

**PROPOSED**

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RESOLUTION NO. 2019-

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA, PERTAINING TO THE PROCUREMENT CODE; AMENDING VARIOUS SECTIONS OF CHAPTER 21 OF THE BROWARD COUNTY ADMINISTRATIVE CODE ("ADMINISTRATIVE CODE") RELATING TO VENDOR PERFORMANCE REVIEWS; AND PROVIDING FOR SEVERABILITY, INCLUSION IN THE ADMINISTRATIVE CODE, AND AN EFFECTIVE DATE.

(Sponsored by Senator Steve Geller)

WHEREAS, the Board of County Commissioners of Broward County, Florida, desires to amend Chapter 21 of the Broward County Administrative Code, the Procurement Code of Broward County, to provide a process whereby vendors may challenge certain vendor performance reviews, NOW, THEREFORE,

BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS OF BROWARD COUNTY, FLORIDA:

Section 1. Section 21.22 of the Broward County Administrative Code is hereby amended to read as follows:

**21.22. Contract Administration.**

...

h. *Evaluation of performance of certain vendors.* The Director of Purchasing or Contract Administrator shall, for each contract above the award authority of the Director of Purchasing, evaluate construction and architect/engineer performance, including achievement of participation goals, and report same to the Board. A report to the Board is required prior to the release of final payment for vendors who have a ~~weighted final~~ performance evaluation of 2.59 or below on two (2) or more contracts over a five (5) year

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1 period. Evaluation of the achievement of participation goals must be done in conjunction  
2 with the Office of Economic and Small Business Development, or successor agency.

3 Section 2. Section 21.23 of the Broward County Administrative Code is hereby  
4 amended to read as follows:

5 **21.23. Vendor Performance Rating.**

6 The Director of Purchasing is authorized to establish a vendor performance rating  
7 system, which may include periodic evaluations at any time during a contract, renewal  
8 evaluations for multiyear contracts, and final evaluations upon contract completion,  
9 termination, or final delivery of contracted services, for use in ~~eliminating~~ identifying those  
10 vendors ~~who~~ that fail to perform or that perform unsatisfactorily in accordance with  
11 Section 21.119. Such rating system may be used for vendor evaluations and awarding  
12 of contracts where applicable. Each final performance evaluation shall include or append  
13 the following:

- 14 a. A total averaged score on a scale from 1-5;
- 15 b. For any total averaged score below a 2.6, detailed written facts and any  
16 applicable documentary evidence supporting the scoring, including any  
17 correspondence or history relating to the vendor's performance under the  
18 contract; and
- 19 c. For any total averaged score below a 2.6, any additional facts or  
20 documentation timely submitted by the vendor after the vendor's receipt of  
21 a draft final performance evaluation.

22 When an evaluator intends to issue a final average performance evaluation score below  
23 2.6, the evaluator shall provide to the affected vendor a copy of the draft final performance  
24 evaluation, and the affected vendor shall have ten (10) business days after its receipt

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1 thereof to submit to the evaluator written materials that the affected vendor believes justify  
2 a score of 2.6 or above. The evaluator shall give good faith consideration to any such  
3 submitted materials prior to issuing a final performance evaluation score. If the final  
4 averaged score is below 2.6, the affected vendor shall have ten (10) business days after  
5 it receives notice of such final score to submit a written rebuttal to the score, in which  
6 event the evaluator shall (i) check a box on the final evaluation scoring form indicating  
7 that a vendor rebuttal has been received; and (ii) append the vendor rebuttal to the final  
8 evaluation scoring form. If a hearing officer orders that a final performance evaluation  
9 score be rescinded per the hearing procedures set forth in Section 21.120, the evaluator  
10 shall issue a memorandum to the Director of Purchasing and the vendor indicating that  
11 the final evaluation score has been rescinded, append such memorandum and the  
12 hearing officer's final order to the front of the final evaluation scoring form, and check a  
13 box on the final evaluation scoring form indicating that the evaluation has been rescinded  
14 pursuant to a successful appeal in accordance with Section 21.120. ~~In the event that~~ If  
15 a vendor receives three (3) or more ~~weighted~~ final performance evaluations of 2.59 or  
16 below over a five (5) year period, the Director of Purchasing is authorized to suspend a  
17 the vendor for a period of three (3) months in accordance with Section 21.119. The vendor  
18 will ~~may~~ be suspended from participating on County contracts as either a prime vendor  
19 or subcontractor/subconsultant. The Director of Purchasing shall provide a monthly  
20 vendor performance report to the Board of any final performance evaluations from the  
21 preceding month.

22 Section 3. Section 21.120 of the Broward County Administrative Code is hereby  
23 amended to read as follows:  
24

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1           **21.120.       Hearing Procedure for Debarment of Persons, Vendor Final**  
2 **Performance Evaluation Challenges, and Determinations of the Director of**  
3 **Purchasing.**

4           a.     *Right of Appeal.*

5           1.     Any person having a substantial interest in the ~~matter~~, and who is  
6           dissatisfied or aggrieved with, ~~the notification of the Director of Purchasing's~~  
7           ~~determination regarding the resolution of a protested solicitation or~~  
8           ~~proposed award or a determination to debar or refusal to reinstate~~, must, a  
9           determination or evaluation made pursuant to Subsection 21.120.a.2 may,  
10          within ten (10) calendar days ~~of such~~ after the applicable notification, submit  
11          a written appeal of said determination or evaluation to the County's Director  
12          of Purchasing ~~in accordance with the hearing procedures contained in~~  
13          ~~Subsection 21.118 of this Code.~~ The written appeal shall briefly state all  
14          facts and arguments upon which the appeal is based. All requirements and  
15          restrictions of Subsection 21.118 apply to appeals filed pursuant to this  
16          Subsection 21.120.a.1. Only appeals that are in writing and timely made by  
17          or on behalf of a person with standing to maintain an appeal under Florida  
18          case law, and accompanied by an original appeal bond or certified copy  
19          thereof as required by Subsection 21.120.a.3, shall be entitled to a decision  
20          by a hearing officer pursuant to the hearing procedures set forth in  
21          Subsection 21.120.c The institution and filing of an appeal pursuant to this  
22          Subsection is an administrative remedy to be employed prior to the  
23          institution and filing of any civil action against the County concerning the  
24          subject matter of the appeal.

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1           2.    The following matters may be appealed, subject to the requirements set  
2           forth in Subsection 21.120.a.1. above:

3           a.    Any person who has a substantial interest in the matter and who is  
4           dissatisfied or aggrieved with the A determination of responsiveness  
5           by the Selection Committee pursuant to Subsection 21.83.d of this  
6           Code must appeal said determination to the County by sending  
7           written notice to the attention of the Director of Purchasing to the  
8           County Purchasing Division.;

9           b.    A determination by the Director of Purchasing regarding the  
10           resolution of a protested solicitation or proposed award;

11           c.    A determination by the Director of Purchasing regarding the  
12           debarment of a vendor or refusal to reinstate a vendor;

13           d.    A determination of a violation of Section 1-266, Broward County  
14           Cone of Silence Ordinance; and

15           e.    A final performance evaluation score of 2.59 or below, unless there  
16           is pending litigation between the vendor and the County relating to  
17           the contract at issue in the challenged performance evaluation (if a  
18           vendor files litigation against the County regarding such contract  
19           after filing the appeal, the appeal shall be deemed to be immediately  
20           dismissed with prejudice). Such appeal must be received by the  
21           County Purchasing Division within ten (10) calendar days of the  
22           determination by the Selection Committee to be deemed timely. The  
23           requirements of Subsections 12.118.e and 21.118.f shall be  
24           applicable to the appeal of the Selection Committee's determination

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1 of responsiveness. Only appeals that are in writing and timely made  
2 by or on behalf of a person who has standing to maintain a protest  
3 under Florida case law, and accompanied by an original appeal bond  
4 or certified copy thereof as required by Subsection 21.120.a.3, shall  
5 be entitled to a decision by a hearing officer. The written appeal shall  
6 briefly state the facts and arguments upon which the appeal is based.  
7 The institution and filing of an appeal pursuant to this Subsection is  
8 an administrative remedy to be employed prior to the institution and  
9 filing of any civil action against the County concerning the subject  
10 matter of the appeal.

- 11 3. Any appeal of the Director's of Purchasing's determination concerning a  
12 protested solicitation or proposed award must be accompanied by an  
13 original appeal bond or certified copy thereof in a form prescribed by the  
14 Director of Purchasing in an amount equal to one percent (1%) of the  
15 estimated contract amount as defined in Subsection 21.118.a.6 of this  
16 Code, or \$25,000, whichever is less, and conditioned upon payment of all  
17 costs and fees awarded the County pursuant to Subsection c.7 of this  
18 ~~Section~~. Any appeal relating to a final performance evaluation must be  
19 accompanied by an original appeal bond or certified copy thereof in a form  
20 prescribed by the Director of Purchasing in the amount of \$5,000, unless  
21 such appeal will be heard by an employee of the Office of the County Auditor  
22 pursuant to Subsection b., in which case no appeal bond shall be required.  
23 In protest appeals where the estimated contract amount is less than  
24 \$250,000, the original appeal bond or certified copy thereof shall be in the

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1 amount of \$500 and conditioned upon payment of all costs and fees  
2 awarded the County pursuant to Subsection c.7 of this Section. In lieu of  
3 the original appeal bond or certified copy thereof, the County may accept  
4 cash, money order, certified check, or cashier's check, payable to Broward  
5 County Board of County Commissioners. The appeal bond shall not be  
6 waived for appeals pursuant to Subsection 21.120.a.2.a of this Code. The  
7 appeal bond shall remain in place until a written final determination is made  
8 by the hearing officer. Failure to provide and maintain the required original  
9 appeal bond or certified copy thereof shall cause the immediate dismissal  
10 of the appeal.

11 ...

12 *b. Hearing Officer and Date.* After receipt of the notice of appeal, the County  
13 shall schedule a hearing before a hearing officer, at which time the person shall be given  
14 the opportunity to demonstrate why the decision of the Director of Purchasing should be  
15 overturned or why the vendor's final performance evaluation score should be rescinded.  
16 All appeals shall be heard by an Administrative Law Judge ("ALJ") from the State of  
17 Florida Division of Administrative Hearings Division. Notwithstanding the foregoing, a  
18 vendor that appeals a final performance evaluation shall have the option to utilize the  
19 employee of the Office of the County Auditor who is designated by the County Auditor as  
20 the hearing officer, provided the vendor submits a written request at the time of submitting  
21 the appeal to utilize such employee.

22 *c. Hearing Procedure.* The procedure for any hearing required by this Part IX  
23 is as follows:

24 ...

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1 4. The hearing officer shall be able to compel the attendance of witnesses, if  
2 requested by a party, by issuance of an administrative subpoena served by  
3 certified mail or by any other process and service authorized by law. Unless  
4 otherwise indicated in this Subsection, ~~T~~the hearing officer shall only  
5 determine whether procedural due process has been afforded, whether  
6 essential requirements of law have been observed, and whether the  
7 Director of Purchasing's findings are arbitrary, capricious, or an abuse of  
8 discretion, or whether such findings are in accordance with the law or are  
9 unsupported by substantial evidence as a whole. In cases involving  
10 determinations of responsiveness pursuant to Section 21.83.d of this Code,  
11 the hearing officer shall only determine whether the Selection Committee's  
12 determination is arbitrary and capricious. In cases involving determinations  
13 of violation of Section 1-266, Broward County Code of Ordinances, relating  
14 to the cone of silence, the hearing officer shall only determine whether there  
15 has been a violation of the ordinance. In cases involving the challenge of a  
16 final performance evaluation score pursuant to Subsection 21.23, the  
17 hearing officer shall only determine whether the evaluation score is justified  
18 based on substantial evidence or whether the evaluation score should be  
19 rescinded, which determination shall be based solely on the written final  
20 performance evaluation (including items appended thereto), any response  
21 to the draft or final evaluation submitted by the vendor, and any testimony  
22 supporting or challenging any such documentary evidence. Substantial  
23 evidence means such relevant evidence as a reasonable person might  
24 accept as adequate to support a conclusion. At the discretion of the hearing

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1 officer, and upon a showing of good cause, depositions may be allowed in  
2 order to present testimony from a witness unavailable to attend the hearing.  
3 The hearing officer may grant the motion of any person having standing  
4 under Florida law to intervene in the proceedings. The hearing officer must  
5 rule upon any preliminary motions or motions to intervene before the  
6 commencement of a hearing held under this section. Such motions shall  
7 be made at least ten (10) days prior to the date the hearing is scheduled.  
8 The motions may be argued at the final hearing or at a motion hearing  
9 noticed prior to the date of the final hearing. Any motions allowed by this  
10 section must be made at least ten (10) days before a hearing is scheduled  
11 and served upon all parties in order to be considered.

12 5. Upon conclusion of the hearing, the hearing officer shall permit all parties  
13 to the appeal an opportunity to submit a proposed final order to the hearing  
14 officer no later than ten (10) days after the conclusion of the hearing, absent  
15 an order from the hearing officer granting additional time for good cause.

16 Within thirty (30) days from the hearing, the hearing officer shall complete  
17 and submit to the eCounty and the person requesting said hearing a final  
18 order consisting of the findings of fact and conclusions of law as to the  
19 granting or denial of the appeal. The hearing officer shall uphold or reverse  
20 the decision giving rise to such protest but may not grant any allied,  
21 additional, alternative, or supplemental relief in the same order.

22 ...

23 7. The original appeal bond or certified copy thereof required by this  
24 Subsection shall be conditioned upon the payment of all costs and fees,

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1 excluding attorney's fees unless allowed for in this Subsection, incurred by  
2 the County in the appeal, and ~~which~~ shall be included in the final order if the  
3 hearing officer denies the appeal. Notwithstanding the foregoing, any  
4 appeal heard by an employee of the Office of the County Auditor shall not  
5 carry any costs and fees, except for staff costs allowed for in this  
6 Subsection. Upon payment of such costs and fees, as applicable, by the  
7 ~~protester~~ party filing the appeal, the bond shall be returned. If the hearing  
8 officer grants the appeal, the original appeal bond shall be returned to the  
9 ~~protester~~ appealing party. Upon timely and proper written motion of the  
10 County, the hearing officer shall be empowered, in the exercise of sound  
11 professional discretion, to award attorney's fees to the County if the hearing  
12 officer finds that the ~~protester~~ appealing party, or its counsel, knew or should  
13 have known that the claim was not supported by facts or law. For any  
14 appeal heard by an employee of the Office of the County Auditor, the  
15 hearing officer, in the exercise of sound professional discretion, may award  
16 costs to the County for staff time (not to exceed \$2,500) related to the  
17 appeal if the hearing officer finds that the appeal was unsupported by any  
18 facts or colorable legal argument.

19 ...

20 Section 4. Severability.

21 If any portion of this Administrative Code Resolution is determined by any court to  
22 be invalid, the invalid portion will be stricken, and such striking will not affect the validity  
23 of the remainder of this Administrative Code Resolution. If any court determines that this  
24 Administrative Code Resolution, in whole or in part, cannot be legally applied to any

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1 individual, group, entity, property, or circumstance, such determination will not affect the  
2 applicability of this Administrative Code Resolution to any other individual, group, entity,  
3 property, or circumstance.

4 Section 5. Inclusion in the Broward County Administrative Code.

5 It is the intention of the Board of County Commissioners that the provisions of this  
6 Administrative Code Resolution become part of the Broward County Administrative Code  
7 as of the effective date. The sections of this Administrative Code Resolution may be  
8 renumbered or relettered and the word "resolution" may be changed to "section," "article,"  
9 or such other appropriate word or phrase to the extent necessary in order to accomplish  
10 such intention.

11 Section 6. Effective Date.

12 This Administrative Code Resolution is effective upon adoption.

13  
14 ADOPTED this                    day of                    , 2019.

15  
16 Approved as to form and legal sufficiency:  
Andrew J. Meyers, County Attorney

17  
18 By /s/ Neil Sharma                    01/30/19  
Neil Sharma                    (date)  
19 Assistant County Attorney

**PROPOSED**

20 By /s/ René D. Harrod                    01/30/19  
René D. Harrod                    (date)  
21 Deputy County Attorney

22 NS/tb  
23 01/31/19  
Vendor Performance Review Admin Code Reso  
24 #401611.16

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