grammatically-correct construction of the sentence is that a vendor did not merge with another firm within the prior six (6) months that (1) is not headquartered in Broward County and (2) is not (referring to the other firm) a wholly owned subsidiary or holding company of another firm not headquartered in Broward County. Because the plain

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language is susceptible to two interpretations (albeit, one of them is somewhat strained), I resorted to my understanding of the Board's intent when I opined that CGA's attestation is accurate under the facts presented.

It should be noted that, unlike the attestation form, the currently codified local bidder preference provision does not contain any language that would prohibit vendors that merge with, or become a wholly owned subsidiary or holding company of, a firm not headquartered in Broward County from receiving location points. Additionally, the language in the attestation form could produce unintended results, such as where a local business merges with a nonlocal firm but the surviving entity is located in Broward County and continues to function as the firm's nerve center. The attestation form at issue appears to have arisen from a June 2014 agenda item that was primarily directed towards applying local business points to joint ventures. Fortunately, these issues will be addressed in the currently pending proposed amendment to the applicable provisions.

For the above-stated reasons, we do not believe there is a legal prohibition against Purchasing allocating location points to CGA under these facts. CGA's response dated February 7, 2020, supports a finding that it meets the "nerve center" test for location point purposes under the applicable code provision. However, as with all of the other guidance we provide to Purchasing, my opinion here is merely advisory. A determination by Purchasing that CGA would not be entitled to receive the location points would also appear to be nonarbitrary and therefore legally sustainable.