

MEMORANDUM

Agenda Item No. 4(A)

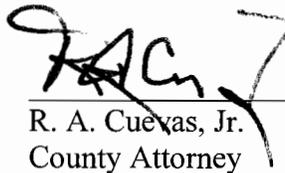
TO: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

DATE: February 17, 2009

FROM: R. A. Cuevas, Jr.
County Attorney

SUBJECT: Ordinance amending Section 10-38 of the Code; providing for use of hearing examiners to conduct debarment proceedings; providing prerequisites and procedures; and abolishing debarment committee

The accompanying ordinance was prepared and placed on the agenda at the request of Prime Sponsor Commissioner Barbara J. Jordan.



R. A. Cuevas, Jr.
County Attorney

RAC/jls



MEMORANDUM

(Revised)

TO: Honorable Chairman Dennis C. Moss
and Members, Board of County Commissioners

DATE: February 17, 2009

FROM: 
R. A. Guevas, Jr.
County Attorney

SUBJECT: Agenda Item No. 4(A)

Please note any items checked.

- "4-Day Rule" ("3-Day Rule" for committees) applicable if raised
- 6 weeks required between first reading and public hearing
- 4 weeks notification to municipal officials required prior to public hearing
- Decreases revenues or increases expenditures without balancing budget
- Budget required
- Statement of fiscal impact required
- Bid waiver requiring County Mayor's written recommendation
- Ordinance creating a new board requires detailed County Manager's report for public hearing
- Housekeeping item (no policy decision required)
- No committee review

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 4(A)
2-17-09

ORDINANCE NO. _____

ORDINANCE AMENDING SECTION 10-38 OF THE CODE OF MIAMI-DADE COUNTY FLORIDA TO PROVIDE FOR USE OF HEARING EXAMINERS TO CONDUCT DEBARMENT PROCEEDINGS; PROVIDING PREREQUISITES AND PROCEDURES; ABOLISHING DEBARMENT COMMITTEE; CLARIFYING ELIGIBILITY FOR SEEKING DEBARMENT; PROVIDING SEVERABILITY, INCLUSION IN THE CODE AND EFFECTIVE DATE

BE IT ORDAINED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA:

Section 1. Section 10-38 of the Code of Miami-Dade County, Florida, is hereby amended as follows:¹

Sec. 10-38. Debarment of contractors from County work.

(a) *Purpose of debarment:*

- (1) The County shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. To effectuate this policy, the debarment of contractors from County work may be undertaken.
- (2) The serious nature of debarment requires that this sanction be imposed only when it is in the public interest for the County's protection, and not for purposes of punishment. Debarment shall be imposed in accordance with the procedures contained in this ordinance.

¹ Words stricken through and/or [[double bracketed]] shall be deleted. Words underscored and/or >>double arrowed<< constitute the amendment proposed. Remaining provisions are now in effect and remain unchanged.

- (3) Debarment is intended as a remedy in addition to, and not in substitution of, the evaluation of the responsibility of County bidders and contractors, and the rejection or termination of County bidders and contractors based on findings of non-responsibility on a case by case basis.

* * *

(g) *Debarment:*

- (1) The ~~[[Debarment—Committee]]~~ >>County Manager<< may, in the public interest, debar a contractor for any of the causes listed in this ordinance, using the procedures outlined below. The existence of a cause for debarment, however, does not necessarily require that the contractor be debarred; the seriousness of the contractor's acts or omissions and any mitigating factors should be considered in making any debarment decision.
- (2) Debarment constitutes debarment of all officers, principals, directors, shareholders owning or controlling ten (10) percent or more of the stock, partners, qualifiers, divisions or other organizational elements of the debarred contractor, unless the debarred decision is limited by its terms to specific divisions, organizational elements, or commodities. The ~~[[Debarment—Committee]]~~>>County Manager<<'s decision includes any existing affiliates of the contractor, if they are (i) specifically named and (ii) given written notice of the proposed debarment and an opportunity to respond. Future affiliates of the contractor are subject to the pre-existing ~~[[Debarment—Committee]]~~>>County Manager<<'s decision.
- (3) A contractor's debarment shall be effective throughout county government.

(h) *Causes for debarment:*

- (1) The ~~[[Debarment—Committee]]~~>>County Manager<< may debar a contractor for a conviction or civil judgment:

- (i) For commission of a fraud or a criminal offense in connection with obtaining, attempting to obtain, performing, or making a claim upon a public contract or subcontract, or a contract or subcontract funded in whole or in part with public funds;
 - (ii) For violation of federal or State antitrust statutes relating to the submission of offers;
 - (iii) For commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;
 - (iv) For commission of any other payment or performance related offense that seriously and directly affects the completion of one (1) or more contracts or the performance of the completed building, or project, or goods and services; or
 - (v) Which makes the County the prevailing party in a legal proceeding, and a court determines that the lawsuit between the contractor and the County was frivolous or filed in bad faith.
- (2) The ~~[[committee]]~~>>County Manager<< may debar a contractor, based upon a preponderance of the evidence, for:
- (i) Violation of the terms of a County contract or subcontract, or a contract or subcontract funded in whole or in part by County funds, such as willful failure to perform in accordance with the terms of one (1) or more contracts; or the failure to perform, or unsatisfactory performance of one (1) or more contracts.
 - (ii) Violation of a County ordinance or administrative order which lists debarment as a potential penalty.

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(iii) Any other cause of so serious or compelling a nature that it affects the responsibility of a county contractor or subcontractor in performing County work.

(3) The ~~[[debarment committee]]~~>>County Manager<< may debar a CSBE based upon a preponderance of evidence that the CSBE has forfeited a bond or has defaulted on financial assistance, either of which was provided under the CSBE program; or if any individual or corporation, partnership or other entity, or any individual officer, shareholder with a significant interests, director or partner of such entity, or affiliated business of such entity attempts to comply with the provisions of this ordinance through fraud, misrepresentation, or material misstatement.

(i) *Debarment procedures:*

(1) Investigation and referral. Departments >>of the County<< shall promptly investigate and prepare written reports concerning a proposed debarment, and prepare written requests to ~~[[DBD]]~~ >>the department designated by the County as the department responsible for administering the debarment process (hereafter “the Administering Department”)<< for the debarment of contractors the department >>requesting debarment<< believes is subject to any of the causes listed above. >>All departments of the County are eligible to request debarment, including but not limited to, user departments, the Department of Procurement Management and the Administering Department.<< The County Manager (or his or her designee), and the Office of the Inspector General, may investigate, prepare written reports on, and prepare written requests for, debarment of contractors or subcontractors. >>Written requests for debarment shall specify the conduct or transaction(s) of the contractor relied on in support of the request for debarment.<<

- (2) Upon receipt of a >>written<< request for debarment >>in conformity with the requirements in subsection (i)(1),<< ~~[[DBD shall create a Debarment Committee, from the Standing Pool of Committee members appointed by the County Manager, none of whose members shall include a representative from the department making the debarment request.]]~~ >>the Administering Department shall issue to the Respondent(s) a Notice of Proposed Debarment. Such Notice of Proposed Debarment shall be filed promptly with the Clerk of the Board of County Commissioners and shall request that the Clerk of the Board of County Commissioners appoint a Hearing Examiner. The Clerk of the Board of County Commissioner shall select such Hearing Examiner within no more than 10 calendar days from the filing of the Proposed Notice of Debarment.<< ~~[[DBD]]~~ The Administering Department shall act as staff to the >>Hearing Examiner<< ~~[[Debarment Committee]].~~ The department requesting debarment shall present evidence and argument [[to the Debarment Committee]] >>to a Hearing Examiner in support of the debarment request in the manner provided below<<. In the event that the requesting department requests the assistance of the County Attorney's Office, the County Attorney's Office shall provide to the requesting department a representative of the County Attorney's Office independent from any designated to advise the ~~[[Debarment Committee]]~~ >>Administering Department, the County Manager and the Hearing Examiner<< in the proceedings.
- (3) Notice of proposal to debar. >>The Administering Department<< ~~[[DBD, on behalf of the Debarment Committee,]]~~ shall issue a notice of proposed debarment advising the contractor and any specifically named affiliates, by certified mail, return receipt requested, or personal service, that:
- (i) Debarment is being considered;
 - (ii) Of the reasons and causes for the proposed debarment in terms sufficient to put the

contractor on notice of the conduct or transaction(s) upon which it is based;

- (iii) That ~~[[a hearing shall be conducted before]]~~ the ~~[[Debarment Committee]]~~ >>Hearing Examiner << will meet ~~[[on]]~~ >>at << a date and time not less than ~~[[twenty-(20)]]~~ >>ninety (90) calendar << days after service of the notice >>to consider the request, supporting and opposing documents and records, and make any appropriate findings of fact <<. The notice shall also advise the contractor that it may be represented by an attorney, may >>, as provided below, << present documentary evidence and verbal testimony, and may >>, as provided below, << cross-examine evidence and testimony presented against it.
 - (iv) The notice shall also describe the effect of the issuance of the notice of proposed debarment, and of the potential effect of an actual debarment.
- (4) No later than ~~[[seven-(7)]]~~ >>thirty (30) << calendar days >>after service of the notice of proposed debarment upon a contractor, affiliate or individual << ~~[[prior to the scheduled hearing date]]~~, the >>respondent << contractor >>and/or individual << must furnish ~~[[DBD]]~~ >>the Administering Department << a list of the defenses, documents and records supporting those defenses, >>and, if the contractor intends to rely on testimony in support of its defenses, a written list identifying the witnesses from whom the contractor proposes to elicit such testimony, together with a written summary of each such witness' proposed testimony. << ~~[[the contractor intends to present at the hearing]]~~. If the contractor fails to submit the list of defenses, in writing, and the documents and records supporting those defenses, >>and, if the contractor intends to rely on testimony in support of its defenses, the written list identifying the witnesses from whom the contractor proposes to elicit such testimony, together with a written summary of each such witness' testimony, << ~~[[at~~

~~least seven (7)]~~ >>within thirty (30)<< calendar days >>after service of the notice of proposed debarment on such contractor, affiliate or individual, <<[[~~prior to the hearing~~]], or fails to seek an extension of time, in writing, at least seven (7) calendar days prior to the [[~~hearing~~]] >>deadline<<[[;]] within which to do so >>imposed herein, the contractor shall have waived the opportunity to present defenses, documents and testimony on its behalf and to<< be heard at the [[~~hearing~~]] >>hearing before the Hearing Examiner<<. [[~~Failure to request an extension at least seven (7) calendar days prior to the hearing shall constitute an absolute waiver to present defenses and to be heard before the Debarment Committee~~]]. The [[~~Debarment Committee Chair (or the Director of DBD or his designee)~~]] >>Hearing Examiner<< has the right to grant or deny an extension of time >>in whole or in part<< so long as the request for an extension of time is made at least seven (7) calendar days prior to the [[~~hearing, and his or her decision~~]] >>deadline within which to do so imposed herein and for good cause shown. The Hearing Examiner's decision on such extension request<< may only be reviewed >>by the County Manager<< upon an abuse of discretion standard.

- (5) >>If the contractor against whom debarment is sought timely files its written list of defenses, documents and written summary of each listed witness' proposed testimony, the department(s) seeking debarment shall have thirty (30) calendar days therefrom to submit a list of documents, witnesses and witness' testimony summaries to the Administering Department. The department seeking debarment may request an extension of time to submit a list of documents, witnesses and witness summaries provided that such request is filed seven (7) calendar days before the deadline within which to do so imposed herein. The Hearing Examiner has the right to grant or deny an extension of time in whole or in part so long as the request for an extension of time is made at least seven (7) calendar days prior to the deadline within which to do so imposed herein and for good cause

shown. The Hearing Examiner's decision on such extension request may only be reviewed by the County Manager upon an abuse of discretion standard.

- (6) After the filing of such lists has been completed or the expiration of the deadlines for filing such lists, documents and witness summaries, if applicable, the Hearing Examiner shall within no more than (30) calendar days therefrom conduct a hearing on the proposed debarment and if the applicable requirements set forth herein are met, the Hearing Examiner shall hear the testimony of the witnesses identified in the department's request for debarment and the testimony of those witnesses listed on the contractor's list, and any cross-examination of such witnesses, and submit a written recommendation making findings of fact based thereon. The Hearing Examiner shall limit the scope of testimony of each witness to that outlined in the witness summary filed as provided above by the party calling such witness, provided that upon good cause shown, additional testimony may be elicited from such witnesses. The Hearing Examiner shall judge the credibility of witnesses and decide what weight to attach to each witness' testimony. The Hearing Examiner shall prepare and submit to the Administering Department a written report containing factual findings and a recommendation on whether debarment is warranted and if so, what the recommended term of debarment should be. Once the Hearing Examiner commences the hearing, if additional days are required, such additional hearing days shall be completed within no more than thirty (30) from the commencement of the hearing. The Hearing Examiner's Report shall be submitted to the Administering Department within thirty (30) calendar days from the date the hearing concludes, although that time may be extended by the Hearing Examiner for cause shown for a reasonable period not to exceed an additional thirty (30) calendar days. The Hearing Examiner's report is purely advisory on the issue of whether to debar a contractor and on the length of debarment. The ultimate issue of whether it is in the public interest for the County's protection to debar the

contractor, and if so, the terms and duration of the debarment is reserved to the County Manager based on the record developed at the hearing and the findings of fact made by the Hearing Examiner unless such findings of fact were not supported by substantial competent evidence. The Administering Department shall develop and submit to this Board for approval an Administrative Order for the selection and appointment of Hearing Examiners, and their compensation for conduct of hearings in accordance with the requirements of this ordinance. Such procedure may provide for use of Hearing Examiners supplied by organizations such as the American Arbitration Association.<<

[[~~(5)~~]]>>(7)<<Discovery. The process of discovery, including the subpoenaing of witnesses, the taking of depositions, the submission of interrogatories, and requests for documents, is not permitted under this ordinance. However, any party may make a public records request under Chapter 119 of the Florida Statutes.

[[~~(6)~~]]>>(8)<<Hearsay evidence shall be admissible at the hearing >>before the Hearing Examiner to the extent the subject thereof is listed in the written lists and summaries submitted in accordance with this paragraph<< but shall not form the sole basis for >>any recommended finding of fact of the Hearing Examiner. Hearsay evidence shall not form the sole basis for<< initiating a debarment procedure nor the sole basis of any determination of debarment. The hearing >>before the Hearing Examiner << shall be transcribed, taped or otherwise recorded by use of a court reporter, at the election of the committee and at the expense of the county. Copies of the hearing tape or transcript shall be furnished at the expense and request of the requesting party.

[[~~(7)~~]]>>(9)<<[[~~Debarment Committee~~]] >>Hearing Examiner report and recommendation<<[[~~'s decision.~~]] In actions based upon a conviction or judgment, or in which there is no genuine dispute over material facts, [[~~the Debarment Committee~~]] >>no Hearing Examiner shall be appointed and the Administering Department<< shall [[~~make a decision on the basis of all~~]] issue a report to the County Manager

detailing the undisputed, material information in the administrative record, including any undisputed, material submissions made by the contractor. Where actions are based on disputed evidence, the ~~[[Debarment Committee]]~~ Hearing Examiner shall decide what weight to attach to evidence of record, judge the credibility of witnesses, and base ~~[[its]]~~ >>his/her<< decision on the preponderance of the evidence standard. In the event that the contractor fails to appear at the >>noticed hearing before the<< ~~[[debarment hearing]]~~ >>Hearing Examiner<< or to present competent proof under affirmation or oath through persons with direct knowledge of the contractor's performance >>before the Hearing Examiner<<, the contractor shall be presumed to be not responsible and subject to debarment. ~~[[The Debarment Committee's decision shall be based on a majority of the members of the Committee. The Debarment Committee shall be the sole trier of fact. The committee's decision shall be made within twenty (20) working days after conclusion of the hearing unless the Debarment Committee extends this period for good cause.]]~~

~~[[8]]~~ >>(10)<<The ~~[[committee's]]~~ >>Hearing Examiner's report and recommendation<< ~~[[decision.]]~~ shall be in writing and shall include ~~[[the committee's]]~~ >>and an advisory recommendation on whether or not to debar the contractor, and if debarment is recommended<<, the principal causes of debarment as enumerated in this Ordinance, identification of the contractor and all affiliates affected by the ~~[[decision]]~~ >>recommendation<<, and the specific term, including duration, of the debarment ~~[[imposed]]~~ >>recommended. The County Manager shall issue a decision within thirty (30) calendar days of the issuance of the Hearing Examiner's report and recommendation which can be extended in the County Manager's sole discretion for an additional twenty (20) calendar days by providing written notice of such extension<<.

~~[[9]]~~ >>(11)<<Notice of ~~[[Debarment Committee's]]~~ >>County Manager's<< decision.

(i) If the ~~[[Debarment Committee]]~~>>County Manager<< decides to impose debarment, ~~[[and the Debarment Committee's decision is not overridden by the County Manager]]~~, the ~~[[e]]~~>>C<<ounty ~~[[m]]~~>>M<<anager shall give the contractor and any affiliates involved written notice by certified mail, return receipt requested, or hand delivery, within ~~[[twenty (20) working]]~~ >>thirty (30) calendar<< days of the >>issuance of the Hearing Examiner's report and recommendation unless such time is extended by the County Manager as provided for herein,<<[[decision,]] specifying the reasons for debarment ~~[[and including a copy of the committee's written decision]]~~; stating the period of debarment, including effective dates; and advising that the debarment is effective throughout the county departments.

(ii) If debarment is not imposed by the ~~[[Debarment Committee]]~~>>County Manager<<,~~[[and the Debarment Committee's decision is not overridden by the County Manager,]]~~ the ~~[[e]]~~>>C<<ounty the ~~[[m]]~~>>M<<anager shall notify the contractor and any affiliates involved, by certified mail, return receipt requested, or personal service, within ~~[[twenty (20) working]]~~ >>thirty (30) calendar<< days >>unless such time is extended by the County Manager as provided for herein<< of the decision.

~~[[40]]~~>>(12)<<All decisions of the >>County Manager<< ~~[[Debarment Committee]]~~ shall be final and shall be effective on the date the notice is signed by the ~~[[e]]~~>>C<<ounty ~~[[m]]~~>>M<<anager ~~[[unless overridden by the County Manager within twenty (20) working days of the date of the Debarment Committee's written decision. If the County Manager overrides the decision of the Debarment Committee, the County Manager shall state in writing the reasons for his or her override of the Debarment Committee's decision. If the County~~

~~Manager does not override the Debarment Committee's decision within twenty (20) working days of the date of the Debarment Committee's written decision, and does not sign the notice to the contractor as stated in Section (i)(9) above, the Debarment Committee's decision is final, and becomes effective on the twenty first (21st) working day after the date of the Debarment Committee's written decision.]~~ The Director of ~~[[DBD or his or her designatee]]~~ >>the Administering Department<< shall then issue the notice to the contractor as required in Section (i)~~[[9]]~~>>(11)<< above. Decisions of the ~~[[Debarment Committee]]~~>>County Manager to impose debarment<< may be appealed to the Appellate Division of the Circuit Court within thirty (30) calendar days of the date the notice is signed by the County Manager ~~[[Decisions of the Debarment Committee shall not be overturned absent a finding of abuse of discretion. A debarred contractor may seek a stay of the debarment decision]]~~ in accordance with the Florida Rules of Appellate Procedure.

(j) *Period of debarment:*

- (1) The period of debarment imposed shall be within the sole discretion of the ~~[[Debarment Committee]]~~ >>County Manager<<. Debarment shall be for a period commensurate with the seriousness of the cause(s), and, where applicable, within the guidelines set forth below, but in no event shall exceed five (5) years.
- (2) The following guidelines in the period of debarment shall apply except where mitigating or aggravating circumstances justify deviation:
 - (i) For commission of an offense as described in subsection (h)(1)(i): five (5) years.
 - (ii) For commission of an offense as described in subsection (h)(1)(ii): five (5) years.
 - (iii) For commission of an offense as described in subsection (h)(1)(iii): five (5) years.

- (iv) For commission of an offense as described in subsection (h)(1)(iv): one (1) to two (2) years.
 - (v) For commission of an offense as described in subsection (h)(1)(v): two (2) to five (5) years.
 - (vi) For commission of an offense as described in subsections (h)(2)(i) or (ii): two (2) to five (5) years.
 - (vii) For commission of an offense as described in subsection (h)(2)(iii): one (1) to two (2) years.
- (3) The ~~[[Debarment—Committee]]~~>>County Manager<< may, in its sole discretion, reduce the period of debarment >>previously imposed<<, upon the contractor's written request, for reasons such as:
- (i) Newly discovered material evidence;
 - (ii) Reversal of the conviction or civil judgment upon which the debarment was based;
 - (iii) Bona fide change in ownership or management;
 - (iv) Elimination of other causes for which the debarment was imposed; or
 - (v) Other reasons the ~~[[Debarment—Committee]]~~>>County Manager<< deems appropriate.
- (4) The debarred contractor's written request shall contain the reasons for requesting a reduction in the debarment period. ~~[[DBD with the assistance of the affected—department]]~~>>The department that requested debarment<< shall have thirty (30) >>calendar<< days from receipt of such request to submit a written response thereto. The >>County Manager shall make the<< decision ~~[[of—the Department—Committee]]~~ regarding a request made under this subsection >>and such decision<< is final and non-appealable.
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(k) *Scope of debarment:*

- (1) The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, agent, employee, or other individual associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the individual's performance of duties for or on behalf of the contractor, or with the contractor's knowledge, approval, or acquiescence. The contractor's acceptance of the benefits derived from the conduct may be evidence of such knowledge, approval or acquiescence.
- (2) The fraudulent, criminal, or other seriously improper conduct of a contractor may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the contractor who participated in, knew of, or had reason to know of the contractor's conduct.
- (3) The fraudulent, criminal or other seriously improper conduct of any subcontractor associated with a contractor may be imputed to the contractor when the conduct occurred in connection with the subcontractor's performance of duties for or on behalf of the contractor and the contractor had knowledge of, approved of, or acquiesced in this conduct. The contractor's acceptance of benefits derived from the conduct shall be evidence of such knowledge, approval or acquiescence.
- (4) The fraudulent, criminal, or other seriously improper conduct of one (1) contractor participating in a joint venture or similar arrangement may be imputed to other participating contractors if the conduct occurred for or on behalf of the joint venture or similar arrangement, or with the knowledge, approval, or acquiescence of these contractors. Acceptance of the benefits derived from the conduct may be evidence of such knowledge, approval, or acquiescence.

Section 2. If any section, subsection, sentence, clause or provision of this ordinance is held invalid, the remainder of this ordinance shall not be affected by such invalidity.

Section 3. It is the intention of the Board of County Commissioners, and it is hereby ordained that the provisions of this ordinance, including any sunset provision, shall become and be made a part of the Code of Miami-Dade County, Florida. The sections of this ordinance may be renumbered or relettered to accomplish such intention, and the word "ordinance" may be changed to "section," "article," or other appropriate word.

Section 4. This ordinance shall become effective ten (10) days after the date of enactment unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

PASSED AND ADOPTED:

Approved by County Attorney as
to form and legal sufficiency:



Prepared by:



Eric A. Rodriguez

Prime Sponsor: Commissioner Barbara J. Jordan