MEMORANDUM Agenda Item No. 11(A)(10)

TO: Honorable Chairman Joe A. Martinez
and Members, Board of County Commissioners

DATE: October 4, 2011

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

SUBJECT: Resolution approving implementing order _____ establishing guidelines and procedures regarding legal opinions with respect to County competitive processes

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

R. A. Cuevas, Jr.
County Attorney

RAC/up

MEMORANDUM

(Revised)

TO: Honorable Chairman Joe A. Martinez
and Members, Board of County Commissioners

DATE: October 4, 2011

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

SUBJECT: Agenda Item No. 11(A)(10)

Please note any items checked.

_____ **"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**

_____ **Ordinance creating a new board requires detailed County Manager's report for public hearing**

_____ **No committee review**

_____ **Applicable legislation requires more than a majority vote (i.e., 2/3's ____, 3/5's ____, unanimous_____) to approve**

_____ **Current information regarding funding source, index code and available balance, and available capacity (if debt is contemplated) required**

Approved _____ Mayor
Veto _____
Override _____

Agenda Item No. 11(A)(10)
10-4-11

RESOLUTION NO. _____

RESOLUTION APPROVING IMPLEMENTING ORDER _____ ESTABLISHING GUIDELINES AND PROCEDURES REGARDING LEGAL OPINIONS WITH RESPECT TO COUNTY COMPETITIVE PROCESSES

WHEREAS, in 2005, the County Attorney's Office has issued opinions regarding guidelines and procedures for requesting legal opinions on County competitive processes; and

WHEREAS, the Board of County Commissioners desires to provide additional direction to the Mayor or the Mayor's Designee regarding the manner and timing of request for responsiveness opinions from the County Attorney's Office consistent with the practices of the County Attorney's Office,

NOW, THEREFORE, BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF MIAMI-DADE COUNTY, FLORIDA, that this Board hereby adopts and approves Implementing Order [ ] in substantially the form attached hereto and incorporated herein, and authorizes the County Mayor or his/her designee to exercise any and all rights conferred therein.

The Prime Sponsor of the foregoing resolution is Commissioner Barbara J. Jordan. It was offered by Commissioner , who moved its adoption. The motion was seconded by Commissioner and upon being put to a vote, the vote was as follows:

Joe A. Martinez, Chairman
Audrey M. Edmonson, Vice Chairwoman

Bruno A. Barreiro	Lynda Bell
Esteban L. Bovo, Jr.	Jose "Pepe" Diaz
Sally A. Heyman	Barbara J. Jordan
Jean Monestime	Dennis C. Moss
Rebeca Sosa	Sen. Javier D. Souto
Xavier L. Suarez	

The Chairperson thereupon declared the resolution duly passed and adopted this 4th day of October, 2011. This resolution shall become effective ten (10) days after the date of its adoption unless vetoed by the Mayor, and if vetoed, shall become effective only upon an override by this Board.

MIAMI-DADE COUNTY, FLORIDA
BY ITS BOARD OF
COUNTY COMMISSIONERS

HARVEY RUVIN, CLERK

By:_____
Deputy Clerk

Approved by County Attorney as
to form and legal sufficiency.

Oren Rosenthal

IMPLEMENTING ORDER

Implementing Order No.: [ ]
Title: Guidelines and Procedures Regarding Legal Opinions with Respect to County Competitive Processes

Ordered: **Effective:**

AUTHORITY:

Section 1.01 and 5.03(D) of the Miami-Dade County Home Rule Charter and Section 2-8.4 of the Code of Miami-Dade County.

SCOPE:

Notwithstanding any contrary provision of any other Administrative Order or Implementing Order, it is the policy of the Board that the procedures expressed in this Implementing Order shall be applicable to and shall govern administrative requests for and opinions rendered by the County Attorney's Office in connection with any competitive process of the County, its agencies and administrative boards, including the Public Health Trust. The opinions covered shall include any relating to the responsiveness of any bidder or proposer where the determination may affect the outcome of the solicitation. This Implementing Order is directory in nature only, designed to guide the administration and the County Attorney's Office in the rendering of such opinions, and is not intended to create any rights for any participant in a bid contest or other proceeding.

DEFINITIONS:

Responsiveness: Responsiveness deals with a bidder or proposer's unequivocal promise, as shown on the face of the response to the solicitation, to provide the items or services called for by the material terms of the solicitation. Responsiveness typically involves matters of form; a responsive bid or proposal means one submitted at the correct time and place, in the correct forms, containing all required information and signatures. Responsiveness deals with whether the effect of a deviation from a solicitation would deprive the County of its assurance that a contract will be entered into, performed and guaranteed according to the County's specified requirements and whether a deviation would adversely affect the competitive process by placing a bidder or proposer in a position of advantage over other bidders or proposers or by otherwise undermining the necessary common standard of competition. Examples of issues involving responsiveness include whether a bid or proposal was signed, whether a bid or proposal bond was posted, and whether a bidder or proposer qualified a response by stating that it would provide something less than what was called for. Responsiveness issues are generally not curable after bid or proposal submission as the bidder or proposer could opt in or out of the process at its will, depriving the County of a valid offer and placing that bidder or proposer at a material advantage over other responders who have made firm offers.

Section 2-8.4(a) of Code of Miami-Dade County provides that before the Board or any committee hears any protests of a competitive bid or request for proposal, or request for qualifications, administrative staff shall request the County Attorney to determine whether the bid or proposal in question is responsive. Sec. 2-8.4(a) further provides that the Board and any committee shall be bound by the determination of the County Attorney with regard to the issue of responsiveness

Responsibility: Responsibility deals with whether the bidder or proposer can perform as provided in the solicitation. In general, solicitation requirements for information relating to a bidder or proposer's financial condition, capability, experience and past performance pertain to responsibility. The term responsible is not limited in its meaning to financial resources and capabilities but include a bidder or proposer's honesty and integrity, skill and business judgment, experience and capacity for carrying out the proposed work, previous conduct under other contracts and the quality of previous work performed. The terms of a solicitation document cannot ordinarily change an issue of responsibility into one of responsiveness. A bidder or proposer need not demonstrate compliance with solicitation requirements pertaining to its responsibility in order for its bid or proposal to be deemed responsive and evaluated. Information regarding a bidder or proposer's responsibility may be furnished up to the time of award.

Determinations of bidder or proposer responsibility are ultimately made by the Board of County Commissioners, or in those instances of delegated authority, by the County Mayor or Mayor's designee, with the advice of the County's professional staff and/or selection and negotiation committees. Issues of responsibility are fundamentally ones of business judgment and policy and should not be covered in responsiveness determinations of the County Attorney's Office.

POLICY:

The County Mayor or Mayor's designee or other person authorized by the Public Health Trust or an agency or administrative board of the County may issue a written request for a Responsiveness Opinion to the County Attorney's Office when an issue of responsiveness is identified in response to a solicitation that will affect the ultimate award of the solicitation. For any contract in an amount which exceeds the threshold for award by the Board of County Commissioners set forth in Section 2-8.1 of the Code of Miami-Dade County, or any contract matter which will be considered by the Board of County Commissioners or the Public Health Trust the County Attorney's Opinion shall be in writing an submitted to the Board, the Public Health Trust or other body along with the award recommendation. Informal opinions in contract matters that do not exceed the threshold amount or that may be awarded pursuant to delegated authority may be issued by the County Attorney's Office.

Questions relating to the Conflict of Interest and Code of Ethics Ordinance, including any concerning the application of the Cone of Silence, shall be referred to the Executive Director or legal staff of the Miami-Dade County Commission on Ethics & Public Trust.

PROCEDURES FOR REQUESTING RESPONSIVENESS OPINIONS:

The County Mayor or Mayor's designee or other authorized person, shall prepare a written request for opinion. At a minimum, the request shall describe the specific issue raising the question of responsiveness, identify the relevant provisions of the specification documents which bear on the issue, and be accompanied by all relevant documentation including the solicitation and the responses under investigation. Staff shall meet with the County Attorney's Office as necessary to understand and address the issue. In the event that the County Mayor or Mayor's designee or other person authorized to request a Responsiveness Opinion cannot deliver a written request of opinion with sufficient time for the County Attorney's Office to issue an opinion on a timely basis, the Responsiveness Opinion shall so state and shall identify the factual basis for the opinion.

TIMING AND SCOPE OF REQUESTS FOR RESPONSIVENESS OPINIONS:

For Requests for Proposals and other solicitation processes utilizing selection committees, negotiating committees or similar selection processes, the County Mayor or County Mayor's designee or such other authorized person shall review all proposals upon receipt to identify potential responsiveness issues and submit any identified questions to the County Attorney's Office for a Responsiveness Opinion prior to such proposal being submitted for oral presentations or final ranking, whichever comes first.

For Invitations to Bid and other solicitation processes relying exclusively on price that do not utilize a selection committee as the selection criteria, Responsiveness Opinions shall be requested of the top bidder recommended for award where the administrative staff has identified a potential responsiveness issue.

The County Mayor or County Mayor's designee shall not submit responsiveness inquiries when the issue of responsiveness is irrelevant to the proposed action or to the type of solicitation involved. Ordinarily, for example, the County Mayor or Mayor's designee need not request responsiveness determinations in connection with a recommendation of rejection of all bids because the low bid exceeds the project budget, or in instances where the County seeks to establish open pools based on qualifications alone.

The failure to submit such inquiries to the County Attorney's Office in accordance with this Implementing Order shall not constitute a waiver of any non-conformity. In the event the County Mayor or County Mayor's designee fails to timely submit a responsiveness inquiry as provided herein, the County Mayor shall include a written explanation of such failure and the causes in the Mayor's recommendation to the Board on the solicitation.

PRESENTATION OF RESPOSIVENESS OPINION TO THE BOARD

Written Responsiveness Opinions shall be contained in the agenda package where the related matter is presented to the Board for consideration. If new facts are discovered or a mistake is made, or any other change is made to an opinion, the County Attorney's Office shall issue a revised opinion, stating expressly that the prior opinion has been revised and superseded and the latest opinion shall be made available to the County Mayor and Board of County

Commissioners. The County Attorney's Office shall maintain a record of all written Responsiveness Opinions rendered.

EFFECTIVE DATE:

This Implementing Order shall become effective after approval by the Board of County Commissioners.