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MEMORANDUM

TO: Board of County Commissioners

FROM: Andrew J. Meyers, County Attorney /s/ *Andrew J. Meyers*

DATE: May 23, 2023

RE: **Proposed Amendments to the Broward County Procurement Code**

This memorandum outlines the proposed amendments to the Broward County Procurement Code regarding procurement appeals.

Under the proposed amendment, an Administrative Law Judge (“ALJ”) would continue to hear appeals regarding five matters (i.e., responsiveness determinations, protest determinations, debarment determinations, cone of silence violations, and final performance evaluations below an overall score of 2.6). However, the ALJ’s decision concerning determinations of responsiveness and protests would be advisory and considered a recommended order. The County Administrator would review the ALJ’s recommended order and be authorized to accept, reject, or modify it, subject to prior written notice to the Board and an opportunity for any County Commissioner to request the matter be presented for Board consideration. These changes have several technical, legal consequences, but are intended to streamline the procurement process, avoid vendor confusion concerning available legal remedies, and ensure the Board retains ultimate control over County procurement decisions.

The proposed process is analogous to the protest resolution procedures under the Florida Administrative Procedure Act (the “APA”) and Miami-Dade County Code of Ordinances. Under both, an ALJ makes only a “recommendation,” which is subject to modification by the governmental entity under various conditions.

Under the APA, a person adversely affected by an agency decision concerning procurement may file a formal protest, which is referred to an ALJ. See § 120.57(3)(b), (e), Fla. Stat. The ALJ then enters a recommended order. § 120.57(1)(k), Fla. Stat. The agency may modify the recommended order’s conclusions of law where erroneous and may modify findings of fact when those findings are not based on competent substantial evidence or where “the proceedings on which the findings were based did not comply

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with essential requirements of law.” § 120.57(1)(l), Fla. Stat. Adversely affected parties may appeal the decision to a District Court of Appeal. See § 120.68(2)(a), Fla. Stat.¹

Under the Miami-Dade County Code of Ordinances, protests are referred to a hearing examiner who considers evidence as well as the mayor’s recommendation. § 2-8.4(c), Miami Dade Cnty. Code. The hearing examiner makes findings and recommendations that are submitted to the Miami-Dade County Commission, which is bound by the evidentiary record before the hearing examiner. § 2-8.4(g), Miami Dade Cnty. Code. Nevertheless, the Miami-Dade County Commission can reject the recommendation of the hearing examiner though this may require a supermajority vote if the hearing examiner concurred with the mayor’s recommendation. § 2-8.4(h), Miami Dade Cnty. Code. Additionally, the Miami-Dade County Commission can waive the procurement procedures upon recommendation of the mayor. § 2-8.4(j), Miami Dade Cnty. Code. Adversely affected parties cannot challenge the decision through either an appeal or writ of certiorari. See *MRO Software, Inc. v. Miami-Dade Cnty.*, 895 So. 2d 1086 (Fla. 3d DCA 2004). Instead, relief must be attained by “direct action”—such as an injunction. See, e.g., *Miami-Dade Cnty. v. Church & Tower, Inc.*, 715 So. 2d 1084 (Fla. 3d DCA 1998).

If you need any additional information or would like to discuss this matter further, please contact René Harrod (x7618), Joe Jarone (x7620), or me.

AJM/cv

c: Monica Cepero, Broward County Administrator
Bob Melton, Broward County Auditor
Fernando Amuchastegui, Senior Assistant County Attorney

¹ The County cannot create a right to appeal. Instead, most local “quasi-judicial” actions can be challenged only by a writ of certiorari. While an appeal can provide broad relief, a writ of certiorari is an extraordinary limited judicial remedy.